

***Public Procurement analysis  
through case studies  
2007 to 2009***

**Report  
by the  
Auditor General**

**NAO 46/2010**

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## Abbreviations

ADT	Awtorita' dwar it-Trasport (Malta Transport Authority)
AFM	Armed Forces of Malta
AG	Auditor General
BWSC	Burmeister & Wain Scandinavian Contractor A/S
CA	Contracting Authority
CAN	Contract Award Notice
DCC	Departmental Contracts Committee
DoC	Department of Contracts
DoH	Department of Health
EIA	Environmental Impact Assessment
EMC	Enemalta Corporation
ERDF	European Regional Development Fund
EU	European Union
GDP	Gross Domestic Product
GCC	General Contracts Committee
ITT	Invitation to Tender
LA	Letter of Acceptance
LN	Legal Notice
MDH	Mater Dei Hospital
MEAT	Most Economically Advantageous Tender
MEPA	Malta Environment and Planning Authority
MfG	Ministry for Gozo
MARRA	Ministry for Resources and Rural Affairs
MoP	Manual of Procedures
NAO	National Audit Office
OECD	Organisation for Economic Cooperation and Development
OJEU	Official Journal of the European Union
PAC	Public Accounts Committee
PAN	Post-Award Negotiations
PCAB	Public Contracts Appeals Board
PCRB	Public Contracts Review Board
Pkg	package
PM	Project Management
SAI	Supreme Audit Institution
SCC	Special Contracts Committee
TEN-T	Trans-European Transport Network
TM	Transport Malta
ToR	Terms of Reference
VAT	Value Added Tax

## Executive Summary

The current global economic situation brings about the need for the public sector to attain higher efficiency levels. Public procurement is a function that needs monitoring so as to ensure that resources are managed well, that transactions are carried out in adherence to legislation and lead to the attainment of value for money.

Public procurement issues have been often addressed by the National Audit Office (NAO). In continuation, this audit examines procurement through tenders issued by the Department of Contracts (DoC). Through this exercise, NAO aims to provide an insight into the regularity of these tendering processes. Hence, audit scope is limited to administrative functions and technical issues are deemed to be out of scope.

A case study approach was adopted: five tenders issued under the Legal Notice (LN) 177/178 of 2005 regime and awarded prior to 2010 were selected. This ensured that the selected tenders covered procurement processes that had reached tender award stage during the audit fieldwork.

As a peripheral issue, the tender processes were tested under the prevailing legislation, LN 296 of 2010 and LN 107 of 2011. The results feature separately in the Report. The Report also discusses Post-Award Negotiations (PAN). This matter ranks high on the concern list of audit institutions globally, hence its inclusion in this audit.

The main tool utilised for the exercise was a specifically-designed audit test template covering issues that were deemed potentially common across tendering processes. Concerns encountered outside this category were labelled 'case-specific'. Fieldwork consisted of a review of files as held by DoC and the Contracting Authorities (CA), supplemented by dossiers of questions, meetings and desk research.

The more salient findings follow:

- **DoC** maintained its role of tendering process overseer as stipulated by the prevailing legislation throughout the tendering processes under review. DoC's actions resulted in a high degree of adherence to legislation. Handling of appeals was likewise appropriately performed.
- In general, **contracting authorities** acted in line with their respective enabling Acts and appointed members of evaluation and adjudication committees upheld the applicable ethical standards.
- A **high degree of liaison** was generally maintained between DoC and the contracting authorities, the latter soliciting advice and guidance which was always forthcoming from the former.
- Non-recourse to the setting up of *ad hoc* Special Contracts Committees burdens the **General Contracts Committee** with a load that is potentially higher than the Committee's technical capacity.

Additionally, analysis at an operational level revealed various shortcomings that cause serious concern to the National Audit Office. Such concerns include, but are not limited to:

- **Organisational amnesia** is common in agencies/authorities. Functions that were carried out with a degree of accuracy and completeness in the traditional civil service, such as the maintenance and retrieval of departmental files, have deteriorated in more than one organisation. This degradation, inhibiting a reliable audit trail to be constructed, occurred

during the metamorphosis from traditional civil service department to autonomous agency/authority.

- Methods of calculating **departmental estimates** were often unclear/inexistent. Coupled with unrealistic estimates, NAO expressed its doubt as to whether contracting authorities were complying with their legal obligation to ensure the attainment of value for money for Government through any procurement process.
- NAO looks askance at contracting authorities obtaining permission to label a tender as **urgent** when such urgency is brought about through procrastination and/or in some way induced by the Contracting Authority. Irrespective of whether DoC approval is obtained, recourse to such methodologies potentially impinges negatively on the level playing field environment, to the detriment of Government's corporate image where accountability, transparency and equity are concerned.
- It is common practice to have **evaluation and adjudication boards** staffed by the same officials. While this is legally correct, such a practice is not reflective of the nature of the boards - staffing the evaluation boards with officials of a technical/administrative background and adjudication boards with financial personnel would be conducive to higher effectiveness.
- The findings in the Report would have remained unchanged had the five case study tenders been issued, processed and awarded under the newer **LN 296** (of 2010) regime.
- Instances of **Post-Award Negotiations** (PAN) were encountered. However none of the PAN cases encountered could have affected the order of merit of bidders or in any other way changed the outcome of the tender proceedings.

In concluding, after analysing these five case study tenders, the National Audit Office can reasonably express assurance that the processing of the tenders was carried out, in general, in a manner that is compliant with legislation. However, the various shortcomings identified need urgent addressing. Contracting Authorities should ensure that all officials involved in the procurement process are well acquainted with the pertinent legislation and directives. Contracting Authorities should also deploy measures to ensure that such officials are aware of their obligations and responsibilities and that they go about conducting their tasks in a manner that is legally compliant and ethically correct. Simultaneously, charged with overseeing the public sector procurement process, DoC needs to strengthen its monitoring and control functions. This latter recommendation has become even more relevant with the changeover to the 2010/2011 legislation and concept of decentralisation *cum* monitoring that was introduced therewith.

## Introduction

### 1. Background

The efficient management of public procurement has become a matter of fundamental public policy importance, particularly in situations of high government debts and deficits and a context of fiscal consolidation and retrenchment in which many countries must now manage public resources. The current global economic environment presents a challenge to many countries, not least Malta. The challenges facing the Euro area apply in large measure to the local context, and although the Maltese economy has until now proved to be quite resilient to external shocks, its openness remains a source of vulnerability<sup>1</sup>. Notwithstanding this positive outlook, Malta entered recession in the first quarter of 2009 which lasted into the third quarter of the year<sup>2</sup>.

A sustainable level of economic growth and economic resilience depend, among other factors, on the efficient use of resources. It is against this background of public spending squeeze and an uncertain economic future that public procurement assumes greater significance.

The efficient and strategic management of public purchasing is an issue of paramount importance on a number of levels:

- (a) the sound management of increasingly scarce public resources;
- (b) the daily administration of the numerous government departments, agencies and public bodies involved in the award and management of public contracts;
- (c) the impact on the supplier base, many of whom are heavily dependent on public sector business, and
- (d) the pattern of public sector consumption can contribute to other policy outcomes<sup>3</sup>.

Public procurement is one of the major items of expenditure for Contracting Authorities in the European Union (EU). In 2009, expenditure on public procurement in the 27 EU Member States amounted to around €2,290 billion, circa 19 per cent of the GDP<sup>4</sup>. In Malta, general government expenditure amounted to €2.5 billion in 2009, or almost 44 per cent of GDP. The largest single item was the wage bill, equivalent to 14.5 per cent of GDP. It was followed by spending on benefits, which amounted to some 13 per cent of GDP. Health care, excluding wages, absorbed a further 2 per cent.

According to the Malta Government Financial Estimates for 2012, total government expenditure for the year is estimated at over €3.7 billion<sup>5</sup>. This continues the upward trend in public expenditure from previous years. Notwithstanding the increase, Government has pledged to *“enforce a fiscal consolidation strategy whereby additional emphasis is being placed on the restraint of recurrent expenditure”*<sup>6</sup>.

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<sup>1</sup> Source: Central Bank of Malta, Annual Report 2010, page 14

<sup>2</sup> Source: NSO News Release No.173/2012 - 7 September 2012

<sup>3</sup> Source: Internal Market and Services Directorate General of the European Commission - June 2011  
[http://ec.europa.eu/internal\\_market/publicprocurement/docs/modernising\\_rules/evaluation-report\\_en.pdf](http://ec.europa.eu/internal_market/publicprocurement/docs/modernising_rules/evaluation-report_en.pdf)

<sup>4</sup> Source: EU - November 2010

[http://ec.europa.eu/internal\\_market/public\\_procurement/doc/indicators2009\\_en.pdf](http://ec.europa.eu/internal_market/public_procurement/doc/indicators2009_en.pdf)

<sup>5</sup> Made up of Estimated Total Recurrent Expenditure, Public Debt Servicing and Capital Expenditure

<sup>6</sup> Source: Pre-Budget Document 2012, page 2

Budgetary pressure and continued emphasis on value for money argue for the continued vigilance over public procurement. The EU has continually insisted that Member States are to take effective action to reduce budget deficits to an EU limit. To this end, in January 2012, the Maltese Government announced that it was cutting public sector expenditure by 0.59 per cent of GDP as part of its deficit reduction strategy. All ministries and government departments were affected by the cuts, amounting to approximately €40 million for financial year 2012.

Over the years, the National Audit Office (NAO) has been active in auditing public procurement and related issues. Procurement features regularly in NAO Annual Reports when reporting on corporate issues and audits of individual ministries and government departments. A performance audit - "Procurement Capability across the Public Administration" - was undertaken by NAO in 2009 wherein a detailed review of the various aspects of public procurement, including the strategic importance of the procurement function, knowledge and skills required in procurement, policies and procedures governing procurement, internal controls and compliance and the planning of procurement requirements were discussed. In its investigative work, this Office has often tackled issues linked to public procurement, as in the 2009 Report on "Control Mechanisms Deployed by the Malta Transport Authority (ADT) in Road Construction Projects partly financed through the Fifth Italo-Maltese Financial Protocol" and the 2010 Report on the "Enemalta Corporation - Tender for Generating Capacity".

## **2. Public Procurement Regulations**

Public procurement rules and regulations organise the way government ministries and public authorities purchase goods, works and services. They set up specific contract award procedures to ensure that public purchases are made in the most rational, transparent and fair manner. Public purchasing has to be underpinned by particular safeguards. Procurement regulations prevent any preferential treatment that could favour particular economic operators and guarantee sound competition between economic operators so as to ensure that contracting authorities get the best value for taxpayers' money. Regulations also constitute the basis for procurement systems that protect against corruption risks.

Local procurement legislation, in line with EU public procurement directives and regulations, is intended to ensure that public-funded contracts are awarded in an open, fair and transparent manner. EU Directives on public procurement date from 1971<sup>7</sup>, when the first Directive relating to public works contracts was adopted. Since then, Directives on public supply contracts and public service contracts have been implemented, as well as Directives for the utilities sector. The basic concept and system of the Directives, though amended several times, was never essentially modified.

In 2003, changes in the legal framework governing public procurement in Malta were initiated through the publication of Legal Notice (LN) 299 of 2003 - the Public Contracts Regulations - which replaced the Public Service (Procurement) Regulations of 1966. Further legislative amendments were enacted in 2005 with the coming into force of LN 177 of 2005 (Public Procurement Regulations) and LN 178 of 2005 (Public Procurement of Entities Operating in the Water, Energy, Transport and Postal Services), bringing the local public procurement regulatory framework in line with EU Directives 2004/18/EC and 2004/17/EC respectively. These changes to the legislative framework on public procurement brought about the introduction of detailed requirements for the publication of tenders and the selection of bidders. The new regulations also required that

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<sup>7</sup> Council Directive 71/305/EEC concerning the coordination of procedures for the award of public works contracts, replaced by Council Directive 93/37/EEC, amended by European Parliament and Council Directive 97/52/EC.



contracts above specified thresholds are advertised in the Official Journal of the European Union (OJEU).

More recent amendments were introduced as from 1 June 2010 with the coming into force of LN 296 of 2010 which sought to, *inter alia*, introduce a more independent review procedure, in line with EU Directive 2007/66/EC. The aims of these regulations were mainly to:

- (a) adjust thresholds to current project realities;
- (b) devolve the publication of tenders to Contracting Authorities while at the same time increase the supervision of the Department of Contracts (DoC), and
- (c) improve the process of transparency and fairness.

Through these regulations, the threshold of departmental tenders increased from €47,000 to €120,000, with contracting authorities now able to publish tenders up to the new threshold without seeking the prior approval of DoC. In line with the introduction of these devolutionary measures, the award of departmental tenders under the €120,000 threshold is now carried out after obtaining the approval of the newly appointed Departmental Contracts Committees (DCC), established within each Ministry. However, despite the fact that public contracts below the thresholds fall outside the scope of the EU public procurement Directives - and outside the scope of this audit - collectively they remain, nonetheless, of significant importance.

Locally, tenders above the EU threshold continue to be published by DoC. However, the new thresholds do not apply for tenders over €47,000 financed by the EU, which continue to be advertised in the OJEU and vetted, published and awarded by DoC.

### **3. Principles of Public Procurement**

A clear and comprehensive regulatory framework for the conduct of public procurement is a fundamental prerequisite and the basis for the development and application of equal practice; for transparency and fairness; and for meaningful review and control mechanisms.

According to Directive 2004/18/EC, public procurement is to be based on the principles of free movement of goods; freedom to provide services (as derived from the Treaty establishing the EU); the principles of economy, efficiency and effectiveness; of ensuring competition among economic operators; of transparency; and of equal treatment of economic operators. EU directives and regulations require that calls for tenders include detailed requirements for the selection of tenderers and the award of contracts, based on the principles of transparency, non-discrimination and competitive procurement.

In particular, this Directive imposes obligations on contracting authorities to:

- advertise their requirements in the Official Journal of the EU for tenders with an estimated value above the thresholds set out in the Directive;
- use procurement procedures that provide open and transparent competition;
- apply clear and objective criteria, notified to all interested parties, in selecting tenderers and awarding contracts;
- use broadly based non-discriminatory technical specifications, and
- allow sufficient time for the submission of expressions of interest and tenders.

Local procurement legislation, in line with EU public procurement directives and regulations, is intended to ensure that contracts are awarded in an open, fair and transparent manner, allowing domestic and non-domestic firms to compete on an equal basis, with the intention of improving the quality and/or lowering the price of purchases made by contracting authorities. In particular, Regulation 4 of LN 296 of 2010 specifies that *“contracting authorities shall ensure that there is no discrimination between economic operators, and that all economic operators are treated equally and transparently in all calls for tenders whatever their estimated value. ... Contracting authorities shall ensure that there is no discrimination between undertakings claiming injury in the context of a procedure for the award of a contract as a result of the distinction made by this regulation between national rules implementing Community law and other national rules”*.

#### **4. Types of Contracting, Time Limits and Basis for Award**

LN 296 of 2010 lays down various procurement procedures that can be used by contracting authorities to procure works, goods and services. The different procedures allow for a flexible procurement regimen, giving Contracting Authorities various options through which they can conduct their procurement more efficiently.

By far, the most common contracting procedures opted for locally are the ‘open’ and, to a much lesser degree, the ‘negotiated’ procedures. The Public Procurement Regulations however allow for other methods, including several e-procurement options, through which purchases can be made. The various procurement procedures are the following:

##### **Open procedure**

Open procedures are those procedures whereby any interested economic operator may submit a tender. This procedure is often used for the procurement of commodity products which do not require a complex tender process in order to be purchased. No negotiation with tenderers is permitted, although there are no restrictions under the Regulations as to when this procedure can be used. In an open procedure, all interested parties can submit an offer in response to a call for tenders.

##### **Restricted procedure**

In a restricted procedure, all interested parties may express an interest in tendering for the contract; however only those meeting the Contracting Authority's selection criteria will actually be invited to do so. Candidates who get through the selection stage can then submit a tender when invited to do so by the Contracting Authority. No negotiation with the tenderers is permitted although there are no restrictions under the Regulations as to when the restricted procedure can be adopted.

##### **Competitive Dialogue**

This procedure has the advantage of allowing the input of those participating in the tender process. In a competitive dialogue, interested parties may express an interest in tendering for a particular contract. The Contracting Authority conducts a dialogue with the candidates admitted in the competitive dialogue with the aim of developing one or more suitable alternatives capable of meeting the Contracting Authority's requirements, on the basis of which candidates chosen are invited to tender. During the dialogue, tenderers are able to individually discuss all aspects of the contract with the Contracting Authority. Once the dialogue has generated potential solutions to the authority's requirements, the remaining tenderers are invited to submit a final tender based on their individual solutions. The best tender can then be selected. There is however very limited room for any further changes that can be made once a tender is submitted. This procedure is

used in limited circumstances, where a public contract is considered to be so “particularly complex” that the Contracting Authority is not objectively able to define technical specifications which meet its requirements or is not objectively able to specify the legal or financial make-up of a project at the outset.

#### **Dynamic Purchasing System**

This is a completely electronic process for making commonly used purchases, the characteristics of which, as generally available on the market, meet the requirements of the Contracting Authority. A tender awarded through a dynamic purchasing system is limited in duration and throughout its validity is open to any economic operator who satisfies the selection criteria and has submitted an indicative tender that complies with specifications.

#### **Electronic Auction**

A Contracting Authority may decide that the award of a public contract is to be preceded by an electronic auction when the contract specifications can be established with precision. An electronic auction is based either solely on price, when the contract is awarded to the lowest price or on price and/or certain elements of the tender indicated in the specification when the contract is awarded to the most economically advantageous tender. An electronic auction occurs after an initial full evaluation of the tenders in accordance with any award criterion specified. Recourse to electronic auctions enables contracting authorities to request tenderers to submit new prices, revised downwards, and when the contract is awarded to the most economically advantageous tender, also to improve elements of the tenders other than price. In order to guarantee compliance with the principle of transparency, only the elements suitable for automatic evaluation by electronic means, without any intervention and/or appreciation by the Contracting Authority, may be the object of electronic auctions. On the other hand, aspects of a tender which imply an appreciation of non-quantifiable elements or which have as their subject-matter intellectual performances, such as the design of works, cannot be the object of electronic auctions.

#### **Framework Agreement**

Framework agreements are agreements between one or more contracting authorities and one or more economic operators the purpose of which is to establish the terms, in particular with regard to prices and quantities, governing the contracts to be awarded during a given period.

#### **Negotiated procedure**

There are two types of negotiated procedure. Under the negotiated procedure without prior advert, the Contracting Authority is not required to issue an OJEU notice and may negotiate directly with the supplier of its choice. Under the negotiated procedure with prior advert, an OJEU notice must be published. All interested parties may express an interest in tendering for the contract, but only those meeting the Contracting Authority's selection criteria will actually be invited to do so. Under the negotiated procedure with prior advert, tenderers are invited to negotiate the terms of the advertised contract with the Contracting Authority. The Regulations do not set out any rules to govern the conduct of negotiations, which effectively means that the Contracting Authority can, within certain parameters, establish its own procedures for the negotiation and tender stage. However, the matter may be referred by the Director of Contracts or the Contracting Authority to the Minister responsible for finance, who appoints an *ad hoc* committee to conduct the negotiated procedure on behalf of the Contracting Authority. The *ad hoc* committee, nonetheless, operates under the supervision of the Director of Contracts.

Contracting authorities<sup>8</sup> require the prior consent of the Director of Contracts or the Minister responsible for the authority<sup>9</sup> to adopt the negotiated procedure to carry out their procurement.

Apart from the various procedures that can be resorted to when procuring works, goods and services, procurement regulations set out other parameters by which contracting authorities are to abide. These include:

#### **Time-Limits**

One of the obligations imposed on a Contracting Authority by the procurement regulations is to allow sufficient time for the submission of expressions of interest and of offers by interested economic operators. According to LN 296 of 2010, when fixing the time-limits for the receipt of tenders and requests to participate “*contracting authorities shall take account in particular of the complexity of the contract and the time required for drawing up tenders, without prejudice to the minimum time limits set out in the Regulations*”<sup>10</sup>. In the case of open procedures, the minimum time limit for the receipt of tenders is fifty-two days from the date on which the contract notice is sent. In the case of restricted procedures, negotiated procedures with publication of a contract notice and the competitive dialogue, the minimum time-limit for receipt of requests to participate is thirty-seven days from the date on which the contract notice is sent. In the case of restricted procedures, the minimum time-limit for the receipt of tenders is forty days from the date on which the invitation is sent. When contracting authorities have published a prior information notice, the minimum time-limit for the receipt of tenders may, as a general rule, be shortened to thirty-six days, but under no circumstances to less than twenty-two days. The time limit runs from the date on which the contract notice is sent in open procedures, and from the date on which the Invitation to Tender (ITT) is sent in restricted procedures.

#### **Basis for Award**

Contracting authorities may choose to award contracts on the basis of either the most economically advantageous tender (specifying, in addition to price, other criteria including running costs, servicing cost, after sales service, technical assistance, maintenance, etc), or the compliant lowest price tendered. When a contract is being awarded on the Most Economically Advantageous Tender (MEAT), the notice or the tender document must clearly state the evaluation criteria.

#### **Separate Packages**

According to the Public Procurement Regulations, contracting authorities are to ensure that for tenders awarded by an open or restricted procedure with an estimated value of over two million euro or, at the discretion of the Director of Contracts, on tenders of a lower estimated value or on tenders awarded through the negotiated or competitive dialogue procedures, offers shall qualify for consideration only if they are submitted in separate and sealed packages, namely:

- Package One: an original valid bid bond for the amount and the validity period stipulated in the tender document;
- Package Two: technical specifications including supportive literature, designs, samples, etc, and
- Package Three: completed price schedules and or bills or quantities and payment terms.

#### **Appeals**

Parts XIII and XIV of LN 296 of 2010 set out the procedure for the submission of appeals and the functions of the Review Board respectively. Any tenderer or person “*having or having had an*

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<sup>8</sup> Those authorities listed in Schedule 2 of the Public Procurement Regulations, 2010

<sup>9</sup> Those authorities listed in Schedules 3 and 5 of the Public Procurement Regulations, 2010

<sup>10</sup> Regulation 41 of the Public Procurement Regulations, 2010

*interest or who has been harmed or risks being harmed by an alleged infringement or by any decision taken including a proposed award in obtaining a contract or cancellation of a call for tender, may file a notice of objection with the Review Board*<sup>11</sup>. The notice is to be filed within ten calendar days following the announcement of a proposed award decision, accompanied by a summary of the relevant reasons for the rejection and a deposit equivalent to 1 per cent of the estimated value of the tender submitted by the tenderer, and in any case not less than €1,200 or more than €58,000. The award process is suspended if an appeal is submitted within the allowed period (ten calendar days).

The above processes and conditions constitute the basic elements of local public procurement procedures. Given the amounts involved, inefficiencies due to contracts not being awarded to what is the most economically advantageous tender or lowest compliant bid may result in significant financial consequences. Moreover, contracting authorities are under increasing pressure to reduce costs and live within budgets by applying efficiency and ensuring that more value is gained without additional outlay.

It is in view of the above that NAO decided to analyse instances of public procurement, specifically of tenders with values above departmental thresholds and therefore issued through the Department of Contracts. The primary aim of the audit is to provide an insight into the regularity of the tendering process, deployed at the time of tender launch up to the award of contract. During this audit, only the administrative functions of public procurement are covered. Issues concerning technical specifications and the options available to contracting authorities are considered to be outside the scope of the audit.

This audit takes a case study approach, through the selection of five tenders issued through DoC under the LN 177/178 of 2005 regime and awarded prior to June 2010. The case studies were selected after due consideration to materiality (in terms of tender value awarded), recentness, nature of the acquisition (whether supplies, services or works), tendering procedure opted for, model (single or three-package), funding (whether local or EU), objection procedure resorted to (if any) and a mix of contracting authorities.

## 5. Methodology

This audit was conducted in terms of Para 9(a) of the First Schedule of the Auditor General (AG) and National Audit Office Act, 1997 (Act XVI of 1997) and in accordance with generally accepted practices and guidelines applicable to NAO.

During the course of the audit, meetings and interviews were held with key stakeholders, notably DoC and the contracting authorities issuing tenders. In order to obtain familiarisation with procurement practices and the Department responsible for the administration of procurement procedures, preliminary meetings were held with DoC officials. These meetings also provided information about the Department's practices in its quest to ensure transparency during all stages of the procurement process. Meetings were also held with representatives from the contracting authorities in question, notably the Armed Forces of Malta (AFM), ADT and Enemalta Corporation (EMC).

The audit sought to achieve its objectives through a selection of five case studies, deemed sufficient for the purpose of indicating whether public procurement practices, for tenders issued through DoC, are compliant with pertinent legislation. In view of the numerous contracts

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<sup>11</sup> Article 84(1) of LN 296 of 2010

awarded during the period under review (2005-2010) - amounting to nearly 2,000 - a representative sample approach would have been too cumbersome to administer. A case study approach was therefore adopted. In view of the approach not being representative of the whole population of contracts, observations are not statistically representative inferences.

DoC provided NAO with a list of tenders awarded under LN 177 of 2005 prior to June 2010, and case studies were selected according to the following criteria:

- tendering process being finalised;
- materiality (in terms of tender value awarded);
- recentness;
- nature of acquisition (supplies, services or works contract);
- tendering procedure;
- model (single or three-package);
- funding (local or EU);
- objection procedure resorted to (if any);
- different Contracting Authority issuing tender, and
- local/foreign tenderer awarded the contract.

Consideration was given to diversity in selection such that, from the chosen case studies, a widespread view of public procurement managed through DoC would have been captured.

Details of the selected contracts are as follows:

1. 'Project management services for the upgrading of five sections of the Trans-European Transport Network (TEN-T) Road Network' (CT 2200/2009) - The 'open' tender procedure was used for this tender issued by ADT. The tendering process adopted for this EU-funded tender was the 'three-package' model. The contract was awarded to a foreign supplier - Kocks Consult GmbH - for the amount of €3,067,079.
2. 'Supply and Service of Breakfast, Lunch and Dinner to Third Country Nationals (Irregular Immigrants)' (CT 2555/2008) - This tender for supplies was issued by AFM and followed the open, three-package model. James Caterers Ltd. was awarded the contract for the amount of €11,315,000, following the settlement of an objection raised by one of the bidders.
3. 'Supply, installation and commissioning of equipment at the Kappara Distribution Centre' (CT 3001/2010) - EMC awarded this supplies tender to a foreign contractor, CG Holdings Belgium NV, for the amount of €9,491,582. The 'open', 'three-package' approach was adopted.
4. 'Cleaning Services at Mater Dei Hospital' (CT 2071/2008) - The Department of Health (DoH) issued the tender for cleaning services at Mater Dei Hospital through local funding. The tender was awarded to Servizi Malta Consortium for a value of €4,737,730.
5. 'Negotiated procedure for the reconstruction of part of Xlendi Road, Xlendi' (CT 2633/2009) - The Ministry for Gozo (MfG) opted for the negotiated procedure to procure these works which were part-financed by the EU European Regional Development Fund (ERDF). The tender was awarded to JPF Joint Venture valued at €2,955,890.

The total value of the selected case studies amounts to €31,567,281.

A snapshot of the above is illustrated in the Table below.

Table 1: Selection Criteria for case study tendering process

Selection Criteria											
Case Study	Package		Funding		Procedure			Category			Appeal
	Single	Three	Local	EU	Open	Negotiated	Restricted	Services	Works	Supplies	
Case Study 1		√	√	√	√			√			
Case Study 2		√	√		√					√	√
Case Study 3		√	√	√	√					√	
Case Study 4		√	√			√		√			
Case Study 5		√	√	√		√			√		√

As per Table 1 above, two of the case studies were locally funded with the remaining three tenders partly funded by the EU. Three of the selected case studies went for an 'open' tender while the other two case studies adopted the 'negotiated' procedure. With regard to the category of the purchases in question, two of the tenders were service contracts, two were supplies contracts and the remaining tender was a works contracts. Although not statistically representative, the selected case studies give a significant picture of various possible scenarios.

Following the selection of case studies, NAO reviewed all files relating to the tenders in question. For every case study, copies of the pertinent files were obtained from both DoC and the CA. Each case was examined individually and issues/shortcomings in connection with each tender process were identified.

The fact that the audit examined the tendering process of five case studies implies that some of the issues and concerns were common to all cases. Thus, an audit checklist template for these 'commonalities'<sup>12</sup> of the five case studies was prepared.

In formulating the general audit template, issues and occurrences relating to the following concerns were addressed:

- pre-tender activities;
- tender announcement and launch;
- pre-package submission;
- submission closing date;
- package opening session;
- evaluation;
- publication of results;
- appeals;
- award of tender;
- post-award negotiations;
- contract endorsement;
- the role of the Department of Contracts;
- sub-contracting;
- tender conditions, and
- others.

Despite the commonalities of the selected case studies, as was expected, specific issues arose in connection with the particular purchases made by the different contracting authorities. As a result, case-specific concerns were addressed during the course of the audit. In this regard, a case-

<sup>12</sup> Henceforth, the term "Commonalities" is used to mean common audit findings in the five case study tenders examined



specific audit approach was undertaken for each case study. The more salient issues identified follow:

- instances where tenders were termed 'urgent', and pertinent rules applied (being more restrictive than the general, default, ones) with the urgency being, to a larger or lesser extent, induced by the CA's actions or omission thereof, rather than a natural occurrence over which the CA would have had no control;
- lack of properly maintained documented evidence inhibiting the construction of a reliable audit trail of key events occurring during tendering processes;
- lack of supporting documentation to critically important data and information, such as departmental estimates of project costs and the basis on which these estimates were drawn up;
- lack of assurance of the attainment of value for money for Government from the procurement processes being administered, and
- lack of formal authorisations to members when setting up evaluation and adjudication boards.

## **6. Ancillary issues**

While the tenders chosen as case studies by NAO featured instances of Post-Award Negotiations (PAN), these were not deemed to have had the potential to change the (bidders') order of merit or to affect tender proceedings outcome in any way. However, PAN is an audit concern that ranks high on the priority list not only of NAO Malta but likewise of Supreme Audit Institutions (SAIs) of other European countries.

PAN mainly occurs in the larger, more complex tenders, where a high degree of customisation exists. A typical example is a maintenance contract supporting the purchase of some equipment and/or plant. In view of the fact that not all technical details would have been designed with precision prior to tender award, post award the CA would need to negotiate with the winning bidder details of the maintenance contract after having agreed upon final design of the plant itself.

While it is an accepted fact that PAN is at times a necessary component of the tendering process, NAO felt the need to express its opinion on the issue, with particular focus on the absolute necessity for the CA to ensure, during PAN, that no substantial modifications take place as a result of these negotiations.

A secondary exercise, consisting of a walk-through of the tendering processes followed during the case studies under the recent legislation as comparative benchmark, was also carried out. The objective of this exercise included determining whether the same deficiencies (or even new ones) would have still manifested themselves under LN 296 of 2010 and LN 107 of 2011.



## **7. Auditee cooperation**

The findings and hence conclusions and recommendations are based on the material evidence received from the key players involved, namely the five entities carrying out the acquisition, and DoC. The entities involved were, in the main, cooperative in this regard. NAO's requests for documentation and evidence were, with notable exceptions, met by the five CAs and DoC.

## Commonalities template contents

As referred to earlier (in the 'Introduction' section), examination of the case studies took the form of a walk-through, prompted by the previously-prepared 'commonalities' template.

Basing on previous experience gained in auditing procurement activities, supplemented by research - academic, practitioner and legal, and discussions with DoC personnel, NAO auditors compiled an extensive set of test questions, forming an audit template. All issues deemed to be of a 'generic' nature - that is potentially relevant to any tendering process of the nature/category being studied - were included in the template.

During fieldwork, a two-pass exercise was carried out per case study. During the first pass, the template was 'walked through' and response for the questions sourced through the tender files and information. As a second pass, the tender files were examined once more, with the objective this time being the identification of issues that did not fall within the 'commonalities' area. These were recorded individually per case (tender) as 'specific findings'.

As for the commonalities template, a copy of which features as Appendix 4 in this Report, following are issues covered:

### **Pre-tender activities:**

- DoC involvement
- Type of procedure (bidder interface)
- Tender model (packages)
- Justification
- Cost estimations
- Tender clauses and conditions
- Preliminary studies
- Documentation
- Publication

### **Tender announcement and launch:**

- DoC involvement
- Announcement media
- Adherence to procedures
- Adequacy of published data

### **Pre-package submission:**

- Clarifications handling
- Propagation of notices regarding changes to tender
- Complaints handling

### **Submission closing date:**

- Adherence to timeframes

### **Package opening system:**

- Time extensions granted and justification for same
- Methods of bids opening
- Discarded offers and justification for same
- Qualification criteria

**Short-listing committee:**

- Issues related to the appointment and endorsement of members
- Conflict of interest
- Outcome of the short-listing report
- Decisions taken after issuance of short-listing report

**Evaluation:**

- Issues related to the appointment and endorsement of members
- Conflict of interest
- Outcome of the evaluation report
- Decisions taken after issuance of evaluation report
- Endorsement of the evaluation report
- Evaluation criteria issues
- Ranking: technical/financial ratios
- Checks on bidders' credentials
- Bidder exclusion
- External consultancy
- Divergence between consultancy function and evaluation report
- Assurance test for unchanged tender specifications

**Adjudication:**

- Issues related to the appointment and endorsement of members
- Conflict of interest
- Outcome of the adjudication report
- Decisions taken after issuance of adjudication report
- Endorsement of the adjudication report
- Publishing of decision
- DoC role
- Special Contracts Committee-related issues
- General Contracts Committee's (GCC) decision and actions
- Assurance test for adherence to tender-published criteria regarding award

**Publication of result:**

- Publication in Government Gazette
- Submission of award results to OJEU
- Contract Award Notice (CAN)
- Post-award reporting
- Extra-legislation obligations
- DoC role

**Appeals:**

- Handling of objections submitted
- DoC management of appeals
- Adherence to legislation with respect to the Public Contracts Appeals Board
- Conflict of interest
- Handling of witnesses
- Outcome of the Appeals decision

**Post-Award Negotiations:**

- Evidence of PAN
- DoC role
- Variance: contract versus tender conditions
- Adherence to target dates
- Activity during the tender award to contract signature period

**Contract endorsement:**

- Contract signature issues
- Financial guarantees
- Drawing up the final contract
- DoC role
- DoC comments and outcome thereof

**Role of the Department of Contracts:**

- Instances when DoC was consulted by the various key players
- Tender conditions
- Deviations
- Fair and level playing field
- Extension of the tendering period
- Pre-publishing vetting of documents
- Relationship between DoC and the Adjudication Boards
- DoC's role during the various stages of the tendering process
- Pro-active stance
- Hand-holding/monitoring of the CA
- Clarity of DoC instructions and advice

**Contracting Authority:**

- Compliance with own enabling Act
- Code of ethics
- Instances when CA sought guidance from DoC
- External consultancy issues

**Subcontracting:**

- Bidders' indication that (part) contract would be sub-contracted
- Permission to sub-contract
- Sub-contractors' credentials

**Tender conditions:**

- Mechanism to adjust standard dates
- Incentive payments
- Was tender document inclusive of all the necessary information

**Miscellaneous:**

- Value for money considerations
- Project Management (PM) function
- Compliance of PM with government regulations

The above test questions were used for the basis of the (commonalities) walk-through exercise (individually) for each of the five case studies. In line with NAO policies and practices, the audit team tested for the availability of evidence substantiating the results. These results were captured in spreadsheets, enabling further analysis for report production purposes.

Once all five case studies were processed, the 'commonalities' findings were reported upon by issue - automatically revealing any common trends across the five case studies. Additionally, each case study was reported upon individually, the resulting output being a snapshot of the manner with which the responsible CA had handled the procurement process in that particular instance. These five case study 'snapshots' feature as Appendix 3 of this Report.

## Findings

### Introduction to findings

The analytical walk-through exercise conducted by NAO on the five case study tendering processes selected has been described in detail in the preceding sections of this Report.

As indicated, results emanating from the exercise were grouped in two distinct ways: by issue to give a 'cross-sectional' trend across the five case studies and by tender process to depict a complete, stand-alone snapshot of the particular tendering process.

The five individual profiles feature as Appendix 3 of the Report. This section reports on the findings in 'cross-sectional' format. The main input is sourced through the commonalities template as updated during the walk-through. This data is supplemented by the case-specific issues encountered during the walk-through. In this manner, the reader is presented with a holistic view of the good practices and the shortcomings identified by NAO during its analytical exercise.

Various key issues make up the findings. These include:

- tender model, costings and timings;
- roles of the Department of Contracts, the General Contracts Committee and the Contracting Authorities;
- attainment of value for money;
- tender evaluation, adjudication and award;
- appeals, and
- Post-Award Negotiations

Each key issue is discussed from a theoretical perspective by way of an introduction to the topic. The 'academic' preamble is then followed by a report on the related findings for the five case studies tendering processes examined.

A number of key issues, due to their inherent complexities, are further dissected into component sub-sections. In this manner, *Tender model, costings and timings* gives a description of the tendering process and discusses tender documentation, emergency situations and re-issue of tenders, EU-funded tender procedures, obtaining permits, departmental estimates, value for money, business continuity, missing documentation and staff turn-around, extension of tendering dates and liaison matters.

In a similar manner, *Evaluation/adjudication* covers the short-listing committee, composition of committees, approval thereof, documentation, disqualification of bidders, factors considered during evaluation/adjudication, external consultancy services and the General Contracts Committee final decision.

### Tender model, costings and timings

As has been previously described in the 'Methodology' sub-section of this Report's Introduction, the five case study tendering processes selected (in a manual fashion) were a mix of open and negotiated tenders. All were modelled on the three-package procedure, in view of the fact that all exceeded the set thresholds. The selection process also took into account funding parameters, ensuring a mix of both

purely local and EU and local funded projects. Additionally a mix of the nature of the purchase was ensured: tenders chosen included the procurement of one-off services; consumables on an on-going (but finite) basis; assets (capital expenditure); on-going (but finite) service provision and infrastructure. Total project cost for the five tenders amounted to €31.5 million, and the procuring authorities were different for all five tenders. Successful bidders were a mix of local and foreign, individual companies and consortia. A birds' eye view of the five case studies selected features as Appendix 2 of this Report.

#### The tendering process described

A process flow chart, depicting in semi-graphical mode key/salient points and milestones in the procurement process for both single and three-package tender procedures features as Appendix 1 of this Report. The flow chart covers the more common eventualities that may materialise during a tendering process and is based on legislation prevailing at the time of the issue of the selected tenders, namely LN 177 and LN 178 (2005).

Referring to Appendix 1, it is to be noted that the flow chart commences from initial steps in the tendering process, namely the identification of the need for procurement, and walks through the process right up to the eventual publishing of the award result.

Apart from depicting the steps making up the process, the flow chart assigned each step to one (or more) of the four key players: the CA, DoC, the GCC and the bidders.

As a separate mini-flowchart, the process followed when an appeal is lodged is also depicted.

With reference to the five case study tenders under evaluation:

#### Tender document characteristics

- Milestones and key/salient events were well documented in the tender document, as was the timetable of events. The documents themselves were deemed by NAO to contain all the necessary information and provisos/clauses.
- In the majority of instances, pre-launch vetting by DoC triggered the proposal of amendments. These were taken on board and included in the documents as published.

#### Re-issue of tenders/emergency situations

- Two particular tenders were re-issues, superseding original Invitations to Tender (ITTs) issued earlier. In this regard, NAO expresses concern in that the re-issue was, in both cases, not advertised. Although legislation allows for this, NAO opines that resort to such an approach potentially impinges negatively on corporate credibility level of the CA, DoC and indeed Government in general and the public procurement process in particular. In addition, this method of tender launch potentially reduces the bidder base, and thus may restrict competition and inhibit the attainment of value for money for Government.

Both tenders re-issued in this manner were a negotiated procedure, replacing the originally-issued open tender which had been cancelled.

One of the tenders was re-issued due to bidders' non-compliance with tender conditions/specifications. Participation was limited to those economic operators who had submitted an offer for the original tender or expressed an interest in writing. Prior approval covering the route taken for the re-issued tender was solicited and obtained from DoC.

In the case of the second tender, the negotiated procedure was likewise deployed. This had been cancelled due to non-compliance on an administrative basis by all bidders. As in the case

of the first tender, permission for the method of issuing and handling the re-issued tender was obtained, *a priori*, from DoC.

In both cases, urgency was quoted as justification for the actions taken by the CAs. Emergencies can be genuine but they can likewise be induced. In both the cases under review, some degree of urgency was brought about by the fact that the tenders had been previously issued and aborted, and as such time was lost. However, NAO opines that it is unethical to 'cut corners' in the tendering process due to a claim of urgency. As explained above, LN 177 of 2005 allowed for situations to be deemed 'urgent' and contemplated special conditions to be employed, especially so with respect to timing of the tender stages and the actual steps to be followed.

However, re-issuing a tender without advertising the (re)launch and circulating the Invitation to Tender solely amongst those economic operators who had previously submitted a bid or showed interest in the tender in some manner translates into a potential limitation of the bidder base, with the consequence that value for money is made even more difficult to achieve. Additionally, the level playing field environment is distorted as any new potential bidder is prohibited from submitting an offer. Finally, induced emergencies will be noted as such by economic operators, possibly also by the media, opinion leaders and the general public. This is conducive to degradation of the corporate image perception of the CA, DoC, Government and the public procurement function. In this regard, transparency, credibility and accountability of the public sector entities involved would suffer.

#### Procedures to be followed in partly EU-funded projects

- Three of the case study tenders evaluated were part-financed through EU funds under the European Regional Development Fund. When availing themselves of such funds, entities are bound to observe the guidelines as featuring in the ERDF Manual of Procedures (MoP) 2007-2013, in addition to local legislation.

A comparison carried out by NAO revealed that the ERDF guidelines were, in some instances, less stringent than local legislation and/or work practices deployed locally. One such subject matter, treated more comprehensively further down in this text, concerned the retention on file of various tender process-related documents deemed of critical importance by NAO. The level of retention stipulated in the ERDF guidelines leaves gaps in the audit trail, inhibiting the possibility of conducting a complete compliance audit test. Justification offered by the CAs in this instance is that, once the funds are EU-sourced, they acted rightly by following solely the guidelines.

NAO does not agree with this stand - even in the case of part EU-funded projects, a share of the investment is public money and as such local legislation applies and locally-adopted work practices are to be deployed. In addition, funding is in effect a delayed function - partly EU-funded projects are paid through the Consolidated Fund and eventually claimed through the EU. In this light, NAO opines that, while ERDF guidelines have to be followed, local legislation and work practices need to be likewise observed by CAs, DoC and all other involved parties when issuing tenders that will be partly financed by the EU.

#### Permits to be obtained *a priori*

- Two cases out of the five under scrutiny were infrastructural in nature. In one instance, a project management services tender covering the upgrade of part of a major road network, the approval of the Ministry for Resources and Rural Affairs was sought and obtained. The Ministry declared that, in this instance, once the project itself concerned solely the management of the



eventual construction project, its scope had no impact on the environment and as such no Environmental Impact Assessments (EIAs) were necessary.

In the second case, the CA carried out the necessary checks with the Malta Environment and Planning Authority. The outcome was the Authority's decision that EIAs were not required for the project.

Obtaining permits from regulatory authorities, especially for complex projects, can be a lengthy process. Additionally, given the autonomous nature of these authorities, it may well be the case that projects are seen by the regulators in a different perspective from that of the responsible CA. All this potentially leads to undesired outcomes and/or delays, both of which impinge negatively on the project scope and completion.

It is laudable that in these two circumstances both CAs consulted the responsible regulators before embarking on the tender launch. Such an approach has, and is, propagated by DoC.<sup>13</sup>

Departmental estimates

- It is a work practice (and makes business sense) that during the planning phase of a tender process, the CA draws up an estimated project cost. Such estimates are used by the CAs in their business plans, in general being also submitted to the respective Line Ministries (and ultimately to the Ministry of Finance, Investment and the Economy) with a request for authorisation to allocate the necessary funds and to kick start the tendering process.

Departmental estimates were computed in all of the five tenders being walked through. NAO noted varying degrees of accuracy of the estimate, ranging from estimates that were very close to the contracted amount to other forecasts that varied immensely from the actual.

Table 2 below depicts the departmental estimates, respective contracted amounts and the percentage variance for all five case study tenders.

**Table 2: Departmental estimates compared with the contracted amounts for the five selected tenders**

Departmental estimate (€M)	Contracted amount (€M)	Percentage difference
10.0	9.5	+5 <sup>14</sup>
3.3	3.1	+6
13.1	11.3	+16
4.2	2.9	+45
14.0	4.7	+198

<sup>13</sup> In June 2008, DoC issued Circular No. 18/2008 instructing all CAs to ensure that regulatory permits are obtained prior to the launch of any tender, as necessary

<sup>14</sup>  $\{(10.0 - 9.5)/9.5\} \times 100 = 5.26\%$

As illustrated in the Table overleaf, in two instances, departmental estimates were very close to the amount eventually contracted, one variance being 5 per cent and another 6 per cent. The third case, at a variance of 16 per cent is quite acceptable. However, at the other range of the spectrum one finds two cases wherein departmental estimates overshoot contracted cost by 45 per cent and by 198 per cent respectively.

NAO sought to determine sources of the variances in the last two instances (of 45 per cent and 198 per cent over-estimation).

In the case of the 45 per cent over-estimation, the CA offered the following explanation: *“the budget was calculated on the basis of the ongoing market prices at the planning stage. Tender offers were evaluated and awarded on the basis of the cheapest technically compliant criteria”*. NAO questions the validity of the departmental estimate: it seems unlikely that prices in the road construction industry fell in such a drastic manner during the period in question. Additionally, the set of working papers and bills of quantity as supplied in support of the departmental estimate was incomplete. This inhibited any effort on the part of NAO to carry out verification exercises on the estimate.

In the second gross over-estimation (of 198 per cent), NAO noted that the contract was based on the provision of 527,000 man hours worth of cleaning services. At a department estimate of €13.97 million, this works out at an hourly rate of €26.50 (inclusive of cleaning equipment, cleaning materials and staff training). This figure should have been indicative to the estimator of errors in the calculations.

From examination of the documentation made available, NAO determined that the estimate was based on departmental workings covering fund commitments for forthcoming years. An official document declared that the estimated expenditure in case of tender award was Lm1.2 million per annum. The Tender Originators' Form confirmed that estimated tender value for five years was Lm6 million, or €13.97 million. No other documents related to the workings or the workings themselves were inserted in the files as supplied by the CA.

Quite apart from distortion of the forecast expenditure in budgetary exercises, such gross over-estimations of project cost are indicative of a severe lack of market prices intelligence. This in turn potentially impinges negatively on the attainment of value for money for Government, a topic that is addressed in greater detail in the subsequent sub-section.

#### Assurance of the attainment of value for money

- Public procurement tenders, as was the case with the five tendering processes examined, adopt two main methods of selecting a successful bidder - either the cheapest offer that is simultaneously technically compliant, or the most economically advantageous tender. Different weightings and criteria are applied in different tenders, but ultimately the choice remains based, quite rationally, on a comparative exercise between the bids that would have remained in the running up to the final adjudication stage. These approaches guarantee that Government transacts at the rate that is, in relative terms, the most beneficial from a buyer's point of view (in line with the selection criteria and weightings pre-determined in the tendering process).

This approach has, however, at least one major drawback: it is based on relative, rather than absolute terms. While the selected offer may represent the best deal out of all submitted bids, this may not necessarily mean it is a fair deal for Government. Reference has already been made to the case, reported in the April 2010 investigation on the Delimara Power Station Extension Tender, wherein, admittedly in a foreign country, bidders had colluded between

themselves and had agreed to increase tender prices by a percentage, to the detriment of the buyer country.

While this occurrence took place, as already mentioned, in a foreign country, it is not unrealistic to assume that Malta and other European countries can undergo a similar experience.

This calls for internal checks to be built into the evaluation and adjudication processes, to include the GCC/DoC review of proposed results/awards.

NAO opines that the attainment of value for money for Government should commence at the tender planning stage, specifically when the departmental estimate is computed. Same should be arrived at following intensive and thorough market analysis to ensure that the quoted estimate is indeed realistic and can serve as a veritable benchmark when evaluating bidders' offers.

In view of the criticality of the departmental estimate and the level of accuracy of same, all workings computed and all source documents perused by the CA to compute the departmental estimate are to be properly annotated and archived.

Once the tender is issued, and the financial stage is reached, bid amounts should be compared against the departmental estimate and if the variance is deemed high, the CA should take steps to investigate the possibility of hiked prices, cancelling the tender if such a possibility materialises.

Attainment of value for money in public procurement is deemed critical for NAO. For this reason, the CAs' efforts in this regard should be supplemented by checks run by DoC/GCC as part of the proposal acceptance process. This is yet another reason in support of having the Contracts Committees staffed by members who are knowledgeable on the product/service being procured. Alternatively, the services of an *ad hoc* expert/consultant would be required. While this may be considered to be an extra expense, it is in reality a minor extra incurred as a safeguard to the more substantial amount being invested in the project.

In three out of the five tender processes under review, NAO did not manage to find evidence of any workings carried out by the CAs with respect to assuring the attainment of value for money for Government as buyer. In none of the five cases was any evidence of checks run by DoC/GCC found. The negative impact of such omissions impinges on the accuracy of the departmental estimate, as has been amply demonstrated in a previous sub-section dedicated to the topic.

#### Business continuity, missing documentation and staff turn-around

- Issues related to business continuity manifested themselves during the evaluation of two of the case study tendering processes.

In one instance, the CA was not in a position to furnish NAO with all the documentation deemed necessary for the conduct of an appropriate walk-through exercise. File minute sheets, instruments that enable an audit trail to be constructed and where all internal minutes are recorded, were missing from the CA files. Other documents not filed by the CA included bidders' requests for clarifications. When asked to justify these deficiencies in the filing/archiving system, CA management asserted that the officials who had processed the tender were no longer within the respective posts.

In the second instance, NAO likewise encountered difficulties tracing various documents deemed relevant to the tendering process. Most notably was the absence of letters of appointment of the evaluation and adjudication committees and the members' declarations of

absence of a conflict of interest, together with a pledge to confidentiality and impartiality. The lack of documentation led to the CA not being in a position to answer a number of NAO's queries. As in the previous instance, CA management justified this inability to supply the information requested by stating that the officials who had handled the tender at the time had, since then, transferred from their respective post.

NAO looks askance at such comments and considers them unacceptable - it is simply unthinkable that an organisation should be maimed in such a manner through staff turn-around as not to be able to track its own activity and reproduce its own documentation pertaining to a tendering process that was issued on its behalf.

Such a critical deficiency needs to be addressed immediately, and a robust filing/archiving system be implemented and maintained. All key documents, working papers, internal and external communication, requests and authorisations, feasibility studies, and similar documents that are in any way connected with the tendering process are to be stored and efficiently minuted.

NAO notes that an efficient registry function was one of the main pillars of the traditional civil service departments, a management tool that doubled as a very effective and precise audit trail.

The Office regrets that the metamorphosis of various traditional civil service departments to the more modern-structured authorities and agencies has often coincided with a serious degradation of the registry function within the particular organisation.

Present-day management dedicates considerable resources to risk and its management. Surely, it is obvious to public sector management that one such risk is business continuity due to staff turn-around. With modern concepts of operating lean organisations, this issue becomes even more concerning - at times, one-man departments/units are solely responsible for an initiative, a project, and they deploy their own peculiar methodologies and tools to carry out the job. While such an approach is conducive to a greater output given the same resources, it is imperative that such 'volatile' systems are backed up by effective and efficient logging, filing and recording systems, enabling a solid audit trail to be created. This will serve management in good stead should staff turn-around occur and the incumbent gets replaced by a newcomer who is totally unfamiliar with the mechanics of the system.

Business continuity can be affected in ways other than through staff turn-around. In one out of the five case study tendering processes evaluated, another form of business continuity, or rather the lack thereof, became manifest. The case in question concerned a period contract for the supply of consumables that had expired before the CA had concluded the subsequent contract (through the issuance of a fresh tender). Circumstances were such that the tender originally issued as follow-up was abandoned and another tender was launched.

This process in itself had its shortcomings, as NAO reports in the appropriate section of this Report dealing with the re-issue of tenders and the labelling of same as 'urgent'. However, in this particular sub-section dealing with 'business continuity' a different perspective of the issue is being considered. Business continuity demands that, in the case of a period contract or a contract that is finite and needs re-issuing (or to be superseded by a replacement contract), the follow-up contract is drawn up in readiness of coming into effect as soon as the original one expires. In this way, a seamless delivery is assured. Far from following this approach, the CA in question ended up with the original contract expiring without its replacement having been endorsed. For a considerable amount of time delivery of the product was assured through recourse to contract extension for 11 months in favour of the supplier who had secured the first contract. Additionally, urgency was claimed in the issuance of the follow-up tender. This led to a

restricted circulation amongst bidders and a peculiar formulation of the tender conditions, in that the tender did not specify a commencement date for the new contract, assuming such commencement to be instantaneous on the issuance of the Letter of Acceptance (LA).

This may be argued as being the CA's remedial action to ensure business continuity, albeit at a late stage. However, NAO is concerned that the move could have disrupted the level playing field environment in favour of the incumbent bidder. This bidder ultimately was awarded the follow-up contract.

#### Missing documentation

- Missing documentation has already been referred to in the previous sub-section. However, the issue is deemed by NAO to be of such concern as to merit individual reporting and commenting upon.

The walk-through revealed documents varying in nature that were missing from the CAs' filing systems. NAO will comment on three categories, possibly being the most critical:

- Paperwork concerning the Short-listing/Evaluation/Adjudication committees

It is imperative that officials serving on short-listing/evaluation/adjudication committees are fully aware of their duties and responsibilities. Situations whereby, in case of mishaps, such officials would declare that they were not cognisant of the responsibility they were shouldering just because this was not made sufficiently clear to them are to be avoided. This can only be done through strict adherence to a well-structured system of documentation serving as evidence and an audit trail related to the events occurring and players involved in the process. Such a system would ensure the archiving of:

(a) a proposed list of members for any of the three committees, together with details of the proposer;

(b) authorisation for the proposed list by recognised authority or authorities;

(c) individual letters of appointment addressed to the members;

(d) individually signed declaration of acceptance of the assignment by the members, accompanied by a (signed) declaration concerning integrity, impartiality, lack of conflict of interest and confidentiality, and

(e) Terms of Reference.

Additionally, the deliverable of each committee, namely a recommendation report grading the bids, should be signed by all members of the committee responsible for drawing up the report. Any minority reports should be likewise endorsed and filed together with the main recommendation report.

- Support workings for departmental estimates

This is also a topic that has been previously addressed within this part of the Report. However, NAO likewise feels that departmental estimates and related support workings have a crucial role in a tendering process and merit individual address in an audit exercise on procurement.

Departmental estimates serve multiple purposes, all of which are sensitive in nature. This brings about the need for the estimates to be worked out diligently and realistically, basing on prices fetching on the open market, factoring in particular needs reflected in the procurement process being planned. One typical adjustment would be freight - given the low degree of economies of scale to be achieved when purchasing for the local scene, and the distance the goods have to travel (together with, in certain instances, the peculiarities of the product when tailored for local use<sup>15</sup>), freight tends to become a significant component in any item cost computation.

Having realistic departmental estimates equates to a realistic demand by the CA for funding from the Line Ministry, and a realistic entry in the state annual financial estimates. In addition, a realistic departmental estimate serves as a credible benchmark against which bidders' offers can be compared. Collusion occurring in public procurement abroad has already been referred to in this Report. There is really no guarantee that this cannot happen locally. Collusion becomes ever more easy and commonplace when specialised products/services are being bought. In such instances, it is easy for a product/service to be handled by an exclusively small number of suppliers. In today's world of *ad hoc* joint ventures it is as likely that two organisations competing for a particular tender would be partners on another one being processed elsewhere. Hence, the increased risk of collusion.

NAO opines that the only manner through which the risk of collusion can be minimised and Government can obtain assurance that a particular procurement is attaining value for money for the buyer is to have a realistic benchmark (departmental) estimate against which to compare the prices being demanded by the various bidders.

It follows that the above workings need to be carefully and sensibly annotated and archived within the CA's tender files. Archiving will enable auditors to express an opinion as to the reliability and realism of the workings as performed. Additionally, such precise workings, suitably annotated, can serve the CA in good stead in future exercises, enabling methodologies to be repeated in subsequent exercises and instances of best practices identified as such and redeployed.

- Correspondence with bidders

In preparing tender documents, it is in the interest of CAs to be as unequivocal as possible. This reduces the possibility of misunderstandings that notoriously trigger complications to an otherwise smooth-running (tendering) process, disrupting the flow and injecting undesired delays into the planned roadmap.

This notwithstanding, it is extremely commonplace for potential economic operators to request further clarifications or otherwise propose some alteration (such as an extension in timing) to tender specifications and terms/conditions.

Such requests are communicated in writing and DoC circulates the response to all interested parties, apart from placing same online on the department website and that of the OJEU (if applicable).

On occasion, departmental response to a bidder's query may not satisfy some interested party. Alternatively, some other issue may be deemed unacceptable to the party in question and an objection is lodged.

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<sup>15</sup> For example, electrical equipment that needs to be 240v rated and vehicles that need to be right-hand drive.

In such cases, one valuable source of data to be used as reference is the set of bidders' requests for clarifications and the subsequent response as issued by the authorities. As NAO has encountered one instance where the CA did not retain copies of such correspondence on file, NAO feels obliged to stress the necessity for CAs to archive and minute same.

Quite apart from serving as reference documents in the case of a lodgement of an appeal, correspondence to and from bidders becomes useful in any audit exercise, particularly in the creation of an audit trail. Additionally, CA management may, in future, refer to such correspondence and be guided on how to proceed in subsequent tendering processes if faced by a circumstance that is identical or similar to one already encountered in a previous tender - in effect creating a knowledge database.

#### Extension of closing dates

- In tendering processes for complex projects the pertinent milestone plan would comprise a multitude of deliverables, delivery dates and phased levels of completion. While in the planning stage the CA would have attempted to forecast, with a high degree of accuracy, the time bidders would require to complete each phase and to meet the set delivery dates, instances when such a forecast needs adjustment occur.

In one of the case studies selected, the initial closing date for the submission of offers was extended on three occasions. NAO considered this as excessive and on further investigation it resulted that in all three cases, the extension was granted following the circulation of various clarifications/addenda to the bidders.

Despite this seemingly obvious reason for the extension, no justification/approval and/or any other reference to the allowed three time extensions were located in the CA's or DoC's files.

#### Liaison with the Department of Contracts

- CAs and DoC alike need to realise that in unison they form the buyer's side of public procurement, even if DoC's role is in reality more wide ranging, in that DoC is charged with a regulatory function that includes, amongst other critical tasks, the protection of bidders and potential bidders through the maintenance of a level playing field that is fair and equitable to all.

In the perception of the economic operator, the CA and DoC are seen as one entity - the buyer. For this reason, it is imperative that both maintain a common front and act in unison, especially where bidder relations are concerned.

Such a scenario can exist only if a high degree of liaison is maintained between the CAs and DoC. Such liaison needs to be on-going and, in view of the fact that the knowledge repository for public procurement is DoC, it makes logical sense that CAs consult DoC before taking any action in connection with a tendering process.

Referring to the five case studies examined in this exercise, NAO is in a position to report that communication between CAs and DoC was indeed continuous and that DoC was actively involved in offering guidance and in vetting documents before these were published. There were no reported cases wherein any formal advice tendered by DoC was not taken on board by the CAs.



### **Role of the Department of Contracts**

The functions of the DoC are defined in LN 177 of 2005. Basically, DoC is charged with the responsibility of administering procurement procedures as laid down in the legislation (Article 5(1) of LN 177 of 2005). While DoC's duties go beyond the signing of the contract and cover project implementation, the scope of this Report covers the tendering processes being examined up to contract signing. As such, DoC duties and role as reported on in this Report do not span beyond the contract signature stage.

Article 5(2) of the same law goes on to describe, in further detail, DoC's function. From this description it emerges that DoC is the owner of the tendering process and as such has to regulate matters concerning, amongst others:

- tender document contents including contractual conditions, approval of any deviation requested from standard ones and eventual publication of the document and subsequent related/supporting documentation;
- the maintenance of a level playing field environment throughout the tendering process;
- timings for key milestones in the tendering process;
- the establishment of procedures to be followed by the Contracts Committees and the Evaluation/Adjudication Boards;
- assurance that the tendering process strictly adheres to the pertinent rules, regulations and directives, whether local or EU as applicable, and the assurance that all players observe these rules, and
- managing of complaints as submitted by interested parties.

The above Terms of Reference (ToR) were utilised as benchmark during the walk-through exercise covering the five case study tendering processes examined. For each case study, as may be observed from the commonalities template featuring as Appendix 4, a number of audit questions were formulated, on the basis of the above ToR and on the experience in public procurement gained to date by NAO, especially so through previous audits and investigations. Through document examination, and supporting meetings/communications with DoC, the response obtained was analysed and is reported, in condensed form, hereunder.

In general, it can be ascertained that DoC maintained its various roles as stipulated by legislation throughout the entire process for the five case study tenders. In each case, DoC guided both CA and bidders, and regulated proceedings, thus ensuring compliance.

Amongst other functions, DoC:

- offered guidance to CAs throughout the entire tendering process, to include the tender pre-launch period;
- approved evaluation/adjudication committees when invited to do so by the CAs;
- maintained a steady flow of communications with CAs;
- maintained a consistent level of document vetting prior to publication of same;
- published the tender and other official documents;



- ensured adherence to procurement legislation regarding tender launch announcements, in line with local legislation and EU requirements;
- ensured adherence to time frames for offer submissions and processing;
- followed pertinent regulations during the package opening stages;
- assumed its role and duties/responsibilities as stipulated by legislation in instances where an appeal was lodged;
- handled informal complaints and comments from interested economic operators;
- circulated response in various ways (online, one-to-many communication) to queries submitted by interested economic operators;
- evaluated the recommendations/proposals of the evaluation/adjudication committees up to tender award stage;
- ensured adherence to regulations pertinent to results publication, and
- signed the contracts for Government on behalf of the CAs.

In one instance, a CA embarked on Post-Award Negotiations with the successful bidder without involving DoC. These PAN resulted in the CA's granting a time extension for the start of works and the acceptance of a penalty for the delay, which was deemed to have been caused by a default on the part of the CA. DoC was presented with a *fait accompli* and, rightly, solicited explanations from the CA. None were provided and the CA, when questioned by NAO, contended that handling the incident without involving DoC was in line with prevailing legislation - the penalty amount was a variance of less than 5 per cent of the total project cost<sup>16</sup>.

NAO cannot support this stand. Variances, by default, occur during project implementation and Article 77 of LN 177 of 2005 concerns these differences. In the instance being described, the 'fluctuation' occurred before start of works, and as such is strictly PAN. For this reason, the CA should have involved DoC *a priori*. The contract was, as appropriate, endorsed by DoC for Government. PAN is an extension, a *corrigendum*, to the main contract. As such, NAO opines it was the prerogative of DoC to handle.

NAO had scrutinised the role assumed by DoC in overseeing public procurement mechanisms prior to this exercise. Such scrutiny was especially thorough in NAO's April 2010 Report dealing with the Delimara Power Station Extension, entitled '*Enemalta Corporation - Tender for Generating Capacity*'. In this Report, NAO had been critical of DoC's performance in that the role assumed was passive and the CA had, in effect, handled the procurement process on its own, on a number of instances during the tendering process, with the consequence that proceedings were, on numerous occasions, misaligned with prevailing procurement legislation and/or practices and were not conducive to the propagation of a perception of transparency, equity and accountability.

The walk-through exercise conducted for the five case study tendering processes selected revealed a different DoC - greater initiative was shown and presence was more substantial. The outcome brought about by this change in behaviour was also grossly evident - in general compliance level was absolute and none of the serious/critical deficiencies identified in the above-mentioned (April 2010) Report were encountered.

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<sup>16</sup> Article 77(1) of LN 177 of 2005 states that: "... in all cases where variation orders individually or in their totality exceed by more than 5 per cent the awarded contract value, the prior approval of the Director is to be sought before a commitment is made by the Contracting Authority with the contractor."

### **Duties of the Contracts Committees and the attainment of value for money**

It is pertinent to note that the products/services procured through the five case study tenders selected for this exercise were complex and specialised: project management for the upgrade of a sophisticated road network; supply of prepared food for a large quantity of consumers; installation and commissioning of electrical equipment critical for the national distribution network; cleaning services for the main state hospital, and the reconstruction of a major road.

The prevailing legislation acknowledged the fact that current-day procurement often develops into a complex operation, given the wide ranging nature of the products/services that are purchased, and the sophistication of the good being procured. In addition, procurement has become even more complex with the deployment of different modes of reimbursement for the acquisition - leases, outright purchase, build and operate methodologies, supplier-assisted financing and public-private ventures are only a few of the various methodologies deployed in procurement.

In support of this acknowledgement of the prevailing situation in procurement, Article 9(1) of LN 177 of 2005 states that:

*“Where the Prime Minister determines that the adjudication of tenders for the award of any particular contract requires special expertise, skills or other specialist knowledge, he may appoint a Special Contracts Committee for the award of that public contract.”*

This implies that the members of the Committee, both the default GCC or any *ad hoc* Special Contracts Committee (SCC), are expected, in terms of legislation, to be knowledgeable in the subject matter of the product/service being procured.

It is true that the evaluative and adjudicative function cycles are commenced by the CAs. The CA is responsible for the setting up of the respective committees; these committees evaluate and adjudicate the bids (during two separate phases of the tendering process in a three-package tender) and draw up a proposed decision, in the form of a report.

However, it is likewise true that the Contracts Committee, as stipulated by law, is charged to:

*“evaluate reports and recommendations submitted by contracting authorities and make definite recommendations for the award of contracts ensuring that the best value for money at lowest cost is attained.”* (Extract from Article 80(b) of LN 177 of 2005)

Furthermore, legislation stipulates that :

*“The Contracts Committees shall have the function to assist the Director in the execution of his duties in accordance with these regulations.”* (Extract from Article 10(5) of LN 177 of 2005)

This implies that the Contracts Committees are expected, in terms of their legal obligations, to be conversant and knowledgeable enough on the good being procured to analyse, question and if appropriate refute recommendations submitted by the CA's evaluation and/or adjudication committees.

This is quite clearly in line with the legislator's conceptual ideology - namely that of having a control mechanism entrenched in the procurement system but totally external and hence autonomous from the CA, thus eliminating (or at least drastically reducing the possibility) of collusion between CA officials responsible for the procurement process and the bidder(s).

Examination of the five case study tendering processes under evaluation reveals that on no occasion was recourse to the setting up of (*ad hoc*) SCC made. The default GCC assisted DoC in arriving at a final decision based on the advice/proposals submitted by the CAs' evaluation and adjudication boards. Such

advice was, in the five cases examined, never queried by the GCC with the exclusion of one instance where a discount afforded by a bidder in a tender was erroneously not taken into consideration by the CA adjudication committee and the error was identified by the GCC.

NAO has its reservations in this regard. While the approach of having the default GCC assist DoC in all tendering processes is perfectly in line with legislation, that same legislation has built-in mechanisms allowing a different, more effective approach to be deployed, namely the setting up of specialised committees staffed with members whose competencies vary according to the nature of the purchase.

In addition, NAO opines that it is very improbable that the same group of persons have the “*special expertise, skills or other specialist knowledge*” to ensure that the CAs’ proposals are indeed the best fit for the tender-set criteria. Such reservations hold even in view of the fact that the GCC may be comprised of a group of members of varied professional background, provenance and work experience.

This audit concern has already been raised by NAO, specifically in the Report drawn up in response to the PAC commission to investigate the tender for the award of the Enemalta Corporation Delimara Power Station Extension project.<sup>17</sup> In the Report, NAO had stated that the Office:

*“fails to understand how the DoC seems to have given little or no priority to the following considerations:*

- a) the complex nature of the project and/or;*
- b) the necessity to seek approval from the Prime Minister to appoint Special and Adjudicating Committees including additional members whose technical expertise measured up to the task, as provided by legislation.”*

Another, related, issue is that of assuring value for money for Government. Selection of the least cost but fully compliant or even of the most economically advantageous tender does not automatically imply that value for money has been achieved. Again this was an issue deliberated upon in the EMC Report mentioned above. In the Report, NAO had quoted an instance (occurring in a foreign country) where it was proven that all bidders for a particular tender had colluded between themselves and had submitted prices that were above the world market ones.

From the walk-through carried out for the five case studies, it would appear that, while a departmental estimate was made, a number of such estimates were unrealistic - implying that no market intelligence function was performed. CAs’ efforts in this regard are covered more comprehensively in the appropriate sub-section of this text.

### **Role of the Contracting Authorities**

The CA, together with DoC and the GCC, forms the buyer’s, or Government’s, side of the procurement equation. In fact, the CA may be considered as being the ‘consumer’ *par excellence*, with its role being purely that. DoC, quite apart from serving as a regulatory institution is also a representative of the buyer in that, most notably DoC typically endorses the final contract on behalf of the CA and for Government.

As may be perceived from Appendix 1, the flowchart detailing the tendering process under the LN 177 / 178 of 2005 regime, the CAs play a major part in the procurement process and may in fact be considered as being the main player. Following the flowchart, the CA identifies the initial need for

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<sup>17</sup> The report, entitled “Enemalta Corporation - Tender for Generating Capacity” was presented to the Hon. Speaker in April 2010.

procurement, establishes and determines specifications and hence calculates estimated project cost. Assuming the tender exceeded the set threshold of €47,000, the CA drafts the tender and forwards this to DoC for vetting. Eventually, after package submission, the CA evaluates the first and second packages (in a three-package model) - the administrative and technical sections. The CA then submits the result for endorsement by the GCC. Following this, the third package (financial) is adjudicated. Once more, the adjudication is submitted to the GCC for endorsement.

CAs are also active in the case of an appeal being lodged. During the process, the CA (in conjunction with DoC) formulate a report. The CA suspends the tendering process until the appeal is heard and decided. Eventually the CA continues the tendering process, reinstating the appellant if his claim is upheld.

In the specific cases of the tenders being analysed, CAs were different for each of the five tendering processes. The mix included a line ministry, core traditional civil service departments, a parastatal corporation and a more-recently founded authority.

In general, however, the CAs' role was similar, in cases, identical, across the five case study tendering processes.

In four of the five cases, members of the evaluation and adjudication committees observed ethical considerations applicable in the circumstances prevailing. In the fifth case, no evidence that ethical issues/considerations of any sort were taken into account during the process of selection of the committee members was sourced. Further analysis of the same tendering process resulted in that declarations of impartiality, lack of conflict of interest, confidentiality and integrity usually signed by committee members were not located.

Taken in conjunction with the lack of due attention on the part of the CA to ethical considerations in the setting up of the evaluation/adjudication committees, the issue of lack of signed declarations becomes even more concerning.

Consultation with DoC was ongoing, ensuring that the tendering processes ran in a manner that was compliant with the prevailing legislation and promoted a corporate image for DoC, the CAs and Government of credibility and accountability. This phenomenon was common for all five tendering processes. Similarly, all five CAs sought DoC's approval before taking any action. Documents prepared for publication were likewise sent to DoC for vetting prior to release. Changes proposed by DoC were taken on board.

The five CAs managed the tender project in house, without resort to external consultancy.

On the issue of DoC liaison, one notable incident merits mention. During the course of one of the tendering processes, following contract signature it transpired that, due to a default on the part of the CA, the site of works was not available for inspection by the successful bidder. This triggered a seven-week delay in the start of works and a penalty of more than €33,000 for the CA.

The CA presented DoC with a *fait accompli*. DoC requested a justification from the CA but none was forthcoming. When NAO raised the issue with the CA, the latter's stand was that the penalty constituted a sum less than 5 per cent of the total contract value and as such was a variance that did not require DoC's *a priori* approval.

NAO disagrees with this reasoning. The 5 per cent threshold as stipulated in the prevailing legislation holds for the project implementation phase. In this instance, the extra expenditure incurred was pre-start of works and can only be considered as PAN. The penalty was, in fact accounted for in the contract through the addition of a *corrigendum* to the original contract.

NAO opines that the negotiations and resulting contract amendments should have been managed by DoC on behalf of the CA.

### **Evaluation/Adjudication**

The evaluation and adjudication functions are undoubtedly the most critical in a tendering process. For this reason, CAs, under the guidance of DoC, need to ensure strict adherence to legislation and an ethically correct behaviour. Should these be perceived to be lacking by either the economic operators with an interest in the process, the media or any other opinion leader, the entire public procurement function will lose credibility and doubts as to lack of accountability, equity and transparency will materialise, to the detriment of the corporate image of the CA, DoC and Government in general.

In view of the above relevance and criticality of the functions in question, NAO focused substantial efforts during the audit to ensure that the walk-through exercise would provide a precise picture of the manner with which the evaluation and adjudication functions were managed in the five tendering processes under review. As may be attested from Appendix 4 of the Report, the Commonalities Template dedicates a number of questions and tests to the functions, considering the issue from various perspectives.

A number of findings were identified through the exercise. The more salient of these are listed and discussed hereunder:

#### Short-listing committee

During any tendering process, the CA is responsible for the process up to the compilation of a report that is eventually submitted to DoC/GCC, comprising a recommendation. This holds good for both the evaluation and the adjudication stages. It follows that formation of the evaluation and adjudication committees is the prerogative of the CA.

The CA may opt to create yet another tier in the tender selection process - that of a short-listing committee. Admittedly, this is usually resorted to when there are a considerable number of bids of which some are deemed to be outright non-compliant on basic terms. In the interest of efficiency, rather than have the (relatively complex) comparative evaluation process take its course across the entire set of bids, a pre-evaluation filter, that of short-listing, is deployed. In a short-listing exercise, the 'evaluation' is lighter than that applied at the evaluation stage, and is hence conducted more expeditiously, saving on precious time allocated to the tendering process life cycle.

In all the five case study tendering processes examined, the number of submitted bids was never too unwieldy to handle within the evaluation stage. For this reason, the CAs in question never resorted to the setting up of a short-listing committee but commenced the filtering process by deploying the evaluation committee.

NAO agrees that, in the prevailing circumstances, the CAs' decision was pragmatic.

#### Composition of the Evaluation and Adjudication Committees

By their very definition, the evaluation and adjudication committees are assigned different roles and perform diverse functions during a tendering process. The evaluation function is concerned with the technical aspect of a tender and evaluates the submitted bids, determining which are (technically) compliant, and grading the level of compliance. Such a process is usually based on criteria pre-determined at tender planning stage and included in the published tender document.

In view of the above, it makes sense to have the evaluation committee staffed by officials who are technically-oriented, as these would be in the most ideal position to ensure that the graded list produced reflects with precision the bids' technical offerings in order of merit.

On the other hand, the adjudication function is a purely financial exercise in which the fiscal component of a bid is analysed. In the case of the cheapest offer that is technically compliant, all that needs to be done is to take the cheapest from the list, as all on the list would have qualified technically. In the case of the most economically advantageous tender, the bids would still be graded in order of merit fiscally, and then a matrix created depending on the weighting of technical : financial. The tender faring best within the specified combination of the two parameters would be graded as the most suitable. In any case, adjudication remains essentially financially-oriented. It follows that a CA can maximise benefit derived from the composition of the adjudication committee by staffing the committee with officials hailing from a financial/administrative background.

Referring to the five case study tendering processes under review, it transpires that, in all cases, the CAs opted to appoint an evaluation committee and have the same members double as an adjudication committee. While this is legally correct, NAO opines that in opting for such a set-up the CAs may have not reaped the full benefit to be derived from a setup as described above, namely wherein technical personnel staff the evaluation committee and officials with a financial background carry out the adjudication function.

Quite apart from the benefit to be obtained given that greater expertise would be at hand, different composition of the two committees translates in greater reassurance of integrity - through segregation of duties.

#### Documentation

This issue is covered in some detail within the 'Tender model, costings and timings' sub-section. However, the criticality of the concern is deemed to be so high as to merit a second reference to the matter within this sub-section.

As explained above, the evaluation and adjudication functions are of critical relevance within a tendering process, and are probably the most fundamental of all key milestone events/occurrences. For this reason, it is necessary that CAs and DoC jointly ensure that all activity related to the functions is managed in a manner that is legal, ethical, and instils a high degree of credibility, accountability and transparency.

Achieving these objectives is facilitated through recourse to a reliable system of documentation and authorisation processes that are adequately minuted and recorded. As described earlier, setting up a short-listing, an evaluation or an adjudication committee should, as a minimum, comprise a proposed list of members, a valid authorisation of same, individual letters of appointment and signed declarations of confidentiality, lack of conflict of interest and integrity/impartiality by all members and a clear set of Terms of Reference.

Referring to the five case study tenders, Terms of Reference describing the tasks, duties and responsibilities of the committee members were never drawn up. Additionally, letters of appointment were missing in three instances. In one case, no declarations regarding lack of conflict of interest, confidentiality, and integrity/impartiality were located.

### Approval of the committees' composition

As indicated above, approval of the committees' composition by competent authorities is a control mechanism that is conducive to ensuring that a valid set of officials form the committee. Furthermore, such approval vests the committee with the necessary authority to carry out its function, whether the evaluation or the adjudication process.

In order to ensure a complete audit trail, any such approval should be given in writing and should be included in the CA's tender files.

Examination of the documentation filed for the five tenders revealed that the composition of the evaluation/adjudication committees was always duly authorised - in some instances by the Line Ministry, in others by DoC. It is pertinent to note that, while it seems to have been a work practice to seek the approval of the Line Ministry for the composition of the committees, in the case of part EU-funded projects, the relevant Manual of Procedures indicates DoC as the authority responsible for endorsing the committees in question.

From an administrative point of view, NAO feels that by soliciting DoC's approval for the composition of a committee, the CA would be ensuring a higher degree of accountability and transparency, as the process of committee formation and authorisation would be extended to include external parties.

### Decision-making

The *raison d'être* of the short-listing, evaluation and adjudication committees is the decision they take at the end of their deliberation. As explained above, considerations regarding maintenance of documentation, adherence to legislation and consideration to ethical issues, together with assurance of integrity, confidentiality, transparency and accountability and the lack of conflict of interest are a necessity where committee formation is concerned. Where decision-making is concerned, this necessity increases exponentially. NAO cannot overstate the need for precise documentary evidence, detailing the decision-making process thoroughly and accurately.

The workings and notes supporting the ultimate decision form the hub of the entire tendering process and will undoubtedly be referred to in case of any objection being lodged. They also form a central part of the audit trail source documentation.

NAO's review of the five tenders revealed that in each instance the (technical) evaluation decision was made in a transparent, accountable manner, with the (evaluation) committee basing its recommendation on the criteria as pre-determined during the tender planning stage and as featuring in the tender document. Eventually this recommendation featured in a report that was submitted to GCC/DoC for an official decision. In all five cases the evaluation committees' proposals were endorsed.

The same process was basically repeated in the case of the adjudication process. In this case, adjudication was based on two separate models - lowest cost satisfying technical criteria and most economically advantageous tender.

In the case of the lowest cost model, all bids that had passed the evaluation phase were considered (bids that were not technically compliant would have been disqualified at the evaluation stage). A ranking order, starting from least cost was created.

When the adjudication model was based on MEAT, the technical to financial weighting ratio as published in the tender was utilised to obtain the proposed grading of bids.

As in the case of the evaluation process, the resulting reports with the proposed successful bidder were passed to GCC/DoC for a final decision. In this instance, there was one case where the Report was sent



back as the adjudication committee had failed to take into account a discount given by one of the bidders.

#### Disqualification of bidders

Four of the five case study tender processes involved the disqualification of bidders whose bids were deemed to be non-compliant with specifications and/or terms/conditions as specified in the tender document. In addition, as has been amply described, two of the tenders were re-issue processes, the original tendering process having been stopped and cancelled as none of the bidders had qualified.

In the case of disqualification of bidders, the recommendations report as submitted by either the evaluation or the adjudication committee (as applicable) features a narrative explaining the reason for the disqualification. This is in line with prevailing legislation.

#### Factors considered during evaluation/adjudication

In all five case study tenders, the CAs had requested bidders to furnish details of their financial and economic standing, together with their technical capacity with respect to tender work requirements. In all cases, these parameters were factored into the evaluation/adjudication process.

#### External consultancy services

CAs are entitled to make use of external consultants in the course of the procurement process. This could occur at any stage - planning, evaluation or adjudication. In the five cases under review, none of the CAs engaged any external consultants.

NAO cannot generalise on the issue of consultancy engagement. Rather, this matter has to be evaluated on a case-by-case basis. It may well be that the CA has sufficient internal knowledge and expertise to handle procurement of a required product/service unaided. In this case, it makes sense to avoid the risk of roping in an external consultant and to manage the procurement without external assistance. However, scenarios exist wherein the product/service being acquired is too complex for the CA to handle on its own, or is a product/service that falls outside the CA's core business, rendering CA personnel unfamiliar with its intricacies. In such cases, it is more sensible for the CA to extend its investment marginally by assuming the services of an external consultant.

#### General Contracts Committee final decision

In line with the tendering process, recommendations drawn up by both the evaluation and the adjudication committee are submitted to GCC/DoC for endorsement. Such endorsement is, as defined by the prevailing legislation, to be based on a solid knowledge of the product/service being procured. This issue, and the possibility that GCC does not possess this level of knowledge across the entire, extremely wide, range of categories of products/services procured, has already been dealt with in the 'GCC duties' sub-section.

What is pertinent to note is that, in all five cases under review, the GCC approved the recommendations of both the evaluation and the adjudication committees without changes. There was only one instance when a report was queried by DoC. The reason was a mathematical error in the computation of project prices by the adjudication board. In any case, the error was corrected and the report accepted.

While it may very well be that the proposals submitted by the CAs' evaluation and adjudication committees were indeed suggesting the best choice, and so the GCC had the relatively simple task of endorsing such proposals, the issue of whether the members of the GCC are knowledgeable on all products/services being procured to such an extent as to be able to 'evaluate reports and make recommendations' without recourse to specialised expertise/consultancy remains.



## **Tender award**

Tender award stage is the climax of a tendering process - all key players' efforts throughout the entire process are reflected in this one result that basically closes off the tendering process, giving way to the transitional phase of contract endorsement (possibly following PAN) and, ultimately, to the project implementation phase.

In the five case study tendering processes reviewed, there were instances wherein the award notice was not advertised locally, although in all EU-part funded tenders notification to the Commission of the Notice of Award was performed as applicable, as was the submission of the Contract Award Notice in the OJEU.

The successful bidder was always informed. In three instances, all bidders were individually informed of the award decision.

The final award decision was not appealed in any of the five cases.

## **Appeals**

Of the five case study tendering processes analysed, two had recourse to the appeals procedure (prior to final award stage). In each case, the appeal was started when a bidder submitted a formal objection to DoC and deposited the mandatory fee. This action on the part of the bidder triggered the standard process as contemplated by the prevailing legislation, starting with an analysis of the case and the subsequent drawing up of a report jointly by DoC and the CA.

The Public Contracts Appeals Board as appointed met in public, calling witnesses who testified under oath.

In one appealed case, the appellant was proved right. The original decision disqualifying him was reversed, the deposit refunded and the bidder continued competing in the subsequent stages of the tendering process. During the appeals procedure, the tendering process was temporarily suspended.

In a second appealed case, the original decision to disqualify a bidder was confirmed. As the appellant did not refer the matter to the Civil Court, the tendering process, temporarily halted during the processing of the appeal, was restarted without the participation of the appellant. In this case the deposit was not refunded.

In both cases, a decision with respect to the appeal was reached within ten working days of the hearing, as stipulated the LN 177 of 2005.

In the walk-through simulation basing on the LN 296 of 2010 and LN 107 of 2011 regime, both appeals processes developed in an identical manner. Likewise, the same outcome would have prevailed.

## **Post-Award Negotiations**

Throughout the five tendering processes selected, there were a number of instances where Post-Award Negotiations (PAN) took place. In effect, the contract as signed remained totally unchanged from the pre-award version as stipulated in the tendering document only in one instance.

In the other four tenders, PAN were carried out, to a higher or lower extent. PAN in general and the high risk element involved when CAs embark on such activity are discussed comprehensively in the

appropriate section of this Report - the section entitled 'Post-Award Negotiations on a global scale'. Reference to the text in question reveals the high concern audit institutions have of such negotiations, in view of the fact that same may very well lead to a disruption of the level playing field environment, may impinge upon the credibility level of CAs, central procurement agencies and Government as a whole, and may (illicitly) alter the order of merit as established during tender evaluation and adjudication.

In this particular sub-section of the Report Findings, the actual instances of PAN encountered during the case study evaluation exercise are described and commented upon.

- In one tender, bidder personnel assigned tasks within the project during implementation became unavailable. On notification of this occurrence by the bidder, the CA scrutinised the reasons for such unavailability. These were deemed genuine and valid. The CA furthermore took measures to ensure that the suggested replacement personnel were at least as competent as those they were replacing. The contract was amended accordingly.
- In the same tender, the bidder contested the nature of interim reports he was to furnish at pre-determined intervals to the CA. Originally such reports were considered to be works-in-progress (interim) in nature. This implied that the bidder would not be remunerated for same on delivery - rather payments effected would be considered as pre-financing instruments. Following PAN, both sides agreed that the interim reports, since they formed part of a modular deliverable, should be considered as stand-alone deliverables in their own right and as such payment was due on delivery.
- Issues of the applicability of Value Added Tax (VAT) arose in PAN in two separate tendering processes. In one instance, a complication arose in that categorising the product was subjective, with two possibilities existing - one category would have attracted VAT, the other would not. In the end, the CA instructed the bidder to abide by the terms and conditions that had been stipulated during the tendering process. In the second instance, prices quoted in the contract included VAT but were erroneously described as being VAT exclusive. Through PAN, the error was corrected.
- Yet another instance necessitating PAN arose in a tendering process where, from the time the ITT was originally issued to tender award and contract signature, a drastic reduction in quantity requirements occurred. Through PAN, an arrangement was reached wherein the originally-tendered quantities were contracted, with the surplus supply being diverted to third party beneficiaries who were also entitled to receive the product.
- In one particular instance, the CA defaulted from the tender-stipulated terms and conditions - this default resulted in a pre-start of works delay. A time extension was accorded and the CA ended accepting to pay a penalty. DoC was not consulted *a priori*, but was faced with a *fait accompli*. The CA contended that DoC go ahead was not required as the variance was less than 5 per cent of the total project cost. NAO disagrees with this stand - the penalty cannot be considered as an implementation phase variance but as a pre-implementation *corrigendum* to the contract as originally signed. As the contract had been signed by DoC, such amendment should likewise have been processed by DoC on behalf of the CA.

As may be attested from the above, PAN are a frequent occurrence in tendering processes - four out of five selected tenders featured PAN. In the four tenders featuring PAN, six issues necessitating negotiations arose.

NAO, in the 'Post-Award Negotiations on a global scale' section of this Report, comments on the fact that PAN is to be resorted to with extreme care and, if possible, avoided altogether. However, PAN is still regarded by the Office as inevitable in a number of circumstances.

Of particular concern is the fact that CAs occasionally embark upon PAN with the successful bidder on their own, without requesting the presence and support of DoC. Such a presence is deemed to be critical to ensure accountability and transparency. In addition, DoC presence during PAN makes business sense especially so in cases where, as is typically the case, DoC would have been the contract signatory for Government.

On a lighter tone, it is comforting to note that none of the PAN instances could have affected the order of merit of bidders in any way. Neither could the occurrences have changed the outcome of any of the tendering processes.

## Post-Award Negotiations on a global scale

### The source of the concern

Early in the audit design stage, NAO identified an audit concern that was deemed critical and sensitive and to have a potential impact on a tendering process - Post-Award Negotiations.

The concern, in the main, was triggered by NAO's experience when conducting the investigation commissioned by the Parliamentary Public Accounts Committee (PAC) in connection with the Delimara Power Station extension tender<sup>18</sup>. During the examination of the tendering process in question, it had become evident that a high degree of PAN had taken place.

In addition, there was no involvement on the part of DoC during the period between tender award and contract signature - EMC had carried out the (post-award) negotiations with the successful bidder Burmeister & Wain Scandinavian Contractor A/S (BWSC) on its own.

It resulted that, as stated in NAO's Report, clauses and conditions as included in the tender document underwent hefty and significant changes when transposed to the final contract version as signed.

As a consequence, EMC's position changed considerably following the negotiations. The agreement as signed was more favourable to the Contractor, to the detriment of the Contracting Authority.

In view of this situation, NAO had, amongst other matters, recommended that contracting authorities employ officials who would be able to negotiate at par with their private sector counterparts, to ensure value for money for the CA.

### Third party opinions on PAN

For the purpose of the present exercise, desk research on PAN was carried out. Surprisingly, very little material was sourced. One publication that addressed the concern of PAN was entitled "Curbing corruption in Asia and the Pacific - Progress and challenges in 25 countries" published by the Organisation for Economic Cooperation and Development (OECD). OECD, in this publication, opines that PAN are either prohibited/unlawful or exercised with strict caution. The main reason cited is that of maintaining transparency and reducing the possibility of corrupt practices.

In addition, NAO sought the opinion/experiences of foreign SAIs within the EU on the subject matter.

**SAI Hungary** states that in cases of procurement reaching or exceeding the EU value limit, a draft contract was a compulsory element of the tender and deviations from the contract conditions stipulated in the tender were not permissible.

SAI Hungary examines the contracts and if it results that the originally stipulated conditions were changed, the audit report would conclude that the public procurement was not in line with the relevant regulations because such changes might distort competition or the principle of equal treatment since other bidders would have submitted their bids basing solely on the originally stated conditions (in the tender document).

**NAO United Kingdom** opines that under EU rules PAN is allowed as long as the scope of the contract fits with the specification in the Invitation to Tender (ITT). This effectively means that changes resulting through such negotiations must not be conducive to claims on the part of unsuccessful bidders that

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<sup>18</sup> The report in question is entitled "Enemalta Corporation - Tender for Generating Capacity", tabled in April 2010.

their offer could have been more successful had the Invitation to Tender reflected the eventual contract scope.

**NAO Cyprus** states that on the basis of the prevailing legal framework regarding the post-contract award stage, changes to contracts are not allowed without the prior approval of the Competent Bodies, which have the authority to handle (reflect, approve or modify accordingly) changes or claims that may arise during the execution stage of a contract. The establishment of these Competent Bodies, their powers and the conditions under which changes and/or claims are handled in contracts at the execution stage, are likewise governed by relative Regulations.

### Legal advice on PAN

NAO sought the opinion of the Office's legal adviser on the matter. As a first step, the position at Law was identified, namely that public contracts *'are subject to community law and the fundamental principles of non-discrimination, equality of treatment, transparency, mutual recognition and proportionality.'*

The advice continued that, as a basic rule of the thumb, PAN leading to *'a post contract amendment would be permissible if the contract remains essentially the same to the contract conditions that were publicised during the tender procedure. If the contract is different in essence, if substantial modifications have taken place, from the contract originally proposed in the tender documents then a suitable solution has to be found to give prospective bidders (including those who may have chosen not to present a bid) a fair opportunity to bid for the contract that is actually awarded. If need be (and as will probably usually be the case) a procurement procedure has to be started afresh.'*

This begs the question: What constitutes substantial modifications?

NAO posed the question to the legal expert: *'Whether modifications affect the essence of the contract or not may be a hard decision to take in practice. It should be noted however according to the United Kingdom Court of Appeal that a Contracting Authority cannot avoid responsibility by reserving (in the tender document itself) an absolute right to amend the contract as it deems fit.'* Such a right could not give the Contracting Authority absolute powers, as this would be in breach of the EU principles referred to earlier above.

Legal advice continued by defining typical examples of substantial modifications, basing on judgements passed by the European Court of Justice. These examples included:

- had the changes been included in the Invitation to Tender, these would have made it possible for bidders to submit a substantially different offer;
- the changes are materially different in character from the original contract (such as to demonstrate the intention of the parties to renegotiate the essential terms of that contract);
- the changes introduce conditions which, had they been part of the initial award procedure, would have allowed for the admission of bidders other than those initially admitted or would have allowed for the acceptance of a bid other than the one initially accepted;
- the changes extend the scope of the contract considerably to encompass services not initially covered;

- the changes tip the economic balance of the contract in favour of the contractor in a manner which was not provided for in the terms of the initial contract, and
- the changes in a supplier/subcontractor could be material if the winning bidder was awarded the tender on the strength of this subcontractor (for example experience and reputation).

The legal advice concluded that procurement regulations offer some guidance on the matter of PAN. However, value judgement needs to be applied on a case-by-case basis to quantify the substantiality of the changes. It was acknowledged that determining where to draw the line could prove difficult.

### **NAO opinion**

On the basis of the above research, peer organisations' opinions and legal advice, NAO opines that extreme care should be exercised by contracting authorities before getting engaged in PAN. As default, such negotiations should be avoided, with (signed) contract conditions being identical to those included in the Conditions Section(s) of the tendering document.

NAO, however, realises that in cases of complex projects, such as plant and construction, detailed plans may not have been drawn up at offer submission stage. Plans and schematics would be compiled and designed, by the contractor in conjunction with the Contracting Authority, post award. This eventuality would perforce bring about the need for various agreements to be agreed to 'in principle' at award stage, with negotiations taking place post award, during project implementation, once the details and hence the components are known with exact precision.

While such cases make PAN inevitable, this does not exonerate the Contracting Authority from respecting to the letter the principles of non-discrimination, equality of treatment, transparency, mutual recognition and proportionality referred to earlier. In addition, any changes resulting from PAN must not fall under the category of 'substantial modifications' as defined above. DoC monitoring, control and indeed participation in PAN is also a necessity.

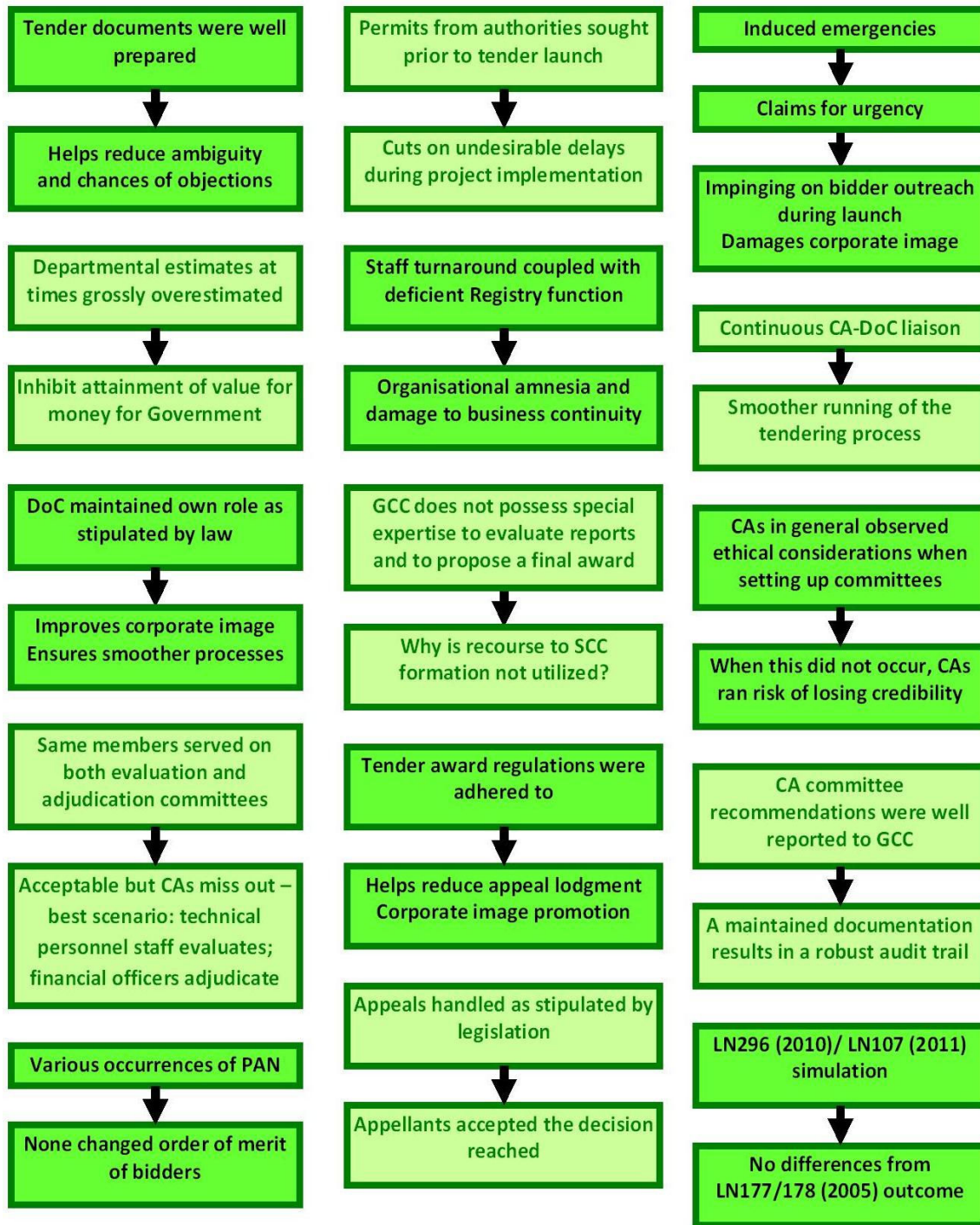
### **PAN and the case studies of this exercise**

It is pertinent to note that while PAN featured in a number of the five case studies selected for this exercise, none of the instances seem to could have been conducive to a change in the order of merit of the bids. This notwithstanding, NAO is concerned that recourse to PAN is quite frequent. Contracting authorities need to be well advised and prepared beforehand if any procurement process they are carrying out necessitates PAN.

In such cases, full adherence with the principles quoted above is a must. The Contracting Authority would need to deploy officials possessing negotiation skills and to implement sufficiently adequate, effective and robust internal controls to ensure that officials involved in PAN would comply with the spirit of the regulations. In turn, this would ensure that PAN, as indeed the entire procurement process, constitute value for money for the Contracting Authority. In addition, NAO opines that DoC presence and full involvement is a necessity during PAN. Such presence leads to greater accountability and transparency.



The Report at a glance



The National Audit Office can reasonably express assurance that tender processing was carried out in a manner that was in general compliant with legislation for the five case studies under review.

However, shortcomings identified in the Report need immediate addressing.

## Simulation - the case studies under LN 296 of 2010 and LN 107 of 2011

As referred to in various instances of this Report, all five case study tenders analysed were issued, evaluated, adjudicated and awarded on the basis of LN 177 and LN 178 of 2005 - Public Contracts Regulations and Public Procurement of Entities operating in the Water, Energy, Transport and Postal Services Sectors Regulations respectively.

In June 2010 LN 177 of 2005 was amended by LN 296 of 2010, introducing new Public Procurement Regulations. Up to March 2011 both LN 296 of 2010 and LN 178 of 2005 were applicable, yet the two Legal Notices lacked the necessary cross-referencing. Subsequently, the necessary provisions and amendments to LN 178 of 2005 were made, resulting in LN 107 of 2011.

Main changes in the 2010/2011 legislation (when compared with the 2005 laws) include:

1. Adjustment of thresholds to current project realities
2. Devolvement of tender publication to contracting authorities for tenders not exceeding €120,000, simultaneously increasing DoC supervision
3. Introduction of Departmental Contracts Committees
4. Introduction of a Public Contracts Review Board
5. Improvement of transparency and fairness

Measures of safeguard were also introduced in LN 296 of 2010 to address various weaknesses in the previous legislative regime:

- the absence of a period allowing for an effective review between the decision to award a contract and the conclusion of that contract
- the duration of the standstill period did not always allow enough time for bidders to examine the award decision and decide whether they required to initiate a review procedure
- the absence of provisions for effective and proportionate sanctions to combat illegal direct award of contracts

Under LN 296 of 2010, the Public Contracts Review Board (PCRB) replaces the Public Contracts Appeals Board of LN 177 of 2005. The PCRB is appointed by the Prime Minister and is totally autonomous of DoC. The Board is responsible, *inter alia*, for:

- taking interim measures to correct alleged infringements or preventing further damage to the parties concerned
- setting aside decisions taken unlawfully including the removal of discriminatory technical, economic or financial specifications in the tender and contract documents
- awarding damages to parties harmed by an infringement

The PCRB also has the authority to declare a contract null and void if:

- the CA awards a contract without prior publication of a contract notice in the Official Journal of the EU without this being permissible
- notwithstanding an appeal lodged before the PCRB, the CA concludes a contract before a final decision is given

LN 296 of 2010 also introduces, at the legislative level, control measures in the form of the possibility of black listing of economic operators (by DoC).

The new legislation has likewise introduced the notion of Departmental Contracts Committees (DCCs). DCCs make recommendations for contract awards not exceeding €120,000. DoC maintains a monitor



and control function: one of three members of the DCC is a DoC representative. Furthermore, procedures followed during DCC meetings are established and regulated by DoC.

LN 296 of 2010 stipulates an increase in the level of control exercised by DoC. DoC may cancel a tender in the event that the evaluation process will not be concluded by the end of the validity period of the submitted bids. The legislation also specifies that DoC is to provide remedies to tenderers in relation to public contracts with a value of less than €120,000.

In view of the above-described updates brought about by the change in the legislative regime, the five selected case study tenders were walked through the LN 296 of 2010/LN 107 of 2011 structure (instead of the LN 177/178 of 2005 on which the Report is based).

This simulation exercise was conducted to enlighten the reader as to the effects (if any) of the new legislation on the selected five case study tenders - allowing one to envisage the outcome of the tendering processes had these been issued after the legislative change of 2010/2011.

The cases most likely to be affected are those in which an appeal was lodged, namely CT 2555/2008 - *Supply and Service of breakfast, lunch and dinner to third country nationals* and CT 2633/2009 - *Negotiated procedure for the reconstruction of Xlendi Road, Xlendi*.

In reality, outcome would not have changed in any of the five selected tender case studies.

In the case of CT 2555/2008, the procedures followed proved to be totally in line and in adherence of those stipulated in LN 296 of 2010. The same applies in the case of CT 2633/2009.

## **Conclusions and recommendations**

In concluding, the National Audit Office can reasonably express its assurance that in the five case study tendering processes analysed, proceedings were in line with prevailing legislation. The Department of Contracts assumed an effective control and monitoring role, overseeing the procurement processes. Contracting Authorities cooperated and maintained consistent liaison with the Department of Contracts.

However, shortcomings and areas for improvement were also identified. The National Audit Office feels these should be addressed with immediate effect, especially in the case of the more critical ones. If no corrective action is taken, credibility levels of the Department of Contracts, the CAs and Government will dip.

By way of recommendations, the following are deemed by the National Audit Office to be the most pressing and critical:

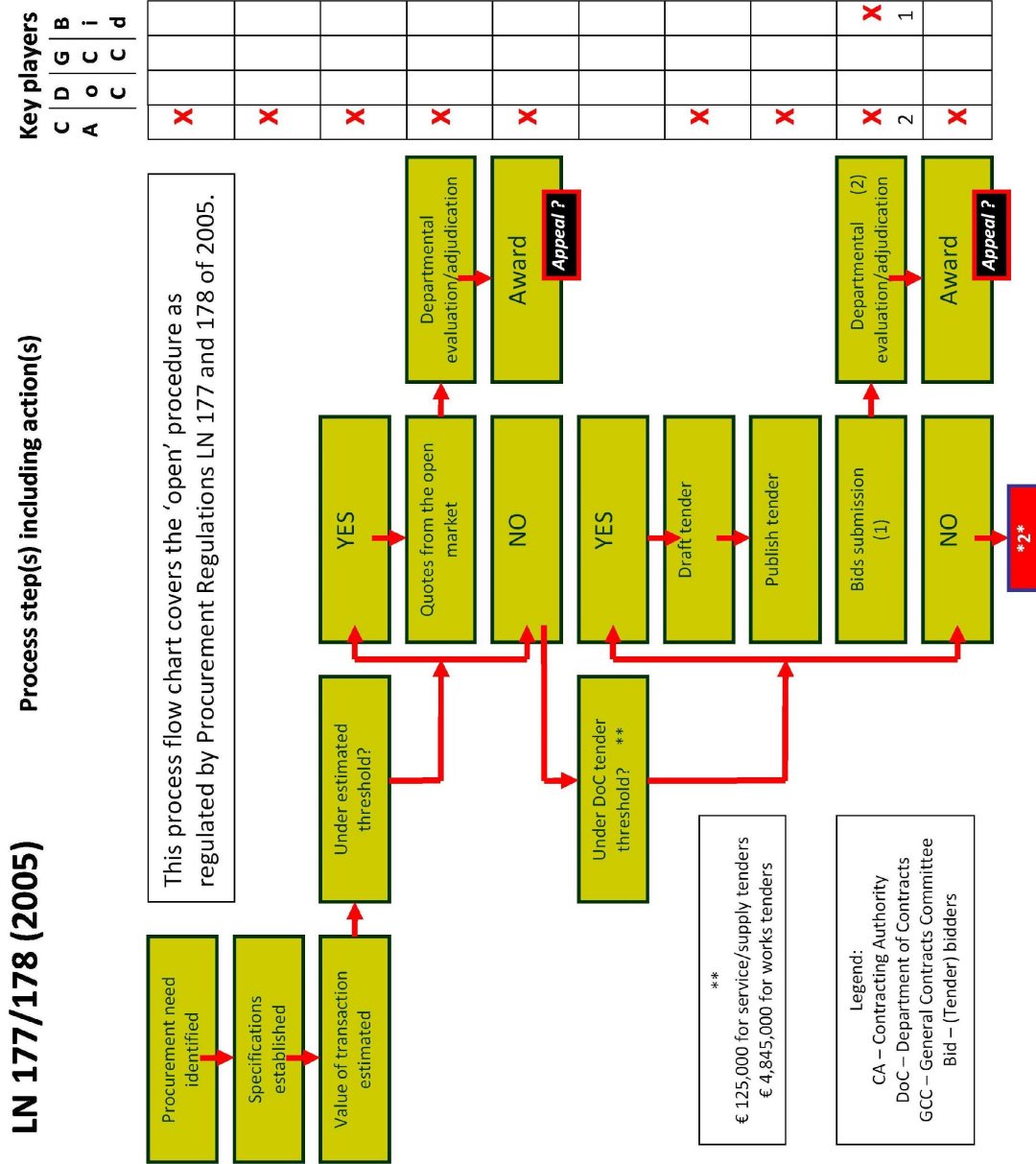
- Induced emergencies invariably lead to direct orders and rushed procurement. These translate in damage to the general perception where accountability and transparency are concerned and ought to be avoided as much as possible.
- While adjudication is taking place in a proper manner following pre-set criteria, the exercise remains, in the main, a relatively limited comparative one, being a choice of the best from the compliant offers. Legislation and good governance alike demand a more wide-scoped exercise, comparing offers submitted with prevailing market prices and thus minimising the risk of bidder collusion and simultaneously ensuring value for money. CAs and the Contracts Committees need to tackle this issue in a more concrete manner.
- CAs should seriously consider setting up evaluation and adjudication committees staffed by different officials, possessing expertise related to the nature of the task of the committee they are to serve on.
- The technical capabilities of the General Contracts Committee to evaluate CAs' recommendations and propose an award need to be assessed with immediate effect. The facility to set up Special Contracts Committees as allowed by law may be the solution to this concern.
- Post-Award Negotiations are a phenomenon that cannot be ruled out completely. On the contrary, given modern-day complex projects, it is commonplace for various details to remain fluid even at the time of contract endorsement. However, PAN should be resorted to as minimally as possible. In addition PAN should be carried out under the auspices of the Department of Contracts. As importantly, in embarking on PAN, it must be ensured that the order of merit of bidders' grading as determined through the adjudication process is not disturbed in any way.
- It has seemingly become common practice for newly re-organised authorities/agencies that were previously core civil service departments to do away with fundamental functions such as the registry and its centralised filing/minuting system. This is detrimental to business continuity, especially if coupled with staff turn-around, and to the maintenance of a robust audit trail. In

order to avoid cases of organisational amnesia, authorities/agencies should ensure that they take on board those good practices that existed well before their formation and have been tried and tested over time.



## **Appendices**

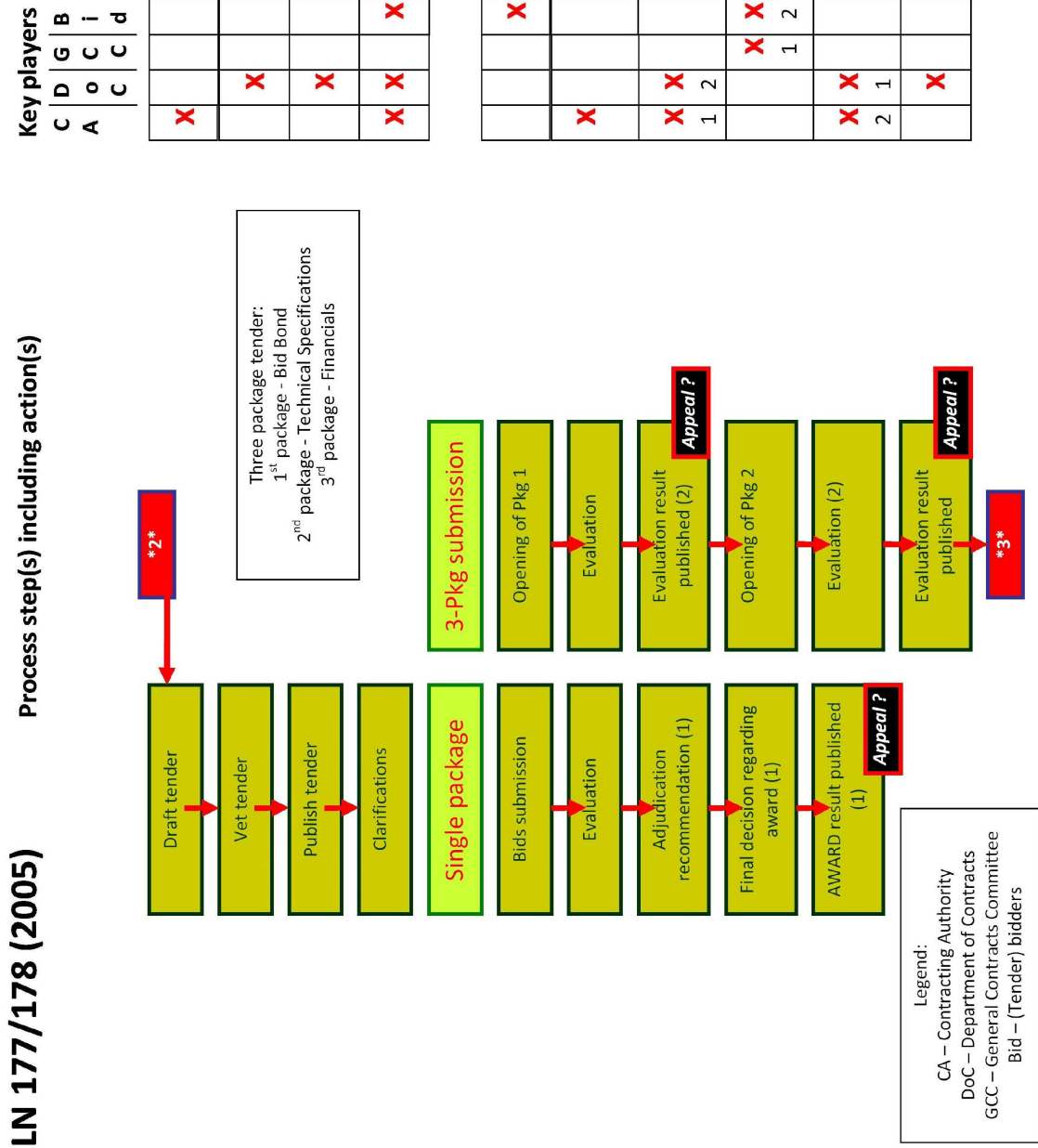
Appendix 1 - Tendering process under LN 177/178 of 2005 (part i)



**Key players**

C	D	G	B
A	o	C	i
C	C	C	d
X			
X			
X			
X			
X			
X			
X			
X	2		X 1
X			

Appendix 1 - Tendering process under LN 177/178 of 2005 (part ii)

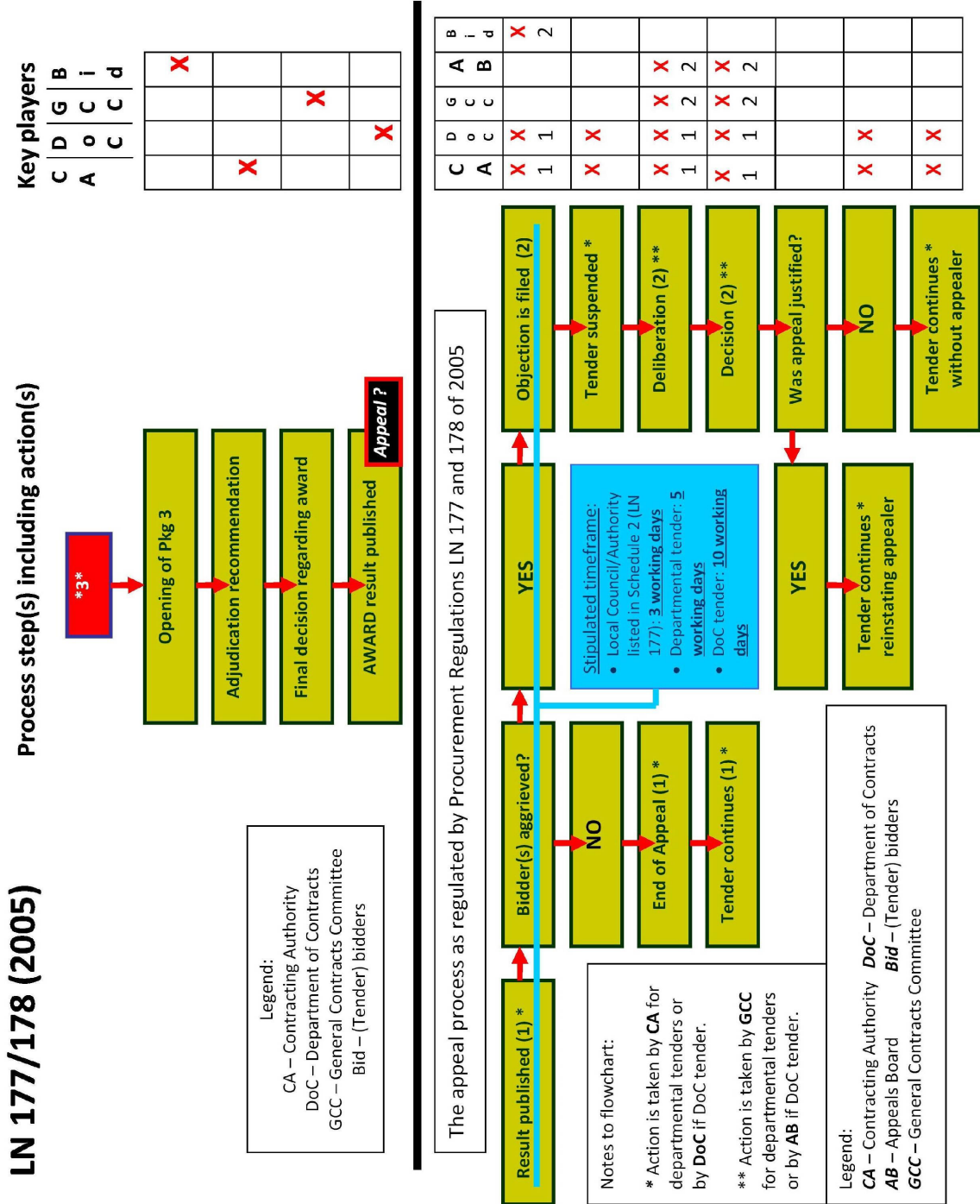


Key players  
C D G B  
A O C i  
C C C d

X				
	X			
		X		
X	X			X

				X
X				
X	X	1	2	
			X	1
X	X	2	1	
				X

Appendix 1 - Tendering process under LN 177/178 of 2005 (part iii)



**Key players**

C	D	G	B
A	O	C	i
		C	C
			d

C	D	G	B
A	O	C	i
		C	C
			d



## Appendix 2 - An overall view of the case studies chosen

## Profile of the five selected case study tenders

Case Ref	Tender title	CA	ITT date	LA date	Winning bidder	Winning bid €	Tender Type	Appeal Y/N	Funds
CT 2200 / 2009	Project management services for the upgrading of five sections of the TEN-T road network	ADT	11/09/09	27/01/10	Kocks Consult GmbH	3,067,079	Open 3-pkg	No	Local & EU
CT 2555 / 2008	Supply and service of breakfast, lunch and dinner to third country nationals (irregular immigrants)	AFM	13/01/09	20/11/09	James Caterers Ltd.	11,315,000	Open 3-pkg	Yes	Local
CT 3001 / 2010	Supply, installation and commissioning of equipment at the Kappara Distribution Centre	EMC	26/02/10	10/12/10	CG Holdings Belgium NV	9,491,582	Open 3-pkg	No	Local & EU
CT 2071 / 2008	Cleaning services at Mater Dei Hospital	DoH	11/02/08	25/08/08	Servizi Malta Consortium	4,737,730	Negotiated 3-pkg	No	Local
CT 2633 / 2009	Negotiated procedure for the reconstruction of Xlendi Road, Xlendi	MfG	29/10/09	14/04/10	JPF Joint Venture	2,955,890	Negotiated 3-pkg	Yes	Local & EU
<b>Total expenditure on the five case study tendering processes selected: €</b>						<b>31,567,281</b>			

**Appendix 3 - Findings for the individual case studies (i)**

Contracting Authority	Description of acquisition	Nature of purchase	DoC Reference
Awtorita' dwar it- Trasport	Project management services for the upgrading of five sections of the TEN-T road network	Services	CT 2200/2009
Tender issue date	Date of publication	Date of award	Contract signing date
11 September 2009	Government Gazette: 11 September 2009 OJEU: 7 September 2009	27 January 2010	04 March 2011
Financials	Source of funds	Tender model	Procedure
Estimate: €3.3M Contracted: €3.1M	Local & EU	3 package	Open

**Tender model and costings**

The tender model adopted was the three-package one. The procedure opted for was the open tender. In view of this default procedure, there was no need for the CA to obtain prior approval from DoC. Milestones in the tendering process were documented in a timetable of events that was included in the tender document.

The CA (Awtorita' dwar it-Trasport) had drawn up a departmental estimate of the project cost. This amounted to €3.3 million. In effect, the tender was eventually awarded for €3.1 million.

As the project was part EU-funded, pertinent guidelines as featuring in the ERDF Manual of Procedures 2007-2013 were followed.

Given that the tender was related to construction work, the approval of the Ministry for Resources and Rural Affairs (MRRA) was sought and obtained. MRRA declared that, in view of the fact that the tender itself covered project management and its scope had no impact on the environment, no Environmental Impact Assessments were deemed necessary.

**Department of Contracts role**

DoC maintained its role as stipulated by legislation throughout the entire tendering process. The Department, amongst other functions:

- ensured adherence to procurement legislation regarding tender launch announcements, in line with local legislation and EU requirements
- offered guidance to the CA
- maintained a consistent level of vetting and discussions with the CA
- vetted the tender document prior to launch
- ensured the contents of the tender document were in compliance with prevailing legislation

### Appendix 3 - Findings for the individual case studies (i) - (continued)

- was active in the announcement and launch of the tender
- published the tender
- approved the composition of the evaluation/adjudication committees
- circulated response to queries submitted by interested economic operators to all those who had collected a copy of the tender and ensured that such response was uploaded on both (online) OJEU and DoC's website
- ensured adherence to timeframes for offer submissions
- followed pertinent regulations during the package opening stages
- managed the opening of tendered offers in line with prevailing legislation
- handled informally lodged complaints and comments from interested economic bidders
- liaised with all interested parties: with the CA during tender drafting and evaluation; with the bidders offering clarifications as requested; dealing with objections from bidders
- approved the recommendations of the evaluation and adjudication committees up to tender award stage
- ensured adherence to regulations pertinent to results publication
- signed the contract for Government on behalf of the CA

#### Contracting Authority role

The CA:

- acted in line and within its enabling Act. Ethical considerations were followed - members of the evaluation/adjudication boards/committees endorsed a declaration of impartiality and a declaration of an absence of conflict of interest
- maintained constant consultation and liaison with DoC and sought the Directorate's approval prior to taking action as and when deemed necessary
- made no resort to external consultancy services

#### Evaluation and adjudication

The short-listing facility was not availed of. The Evaluation Committee was appointed by the CA. Correspondence between DoC and the Line Ministry indicates that the former approved the appointments. No evidence of the circulation of letters of appointment amongst Committee members was found.

### **Appendix 3 - Findings for the individual case studies (i) - (continued)**

The same Evaluation Committee doubled as an Adjudication Board. The proviso in legislation enabling the appointment of a Special Contracts Committee was not utilised. Neither was external consultancy resorted to.

The Evaluation Committee's decision was based on criteria that were set out clearly in the tendering document. Basing on these, bidders that were deemed to be non-compliant to specifications were eliminated. Criteria on which bidders were evaluated included, amongst other parameters, (bidders') financial and economic standing and their technical capacity with respect to tender work requirements.

The Evaluation Committee drew up a report that was submitted to the GCC and DoC. These expressed themselves to be in accordance with the Evaluation Committee's recommendation.

#### **Tender award**

The GCC issued the award as recommended in the Adjudication Report, following endorsement by DoC. No details regarding the publication (media) of the tender award notice were found. The tender was in effect awarded to the only compliant offer, this was slightly lower than the departmental estimate.

Given that the tender was part EU-funded, (EU) Commission procedures regarding tender award publication were followed - notice of the results of the award procedure were submitted to the Commission, and the Contract Award Notice was published In the OJEU.

The customary post-award administrative reports were duly compiled.

#### **Appeals**

No appeals were lodged at any stage of the tendering process.

#### **Post-Award Negotiations**

Three issues arose post-award, but none would have affected the order of merit or changed in any way the tender award parameters.

Two of the changes occurring post-award concerned the unavailability of two of the key personnel quoted in the tender by the bidder as forming part of the management setup being deployed to carry out the assignment.

Replacement in both cases was requested by the successful bidder (post-award) for what were deemed by ADT to be valid reasons. The suggested replacements were vetted by ADT and were deemed to be at least as competent as the personnel they were replacing. In view of these circumstances, the CA found no objection to meeting the supplier's requests.

### Appendix 3 - Findings for the individual case studies (i) - (continued)

The third issue that brought about a (post-award) change concerned the reimbursement method/approach. Initially, and as contemplated in the tender document, payments effected by the CA against mile-stoned deliverables were considered as being 'on account', and hence categorised as a pre-financing instrument. Following negotiations, it was agreed by ADT that these reports constituted modules that were standalone in nature and as such the corresponding payments were to be considered as interim payments and outside the scope of the pre-financing mechanism.

#### In conclusion

Documentation pertinent to the tendering process as recorded by Transport Malta (TM) – (ADT's successor Authority) was not comprehensive. File minute sheets, instruments that during a post mortem exercise (such as an investigation or an audit) give a chronological sequence of documents related to the tender and where all internal minutes are recorded, were missing in TM's files.

Missing copies of bidders' requests for clarifications in TM files was another deficiency noted by NAO. While these documents were located in the files held by DoC, NAO contends that it is even in the interest of the CA that copies of such documentation should be recorded by the CA.

NAO opines that such documents should have formed part of the files as maintained by TM as CA. TM Management, at the time of the audit exercise, simply stated that the officials who had handled the tender were no longer within the respective posts.

NAO looks askance at such comments - it is unacceptable that turn-around in staff should cause organisational amnesia. Such a serious ailment can only be eliminated through the maintenance of a robust filing system wherein all key documents, working papers, communications, authorisations, and similar documents impinging upon the outcome of a tendering process are stored and minuted. An efficient registry function was one of the strong points of the core civil service, a management tool that is resorted to by auditors as it automatically provides a well-documented audit trail of any process being analysed.

It is surprising how the metamorphosis of various core civil service departments to the more modern-structured authorities and agencies has often resulted in a degraded quality registry function in this regard.

While TM did not contest these shortcomings, the CA stated that, as a rule, the contents of the files maintained by itself were in line with the requirements of the Manual of Procedures for Projects Implementation of ERDF projects. NAO opines that, quite apart from the guidelines that need to be observed when administering EU funds, part EU-funded projects have an element of local funding and are still subject to local legislation. In addition, it only makes business sense to ensure that all instances of best practice that are deployed in the case of locally-funded projects (such as the comprehensive filing and minuting systems utilised) are likewise deployed in the case of part EU-funded projects.

In the same manner, TM justified its lack of copies of formal letters of appointment to members of the evaluation/adjudication committee and evidence of the endorsement of same by the members, and/or by the competent authorities.

**Appendix 3 - Findings for the individual case studies (i) - (continued)**

Again NAO opines that, even in cases of part EU-funded projects, all rules and regulations, together with all practices, followed for locally-funded projects, need to be observed. Adherence solely to the ERDF guidelines is not deemed to be sufficient where the creation of a robust audit trail is concerned.

The CA's action with respect to the changes requested by the successful bidder was channelled through DoC. In fact the resulting Addenda to the Contract were submitted for the approval of the GCC. This is a laudable behaviour as it helps promote an image of credibility, transparency and accountability in the public procurement mechanism.

The project covered by the tender was, itself, services in the field of Project Management. As such, a number of other road works projects, each covered by specific tenders, were dependent on this 'master' tender.

For completion's sake, NAO requested, and obtained, information from TM concerning the subsequent works tenders covering (works) projects scoped within the tender under scrutiny. In all, three tenders were issued covering works on six road sections. The tenders were issued in August 2009, August 2010 and October 2010. Tender awards took place in December 2010 and (for two tenders) in May 2011.

March 2011 and November 2011 saw the issuing of the Orders to start works. Some works have been completed, others are due for immediate completion. Other works are scheduled for completion early in 2013 while at the time of writing, major heritage issues had been encountered in one case and visibility of deadline is (currently) inexistent.

## Appendix 3 - Findings for the individual case studies (ii)

Contracting Authority	Description of acquisition	Nature of purchase	DoC Reference
Armed Forces of Malta	Supply and service of breakfast, lunch and dinner to Third Country nationals	Supplies	CT 2555/2008
Tender issue date	Date of publication	Date of award	Contract signing date
13 January 2009	Government Gazette: 13 January 2009 OJEU: 8 January 2009	20 November 2009	2 February 2010
Financials	Source of funds	Tender model	Procedure
Estimate: €13.1M	Local	3 package	Open
Contracted: €11.3M			

**Tender model, costings and timings**

The tender model adopted was the three-package one. The procedure opted for was the open tender. The document itself was deemed by NAO to contain all the necessary information, sections and provisos/clauses charting the path the tendering process was expected to follow. In line with legislation, this was due to the fact that the amount being procured was in excess of €2 million.

The departmental estimate was based on the costs of the preceding contract. In effect, the actual amount contracted was 13.65 per cent less than the estimate.

It would appear that no exercise was carried out by the CA to ensure that value for money would be attained for Government through the transaction - no prevailing market prices and/or costings were obtained.

The tender covered the continuous supply of a product and service and was in continuation of a previously-awarded contract of the same nature and covering the same purpose. However, AFM as CA did not assure continuity - the previous contract had expired well before the tender for a new contract was issued. In the interim period, direct orders to the same supplier were resorted to.

Additionally, the tender did not specify a commencement date for the new contract. NAO considers this to be unorthodox and potentially conducive to a disruption of the much-vaunted level playing field that is supposed to encompass public procurement. Such a move may have favoured the supplier of the previous contract. In reality, the same supplier secured the preceding tender, the interim direct orders and the tender being analysed.

**Department of Contracts role**

DoC maintained its role as stipulated by legislation throughout the entire tendering process. The Department, amongst other functions:

- ensured adherence to procurement legislation regarding tender launch announcements, in line with local legislation

**Appendix 3 - Findings for the individual case studies (ii) - (continued)**

- offered guidance to the CA
- maintained a consistent level of vetting and discussions with the CA
- vetted the tender document prior to launch
- ensured the contents of the tender document were in compliance with prevailing legislation
- was active in the announcement and launch of the tender
- published the tender
- approved the composition of the evaluation/adjudication committees
- circulated response to queries submitted by interested economic operators to all those who had collected a copy of the tender and ensured that such response was uploaded on both (online) OJEU and DoC's website
- ensured adherence to timeframes for offer submissions
- followed pertinent regulations during the package opening stages
- managed the opening of tendered offers in line with prevailing legislation
- handled informally lodged complaints and comments from interested economic bidders
- liaised with all interested parties: with the CA during tender drafting and evaluation; with the bidders offering clarifications as requested; dealing with objections from bidders
- approved the recommendations of the evaluation and adjudication committees up to tender award stage
- ensured adherence to regulations pertinent to results publication
- signed the contract for Government on behalf of the CA

**Contracting Authority role**

The Contracting Authority:

- followed ethical considerations - members of the evaluation/adjudication boards/committees endorsed a declaration of impartiality and a declaration of an absence of conflict of interest
- maintained constant consultation and liaison with DoC and sought the Directorate's approval prior to taking action as and when deemed necessary
- had no issues with subcontracted work
- managed the project in-house



### **Appendix 3 - Findings for the individual case studies (ii) - (continued)**

#### **Evaluation and adjudication**

The short-listing facility was not availed of. The Evaluation Committee was appointed by the CA but no evidence of endorsement by the Line Ministry was found. A letter of appointment was circulated amongst Committee members.

The same Evaluation Committee doubled as an Adjudication Board. The proviso in legislation enabling the appointment of a Special Contracts Committee was not utilised. Neither was external consultancy resorted to.

The decision of the Evaluation Committee was endorsed by the CA and the Line Ministry, and subsequently by the GCC/DoC.

This decision was based on criteria that were set out clearly in the tendering document. Basing on these, bidders that were deemed to be non-compliant to specifications were eliminated at the second stage of the tendering process (technical evaluation). Criteria on which bidders were evaluated included, amongst other parameters, (bidders') financial and economic standing and their technical capacity with respect to tender work requirements.

The recommendation of the Adjudication Board was endorsed by the CA and the Line Ministry. On submission at DoC, the GCC and DoC expressed themselves in accordance with the Adjudication Board's recommendation.

#### **Tender award**

The GCC issued the award as recommended in the Adjudication Report. The tender, as stipulated in the tender document, was awarded on the basis of the lowest price (satisfying technical specifications). Bidders were individually informed of the award decision.

#### **Appeals**

An appeal was lodged after the second stage (technical evaluation) decision was published. A disqualified bidder followed the procedure as contemplated by law, submitting a formal objection and effecting the mandatory deposit.

The DoC and the CA likewise followed the prescribed procedure and drew up a report. The Public Contracts Appeals Board as appointed was convened. This board met in public, calling witnesses who testified under oath.

The outcome proved the bidder right and the disqualification decision was reversed, the deposit refunded and the bidder was allowed to continue competing in the successive stage of the tendering process.

### **Appendix 3 - Findings for the individual case studies (ii) - (continued)**

#### **Post-Award Negotiations**

Two issues arose post award, but both were solved in such a manner as to ensure that none of the parties suffered any loss. In addition, the outcome in both cases did not, in any manner, impinge upon the merit of ranking of the bidders. Hence, audit concerns related to Post-Award Negotiations, discussed as a separate section within this Report, did not materialise during the course of this tendering process.

One issue that arose concerned Value Added Tax - whether tax was chargeable or not was contended at one point. Eventually, the CA ensured compliance and adherence to the tender conditions and instructed the successful bidder to regularise his position and adopt what had been determined during the tendering process.

A second issue was one of volumes - by the time the contract came into effect, feeding requirements for third country nationals (immigrants) reduced to levels significantly below those anticipated at the time the tender was published. Following negotiations, the surplus food was diverted to other immigrants and to inmates at the Corradino Correctional Facility.

#### **In conclusion**

Behaviour on the part of the CA and DoC was laudable. In partnership, the two entities managed a smooth run of the tendering process, offering interested economic operators a perspective of a level playing field and a procurement mechanism that is, and appears to be, accountable and transparent.

On the negative side, no effort was made on the part of the CA to ensure that the procurement represented value for money for Government. This is mandatory, as stipulated in LN 177 of 2005, the prevailing procurement legislation at the time of the tender.

The second issue that caused NAO concern is business continuity. The successive tender was only issued after expiry of the preceding contract. In the interim, direct orders were resorted to. Additionally, the manner with which the tender document and contract were worded could have proved advantageous to the incumbent supplier. It is to be noted that the same supplier had secured the original preceding contract, the interim direct orders and the successive contract.

## Appendix 3 - Findings for the individual case studies (iii)

Contracting Authority	Description of acquisition	Nature of purchase	DoC Reference
Enemalta Corporation	Supply, installation and commissioning of equipment at the Kappara Distribution Centre	Supplies	CT 3001/2010
Tender issue date	Date of publication	Date of award	Contract signing date
26 February 2010	Government Gazette: 26 February 2010 OJEU: 23 February 2010	10 December 2010	24 December 2010
Financials	Source of funds	Tender model	Procedure
Estimate: €10M	Local & EU	3 package	Open
Contracted: €9.5M			

**Tender model, costings and timings**

The tender model adopted was the three-package, the competitive procedure opted for being the open one. The tender was issued by DoC after vetting a draft prepared by EMC. During the vetting process, DoC proposed changes and these were taken on board.

Level of accuracy of the project cost estimation was good - an estimated €10 million versus an actual contracted €9.5 million, both excluding VAT.

The tender contained a detailed description and workings of the selection and award criteria based on the Most Economically Advantageous Tender. In this particular case, MEAT was established by weighting technical quality against price on a 60/40 basis. The tender document also contained a milestone plan of the key events of the tendering process as envisaged.

One point of particular interest is that for this particular tender, bidders were given the possibility to rectify administrative shortcomings (for example to submit requested documentation at a date later than the stipulated closing date) against payment of a penalty fee. DoC indicated that due to the complexity of tendering processes which at times involve the submission of numerous documents, instances where bidders had to be eliminated due to administrative shortcomings would arise. DoC opined that rectifying administrative shortcomings would not affect the order of merit should these documents be submitted at a later stage. The rectification against an administrative penalty has become standard in all tenders as of March 2010. Since this tender was published before this change in tendering procedure, EMC had introduced this concession through Clarification 1 circulated amongst tenderers.

Another point to note is that while the initial closing date for the submission of offers was 20 April 2010, during the course of the tendering process the closing date was extended on three occasions: initially to 15 June 2010, later to 24 June 2010 and finally to 30 June 2010. From documents furnished to NAO, it transpires that the initial extensions (15 and 24 June 2010) resulted from request for time extensions made by tenderers. No documents and justifications were furnished in conjunction with the final (30 June 2010) submission date.

### **Appendix 3 - Findings for the individual case studies (iii) - (continued)**

#### **Department of Contracts role**

DoC maintained its role as stipulated by legislation throughout the entire tendering process. The department, amongst other functions:

- ensured adherence to procurement legislation regarding tender launch announcements, in line with local legislation and EU requirements
- offered guidance to the CA
- maintained a consistent level of vetting and discussions with the CA
- vetted the tender document prior to launch
- ensured the contents of the tender document were in compliance with prevailing legislation
- was active in the announcement and launch of the tender
- published the tender
- approved the composition of the evaluation/adjudication committees
- circulated response to queries submitted by interested economic operators to all those who had collected a copy of the tender and ensured that such response was uploaded on both (online) OJEU and DoC's website
- approved the requested time extensions to the tender submission closing date
- ensured adherence to timeframes for offer submissions
- followed pertinent regulations during the package opening stages
- managed the opening of tendered offers in line with prevailing legislation
- liaised with all interested parties: with the CA during tender drafting and evaluation; with the bidders offering clarifications as requested; dealing with objections from bidders
- approved the recommendations of the evaluation and adjudication committees up to tender award stage
- ensured adherence to regulations pertinent to results publication
- signed the contract for Government on behalf of the CA

### Appendix 3 - Findings for the individual case studies (iii) - (continued)

#### Contracting Authority role

The CA acted in line with its enabling act. The Corporation is bound by the same code of ethics that are applicable to public sector employees. In this respect, the evaluation/adjudication board members list was endorsed by the Permanent Secretary. The members signed a declaration of impartiality.

In general, EMC maintained constant liaison with DoC, with changes being passed through the Directorate. In a similar manner, the tender was issued by DoC and the contract was likewise signed by DoC for Government. One notable exception, already referred to above, was the instance of Post-Award Negotiations. In this case, EMC negotiated on its own and only presented DoC with a *fait accompli*, failing to justify its actions when asked to do so by DoC. Given that the variations did not exceed 5 per cent of the contract value, EMC was not obliged to furnish justifications and obtain approval from DoC. However NAO disagrees with this argument since the so called variation was, in effect PAN prior to contracted start of works, rather than a variation encountered during project implementation. In view of this, EMC was obliged to inform DoC *a priori*.

#### Evaluation and adjudication

The short-listing facility was not availed of. The Evaluation Committee was appointed by the CA, endorsed by Permanent Secretary and approved by DoC. While no issuance of letters of appointment of the evaluation committee members was made, members' signed declarations in connection with their lack of conflict of interest were annexed to the evaluation report. The recommendation of the evaluation committee was endorsed by the GCC and DoC. This recommendation was reached on the basis of the evaluation grid as published within the tender document. At the evaluation stage, all five bidders qualified for the next round, being deemed to be administratively and technically compliant.

Submitted documentation by the bidders included evidence of their financial and economic situation. As part of the evaluation process, checks were run to ensure that the bidders met all technical requirements and were asked to submit evidence of relevant experience. No bidders were eliminated due to their financial situation and/or background.

The deliverable of the evaluation exercise was a report, submitted to the GCC. The GCC and DoC endorsed the recommendation of the evaluation committee. The entire evaluation process was carried out by the CA up to evaluation report stage, without any recourse to external consultancy.

The evaluation committee doubled as adjudication board. Again, letters of appointment have not been prepared and circulated. A decision was reached by the adjudication board, taking into account all three packages of the tender. This decision was submitted to the GCC and DoC. However, same was approved only after DoC pointed out that the adjudication board had not taken into account a discount offered by one of the bidders when working out total bids costs. The error was subsequently corrected, a fresh adjudication report submitted and approved by GCC/DoC.

A Special Contracts Committee, as contemplated by legislation, was not set up.

### Appendix 3 - Findings for the individual case studies (iii) - (continued)

#### Tender award

The GCC issued the award as recommended in the Adjudication Report. However, no documentation evidencing the tender award publication in the Government Gazette was found. The decision was not subject to the lodgement of any official objection. Bidders were individually informed in writing. Notice of the results of the award procedure was submitted to the EU Commission. The Contract Award Notice was likewise published in the OJEU.

It is to be noted that, post tender award, DoC requested additional assurance from the successful bidder regarding any defaults in the payment of taxes and/or court convictions. The bidder had already supplied evidence of financial and economic standing as stipulated in the tender form. Post award, but prior to contract signature, DoC requested the additional documentation, in view of the fact that the successful bidder did not have a company registered in Malta.

#### Appeals

No appeals were lodged at any stage of the tendering process.

#### Post-Award Negotiations

Post-Award Negotiations were held, and resulted in the granting of a seven-week time extension as requested by the successful bidder. The extension was agreed to by the CA, in view of the fact that it was necessitated by the fact that EMC failed to make the site available on the agreed dates, causing a suspension of the pre-construction activities.

EMC handled these negotiations by itself, without involving DoC. The latter was only informed of the time extension granted by EMC and the extra costs (€33,880) incurred. DoC requested EMC to justify its case but the Corporation failed to do so.

#### In conclusion

The level of project cost estimation was good in this case study tender. Although no evidence to this effect was found, it would seem that the CA was meticulous in its pre-tender launch workings, ensuring that a departmental estimate based on prevailing market prices was calculated.

During the tendering process, bidders were given the opportunity to rectify administrative shortcomings against payment of a penalty. This enabled them to remain in the running, rather than be disqualified. NAO opines that, as long as such an action does not impinge negatively on the credibility and accountability of the procurement system, then the measure is to be considered beneficial.

Through such a measure, the buyer is assured of a wider range of bidders and hence has increased chances of obtaining a good deal that generates value for money.

Tender submission closing date was extended on three occasions. However, justification documentation for only two extensions was sourced. NAO opines that similar actions, reasons leading to same, and authorisations thereof should be well documented.

### Appendix 3 - Findings for the individual case studies (iii) - (continued)

While the level of involvement of DoC in this case study tendering process was consistently high up to tender award stage, NAO notes that such an involvement dwindled to nil when EMC negotiated, post award, with the successful bidder, presenting DoC with a *fait accompli*. EMC justified this action by declaring that once the variations did not exceed 5 per cent of the contract value, the CA was not obliged to furnish justifications and obtain approval from DoC. NAO disagrees with this stand - the incurred extra expense and the time extension cannot be considered to be a variance.

In view of the fact that these extras materialised pre-start of works, they are to be considered as amendments to the original contract as signed by DoC, rather than variations encountered in the course of a project implementation. The 5 per cent threshold contemplated in LN 177 of 2005 covers project implementation variances, rather than pre-implementation addenda/corrigenda to a signed contract.

In view of the fact that the Contract was signed, on behalf of Government, by DoC, NAO opines that EMC should have likewise channelled any such amendment through DoC.

The composition of the evaluation committee and the adjudication board was identical, the same officials serving on both. While this is legally correct, NAO opines that more leverage can be obtained if different officials sit on the two boards. This makes sense when one considers that the evaluation committee would be analysing bids for technical and administrative compliance with no reference to costs (the financials are only submitted as the third package of a three-package tender). As such, maximum benefit can be derived if the evaluation committee is formed of technical personnel.

On the other hand, the adjudication board is concerned with choosing the best offer on financial grounds, basing on the criteria preset in the tender document. Such a choice is weighted in with the technical/administrative results calculated previously by the evaluation committee. It follows that officials with financial backgrounds had best staff adjudication boards.

In any case, it is imperative that board members are made aware of their duties and responsibilities and that they acknowledge this awareness formally by endorsing relevant declarations. In this instance, letters of appointment were not sourced although (signed) members' declarations with respect to a lack of conflict of interest were duly attached to the evaluation report.

Recommendations of both the evaluation and adjudication boards were endorsed by the GCC and DoC.

Post award, DoC requested the successful bidder to submit additional assurances with respect to defaults in payments of tax and/or court convictions. While it is laudable of DoC to take extra measures to ensure that the winning bidder had no similar problems, NAO opines that it would have been more appropriate had such assurances been requested of all bidders pre-award.

## Appendix 3 - Findings for the individual case studies (iv)

Contracting Authority	Description of acquisition	Nature of purchase	DoC Reference
Department of Health	Cleaning services at Mater Dei Hospital	Services	CT 2071/2008
Tender issue date	Date of publication	Date of award	Contract signing date
11 February 2008	Government Gazette: Not applicable	25 August 2008	06 October 2008
	OJEU: Not applicable		
Financials	Source of funds	Tender model	Procedure
Estimate: €13.97M	Local	3 package	Negotiated
Contracted: €4.7M			

**Tender model, costings and timings**

The tender model adopted was the three-package one. The negotiated procedure was opted for. The tender, with no significant changes to design, had been previously issued in April 2007 by DoC as CT 2194/07. At the time, three bidders had submitted offers but all had been disqualified due to non-compliance.

The re-issue in February 2008 limited participation to those economic operators who had submitted an offer for the original open tender procedure and to other parties who had expressed interest in the tender in writing. Prior approval from DoC was obtained in support of the decision to opt for the negotiated procedure. A report was compiled, furnishing details about the circumstances justifying recourse to such procedures. While the prevailing legislation allowed such an approach, NAO feels that, for the sake of corporate credibility, accountability and transparency, it would have been more appropriate had the re-issued tender been advertised. Apart from ethical issues, and hence better chance of a more favourable deal, such an action makes business sense in that the CA in this manner ensures the widest possible outreach to interested parties.

The tender document itself was deemed by NAO to contain all the necessary information, sections and provisos/clauses charting the path the tendering process was expected to follow. As the tender followed the negotiated procedure, compliance included: a copy of the specifications, deadline for receipt of offers, details and format of the response to be submitted.

The departmental estimate was grossly over-estimated at €13.97 million against a contracted amount of €4.7 million. The contracted amount is based on 527,000 man hours at the rate of €8.99 per hour. In effect, this amounts to an over-estimation of 198 per cent. Basing the unit (per man hour) price on the departmental estimate, this comes to €26.50. Both rates, that is €8.99 and €26.50, are inclusive of cleaning equipment, cleaning material and staff training.

In view of the above per-hour rate, it would appear that no exercise was carried out by the CA to ensure that value for money would be attained for Government through the transaction - no prevailing market prices and/or costings were obtained. Rather, it transpires that the estimate was based on departmental workings covering fund commitments required for forthcoming years. One such document dated February 2007, listed 'Estimated expenditure falling due if tender<sup>19</sup> is awarded' at

<sup>19</sup> Tender for the Provision of Cleaning Services



### Appendix 3 - Findings for the individual case studies (iv) - (continued)

Lm1,200,000<sup>20</sup> for each of the three years 2008 to 2010 both inclusive.

It is to be noted that in August 2008, Mater Dei Hospital (MDH) informed the Ministry of Health that the €4.7 million bid was 28.5 per cent more than MDH's estimate. While this would contradict the February documents quoted above, no evidence in the files substantiating any such estimate was found.

On this matter, NAO must comment that various documents serving as evidence were not present in the MDH file. NAO opines that MDH's filing/recording system (where administrative matters are concerned) leaves much to be desired. Such filing proved to be detrimental to the creation of a complete and clear audit trail and to NAO's obtaining the desired level of assurance through its walk-through exercise.

By way of timing, the tender in question was deemed to be urgent as the original cleaning contract had expired and as such DoC was obliged to authorise an extension of (the original) contract by 12 months or until the award of a new contract, whichever the earlier. In addition, a specific clause in the Public Contracts Regulations prevailing at the time was invoked. This permitted 'a negotiated procedure without adhering to time limits imposed'. Following endorsement by the GCC, this proviso was utilised.

#### Department of Contracts role

DoC maintained its role as stipulated by legislation throughout the entire tendering process. The Department, amongst other functions:

- ensured adherence to procurement legislation regarding tender launch announcements. In effect, for this tender, articles in legislation enabling DoC and the CAs not to announce tenders on the Government Gazette and OJEU were invoked and no contract notice was issued
- offered guidance to the CA
- approved the switch to a negotiated procedure for the re-issue from the originally issued open tender
- maintained a consistent level of vetting and discussions with the CA
- vetted the tender document prior to launch
- ensured the contents of the tender document were in compliance with prevailing legislation
- was active in the launch of the tender
- published the tender
- ensured that all those economic operators who had bid for the original tender and those who had expressed interest in bidding were given the opportunity to bid in this subsequent, superseding tender

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<sup>20</sup> Lm1,200,000, at the standard conversion rate of Lm0.4293 to €1, amounts to €2,795,248 per annum. As per the Tender Originators' Form, Reference DH1649/2006 and dated 28 February 2007, Provision of Cleaning Services at Mater Dei, the estimated tender value for the five year period ending 31 December 2012 was set at Lm6 million, or €13.97 million.

**Appendix 3 - Findings for the individual case studies (iv) - (continued)**

- approved the composition of the evaluation/adjudication committees
- ensured adherence to timeframes for offer submissions
- ensured adherence to timeframes for offer submissions including special provisos where urgency was claimed
- followed pertinent regulations during the package opening stages
- managed the opening of tendered offers in line with prevailing legislation
- handled informally lodged complaints and comments from interested economic bidders
- liaised with all interested parties: with the CA during tender drafting and evaluation; with the bidders offering clarifications as requested; dealing with objections from bidders
- approved the recommendations of the evaluation and adjudication committees up to tender award stage
- ensured adherence to regulations pertinent to results publication
- signed the contract for Government on behalf of the CA

**Contracting Authority role**

There is no evidence on file covering ethical considerations taken into account in the process of selection of the evaluation and adjudication boards. NAO looks askance at this matter, even if, admittedly, composition of the boards was confirmed by DoC. In this regard, it must be stated that MDH kept an open communication with DoC, advising the latter of actions being taken with respect to the tendering process. No resort to external consultants was made throughout the entire tendering process.

**Evaluation and adjudication**

The short-listing facility was not availed of. The Evaluation Committee was appointed by the CA. While composition of the Committee was approved by DoC, no evidence of the circulation of letters of appointment amongst Committee members was found. In a similar manner, declarations from the members asserting their lack of conflict of interest and declaring their adherence to ethical standards to include confidentiality and impartiality were likewise not located. NAO repeatedly asked MDH Management for these documents, in view of the fact that copies thereof were not archived in either MDH's or DoC's tender files. Despite the various attempts made by the NAO team, no such documentation was made available.

The same Evaluation Committee doubled as an Adjudication Board. The proviso in legislation enabling the appointment of a Special Contracts Committee was not utilised. Neither was external consultancy resorted to.

### **Appendix 3 - Findings for the individual case studies (iv) - (continued)**

The Evaluation Committee's decision was based on criteria that were set out clearly in the tendering document. Basing on these, bidders that were deemed to be non-compliant to specifications were eliminated. Criteria on which bidders were evaluated included, amongst other parameters, (bidders') financial and economic standing and their technical capacity with respect to tender work requirements.

The Evaluation Committee drew up a report that was submitted to the GCC and DoC. These expressed themselves to be in accordance with the Evaluation Committee's recommendation.

#### **Tender award**

The GCC issued the award as recommended in the Adjudication Report, following endorsement by DoC. The decision, based on the most economically advantageous tender, was endorsed by DoC.

As contemplated by legislation, the Contract Award Notice was not published in the Government Gazette. Neither was the notice of the award procedure submitted to the EU Commission nor published in the OJEU. The successful bidder was informed of the tender award outcome. Similarly, the unsuccessful bidders were also informed.

#### **Appeals**

No appeals were lodged at any stage of the tendering process.

#### **Post-Award Negotiations**

Post award, there were no issues leading to negotiations of any type.

#### **In conclusion**

On the one hand, it appears that the CA was working in liaison with DoC. This is deemed to be best practice - DoC is the repository of public sector procurement knowledge and expertise and it makes logical sense for any purchasing entity to draw on this information that is so readily available, and thus ensure that procurement processes are carried out in strict adherence to legislation.

However, in the case of this particular tendering process, there are a number of concerns, the more salient ones being listed and described briefly hereunder:

- Administration and records maintenance

As already referred to above, NAO encountered difficulties tracing various documents deemed relevant and critical in a tendering process. Most notably was the absence of letters of appointment of the evaluation/adjudication committee members, and the latter's declaration of the absence of conflict of interest and a pledge to confidentiality and impartiality. NAO opines that such documents should have formed part of the files as maintained by Mater Dei Hospital, as CA. The lack of documentation also led to a number of NAO's queries remaining unanswered. MDH Management, at the time of the audit exercise, simply stated that the officials who had handled the tender were no longer within the respective posts.

### Appendix 3 - Findings for the individual case studies (iv) - (continued)

NAO looks askance at such comments - it is unacceptable that turn-around in staff should cause organisational amnesia. Such a serious ailment can indeed only be eliminated through the maintenance of a robust filing system wherein all key documents, working papers, communications, authorisations, and similar documents impinging upon the outcome of a tendering process are stored and minuted. An efficient registry function was one of the strong points of the core civil service, a management tool that was resorted to by auditors as it automatically provided a well-documented audit trail of any process being analysed.

It is surprising how the metamorphosis of various core civil service departments to the more modern-structured authorities and agencies has often resulted in a degraded quality registry function.

- Assuring value for money

While in the majority of cases tenders are awarded to that bidder whose offer represents the most economically advantageous tender, such a process is often one of comparison strictly between the bidding economic operators' offers. In this manner, the 'best' offer of those tendered is accepted.

However, NAO draws attention to the fact that procurement legislation stipulates that, quite apart from choosing the cheapest technically compliant offer, value for money must also be assured - in this manner, it is necessary for the CA and DoC to jointly ensure that the chosen offer represents value for money for government. Same can only be assured if prices on the open market for similar products and services are obtained and used for comparison purposes.

In this particular instance, while a single email (unsubstantiated by working papers) makes mention of the fact that the successful bid was 28.5 per cent higher than the CA's estimate, formal documents set this departmental estimate as being over-estimated (when compared with the amount of the successful bid) by 198 per cent. This is certainly not conducive to any exercise in the assurance of value for money.

- Emergency situations

Emergencies can be genuine but they can likewise be induced. In this particular instance, the situation was partly made urgent by the fact that this tender was originally issued and aborted as none of the bidders qualified. It is hereby acknowledged that legislation prevailing at the time (LN 177 of 2005) allowed for situations to be deemed 'urgent', triggering special conditions especially where timing of tender stages are concerned.

However, urgency should never be resorted to just because the tendering process was not embarked upon on time. While not in breach of any legislation, such recourse is deemed to be unethical. In addition, induced emergencies will invariably be noted as such by interested economic operators, possibly also by the media, opinion leaders and the general public. This would lead to a general loss of confidence in the corporate image of DoC, the CA involved, and indeed the entire public sector. One such instance is when, for reasons of urgency, the CA decides to invoke Article 59 of LN 177 of 2005, whereby the Authority is allowed to issue a tender, especially if it is a negotiated or restricted procedure, without even advertising it. Such was the case with this case study tender.

Finally such situations generally lead up to recourse to interim measures such as direct orders and extensions to expired contracts, actions that are not looked upon in a favourable light by NAO.

## Appendix 3 - Findings for the individual case studies (v)

Contracting Authority	Description of acquisition	Nature of purchase	DoC Reference
Ministry for Gozo	Negotiated procedure for the reconstruction of Xlendi Road, Xlendi	Works	CT 2633/2009
Tender issue date	Date of publication	Date of award	Contract signing date
29 October 2009	Government Gazette: Not applicable	14 April 2010	09 July 2010
	OJEU: Not applicable		
Financials	Source of funds	Tender model	Procedure
Estimate: €4.2M	Local & EU	3 package	Negotiated
Contracted: €2.9M			

**Tender model, costings and timings**

The tender model adopted was the three-package one. The negotiated procedure was opted for, in view of the fact that there was a need to expedite award given the tight time frames of the project.

This urgency was accentuated by the fact that an open call for tenders for the same project had been previously issued but the process had been cancelled due to non-compliance on an administrative basis of the bids submitted.

Prior approval from DoC was obtained in support of the decision to opt for the negotiated procedure. A report was compiled, furnishing details about the circumstances justifying recourse to such procedures.

The four bidders who had submitted an offer in the original call for tenders were invited to submit a fresh bid in the re-issued negotiated procedure tender. Three bidders complied and submitted an offer. It is to be noted that the tender (as re-issued) was never advertised in the Government Gazette and/or the OJEU. The justification given was that the procedure opted for was the negotiated one. This approach is partly contemplated by the then-prevailing legislation that enabled a CA to award its public works contracts by negotiated procedure under circumstances similar to those within this particular case study tender without prior publication of an EU Contract Notice. However, NAO opines that it would have made more business sense had the re-issued tender been advertised, even in order to ensure a (possibly) wider outreach to bidders. Certainly, general perception of corporate transparency, accountability and adherence to ethical standards would have benefitted from such an approach.

MfG had initially estimated the value of the reconstruction works at €4.2 million excluding Value Added Tax. This varied significantly from the contract value which, at €2.9 million excluding VAT resulted in a gross departmental over-estimation of 45 per cent<sup>21</sup>. The Ministry's justification of this incident was that *'the budget was calculated on the basis of the ongoing market prices at the planning stage. Tender offers were evaluated and awarded on the basis of the cheapest technically compliant criteria'*.

<sup>21</sup> 2.9 million x 1.45 = 4.2 million

### **Appendix 3 - Findings for the individual case studies (v) - (continued)**

NAO questions the validity of the initial estimate raised since it seems unlikely that prices in the construction industry fell in such a drastic manner during the period in question. It is pertinent to note that the set of working papers and Bills of Quantity as supplied by MfG was incomplete. NAO could not carry out verification exercises in connection with same and thus was unable to determine whether the estimated amount was indeed substantiated by support calculations. In any case, the forecast figure was grossly over-estimated.

The tender document itself was deemed by NAO to contain all the necessary information, sections and provisos/clauses charting the path the tendering process was expected to follow. As the tender followed the negotiated procedure, compliance included: a copy of the specifications, deadline for receipt of offers, details and format of the response to be submitted.

MfG carried out the necessary checks, prior to tender publication, with Malta Environment and Planning Authority, ensuring that an Environmental Impact Assessment was not required for the project.

#### **Department of Contracts role**

DoC was involved throughout the entire tendering process, maintaining its legal role as overseer of the procurement process and offering guidance to the CA. Specifically, DoC, amongst other functions:

- ensured adherence to procurement legislation regarding tender launch announcements. In effect, for this tender, articles in legislation enabling DoC and the CAs not to announce tenders on the Government Gazette and OJEU were invoked and no contract notice was issued
- offered guidance to the CA
- approved the switch to a negotiated procedure for the re-issue from the originally issued open tender
- maintained a consistent level of vetting and discussions with the CA
- vetted the tender document prior to launch
- ensured the contents of the tender document were in compliance with prevailing legislation
- was active in the launch of the tender
- published the tender
- ensured that all those economic operators who had bid for the original tender and those who had expressed interest in bidding were given the opportunity to bid in this subsequent, superseding tender
- approved the composition of the evaluation/adjudication committees
- ensured adherence to timeframes for offer submissions
- ensured adherence to timeframes for offer submissions including special provisos where urgency was claimed

### Appendix 3 - Findings for the individual case studies (v) - (continued)

- followed pertinent regulations during the package opening stages
- managed the opening of tendered offers in line with prevailing legislation
- handled informally lodged complaints and comments from interested economic bidders
- liaised with all interested parties: with the CA during tender drafting and evaluation; with the bidders offering clarifications as requested; dealing with objections from bidders
- approved the recommendations of the evaluation and adjudication committees up to tender award stage
- ensured adherence to regulations pertinent to results publication
- signed the contract for Government on behalf of the CA

#### Contracting Authority role

The members of the evaluation/adjudication committees acted ethically, formally endorsing the necessary declarations covering impartiality and the lack of conflict of interest.

At all stages of the tender, the CA liaised seamlessly and continuously with DoC, forwarding any documents/changes to DoC for vetting prior to release.

No technical external consultancy was sought during the tendering process.

#### Evaluation and adjudication

The facility of a short-listing committee was not availed of. Additionally, composition of the evaluation and adjudication boards was identical, with the same officials serving on both boards. The list of board members was endorsed by DoC, while the (Line Ministry) Permanent Secretary was informed of the composition of the boards.

The board members were furnished with a letter of appointment and each official duly signed a declaration of impartiality and of a lack of conflict of interest.

The recommendation of the Evaluation Committee was based on the first part of the criteria for award as set in the tender document, namely selecting those bids that were, simultaneously, both technically and administratively compliant. As a consequence of this selection, two bidders were eliminated and a third deemed compliant. This recommendation was explained in the refusal letters issued.

Evaluation criteria included request for evidence of the bidders' financial and economic standing. In addition, evidence of bidders' technical capacity was likewise sought. No external expertise/consultancy was sought throughout the tendering process.

The deliverable of the evaluation process was a report, submitted to the GCC. This was endorsed and decision notification letters were issued to the bidders. The decision was contested by one of the (unsuccessful) bidders who lodged a complaint.

### Appendix 3 - Findings for the individual case studies (v) - (continued)

Issues concerning this complaint are covered in detail under the 'Appeals' section of this Report. The outcome of the appeal was that the Public Contracts Appeals Board (PCAB) found against the appellant and the tendering process continued following the (confirmed) disqualification of the appealing bidder.

The decision of the Adjudication Board was contained in a report submitted to, and eventually endorsed by, both the GCC and DoC. It is to be noted that, by the time the tendering process had reached the adjudication stage, only one bidder had remained in the running. This bidder was eventually selected as the successful one.

The facility for the appointment of a Special Contracts Committee was not utilised.

#### Tender award

The endorsement of the Adjudication Board's recommendation triggered the publication of the tender award, via a letter to the successful bidder and notification on DoC's website and notice board.

The need to submit results of the award procedure and the Contract Award Notice (CAN) to the EU were, in this particular instance, in-existent as the CAN is not required for negotiated tenders without prior contract notice.

#### Appeals

As referred to previously, in the 'Evaluation and Adjudication' section, a disqualified bidder lodged a formal appeal, in line with prevailing legislation. A second bidder objected to the appeal theory raised by the appellant.

Procurement legislation was adhered to: the PCAB as appointed was convened, meetings were held in public and DoC and the Line Ministry (in its role as CA) were called to witness the sittings.

Witnesses were called by the Board. A decision was reached unanimously within the stipulated ten working days of the hearing. As indicated above, PCAB found against the appellant who decided not to avail himself of the right to refer the matter to the Civil Court. On the basis of this outcome, the tendering process continued, following the reconfirmed disqualification of the appellant.

#### Post-Award Negotiations

Negotiations post award were carried out with respect to the inclusion/exclusion of VAT in prices/charges. A *corrigendum* to the contract agreement, signed post-contract endorsement, affected changes in respect of contract value and performance guarantee. These were made necessary by the fact that the original contract quoted VAT-inclusive values which were erroneously indicated as being exclusive of VAT.

The contract as signed by DoC and the successful bidder varied from the conditions as included in the tender document in that the former took the above (accepted) changes into account. NAO opines that the Post-Award Negotiations carried out in this case did not affect in any way the order of merit and could not have led to an outcome of the tender award other than the actual.



### Appendix 3 - Findings for the individual case studies (v) - (continued)

#### In conclusion

Documentation pertinent to the tendering process as maintained by the Contracting Authority (MfG) was comprehensive. This enabled the audit team to carry out the process walk-through exercise with relative ease. The Ministry was very cooperative in making the documents available to the Office.

This case study proved to be another instance of the CA quoting urgency. In this case, the hurry was brought about by the fact that tight time frames were to be adhered to even in view of the fact that the project was partly EU-funded. Additionally, the tender under review was in effect a re-issue. A previous call for tenders had been issued and had been aborted due to a lack of compliant bidders.

While DoC approval was obtained and the re-issue was in negotiated procedure format as against an open call, NAO looks askance at the fact that the re-issue itself was not advertised. In this manner, only those bidders who had submitted an offer for the first tender were aware of the re-issue. NAO opines that such actions impinge negatively on the credibility of the procurement process as they may be perceived as not being conducive to the propagation of a level playing field environment, of accountability and of transparency. It would have been more appropriate had the re-issued tender been advertised. Apart from ethical issues, such an action makes business sense in that the Contracting Authority in this manner ensures the widest possible outreach to interested parties.

Value for money considerations, and related concerns, arise. The high departmental estimate when compared with the amount contracted puts in doubt the validity of any market analysis exercises carried out pre-tender launch by the CA, aimed at arriving at a realistic project cost estimate. This is an issue contemplated in legislation - while procurement is to be, as much as possible, of the most economically advantageous tender, or of the cheapest offer satisfying technical and administrative specifications/requirements, it is still responsibility of the CA to ensure that the chosen offer compares favourably with prices on the open market for identical/similar purchases.

It is laudable that the CA maintained contact with MEPA to ensure that the project would not be the subject of any environmental assessments which would have delayed its execution. The consistent liaison maintained with DoC by the CA is likewise considered to be commendable.

DoC maintained its role as tendering process overseer as stipulated by the prevailing legislation. The CA's evaluation and adjudication board members were ethical in their behaviour, complying by endorsing the necessary declarations of impartiality and of a lack of conflict of interest.

As seems to be fairly standard practice, the members of the evaluation committee doubled as the adjudication board. While there is no legal objection to this, NAO opines that, given the differing functions of the two entities, it makes more sense to have officials hailing from different backgrounds serving on the two boards. This point is discussed in more detail in the appropriate section of the (main) Report, namely in the 'Findings arising from Commonalities'.

The lodged appeal was handled in the right manner by the key players involved. The tendering process was temporarily suspended until the appeal was heard and processed and a decision reached.

An element of Post-Award Negotiations was manifest in this tender. An issue of VAT chargeability arose. NAO opines that this could very well have been avoided, had greater attention been paid to the figures being quoted.

Appendix 4 - The commonalities audit template (i)

Section	Question reference	Question text
<b>Pre-tender activities</b>	0001	Was tender, if issued by Contracting Authority, endorsed by the Director of Contracts?
	0002	What was the level of involvement of the Department of Contracts at the tender design stage?
	0003	Which competitive procedure was opted for (whether open, restricted, negotiated etc.)?
	0004	If the restricted/negotiated competitive procedure was opted for, was prior approval of the Department of Contracts sought by the Contracting Authority?
	0005	Which system was opted for (whether one-package, three-package)?
	0006	What were the justifications for a particular competitive procedure over another?
	0007a	Was there a departmental estimate of project cost?
	0007b	If positive, how was this calculated and with what level of accuracy?
	0008	Was the Department of Contracts comfortable with any critical clauses such as clauses relating to penalties, bonuses and deadlines as included in the conditions sections of the tendering document?
	0009	Procurement legislation assumes that the Contracting Authority bases its selection and award criteria based on the Most Economically Advantageous Tender (MEAT) or on the lowest price tender. What studies were conducted (if any) by the Contracting Authority in determining which tender satisfied the MEAT criteria?
	0010a	In case of works-related contracts, were preliminary studies (such as the Environmental Impact Assessment study, Financial and Economic studies, technical feasibility studies etc.) commissioned?
	0010b	If negative, what safeguards were included for government to ensure its interests would be protected in case of non issuance of the necessary permits?
	0011a	Was the entire tendering process documented beforehand?
	0011b	Was this made publicly available?
0011c	On what dates?	

## Appendix 4 - The commonalities audit template (ii)

Section	Question reference	Question text
<b>Tender announcement and launch</b>	0012	Was the Department of Contracts involved during the announcement and launch of the tender?
	0013	Was the tender announced on the Government Gazette and/or OJEU, as required by Procurement Regulations?
	0014	In cases of restricted/negotiated tender procedure with publication of a contract notice or competitive dialogue, was contract notice issued, as required?
	0015	If contract notice was issued, were criteria and minimum/maximum number of candidates to be invited to tender specified?
	0016	If restricted, negotiated with publication of a contract notice or competitive dialogue procedure was adopted, did invitation to tender include: (a) copy of specifications or of descriptive document or (b) a reference to accessing the specifications when these are directly available by electronic means; (c) a reference to the contract notice published, (d) deadline for the receipt of tenders, (e) address to which tenders must be sent, (f) language/s in which tenders must be drawn up?
	0017	If restricted, negotiated with publication of a contract notice or competitive dialogue procedure was adopted, were bidders who were NOT invited to tender informed?
<b>Pre-package submission</b>	0018	Indicate instances and motives (if any) when bidders contacted the Contracting Authority and/or Department of Contracts for clarifications.
	0019a	Were clarifications (if any) circulated amongst all bidders?
	0019b	Were all bidders always kept informed of any changes to the initial tender document ?
	0020	Were there any significant changes to conditions in the Invitation to Tender and were the bidders who responded to the initial Invitation To Tender the only persons notified of such changes (rather than all interested parties/general public)?
	0021a	Were there any informally lodged complaints/objections/comments?
	0021b	If yes, to whom/by whom?
	0021c	How were these handled?

Appendix 4 - The commonalities audit template (iii)

Section	Question reference	Question text
<b>Submission closing date</b>	0022	Was the closing date for the submission of offers in line with any stipulated requirements?
	0023	Depending on the type of contracting procedure adopted, was the relevant time-limit for submission of offers granted?
<b>Package opening system</b>	0024a	Were any extensions to the closing date for offer submission granted?
	0024b	If yes, what were the reason(s) for such action?
	0025	Were the bids opened in public?
	0026	Was the list of tenders received published as stipulated by the procurement regulations?
	0027a	Were any offers discarded?
	0027b	If positive, why?
	0028	Following the opening of offers, on which criteria did bids qualify to the next stage?
<b>Short-listing committee</b>	0029	Was a short-listing committee appointed by the Contracting Authority?
	0030	In the affirmative, was the short-listing committee (and its members) endorsed by Minister and/or Permanent Secretary?
	0031	Were letters of appointment endorsed by members appointed on the short-listing committee?
	0032	Were members' formal letters of appointment submitted?
	0033	Were members asked to confirm they had no conflict of interest?
	0034	To whom was the generated short-listing report presented?
	0035	Were the contents of the short-listing report accepted? Comment.
	0036	Was the decision taken by the short-listing committee endorsed by the Minister, Management Board, Chairman and/or any other authority?

## Appendix 4 - The commonalities audit template (iv)

Section	Question reference	Question text
<b>Evaluation</b>	0037	Was an Evaluation Committee appointed?
	0038	In the affirmative, was the committee endorsed by a higher authority?
	0039	Were formal letters of appointment submitted?
	0040	Were letters of appointment endorsed by members appointed on the Evaluation Committee?
	0041	Were members asked if they have a conflict of interest?
	0042	Was decision of Evaluation Committee endorsed by any other authority?
	0043	Were evaluation criteria and maximum/minimum points required and clearly stipulated in tender document?
	0044	Stipulate the tender's award criteria (ratio of the technical to the financial aspect).
	0045	Comment on bidders' level of compliance with tender specifications.
	0046	When evaluating, did the evaluation board find offers to comply with 'completion dates'?
	0047	How did bids rank technically?
	0048	Was there evidence about bidders' financial and economic standing?
	0049	Was evidence of the bidders' technical capacity sought?
	0050	Were any bidders excluded from participating from the public contract due to their financial situation and/or background?
	0051	To whom was the generated evaluation report presented?
	0052	Was the evaluation report accepted? Comment.
	0053	Were there any external consultations?
	0054	In the affirmative, were there any divergences between the consultancy report and the evaluation report?
	0055	Were any contracts disqualified? If positive, were reason(s) clearly logical?
	0056	Were selection criteria/weighting applied across the board?
0057	Examine evaluation reports and any selection criteria templates to ensure that specifications remained unchanged and that the purchase tallied with what was requested. Also, examine any disqualified tenders. Comment in detail.	

Appendix 4 - The commonalities audit template (v)

Section	Question reference	Question text
<b>Adjudication</b>	0058	Was an Adjudication Board appointed?
	0059	In the affirmative, was Adjudication Board endorsed by a higher authority?
	0060	Were formal letters of appointment submitted?
	0061	Were members asked regarding conflict of interest?
	0062	Were letters of appointment endorsed by members appointed on the Adjudication Board?
	0063	Was decision of the Adjudication Board endorsed by any other authority?
	0064	Was the recommendation of the Adjudication Board endorsed by the Director of Contracts/General Contracts Committee?
	0065	When and how was decision of Adjudication Board published?
	0066	Were any supporting documentation passed to the Department of Contracts?
	0067	Was recommendation upheld by the Department of Contracts?
	0068	Was a Special Contracts Committee appointed?
	0069	In the affirmative, who appointed the Special Contracts Committee?
	0070	What were the recommendations made by the General Contracts Committee/Special Contracts Committee?
	0071	Was the decision taken endorsed by the Director of Contracts?
	0072	If General Contracts Committee/Special Contracts Committee made its recommendation, was this deemed to be sufficiently knowledgeable?
	0073a	Regarding the decision taken by the General Contracts Committee/Special Contracts Committee: When was this published?
	0073b	How was it published?
	0073c	Where was it published?
	0074	Review and comments of minutes covering the General Contracts Committee/Special Contracts Committee.
	0075	Was contract awarded to (a) most economically advantageous tender or (b) lowest price offered compliant with tender specifications?
0076	If contract was awarded to the most economically advantageous tender; were criteria, giving relative weightings or criteria in descending order of importance, indicated in the adjudication report; or, in the case of a competitive dialogue, in the descriptive document?	

Appendix 4 - The commonalities audit template (vi)

Section	Question reference	Question text
<b>Publication of result</b>	0077	When was the Contract Award Notice published in the Government Gazette?
	0078	When was notice of the results of the award procedure submitted to the EU Commission?
	0079	When was the Contract Award Notice (CAN) published on the OJEU?
	0080a	If contract was awarded by the Contracting Authority, was a report drafted to give details about: (a) the name and address of Contracting Authority, the subject-matter and value of contract; (b) the name of the successful bidder and the reasons for the selection; and (c) the names of bidders rejected and reasons for rejection?
	0080b	In the case of negotiated procedures, was a report drafted to give details about the circumstances that justify the use of such procedures?
	0080c	In the case of competitive dialogue, was a report drafted to give details about the circumstances justifying the use of this procedure, and if necessary, the reasons why the Contracting Authority has decided not to award a contract submitted to Director of Contracts and/or Commission?
	0081a	Were there any extra obligations (over & above legal ones) specified in the tender document regarding notifications/communications with bidders?
	0081b	If yes, were such commitments respected?
<b>Award</b>	0082	What was the Department of Contracts' involvement at the award stage?

Appendix 4 - The commonalities audit template (vii)

Section	Question reference	Question text
<b>Appeals</b>	0083	Were any objections filed?
	0084	Was the required deposit paid?
	0085	Was the notice of objection published by the next working day following its filling as required by regulation?
	0086	When was the list of 'Bidders Objection to Decision' made public?
	0087	Had any other interested party shown interest in the proceedings?
	0088	Was a report by Director of Contracts or Head of Contracting Authority drawn up as required by procurement regulations?
	0089	Was a Public Contracts Appeals Board appointed?
	0090	Were meetings related to appeals held in public? When?
	0091	Were witnesses called by the Public Contracts Appeals Board?
	0092	When was decision of the Public Contracts Appeals Board submitted to the Director of Contracts?
	0093	Was the Public Contracts Appeals Board composed of a Chairman and two members appointed by the Prime Minister?
	0094	Were substitute Chairman and members appointed in the Board?
	0095	Were there any changes to members on the Public Contracts Appeals Board?
	0096	Were there any instances where any member with potential conflict of interest or member of the House of Representatives was appointed on the Board?
	0097	Did the Public Contracts Appeals Board call for witnesses, administer oaths or engage third parties to assist in the investigations?
	0098	Was a public hearing appointed by the Chairman? Were the sessions of the Appeal Board held in public?
	0099	Was the decision taken by the Public Contracts Appeals Board agreed unanimously or was it taken on simple majority?
	0100	Was the decision taken submitted within 10 working days?
0101	Was the deposit submitted by the bidder filing the objection refunded?	
0102	Following the appeal theory, were there any instances of unsatisfied bidders who referred the matter to the First Hall of the Civil Court?	



## Appendix 4 - The commonalities audit template (viii)

Section	Question reference	Question text
<b>Post-Award Negotiations</b>	0103	Is there evidence of any Post-Award Negotiations?
	0104	Was the Department of Contracts involved during the Post-Award Negotiations?
	0105	Did the contract differ from the Invitation to Tender? In what way? Describe in detail.
	0106	Did the winning offer comply with the stipulated target dates?
	0107	Does the contract being assessed have built-in time milestones that are more favourable to the contractor than those of the original tender?
	0108	Generally the awardee of the tender contract takes out insurance against any loss or damage for which he is liable under the contract. Was this done?
	0109	What was happening in the period between tender award and contract signature? How was the Department of Contracts involved?
<b>Contract endorsement</b>	0110	When was the contract signed?
	0111	Who were the signatories for (1) the successful bidder and (2) the Government/Contracting Authority?
	0112	Did Contractor comply with provision of a financial guarantee within the stipulated time as specified in the tender document?
	0113	Who was responsible for drawing up the final contract?
	0114	Was the Department of Contracts satisfied with the contract as signed?
	0115	Was the Department of Contracts involved at all while the contract was being compiled?
	0116a	Did the Department of Contracts review contract before this was signed?
	0116b	Did the Department of Contracts comment after this review?
	0116c	Were the Department of Contracts' comments taken into account?

Appendix 4 - The commonalities audit template (ix)

Section	Question reference	Question text
<b>Role of the Department of Contracts</b>	0117	Throughout the whole tendering process, when was the Department of Contracts consulted by: - The Contracting Authority in question? - economic operators? - bidders? - the successful bidder?
	0118	Did the Department of Contracts establish or approve the general conditions of the tender?
	0119	Did Department of Contracts authorise the deviations from the standard conditions?
	0120	Did the Department of Contracts ensure that no tenderer or person having or have had an interest in obtaining a particular tender had any advantage or disadvantage due to tender conditions and/or specifications?
	0121a	Did the Department of Contracts order any extension(s) of the tendering period?
	0121b	If so what circumstances warranted these extension(s)?
	0122	Did the Department of Contracts check and approve tender documents prior to these being issued and published?
	0123	What role and involvement did the Department of Contracts have in relation to the Adjudication Boards?
	0124	What was the role of the Department of Contracts during: (a) the issue and publication of calls for tenders, (b) the receipts of offers, (c) the opening of bids, (d) the adjudication of tenders, and (e) the award of contracts?
	0125	How pro-active was the behaviour of the Department of Contracts?
	0126	Up to what stage was the Department of Contracts active in the process?
	0127	Were there instances of hand holding/monitoring by the Department of Contracts?
	0128	Comment on the clarity of instructions/advice throughout process on the part of Department of Contracts.

Appendix 4 - The commonalities audit template (x)

Section	Question reference	Question text
<b>Contracting Authority</b>	0129	Was the Contracting Authority in line with its enabling act?
	0130a	Does the Contracting Authority own/follow a code of ethics?
	0130b	If positive, did the contracting authority, its board(s) members and employees involved in the tendering process follow and comply with the spirit and text of the code of ethics?
	0131	General comment on how much the Contracting Authority sought guidance from Department of Contracts and the level of compliance with its instructions.
	0132	Did the Contracting Authority at any time during the tendering process, resort to external consultancy? If positive how were such services commissioned? Was a tender issued? Was consultant engaged via direct order?
<b>Subcontracting</b>	0133	Did the bidders indicate any share of the contract that would be sub-contracted to third parties in the tender bid?
	0134	Was authority for sub-contracting obtained by the winning bidder from Contracting Authority?
	0135	Was proof of subcontractor's economic and financial standing furnished?
	0136	Was proof of subcontractor's technical and/or professional capabilities requested? If so, was it furnished?
	0137	From the offers submitted, were there any bids that required subcontracting but were not so marked in the original offer?
	0138	Comment about the legal standing of contractor and sub-contractors.
<b>Tender conditions</b>	0139	Was there a mechanism aimed at adjusting standard dates or any incentive payments?
	0140	Did the tender document contain all the necessary information and sections?

**Appendix 4 - The commonalities audit template (xi)**

Section	Question reference	Question text
<b>Miscellaneous</b>	0141a	Was value for money assured throughout the whole process?
	0141b	How?
	0142a	Who was responsible for the project management function?
	0142b	What rights/responsibilities were assigned to the designated project manager?
	0142c	Was this role compliant with government procurement regulations?