

An investigation of
matters relating to
the contracts awarded
to ElectroGas Malta Ltd
by Enemalta Corporation
(Abridged)

Report by the
Auditor General
November 2018

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

A handwritten signature in black ink, appearing to read 'CD', with a long horizontal stroke extending to the right.

Charles Deguara
Auditor General

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List of Abbreviations

AG	Auditor General
BoV	Bank of Valletta
CCGT	combined cycle gas turbine
DoC	Department of Contracts
EC	European Commission
EIS	Environmental Impact Statement
EoIC	Expression of Interest and Capability
ERL	Engineering Resources Ltd
FSU	Floating Storage Unit
GSA	Gas Supply Agreement
IA	Implementation Agreement
LNG	liquefied natural gas
MECW	Ministry for Energy and Conservation of Water
MEH	Ministry for Energy and Health
MFIN	Ministry for Finance
MGP	Mercato Giorno Prima
MI	Intraday Energy Market
MLA	multi-lateral lending agencies
mmbTU	million British Thermal Units
MOT	Ministry for Tourism
MP	Members of Parliament
MW	Megawatt
MWe	Megawatt electric
MWh	Megawatt hour
NAO	National Audit Office
O&M	Operations and Maintenance
PAC	Public Accounts Committee
PPA	Power Purchase Agreement
RfP	Request for Proposals
SPA	Sale and Purchase Agreement
SPC	Special Purpose Company
SSA	Security of Supply Agreement
TFEU	Treaty on the Functioning of the European Union

1. Request by the Public Accounts Committee

1.1 On 30 July 2015, the Opposition Members of Parliament (MPs) on the Public Accounts Committee (PAC) and the Shadow Minister for the Environment, Energy and Transport requested the Auditor General (AG) to investigate matters relating to the selection of the ElectroGas Malta Consortium and the contracts awarded for the supply of gas to and the purchase of power by Enemalta Corporation.

1.2 The AG was requested to investigate:

- a. the process of selection leading to Government's award of contracts, relating to the construction of a power station and the supply of electricity to Enemalta, to the ElectroGas Consortium and determine whether the selection was diligently made and based on the principles of good governance;
- b. whether documentation indicating the financial standing of each company forming part of the ElectroGas Consortium was requested and whether these documents indicated the risks identified by Gasol plc's auditors;
- c. whether Government was aware of this information, whether this was disregarded, or if unaware, why Government failed to request this information;
- d. whether Government and/or Enemalta had sufficient and documented proof that the ElectroGas Consortium had the necessary financing to undertake the project as required in the Expression of Interest and Capability (EoIC) and the Request for Proposals (RfP);
- e. whether Government created favourable conditions for the ElectroGas Consortium, to the detriment of other companies that could have had interest in this project, when providing a state guarantee for a bank loan and whether this guarantee was in breach of Government's financial regulations;
- f. the process through which Gasol plc was allowed to withdraw from the ElectroGas Consortium and to determine whether this was in line with the procedure ordinarily applied in similar cases;
- g. the contracts entered into by Government and/or Enemalta for the purchase of electricity from ElectroGas Malta Ltd (hereinafter referred to as ElectroGas Ltd) and whether the

contracts were consonant with the principles of good governance, including transparency, viability and value for money; and

- h. whether the rate at which Government and/or Enemalta agreed to purchase electricity from ElectroGas Ltd was more favourable than that at which Enemalta procured electricity through the interconnector.¹

1.3 Further concerns were raised by the Opposition MPs on the PAC and the Shadow Minister for the Environment, Energy and Transport on 21 August 2015 regarding the state guarantee that was to assist the ElectroGas Consortium secure bank loans to finance the project. Noted was that this state guarantee was without precedent and was not included as part of the conditions in the call for tenders issued by Government. Concerns were cited regarding whether the provision of a state guarantee constituted good governance and whether this development was conformant with the public procurement regulations. Further aggravating these concerns was the fact that Government had increased the state guarantee from €88,000,000 to €360,000,000.

1.4 Additional information was brought to the attention of the AG on 25 April 2016 by the then Leader of the Opposition. Prior to the 2013 general election, the Nationalist Party had been approached with a proposal for the construction of a new power station. It was alleged that the same proposal was put forward to the Labour Party and consequently agreement regarding this project was reached prior to the election. Furthermore, it was evident that Gasol plc and GEM Holdings Ltd, the parties involved in putting forward this proposal and investing in the project, were those awarded the contract.

1.5 The initial request by the PAC and the subsequent submissions made formed the basis of the terms of reference set by the National Audit Office (NAO). This investigation was conducted in accordance with article 9(a) of the First Schedule of the Auditor General and National Audit Office Act (Act XVI, 1997) and in terms of practices adopted by the NAO.

1.6 The NAO considered this investigation as technically complex and broadly scoped, entailing the review of voluminous documentation and the submission of extensive audit queries. The cooperation afforded by Enemalta and the Permanent Secretaries at the Ministry for Finance (MFIN) and the Ministry for Tourism (MOT) is acknowledged and was essential in the compilation of this report.

¹ Following the award of the contracts to the ElectroGas Malta Consortium, the Consortium acquired the company Malta Power and Gas Ltd, which was later renamed ElectroGas Malta Ltd. It was through the latter that agreements with Government and/or Enemalta were entered into.

1.7 Hereunder are the salient facts relating to the process through which ElectroGas Ltd was awarded the contracts for the supply of energy and gas to Enemalta, as well as relevant conclusions arrived at by the NAO. Although this Report provides an overview of matters relating to this award, a comprehensive account of all aspects relating to the review undertaken by the Office is presented in a separate Report titled 'An Investigation of matters relating to the Contracts Awarded to ElectroGas Malta Ltd by Enemalta Corporation'.

2. The Call for Expressions of Interest and Capability for Energy Supply to Enemalta Corporation

2.1 A call for EoIC was issued on 11 April 2013, with submissions to be made by not later than 10 May 2013. The call was issued for candidates who were willing and able to supply and deliver natural gas to Enemalta under the terms of a long-term Gas Supply Agreement (GSA) to fuel Enemalta's own gas-fired power plant, and supply and deliver electricity to Enemalta under the terms of a long-term Power Purchase Agreement (PPA). The energy for the gas and electricity agreements was to be sourced from facilities which the selected candidate was to build, own, operate and maintain by 31 March 2015. The EoIC identified two potential sites at the Delimara Power Station for this project. Although interested candidates were free to propose solutions capable of meeting Enemalta's supply requirements at the lowest cost while ensuring security of supply, the model technical solution being considered was a new liquefied natural gas (LNG) delivery, storage, regasification and natural gas supply facility, and a new gas-fired combined cycle gas turbine (CCGT) electricity generation plant.

2.2 The GSA was to entail a long-term gas supply agreement with a Special Purpose Company (SPC), a company purposely set up by Enemalta to facilitate the contracting process. The GSA, through which Enemalta could supply Delimara 3, its own gas-fired generating plant, was for an anticipated duration of 18 years, subject to the conditions of the RfP. The delivery of gas was to commence as from 31 March 2015. The GSA was to have an initial fixed price for five years from commencement of commercial operations of the new plant, followed by an indexed price for the remaining period.

2.3 Enemalta was also to enter into a long-term PPA with the SPC, which was to give Enemalta exclusive rights to dispatch electricity from Delimara 4 for 18 years. The PPA was to have an initial fixed price for the first five operating years, followed by an indexed price for the remaining period. The electricity dispatch profile under the PPA was to entail a continuous demand equivalent to 180 to 220 Megawatt electric (MWe), reduced to approximately 160MWe overnight.

2.4 Although partial EoIC submissions to enter into either a PPA or a GSA would be considered, a consolidated submission was preferred. Following the award of the PPA and the GSA, the selected

candidate was expected to take over the SPC. The SPC would then have a maximum of 18 months to complete and commission the new plants in order to commence supply.

- 2.5 The EoIC Evaluation Committee was appointed on 9 May 2013 and was composed of a Chair, a Commercial Evaluator, a Financial Evaluator and two Technical Evaluators. By the closing date, a total of 19 bids were submitted.² The EoIC evaluation process was concluded on 1 June 2013, with the outcome referred to the Chair Programme Review Board, which Board was tasked with the strategic oversight of the selection process. Of the submissions, ten were for the PPA and the GSA, five were limited to the PPA and three to the GSA.
- 2.6 Following the analysis by the EoIC Evaluation Committee, 11 submissions were recommended to proceed to the RfP stage. While six bids qualified in terms of their proposed complete solution, the remaining successful bidders fulfilled one aspect through a partial solution. Three candidates were recommended to proceed to the RfP stage on the basis of their power generation proposal, while two candidates in terms of their gas supply proposal. However, the Committee noted that, to be eligible at the RfP stage, bidders who had submitted a partial solution were to partner up with a successful bidder, endorsed by the Committee with respect to a complementary partial solution. Alternatively, successful bidders were to propose a new LNG or power generation partner, complementary to their bid, for approval by Enemalta.
- 2.7 On 13 June 2013, Energy World International Ltd submitted an appeal. The Appeals Board found against Energy World as it had failed to satisfy the requirements of the EoIC and confirmed the decision taken by Enemalta to exclude the Company in the shortlisting of candidates eligible to progress to the RfP stage.

Analysis of the EoIC Evaluation Process

- 2.8 The NAO reviewed all submissions received in reply to the EoIC and carried out an evaluation thereof utilising the parameters established by the EoIC Evaluation Committee. In essence, the evaluation was based on administrative compliance, exclusion criteria, technical experience and reputation, and commercial experience and robustness.
- 2.9 Administrative conformity was essential in verifying whether submissions satisfied all the conditions, procedures and specifications stipulated therein, without substantial departures therefrom or restrictions thereto. Importantly, the EoIC specified that if a submission did not comply with the mandatory requirements of the call, it would not be considered any further. The NAO noted the

² One of the bids was a non-disclosure agreement which, following legal advice obtained by the EoIC Evaluation Committee, was discarded.

stark contrast between this and the stance adopted by the Committee with regard to administrative compliance. In its evaluation report, the Committee erroneously remarked that the EoIC did not specify that candidates not compliant with the EoIC reporting requirements would be disqualified from the process. Although the Committee acknowledged that none of the submissions were fully compliant, it adopted a more lenient approach and sought to mitigate shortcomings in the submissions through the information provided therein, publicly available information and requests for clarifications. Analysis of the evaluation process resulted in concerns relating to the uniformity of approach and the extent of leniency applied. While the NAO acknowledges that certain infringements were minor, others were substantial, constituting evident departures from the EoIC provisions with respect to administrative compliance.

- 2.10 For submissions to be considered administratively compliant, candidates were to submit evidence of experience and capability, as well as ability to source appropriate finance and demonstrate credit worthiness. The NAO noted that certain candidates failed to provide either all or elements of these non-elective requirements. While certain candidates were allowed to proceed despite the evident shortcomings, others were deemed ineligible on similar grounds.
- 2.11 The second aspect of EoIC evaluation entailed the verification of whether grounds existed for exclusion under specified criteria. Such criteria comprised bankruptcy, failure to pay tax and fraudulent and criminal activities, among others. The Committee acknowledged that candidates were not obligated to submit a declaration or provide evidence regarding the existence, or otherwise, of such exclusionary circumstances. In addressing this aspect, the Committee undertook basic Internet searches with the aim of gathering publicly available evidence that would provide grounds for exclusion. None of the candidates were disqualified on this basis. Nonetheless, the Committee indicated that it was imperative that a detailed due diligence process be carried out at the RfP stage and that candidates be required to sign a formal declaration with respect to the exclusionary criteria. The NAO is of the opinion that the due diligence checks undertaken at this stage of the procurement process were sufficient, provided that detailed verification be carried out at the RfP stage.
- 2.12 The third aspect of the evaluation consisted of an analysis of the technical experience and reputation of the candidate. Cited in the EoIC evaluation report was that candidates were required to demonstrate experience and expertise, by a key member, in the fields of power plant and LNG terminal development, who was to have a minimum shareholding of 20 per cent. While a significant number of the submissions presented the necessary experience with respect to power plants, this was not so in respect of LNG terminal development. Towards this end, the Committee resolved to accept references of LNG projects undertaken by the bidders' engineering, procurement and construction contractors. The NAO reviewed the EoIC and could not find reference to the requirement of experience in LNG terminal development.

- 2.13 In the NAO's opinion, the extent of non-adherence of submissions to the requirements of the EoIC limited the Committee in its evaluation, with missing documentation precluding the Committee from arriving at a comprehensive understanding of the bids. However, the NAO noted that, at times, the Committee applied different measures to identical shortcomings. For example, three candidates lacked the appropriate reference to projects utilising the desired technology and capacity. While one of the candidates was excluded on these grounds, the other two were recommended to proceed to the RfP stage.
- 2.14 Finally, candidates were required to illustrate their capability to source finance and demonstrate credit worthiness to support the project. Candidates were also required to demonstrate the management expertise necessary to undertake the solution proposed and access to an appropriate gas supply stream. The NAO noted that while most of the candidates complied with these requirements, others failed to submit the required information for consideration by the Committee. Despite this shortcoming, the Committee recommended that these submissions progress to the RfP stage.
- 2.15 The key concern that emerged from the NAO's review of the EoIC evaluation process was the inconsistent approach at times adopted by the Committee in its assessment of submissions. While the NAO acknowledges that a number of submissions were rightly eliminated on sufficient and justifiable grounds, this Office noted that others proceeded to the RfP despite similar shortcomings. This Office maintains that Energy World, despite its appeal, was justifiably excluded from the process as it was not compliant with the EoIC; however, concerns emerge when one considers that other instances of non-compliance, in cases identical to that subject to appeal, were allowed to progress to the RfP stage. While the NAO acknowledges that an element of latitude prevails in the assessment of diverse proposals, this Office maintains that evaluation must be equitable and that evaluation criteria must be uniformly applied.

3. Request for Proposals for a Gas Supply Agreement and a Power Purchase Agreement

- 3.1 An RfP was issued on 6 July 2013, inviting candidates shortlisted at the EoIC stage to submit detailed proposals. The bid submission deadline was 16 September 2013, later extended to 20 September 2013. The RfP was issued for the supply and delivery of electricity to Enemalta under the terms of the PPA, which was to be sourced from the new plant at Delimara 4. While the call for EoIC did not restrict applicants to the utilisation of a specific technology for their electricity generation plant, the RfP indicated that only CCGT technology would be considered. In addition, the RfP provided for the supply and delivery of gas to Enemalta under the terms of the GSA to fuel Enemalta's existing plant at Delimara 3 following its conversion to operate on gas and gasoil. Enemalta planned

to commence the conversion of Delimara 3 shortly after Delimara 4 was fully operational, which works were to be completed within one year from commencement. The PPA and the GSA were to be entered into for a period of 18 years. Bidders were required to provide a reliable source of LNG for the term of the Agreements. Furthermore, the SPC, to be acquired by the successful bidder, was required to maintain defined levels of strategic stocks of LNG and fuel throughout the term.

- 3.2 Additional details regarding the SPC were provided in the RfP. The successful bidder was to acquire the SPC for a consideration of €30,000,000. The SPC would then enter into the Transaction Agreements, that is, all contracts relating to the project, with Enemalta. The RfP provided a high-level completion milestone plan and details regarding project construction, commissioning, operation and decommissioning. Works were to be completed and commissioned within 18 months from the signing of the PPA and the GSA.
- 3.3 In order for Enemalta to ensure that bidders delivered the project on a commercially sound and a financially robust basis, bidders were required to submit detailed financial information. Submissions were to include a financial model, projected financial statements and relevant supporting information. By the date of effect of the Transaction Agreements, bidders were to have secured equity funding and financing facilities to meet all the costs associated with the project.
- 3.4 Bidders were to quote a fixed price with respect to the PPA and the GSA for the first five years of the term. In the case of both Agreements, payments by Enemalta were to compensate the SPC for energy or gas made available and energy or gas supplied. Beyond the five-year fixed term, escalated charges for availability and energy payments with respect to the PPA and the GSA were to be indexed according to the Brent Price Index. Draft copies of the agreements that were to be entered into between Enemalta and the successful bidder were attached to the RfP.
- 3.5 According to the RfP, bids were to be evaluated in five stages. At Stage 1, bids were to be checked for completeness. Stage 2 was to determine whether bids fulfilled the minimum legal, commercial, technical and financial requirements. At Stage 3, bids were to be evaluated on the basis of their commercial, technical and financial strength. The evaluation at Stage 3 was to consider the degree to which bidders exceeded the minimum requirements. Stage 4 comprised the analysis of price proposals. At Stage 5, the results of the Stage 3 and Stage 4 evaluations were to be combined, utilising a weighting factor. Stage 3 was allocated a weighting of 0.2 and Stage 4 a weighting of 0.8. The total points gained by each of the bidders at the two stages were to be combined to generate a final score.
- 3.6 Following the issuance of the RfP, bidders could submit requests for clarification. In parallel with the process of submissions for clarification, requests for changes to bidders and bidding groups

subsequent to the EoIC process were received by Enemalta. Six bidders submitted proposals to Enemalta for changes to their consortium. Of relevance was that proposed by the ElectroGas Consortium, whereby its preference to reserve the right for Gasol plc and Socar Trading SA to form part of the consortium as individual members, as opposed to the joint venture originally put forward at the EoIC stage, was indicated. The EoIC Evaluation Committee noted that the change in the relationship between Gasol plc and Socar Trading SA did not alter the consortium composition as a whole, and that therefore such a change was acceptable.

- 3.7 Enemalta held a bidders' conference on 2 August 2013 to provide an overview of the RfP, enable prospective bidders to familiarise with the sites and provide them with the opportunity to verbally seek clarifications. Another bidders' conference relating to the Environmental Impact Assessment was held on 3 September 2013.
- 3.8 By the bid submission deadline, bids by the ElectroGas Consortium, the Endeavor Consortium and the Yildirim Consortium were submitted. Four different committees were tasked with the evaluation of stages 1 to 4, each chaired by a Team Leader. The four Team Leaders, together with the Chair, formed the Stage 5 Evaluation Committee.
- 3.9 While the bids submitted by the ElectroGas Consortium and the Endeavor Consortium were deemed administratively compliant by the Stage 1 Evaluation Committee, concerns were raised regarding that by the Yildirim Consortium. In particular, the Consortium failed to provide a bid bond, and did not indicate the price of gas per million British Thermal Units (mmBTU) as well as the commodity multiplier. Legal advice obtained deemed these omissions material and recommended the disqualification of the Yildirim Consortium.
- 3.10 In its consideration of the submissions by the ElectroGas Consortium and the Endeavor Consortium, the Stage 2 Evaluation Committee noted instances of non-conformity with the minimum requirements. The Committee sought to address these through enquiries with bidders, referral for legal or technical advice and independent verification, or deemed it appropriate for further action to be taken if the bidder was selected as the preferred bidder. In conclusion, the Committee resolved that the submissions by the ElectroGas Consortium and the Endeavor Consortium were materially compliant with the minimum requirements of the RfP. Nonetheless, a number of issues were highlighted for consideration by the Programme Review Board. Ultimately, the Committee recommended that both bidders be considered for the ensuing stages of the evaluation process.
- 3.11 In Stage 3 of the evaluation process, the technical and financial strength of each bid was to be determined through reference to four criteria, that is, the bidder's additional experience in electricity facilities, the bidder's additional experience in gas facilities, matters relating to energy

and gas delivery, and the bidder's financial strength. The Stage 3 Evaluation Committee allocated 61 marks to the ElectroGas Consortium and 37 marks to the Endeavor Consortium out of a total of 100 marks.

- 3.12 The objective of the Stage 4 Evaluation Committee was to calculate the lifetime aggregate cost of electricity and gas offered by each bidder, the basis for establishing the Final Price. The Final Price calculation included four components, that is, the lifetime average prices for electricity and gas, and the remaining useful life of the power and gas facilities beyond the term of the PPA and GSA, all of which were then converted into a single value Final Price. The bidder with the cheapest Final Price was allocated 100 marks, while the other was assigned marks corresponding to the percentage difference between the two Final Prices. At €95.99/Megawatt hour (MWh), the cheapest Final Price was submitted by the ElectroGas Consortium and awarded 100 marks.
- 3.13 Based on the weightings specified in the RfP, the Stage 5 Evaluation Committee assigned a Final Score of 92.2 to the ElectroGas Consortium, while the Endeavor Consortium was allocated a Final Score of 71.3. On 10 October 2013, the Committee recommended that, subject to the ratification of the key issues outlined in Stage 2 of the evaluation process, the proposed Preferred Bidder was the ElectroGas Consortium, while the proposed Reserve Bidder was the Endeavor Consortium, which recommendation was endorsed by the Programme Review Board and the Enemalta Board of Directors. The ElectroGas Consortium was announced as the winning bidder by the Minister responsible for energy and the conservation of water (MECW) on 12 October 2013 and the notice of award was eventually published on 4 December 2013.

Analysis of the RfP and its Evaluation

- 3.14 The NAO considered the RfP document well structured and one that provided a sound basis for prospective bidders to bid. Although concerns regarding the period of submission were expressed by bidders, the NAO deemed the time allowed for the submission of bids as adequate. The period for submission was of 76 days, which compares favourably with public procurement guidelines issued by the European Commission (EC). The EC establishes an array of minimum time limits based on the nature and method of procurement, which range from 24 to 52 days. Another positive aspect identified by the NAO was the inclusion of the main draft agreements, with bidders afforded the opportunity to propose changes to the draft agreements for consideration by Enemalta. The NAO deemed the RfP clarification process as managed by Enemalta as well-structured and documented, with timeframes for the submission of requests for clarification and replies by Enemalta established at the outset and honoured. In terms of evaluation, the NAO noted that the relative stages of assessment were outlined and criteria and weightings specified. The Office considered these measures as contributing to the transparency and fairness of the procurement process.

- 3.15 Notwithstanding this, the NAO noted shortcomings, mainly relating to major changes effected during the clarification process, such as the introduction of the Security of Supply Agreement (SSA) and revisions to the commissioning period. Another major change was in respect of the take-or-pay obligation. Other concerns related to the design of the project model, particularly the inclusion of LNG supply as part of the RfP framework and the requirement that LNG suppliers were to form part of project equity.
- 3.16 The NAO sought to establish the basis of Enemalta's preference to include LNG supply as part of the RfP framework, particularly in view of the concerns raised by prospective bidders. The Minister MECW informed the NAO that the rationale underlying this decision was the transfer of risk to the operator, with the complexity of managing all stages of the project assumed by the operator. Furthermore, the Minister MECW referred to Enemalta's adverse financial position at the time, which precluded Enemalta from raising the required finance. Requests for documentation substantiating any analysis undertaken by Enemalta leading to the decision to only allow complete solutions at RfP stage, that is, integration of the LNG supply with the PPA through a GSA, remained unaddressed.
- 3.17 The views of the Minister MECW were also sought in relation to concerns raised by bidders that it was not an industry standard for LNG suppliers to form part of project equity. The Minister MECW maintained that this structure again allowed for the transfer of risk, with responsibility for the whole value chain, from fuel supply to shipment and scheduling, to be borne by one operator. The Minister MECW also made reference to the fact that gas was to be a shared service, utilised by the operator of Delimara 4 and Enemalta in the operation of its plant. The Chair RfP Evaluation Committee noted that under a scenario where LNG supply was separated from the provision of power, LNG suppliers would not accept liability for availability payments incurred by Enemalta arising from the PPA. As indicated in the preceding paragraph, documentation substantiating the assessment of risk undertaken by Enemalta was not made available to this Office.
- 3.18 The Office's attention was also drawn to clarifications relating to the issuance of a sovereign guarantee with respect to Enemalta in order to enhance credit rating and facilitate project financing, as well as in terms of the PPA and the GSA. According to Enemalta, the project was to be backed by an SSA, pursuant to which Enemalta's obligation to purchase electricity and gas would be assumed by Government in certain specified circumstances. Furthermore, a letter of credit equivalent to the sale option fair value was to secure Enemalta's obligations at the end of the contract term. The NAO noted that the SSA was not circulated among bidders. Although the concept of security in terms of the operation of the facilities and the generation of revenue was referred to in the bidders' conference, specific reference to the SSA was first made through an amended draft Implementation Agreement (IA) circulated on 5 September 2013 and subsequently

brought to the attention of bidders through clarifications issued by Enemalta on 12 September 2013, days before the bid submission deadline.

- 3.19 The NAO maintains that the introduction of the concept of security of supply was a substantial change from that stated in the EoIC and RfP that significantly reduced the risk to bidders. While the concept of security of supply was communicated at the bidders' conference, this was concretised as an SSA at a late stage in the bid submission process. Even then, bidders were not provided with a draft SSA, but this was merely referred to in the IA. It is in this context that concerns regarding the governance of the RfP process emerge, with the Office of the opinion that this significant factor ought to have been disclosed at the outset.
- 3.20 Not only was security of revenue ensured through the SSA, as the notable revision of take-or-pay provisions also guaranteed a minimum revenue to the selected bidder. Through these provisions, Enemalta committed to an overall take-or-pay obligation equivalent to 85 per cent of the annual contract power that was to be supplied in terms of the PPA and 85 per cent of the annual contract quantity in terms of the GSA. It is to be noted that, in the case of the GSA, a take-or-pay obligation was included at the outset; however, this was originally set at 65 per cent of the annual contract quantity. Reference to the extension of the take-or-pay obligation to the PPA was first announced during the bidders' conference.
- 3.21 The NAO is of the understanding that while the take-or-pay provisions ensured a minimum revenue to the selected bidder, the SSA provided further assurance that Government would step in instead of Enemalta in circumstances where the latter could not honour its obligations. These major changes, at a late stage in the RfP process, were deemed by the NAO as a shortcoming in the governance of the procurement process. Although all bidders were informed of these developments, the nature of the changes and their timing drew the Office's concern, for they significantly altered the contractual relationship that was to be entered into, drastically reducing the risk to revenue for the selected bidder. The risk was transferred to Enemalta and Government, now obligated to purchase 85 per cent of the annual contract quantity, be it power and gas, irrelevant of requirements. Aside from these considerations, in the NAO's opinion, it was in Enemalta's interest to disclose all conditions favourable to prospective bidders in order to encourage competitive tension in the RfP, with relevant implications on value for money.
- 3.22 Another major change that occurred at a late stage in the RfP clarification process related to the extension in the commissioning period, with Enemalta accepting the postponement of the imposition of delay liquidated damages by four months, later revised to six months. This postponement in delay charges, as well as the postponement of the date by which the power plant was to be fully operational, was possible only if the plant was in a position to provide a net electrical output and

an energy availability of at least 150 Megawatts using natural gas as fuel by the scheduled energy delivery date. Although the change was effected within the permissible period, the NAO maintains that this constituted another significant change late in the bidding process, compounding similar concerns highlighted in the preceding paragraphs.

3.23 Other concerns relating to the RfP emerged following the NAO's review of the EIA. According to Enemalta, the onshore option for LNG storage was eliminated since, after a number of studies, it was concluded that the offshore option was the most feasible. The NAO sought to review the basis of this decision and requested the studies cited during the bidders' conference. Enemalta informed the NAO that this decision was not based on any studies carried out, but on the content of submissions made by bidders in reply to the EoIC. According to Enemalta, all submissions received made reference to offshore storage (Floating Storage Unit (FSU) or Floating Storage Regasification Unit) and there were no proposals that put forward a solution that included onshore storage. Enemalta maintained that it was on this basis that the RfP was issued solely for floating storage solutions for LNG. The NAO considered Enemalta's reference to bids as studies as incongruent. Moreover, the NAO failed to understand Enemalta's assertion that all EoIC submissions made reference to offshore storage and that none of the submissions proposed solutions which included onshore storage, when this was not the case.

3.24 Although the NAO acknowledges that the offshore solution was more readily achievable within the established timeframes, the various assertions made by Enemalta justifying resort to the offshore solution were factually incorrect. Moreover, reference to the minutes of the Programme Review Board provides contradictory information. During the Board's meeting held on 2 May 2013, the following was minuted, "The Board is expecting that, given the 18 month project timeline, the most probable technical solution would involve floating storage. The EC has a set of Best Available Techniques reference documents, which state that floating storage is not the best technique, and it is only considered unless the onshore option is demonstrated as not possible." With regard to the views expressed by Enemalta's technical consultants, to limit LNG storage to one solution, the NAO noted the following in the Board minutes of 13 May 2013, "The first issue is the onshore or offshore placement of the LNG infrastructure. According to the technical specialists the onshore option is better however the tight timelines almost certainly exclude this option."

3.25 The NAO enquired with the Minister MECW and the Chair RfP Evaluation Committee whether the decision to resort to an offshore solution was dictated by the 18-month timeframe for completion. According to the Minister MECW, the offshore option allowed for quick reversal through removal of the FSU, deeming this as having the least environmental impact. Furthermore, the Minister MECW indicated that removal of the FSU was possible once supply of gas was secured through the gas pipeline. The Chair RfP Evaluation Committee referred to studies undertaken that considered

the implications of offshore versus onshore storage facilities; however, despite requests, no such studies were provided.

- 3.26 Shifting focus onto the evaluation of the RfP, by the bid submission deadline, three bids were received by Enemalta, namely those by the ElectroGas Consortium, the Endeavor Consortium and the Yildirim Consortium. It was in Enemalta's interest to ensure a wide participation to obtain the best possible value. Whether the competitive tension that Enemalta sought to create through this process of procurement was achieved, or otherwise, is debatable given that selection was ultimately restricted to one of two bids.
- 3.27 Of significant concern to the NAO was the lack of appropriate due diligence undertaken at the RfP evaluation. Following queries raised, Enemalta asserted that a due diligence process had been carried out on the ElectroGas Consortium and the Endeavor Consortium with relevant findings featured in the evaluation reports. While no concerns were identified with respect to the Endeavor Consortium, certain issues were noted with regard to the submission by the ElectroGas Consortium. According to Enemalta, all the financial statements of the members of the ElectroGas Consortium were reviewed. In all cases, a clean opinion on the financial statements of the members was given. However, in the case of Gasol plc, an emphasis of matter was raised. Although a potential situation for a going concern issue was highlighted, the RfP Evaluation Committee viewed the submission made by the Consortium as admissible. This view was based on the premise that the submission by Gasol plc had no influence on the commercial and technical criteria and that it did not qualify as an insolvent company. Moreover, Socar Trading SA had provided a letter of commitment to cover the equity contribution of Gasol plc and a letter from the banks had been submitted confirming willingness to support the project.
- 3.28 The NAO is of the opinion that, although not qualified, the financial statements should have raised significant concern for the Stage 2 Evaluation Committee with respect to Gasol plc. According to the Chair RfP Evaluation Committee, Gasol plc was not legally or technically insolvent at that time and the role of Gasol plc within the Consortium was not fundamental as it bore no influence on the evaluation process. Notwithstanding this, the NAO maintains that the Committee too readily dismissed concerns that the audit reports should have raised. Justification that Socar Trading SA mitigated such risks through its commitment to cover the equity contribution of Gasol plc raises further doubt as to the utility of Gasol plc as the lead member of the ElectroGas Consortium.
- 3.29 Overall, the NAO is of the opinion that the due diligence undertaken was insufficient. While the review of technical-related matters was comprehensive, with verifications extended to encompass downstream partners, other aspects of the due diligence process were lacking. The financial aspect of the due diligence process was not sufficiently robust and thereby deemed inadequate by the Office given the materiality of the project. The NAO noted instances of reliance, at RfP stage, on

the due diligence undertaken by the EoIC Evaluation Committee, when this was carried out in a preliminary manner on the assumption that an in-depth verification would be carried out at RfP. Other aspects inadequately addressed in the due diligence undertaken related to governance and control checks, again reliant on the initial basic assessment undertaken at the EoIC stage. Checks relating to fraud, bribery and corruption, internal controls, risk management considerations, ethical conduct and other governance issues were not part of the due diligence carried out. The NAO is of the opinion that consideration of these aspects would have strengthened the scrutiny undertaken.

3.30 Having addressed the general concerns identified by the NAO with respect to the RfP, attention is now focused on the stage-specific conclusions arrived at by the Office. With regard to Stage 1 of the evaluation, the NAO is of the opinion that the exclusion of the Yildirim Consortium was justified and in line with that stipulated in the RfP. The bids submitted by the ElectroGas Consortium and the Endeavor Consortium had shortcomings in terms of completeness identified by the Stage 1 Evaluation Committee. Notwithstanding this, the Committee considered both bids materially complete, which conclusion was deemed reasonable by the NAO. However, the Office's attention was drawn to the fact that, although similar shortcomings were identified in bids by the ElectroGas Consortium and the Endeavor Consortium, the Committee only sought advice from the technical and legal teams with respect to the bid by the ElectroGas Consortium. This difference in treatment was of concern to the NAO, for it indicated that the level of assurance sought with respect to the bid by the ElectroGas Consortium was not applied in the case of the bid by the Endeavor Consortium.

3.31 Stage 2 of the RfP evaluation process entailed determining whether bids adhered to the minimum requirements outlined in the RfP. The Stage 2 Evaluation Committee noted multiple instances of shortcomings, which ranged from outright non-conformity to minor deviations. At times, shortcomings related to insufficient documentation or specifications that were to be determined at a later stage. The NAO deemed the reasoning of the Committee, in determining what was to be addressed by bidders through confirmation in terms of material compliance and what was to be resolved in the event of selection as the preferred bidder, as unclear. The Committee referred the most significant deviations identified to the Programme Review Board. Although referral to the Board related to both bids, the NAO noted that this Committee, similar to the Stage 1 Evaluation Committee, only referred matters for legal consideration with respect to the bid by the ElectroGas Consortium. Despite the considerable number of instances of non-compliance with the minimum requirements noted by the Committee, the submissions by the ElectroGas Consortium and the Endeavor Consortium were recommended to proceed to the ensuing stages of evaluation. While the NAO is cognisant of the shortcomings identified during Stage 2 of the RfP evaluation, the Office acknowledges that the Committee was limited in terms of options available. In the circumstances, the NAO is of the understanding that allowing for the rectification of deviations from the minimum requirements at a later stage was reasonable.

- 3.32 The NAO deemed the criteria for the allocation of marks at Stage 3 of the RfP evaluation process as well designed and clearly defined, which eliminated subjectivity in the allocation of marks. Notwithstanding this, there were instances where the NAO disagreed with the marks assigned. Despite the inconsistencies noted, this Office is of the understanding that all cases reviewed bore no significant impact on Stage 3 of the evaluation process and no effect on the final outcome of the selection process.
- 3.33 Stage 4 of the RfP evaluation process compared bid price and terms. Stage 4 was assigned a weighting of 80 per cent of the overall mark. The criteria that were to serve as the basis of adjudication were also specified in the RfP. In the NAO's opinion, this ensured an element of transparency and fairness in the adjudication process, as the basis of selection was declared at the outset, thereby creating a level playing field for bidders. The evaluation at Stage 4 was based on a pre-determined financial model reflecting the criteria specified in the RfP. The NAO is of the opinion that the model was a valid tool for the financial evaluation of the complex bids submitted, allowing for the monetisation of the project over its lifespan through the synthesis of diverse variables into one comparable rate. This Office is of the understanding that the a priori determination and publication of bid parameters also contributed towards the transparency of the Stage 4 evaluation process. The NAO reviewed the inputs plugged into the model by the Stage 4 Evaluation Committee and confirmed the accuracy thereof. In addition, the Office ascertained that the model calculations were uniformly applied in both submissions, which provided an element of assurance with respect to Stage 4 of the evaluation process. Notwithstanding this, the NAO noted a few instances where the model mechanics were adjusted by the Stage 4 Evaluation Committee following submissions by both Consortia that did not fit the structure of the financial model and that specified in the bid forms. The NAO noted other instances where submissions were revised following clarifications sought by the Committee. Notwithstanding the multiple instances of changes to submissions by the ElectroGas Consortium and the Endeavor Consortium during Stage 4 evaluation, the NAO established that these bore no significant impact on the outcome of this stage of the evaluation process and were of no consequence to the outcome of the selection process.
- 3.34 Finally, the NAO's attention was drawn to the possible conflict of interest of the Stage 4 Evaluation Committee Team Leader. The Team Leader was the Managing Partner of Nexia BT, which firm was the auditor of GEM Holdings Ltd, one of the shareholders of the ElectroGas Consortium. A declaration of impartiality was signed by the Team Leader on 23 September 2013. In addition, the NAO established that all members of the various RfP Evaluation Committees were aware of the bidders shortlisted at the EoIC stage prior to the signature of this declaration. The Office sought to determine whether Nexia BT was the auditor of GEM Holdings Ltd at the time of adjudication of bids, as this would have been in breach of the declaration of impartiality. Queries to this effect were made with GEM Holdings Ltd and Nexia BT. The parties informed the NAO that Nexia BT

were appointed auditors on 25 April 2014, which implied that the engagement of the auditors of GEM Holdings Ltd occurred after the conclusion of the RfP evaluation. An engagement letter to this effect was provided by GEM Holdings Ltd to this Office; however, verification with the Malta Financial Services Authority was not possible.

- 3.35 Stage 5 of the RfP evaluation entailed the aggregation of the scores arrived at by the Stage 3 and Stage 4 Evaluation Committees, which was to establish the Preferred Bidder and the Reserve Bidder. The NAO noted that the weighting determined in the RfP was correctly applied. This Office acknowledges that the outcome of the Stage 5 evaluation was referred to the Programme Review Board for its consideration, bringing the RfP evaluation process to a close, with the ElectroGas Consortium proposed as the Preferred Bidder.
- 3.36 Having concluded the review of the RfP evaluation process, the NAO sought to establish whether any alternative projects and/or models were considered. When queried on the alternatives considered, Enemalta referred to the EIA, which in turn made reference to the Environmental Impact Statement (EIS). The EIS outlined the alternative sites, technologies and layouts considered, as well as the downscaling of the project. The only site found suitable for the proposed development was the Delimara Power Station, identified on the basis of its location and the power distribution infrastructure. When considered in terms of applicable policy, the proposed combined use of a CCGT plant and the interconnector emerged as the preferred option from a technology perspective. In terms of alternative layouts, three options relating to the proposed layout of the CCGT and LNG facilities were considered. The offshore option outside of the port of Marsaxlokk was not considered due to various reasons. With regard to the possible downscaling of the project, the EIS indicated that this could not be considered due to the decommissioning of old plant when the installation of the interconnector was completed.
- 3.37 The NAO is of the understanding that in its consideration of alternatives, Enemalta prioritised adherence to the applicable energy policy. This Office reviewed the National Energy Policy for the Maltese Islands 2012 and ascertained that reference was in fact made to a strategy driven by diversification from the use of oil as an energy source, while ensuring security of supply. Furthermore, this Policy specifically indicated resort to natural gas as integral in changing generating capability. The Policy pre-dated the design of the EoIC and the RfP.
- 3.38 While the choice of plant was dictated by applicable policy, and the identification of sites was driven by practical considerations and infrastructural limitations, an element of reservation persists with regard to the layout of the facilities, specifically in terms of resort to an offshore solution as opposed to the onshore storage of gas. The NAO's attention was drawn to the minutes of the Programme Review Board, wherein the experts engaged by Enemalta outlined that an onshore

option for LNG infrastructure was better than the offshore alternative. According to the minutes, this was in line with the Best Available Techniques reference document issued by the EC, which indicated that floating storage should only be considered when the onshore option was not possible. Stated in the EC publication 'IPPC: Reference Document on Best Available Techniques on Emissions from Storage' was that floating storage was not considered a Best Available Technique; however, this could not be excluded. The NAO noted that ElectroGas Ltd was granted a derogation from this particular Best Available Technique in the IPPC subsidiary permit issued to it.

3.39 The NAO sought to establish whether Enemalta's decision to opt for this procurement model was the result of the consideration of other models. Enemalta indicated that several options were considered, namely, internal development by Government and/or Enemalta of the power and gas facilities, a management agreement, the issue of a GSA and the internal development of the power plant facility, entry into a tolling agreement, and a PPA and GSA. Enemalta maintained that in the context of these options, the most appropriate manner in which the project could be implemented was through a PPA and a GSA. Despite requests for documentation in support of the options identified by Enemalta, the NAO was not provided with evidence of analysis undertaken prior to the commitment to procure power and gas from one supplier. In the absence of documentation rendering evident the consideration of alternatives, the NAO's concerns regarding the design of the procurement process emerge.

4. Laying the Groundwork

4.1 In order to facilitate the project, Enemalta had set up a company, Malta Power and Gas Ltd, to undertake preliminary work, such as the securing of permits and the commissioning of studies. Enemalta sold its shareholding in Malta Power and Gas Ltd to the ElectroGas Consortium, as contemplated in the RfP and formalised in the Share Purchase Agreement entered into on 9 May 2014. By virtue of this agreement, Enemalta transferred its shares in Malta Power and Gas Ltd to the members of the ElectroGas Consortium, that is, Gasol plc, GEM Holdings Ltd, Siemens Project Ventures GmbH and Socar Trading SA, for a total consideration of €10,000. The transferees and Malta Power and Gas Ltd acknowledged and accepted that the latter was to reimburse Enemalta an amount of €30,000,000 for services rendered, to be invoiced at a future date. The NAO established that this fee was paid on time. The SPC changed its name to ElectroGas Malta Ltd on 9 July 2014. Subsequent agreements relating to the project were entered into by Government and Enemalta with ElectroGas Ltd.

4.2 It was in this context that ElectroGas Ltd was tasked with the design, build and operation of the onshore CCGT Delimara 4 power plant and the FSU. Furthermore, ElectroGas Ltd was required to source a minimum supply of LNG for use by the Delimara 4 and Delimara 3 plants. The investment in infrastructure was to be fully financed by ElectroGas Ltd, with the Company having formal title

to the assets. Accordingly, a number of contracts necessary for the operation and maintenance of the project were entered into in 2014 and 2015.

4.3 ElectroGas Ltd secured title to the area of sea required in terms of the project on 12 December 2014. To this end, ElectroGas Ltd and the Authority for Transport in Malta entered into the Exclusive Berthing Rights Agreement, whereby the Authority granted ElectroGas Ltd the exclusive right to use, occupy, enjoy, administer, operate and manage a specific sea area. The Agreement was to remain in effect until the date of expiry or termination of the IA. In consideration for the use of the sea area granted, ElectroGas Ltd was to effect an annual payment of €1 to the Authority.

4.4 Similarly, on 16 December 2014, Enemalta and ElectroGas Ltd entered into a Site Lease Deed, whereby Enemalta sublet the premises wherefrom the Company was to undertake project-related business. The area sublet exceeded 19,000 square metres, excluding a tract of reclaimed land on which the jetty was to be constructed, and was subject to rent of €11.65/m². The term of the Site Lease Deed was for a fixed period of 22 years from the commencement date, with the possibility of extending for a further 12 years. On termination, unless the energy facilities were transferred to Enemalta, ElectroGas Ltd was required to decommission the facilities on the leased premises.

5. The Supply Agreements

5.1 Key contractual developments were registered on 14 April 2015, when Enemalta and ElectroGas Ltd entered into a series of agreements, namely the IA, the PPA and the GSA, collectively referred to as the Supply Agreements. In sum, the Supply Agreements outlined the terms that were to regulate the supply of electricity and gas to Enemalta by ElectroGas Ltd.

5.2 The PPA was entered into by ElectroGas Ltd and Enemalta on 14 April 2015, whereby ElectroGas Ltd agreed to make available electrical energy to Enemalta and to supply up to 205MW of electrical energy every hour, when dispatched by Enemalta, from the Delimara 4 CCGT power plant that was to be constructed. In turn, Enemalta agreed to pay for the availability of electrical energy at Delimara 4 and the electrical output delivered by ElectroGas Ltd to Enemalta's network throughout the 18-year term of the PPA.

5.3 In order to meet its obligations in terms of supply and availability of energy to Enemalta, ElectroGas Ltd was to design, engineer, construct, finance, own, operate and maintain Delimara 4, which was to conform to the minimum functional specifications established in the IA with respect to characteristics, capacity and performance.

5.4 Two key milestones were established, namely the Scheduled Open Cycle Energy Delivery Date and the Scheduled Energy Delivery Date. Open cycle refers to a mode of operation where the flue gases

from a gas turbine generator are fed directly to the atmosphere. The tendered open cycle energy availability of Delimara 4 was to be 134MW. The Scheduled Open Cycle Energy Delivery Date was to be achieved when the requirements in terms of open cycle operation of Delimara 4 were met. This date was set at 14 October 2016, yet achieved on 5 April 2017. When operating in combined cycle mode, the tendered energy capacity of the Delimara 4 plant was to be 205MW. This level of output was to be achieved by 14 April 2017; however, was attained on 10 August 2017. In a combined cycle power plant, the output heat of the gas turbine flue gas is utilised to generate steam by passing it through a heat recovery system generator so it can be used as input heat to the steam turbine, thereby generating additional electricity. The attainment of these milestones was certified by an independent engineer in line with the functional, performance and reliability testing stipulated in the PPA.

- 5.5 The NAO ascertained that the Open Cycle Energy Delivery Date and the Energy Delivery Date were achieved by ElectroGas Ltd prior to the Last Open Cycle Energy Delivery Date and the Last Energy Delivery Date, respectively. However, in view of the failure by ElectroGas Ltd to achieve the set milestones by their scheduled dates, queries were raised by the NAO with respect to delay charges imposed by Enemalta on ElectroGas Ltd. The NAO established that delay charges with respect to the Open Cycle Energy Delivery Date and the Scheduled Energy Delivery Date amounted to €10,440,000 and €9,680,000, respectively. Additional penalties of €2,295,000 were also due in 2016 and 2017 for delays in achieving the Gas Availability Date pursuant to the GSA. Although the total delay liquidated damages amounted to €22,415,000, these were effectively capped at a comprehensive €18,000,000 by the PPA and the GSA. The Office was unable to ascertain whether the delay liquidated damages were paid by ElectroGas Ltd as queries submitted to Enemalta in this regard remained unaddressed.
- 5.6 Tariffs were payable by Enemalta to ElectroGas Ltd as consideration for the energy made available, the energy supplied and the provision of ancillary services and starts, that is, the Energy Availability Payment, the Energy Delivery Payment and Additional Charges, respectively. The Energy Availability Payment for a given month was to be calculated through reference to a per unit rate, the amount of energy made available, a weighting taking into account the hour when such energy was available and an adjustment factor. On the other hand, the Energy Delivery Payment for a given month was to be based on the net electrical output less the imported electricity aggregated for the hours in the billing period. A rate was to be applied to the energy delivered, which was to be based on the effective gas price, the guaranteed Delimara 4 heat rate, and the total variable operating costs for power and gas. Additional Charges were to be levied by ElectroGas Ltd for Starts and Reactive Power.
- 5.7 Based on invoices issued by ElectroGas Ltd, between February 2017 and June 2018, energy made available and energy delivered to Enemalta amounted to 1,382,605MWh and 1,420,829MWh,

respectively. During this period, Energy Availability Payments and Energy Delivery Payments amounted to €53,634,937 and €112,348,660, respectively.³

- 5.8 The payment of performance liquidated damages was stipulated in the PPA should the average energy availability of each gas turbine fall below the acceptable level established in the Agreement. The NAO established that there were no instances of default when operating in open cycle mode. The period of review relating to combined cycle operation was still active at the time of reporting and therefore it was not possible to ascertain whether performance liquidated damages were due. Notwithstanding this, as at end November 2017, there had been no instances of default.
- 5.9 Integral to the effective management of the PPA were other provisions relating to the metering of output, reporting, retention of records, planning and monitoring, as well as provisions regulating the resolution of disputes.
- 5.10 The GSA was entered into between ElectroGas Ltd and Enemalta on 14 April 2015. Through this Agreement, ElectroGas Ltd agreed to make available and supply natural gas to Enemalta for the purposes of operating Delimara 3. In turn, Enemalta agreed to pay for the availability of gas and the gas delivered pursuant to the terms and conditions of this Agreement. The term of the GSA was of 18 years; however, Enemalta could terminate the Agreement earlier, subject to notification at specific junctures during the term of the GSA.
- 5.11 In terms of the GSA, ElectroGas Ltd was to design, engineer, construct, finance, own, operate and maintain the gas facility, which was to conform to the minimum functional specifications in terms of technical requirements, design and emissions control. The gas facility was to include an FSU required to receive and store LNG, together with associated marine infrastructure, including mooring facilities for floating storage, wharves and jetties. Also required was infrastructure necessary in the re-gasification, delivery and metering of gas to Delimara 3 in line with the GSA, and to Delimara 4 in line with the PPA.
- 5.12 Gas deliveries were to be attained by the Scheduled Gas Availability Date, that is, 14 October 2016. The NAO established that gas deliveries were not made and the gas facility was not fully operational by this date, which milestone was in fact achieved on 16 March 2017.
- 5.13 The key project deliverables in terms of the GSA were linked to the conversion of Enemalta's Delimara 3 plant. Once converted, Delimara 3 was to operate on gas sourced from the gas facility that was to be constructed by ElectroGas Ltd. This conversion did not fall within the ambit of the

³ The anomalous situation whereby units of energy delivered exceeded energy available may be partly attributed to information not provided for the months of April 2017 to June 2017 with respect to energy availability.

GSA, as responsibility in this respect rested with Enemalta. The conversion was to be undertaken in two stages. Delimara 3 Phase 1 entailed the conversion of the first four diesel engines to operate on gas and gasoil, which milestone was to be attained by 14 October 2016. This was in fact achieved on 16 March 2017. On the other hand, Delimara 3 Phase 2, which related to the conversion of the remaining four engines, was to be achieved by 14 April 2017; however, this milestone was attained on 28 September 2017. The attainment of these milestones was certified by an independent engineer in line with the functional, performance and reliability testing stipulated in the GSA.

- 5.14 The NAO ascertained that the Phase 1 Gas Delivery Date and the Phase 2 Gas Delivery Date were achieved by ElectroGas Ltd prior to the Last Phase 1 Gas Delivery Date and the Last Phase 2 Gas Delivery Date, respectively. However, the delays in attainment of the Phase 1 and Phase 2 Gas Delivery Dates by their scheduled dates resulted in the imposition of delay liquidated damages by Enemalta on ElectroGas Ltd. The NAO confirmed that Enemalta levied delay liquidated damages of €2,295,000 with respect to the failure to achieve the Phase 1 Gas Delivery Date by the scheduled date. No delay liquidated damages were charged by Enemalta with regard to Phase 2, for the €18,000,000 capping applicable to the PPA and GSA had been reached by the time these delays were realised. The Office was unable to ascertain whether the delay liquidated damages were paid by ElectroGas Ltd as queries submitted to Enemalta in this regard remained unaddressed.
- 5.15 The GSA differentiated between the gas to be made available by ElectroGas Ltd and the gas to be supplied by ElectroGas Ltd when nominated by Enemalta. The Gas Availability Payment for a given month was to be determined through reference to a per unit rate, the quantity of gas made available and an adjustment factor accounting for stock shortfalls. On the other hand, the Gas Delivery Payment for a given month was to be the summation of an allowance in respect of gas cost recovery and another allowance relating to other operating costs. Based on invoices issued by ElectroGas Ltd, between February 2017 and June 2018, gas made available and delivered to Enemalta amounted to 11,844,897mmBTU and 4,160,119mmBTU, respectively. The corresponding invoiced amounts for Gas Availability and Gas Delivery were €14,309,041 and €48,957,424, respectively.
- 5.16 In cases where the average availability of the gas facilities fell below the acceptable level established in the GSA, the Agreement provided for the payment of performance liquidated damages. In submissions made to the NAO, Enemalta stated that as at end November 2017, there had been no cases when the average availability of the gas facilities had fallen below the acceptable level established in the GSA. This implied that no performance liquidated damages were levied by Enemalta.
- 5.17 The GSA established provisions regarding the quality of gas, with procedures established outlining the treatment of non-conforming gas. Other provisions addressed metering requirements, maintenance and forced outages, as well as dispute resolution procedures.

- 5.18 The IA provided the framework of responsibilities and obligations that were to be borne by Enemalta and ElectroGas Ltd in terms of the project. Among other matters, the IA established the dates of commencement and completion of the key stages of the project. To this end, 14 April 2015 was determined as the start date, with the scheduled delivery date for energy and gas set at 24 months after this date. The term of the IA was for a period of 18 years from the Open Cycle Energy Delivery Date, or as accordingly extended.
- 5.19 Also stipulated in the IA were a number of conditions that were to be satisfied or waived for financial closing to be achieved, that is, the point at which ElectroGas Ltd secured long-term financing for its project. These conditions included entry into the SSA, the Conversion Term Agreement, and other direct agreements. Another condition related to the establishment of the maximum aggregate principal under the term loan of the financing agreements, set at €380,000,000. The NAO established that all conditions were satisfied by financial closing.
- 5.20 Furthermore, according to the IA, Enemalta committed to buy minimum volumes of electrical output and gas to allow ElectroGas Ltd to enter into long-term LNG supply agreements essential for the performance of its obligations. This commitment by Enemalta was governed by a 'take or pay' provision, obliging Enemalta to consume or pay for agreed quantities of gas, utilised as gas for Delimara 3 or as electricity from Delimara 4, over specified reference periods. It was possible for Enemalta to recover a portion of the Take or Pay Deficiency that arose in the previous supply reference period through a quantity of gas and equivalent net electrical output, referred to as Enemalta Make up Gas.
- 5.21 The term of the IA was organised around distinct LNG supply reference periods. The Early Gas Period was to commence on 14 August 2016 and end on 13 April 2017. Following the Early Gas Period was the LNG Supply Term, with two distinct stages, the Fixed Price LNG Supply Term and the Indexed Price LNG Supply Term. The Fixed Price LNG Supply Term was to expire after five years, at which point the Indexed Price LNG Supply Term would commence. During the Early Gas Period, the Enemalta contract quantity was either zero or one cargo of LNG in the range of 2,500,000mmBTU to 3,000,000mmBTU. On the other hand, during the Fixed Price and Indexed Price LNG Supply Terms, the Enemalta annual contract quantity consisted of the contract volume and any upward revisions effected by Enemalta, that is, a minimum of 14,000,000mmBTU. A Conversion Term was to commence following the LNG Supply Term, during which period the Enemalta contract quantity was zero. In essence, during the Conversion Term, the roles of Enemalta and ElectroGas Ltd would be reversed with regard to the supply of gas, with Enemalta supplying LNG to ElectroGas Ltd for its generation of power.
- 5.22 In the NAO's review of the Early Gas Period, the Office understood that Enemalta paid the difference between the stipulated range of 2,500,000mmBTU to 3,000,000mmBTU and the nominated

quantity of gas of 316,044mmBTU in terms of its take or pay obligations. Despite requests for clarification submitted to Enemalta, no replies were forthcoming.

- 5.23 The IA defined actual contract stock as the amount of LNG held by ElectroGas Ltd in the gas facilities, less that required to maintain the FSU at a specified temperature and that in transit. The contract stock requirement varied according to the stages of the project, with 4,000m³ of LNG on or after the Gas Availability Date, 16,000m³ of LNG on or after the Open Cycle Energy Delivery Date and 20,000m³ of LNG on or after the achievement of the Gas Availability Date and the Open Cycle Energy Delivery Date.
- 5.24 In terms of the IA, Enemalta was to provide ElectroGas Ltd with regular forecasts specifying the amount of net electrical output and gas that was to be dispatched and nominated from the Delimara 4 and the gas facilities. In turn, ElectroGas Ltd was to inform Enemalta of scheduled cargo deliveries on a three-month rolling basis. The NAO reviewed planning, dispatch and stock management requirements and no issues of concern were identified.
- 5.25 Given Enemalta's significant reliance on electricity and gas supplied through this project, it was fundamental that, at all times during the 18-year term of the agreement, ElectroGas Ltd was able to display compatibility with Enemalta's infrastructure and the electricity's distribution network, conformity with all licence and permit conditions and observance of agreed business security criteria relating to security of energy supplies. To this end, the IA stipulated the minimum functional specifications for the plants.
- 5.26 The IA defined the billing and payment terms to be adhered to by the parties. The NAO sought to ascertain whether invoices raised by ElectroGas Ltd were in accordance with the provisions of the IA. The Office established that invoices were broadly conformant. Between June 2017 and August 2018, Enemalta payments to ElectroGas Ltd amounted to €223,309,831.
- 5.27 Restrictions on the lease and transfer of assets and shares were imposed on ElectroGas Ltd through the IA. After the final effective date, the initial shareholders of ElectroGas Ltd were to retain their percentage shareholding for at least three years after the Open Cycle Energy Delivery Date. This assumes relevance in view of changes to the composition of the ElectroGas Consortium that took place after entry into the IA.
- 5.28 The IA stipulated each party's obligations in terms of financial guarantees. ElectroGas Ltd was to provide a performance guarantee for €5,000,000 in favour of Enemalta, while Enemalta was to procure a letter of credit in favour of ElectroGas Ltd, if requested. The NAO established that the letter of credit was not required during the period reviewed and ascertained adherence in terms of provision of the performance guarantee, which had not been called.

- 5.29 Other matters considered in the IA related to insurance requirements, performance guarantees, and liabilities and indemnities in respect of claims emanating from the Agreements. Also outlined in the IA were measures to be followed in case of termination of the Supply Agreements by any of the parties, the resolution procedure that was to be employed in case of disputes and provisions regulating possible adjustments to the end of term.
- 5.30 Deemed essential in terms of the framework of supply was the SSA. Through this Agreement, Government was to ensure that, should any circumstance materialise which could potentially lead to the termination of the Supply Agreements, the Government would be able to ensure continuity of security of an uninterrupted supply of electrical power in Malta, under the same terms and conditions of the Supply Agreements. However, this Agreement was not entered into simultaneous to the Supply Agreements, pending the outcome of the EC's decision regarding possible implications of state aid. This resulted in a delayed entry into the SSA, in fact signed on 15 December 2017.

Comparison of the Draft and Final Supply Agreements

- 5.31 The NAO compared the draft Supply Agreements appended to the RfP with those entered into by Enemalta with ElectroGas Ltd. Notable in this regard was the introduction of operation of Delimara 4 in open cycle mode. In the draft PPA, the open cycle energy delivery date was not considered, but only referral to the energy delivery date was made. Another significant amendment related to the consideration of take or pay obligations. In the draft PPA and GSA, the quantity of take or pay was to be of net electrical output and gas, and was to be 85 per cent of the annual contract power and the annual contract quantity, respectively. Specified in the final IA was that during the LNG Supply Term, the Enemalta contract quantity consisted of the contract volume and any upward revisions effected by Enemalta. This implied that the 85 per cent limitation no longer applied to the determination of the take or pay quantity. The interchangeability of net electrical output with gas in accounting for Enemalta's take or pay obligations also represented a notable change.
- 5.32 Another change noted by the NAO was the introduction of distinction between Delimara 3 Phase 1 and Delimara 3 Phase 2. In the draft GSA, no reference was made to the Phase 1 Gas Delivery Date, with the key milestone in this case being the Gas Delivery Date, scheduled for 18 months following commencement. In the final GSA, the Scheduled Phase 1 Gas Delivery Date was to be 18 months from the Schedule Start Date, while the Scheduled Phase 2 Gas Delivery Date was to be 24 months from the Schedule Start Date.
- 5.33 Other provisions were introduced through the final IA. These included the Enemalta development fee of €30,000,000, payable by ElectroGas Ltd, as well as the concept of a conversion term. Related to this was the introduction of a GSA exit and an accelerated GSA exit, which allowed Enemalta to terminate the GSA at specific junctures during its term.

6. Direct and Other Transaction Agreements

- 6.1 On 13 April 2015, Enemalta entered into a series of Direct Agreements relating to the purchase of LNG and the FSU. In essence, these were meant to allow for Enemalta to replace ElectroGas Ltd in its agreements with third parties should certain circumstances arise.
- 6.2 Socar Trading SA and ElectroGas Ltd entered into the LNG Sale and Purchase Agreement (SPA) on 14 April 2015. This Agreement regulated the sale of LNG by Socar Trading SA and its purchase by ElectroGas Ltd. The term of the Agreement was to expire after 10 years and one month from the start date. Specified was the price of LNG sold and delivered under the LNG SPA, which during the Early Gas Period was set at 13.85 per cent Brent per mmbTU. During the Fixed Price Period and the Indexed Price Period, the price for the annual contract quantity of LNG was €9.40 per mmbTU and 14 per cent Brent per mmbTU, respectively. The LNG SPA stipulated that Socar Trading SA was to enter into the Shell Direct Agreement with Shell for the supply of LNG by 14 October 2016. The NAO did not review this Agreement as Enemalta was not privy to the Shell Direct Agreement.
- 6.3 Corresponding to the LNG SPA was the Enemalta – LNG SPA Direct Agreement, entered into by Enemalta, Socar Trading SA and ElectroGas Ltd on 13 April 2015. The term of this Agreement was to extend until the date of termination of the LNG SPA. In this Direct Agreement, it was noted that in order to carry out its obligations pursuant to the IA, ElectroGas Ltd had entered into a long-term LNG SPA with Socar Trading SA for the shipment of LNG to the ElectroGas Ltd facilities. Through this Direct Agreement, it was guaranteed that should certain circumstances occur, resulting in the termination of the LNG SPA or the IA, Enemalta could be assigned and novated the LNG SPA, effectively assuming the rights and obligations of ElectroGas Ltd.
- 6.4 Other agreements for which Enemalta entered into direct agreements related to the FSU. The FSU Conversion and Charter Agreement was entered into by ElectroGas Ltd, as the charterer, and Armada Floating Gas Storage Malta Ltd, the vessel owner, on 13 April 2015 for the use and hire of the FSU. Specified in this Agreement was that Armada Floating Gas Storage Malta Ltd was to convert the FSU in accordance with the specifications set by ElectroGas Ltd.
- 6.5 The counterpart to the FSU Conversion and Charter Agreement was the FSU – Enemalta Charter Direct Agreement, entered into by Enemalta, ElectroGas Ltd and Armada Floating Gas Storage Malta Ltd on 13 April 2015. Through this Agreement, it was ensured that should certain circumstances materialise resulting in the termination of the IA, Armada Floating Gas Storage Malta Ltd could be paid certain termination costs or Enemalta be assigned and novated the FSU Conversion and Charter Agreement.

- 6.6 In addition to the FSU Conversion and Charter Agreement, Electrogas Ltd and Armada Floating Gas Services Malta Ltd entered into the FSU Operation and Maintenance (O&M) Agreement on 13 April 2015. This Agreement regulated the operation, maintenance and repair of the FSU by Armada Floating Gas Services Malta Ltd and was to be effective until the expiry or earlier termination of the FSU Conversion and Charter Agreement.
- 6.7 In turn, Enemalta, ElectroGas Ltd and Armada Floating Gas Services Malta Ltd entered into the FSU – Enemalta O&M Direct Agreement on 13 April 2015. Through this Direct Agreement the parties ensured that the FSU O&M Agreement was novated to Enemalta at the time that the FSU Conversion and Charter Agreement was novated to Enemalta in accordance with the Enemalta FSU Charter Direct Agreement.
- 6.8 Finally, Enemalta, ElectroGas Ltd, Armada Floating Gas Storage Malta Ltd (the FSU owner) and Armada Floating Gas Services Malta Ltd (the FSU operator) entered into the FSU – Enemalta Bridge Direct Agreement on 13 April 2015. This Agreement was to remain in effect until ElectroGas Ltd secured long-term financing. In this context, the FSU – Enemalta Bridge Direct Agreement provided for the assignment and novation of the FSU Conversion and Charter Agreement and the FSU O&M Agreement to Enemalta or Government should certain circumstances arise in the interim.
- 6.9 On 14 April 2015, Enemalta and ElectroGas Ltd entered into two other agreements, namely, the Site Services Agreement and the Electricity Connection Agreement. Under the terms of the Site Services Agreement, Enemalta was engaged by ElectroGas Ltd to provide certain services relating to the construction phase and operation phase of Delimara 4, and the operation phase of the gas facilities. These services included the provision of potable water, as well as access to fire-fighting systems, seawater cooling water systems and the sewage system. Through the Electricity Connection Agreement, Enemalta granted ElectroGas Ltd the right to connect Delimara 4 to the network at the connection point. In consideration for the facility to connect to the network, ElectroGas Ltd was to pay Enemalta a one-time charge of €250,000 and a monthly payment of €2,000 from the connection date up to the expiry of the term.
- 6.10 The Share Purchase Agreement, the Site Lease Deed, the Enemalta – LNG SPA Direct Agreement, the FSU – Enemalta Bridge Direct Agreement, the FSU – Enemalta Charter Direct Agreement, the FSU – Enemalta O&M Direct Agreement, the IA, the PPA, the GSA, the SSA, the Site Services Agreement and the Electricity Connection Agreement were collectively referred to as the Transaction Agreements. Together, the Transaction Agreements regulated all aspects of the contractual relationship between Enemalta, ElectroGas Ltd and other parties with respect to the project. Through these agreements, ElectroGas Ltd became the principal source of gas supplied to Enemalta, and, consequently, the main source of energy for Malta.

6.11 Enemalta, ElectroGas Ltd, Gasol Malta Ltd, GEM Holdings Ltd, Siemens Project Ventures GmbH and Socar Trading SA signed a Side Letter pending the sanctioning of the EC that the SSA and the Transaction Agreements were compliant with EU state aid rules. Stipulated in the Side Letter, dated 14 April 2015, was that the Transaction Agreements were to be placed in escrow pending a positive decision by the EC. In the event that the EC deemed that certain changes to the Transaction Agreements were required in order to comply with state aid rules, the signatories to the Side Letter were to negotiate amendments to the Agreements.

7. Other Project-related Agreements

7.1 Although not part of the Transaction Agreements, on 14 April 2015, Government and Socar Trading SA entered into an LNG SSA. According to the LNG SSA, given the considerable insecurity of supply in the future global LNG market, the Government, as Enemalta's majority shareholder, sought to secure a clear obligation from Socar Trading SA to continue to supply LNG to the plant even in circumstances that would otherwise permit Socar Trading SA to cease supply. On 7 December 2017, Government and Socar Trading SA entered into the LNG SSA Termination Agreement. The Parties agreed to terminate the LNG SSA on financial closing, which was to occur shortly thereafter.

7.2 Another project-related agreement was the Plant Manning Agreement, entered into between ElectroGas Ltd, Engineering Resources Ltd (ERL) and ESBI Engineering & Facility Management Ltd on 19 February 2016. Through the Plant Manning Agreement, ElectroGas Ltd and ESBI engaged ERL, a subsidiary of Government, to provide human resources for deployment in connection with the generation and supply of electricity by ElectroGas Ltd to Enemalta through the electricity generating facility.

8. The Transfer of Shares in ElectroGas Ltd

8.1 A notable development occurred on 22 July 2015 when Gasol plc, a shareholder of ElectroGas Ltd and originally the lead member of the ElectroGas Consortium, withdrew from ElectroGas Ltd, citing difficulties in raising the required equity to support the project. The other three shareholders, namely GEM Holdings Ltd, Siemens Project Ventures GmbH and Socar Trading SA, acquired the shares of Gasol plc, resulting in equal shareholding. A request for a change in the shareholding composition of ElectroGas Ltd, entailing the departure of Gasol plc, was submitted to the Ministry for Energy and Health (MEH) as well as Enemalta on 16 July 2015. After consideration, the MEH and Enemalta consented to the proposed change on 21 July 2015 and 22 July 2015, respectively. The transfer of shares was registered on 22 July 2015. On 27 July 2015, Enemalta and ElectroGas Ltd entered into the Pre-financial Closing Share Transfer Restriction Agreement, which among others, regulated the transfer of shares prior to January 2018, that is, financial closing.

- 8.2 Having considered the developments leading to the transfer of shares from Gasol (Malta) Ltd to the other shareholders of ElectroGas Ltd, the NAO is of the understanding that this transfer was not in line with the prevailing contract in force at the time of the transfer, that is 22 July 2015. At this point in time, the only provisions regulating transfers of shares were those stipulated in the IA, which allowed for such transfers to take place after financial closing. In the NAO's opinion, the consent provided by the MEH and Enemalta was in breach of the provisions of the IA. Although the parties sought to regularise this matter through the Pre-Financial Closing Share Transfer Restriction Agreement, the application of this Agreement was only valid and binding between the parties from the date of its execution, that is, 27 July 2015.
- 8.3 Aside from the regularity of the change in shareholding of ElectroGas Ltd in terms of the contractual framework that regulated its relationship with Government/Enemalta, the NAO sought to determine whether the transfer of shares was permissible from a public procurement perspective. The General Rules Governing Tendering regulating procurement undertaken by public sector entities, applicable at the time, provided for restrictions in this respect. In fact, clause 2.3 stipulated that, "All partners in the joint venture/consortium are bound to remain in the joint venture/consortium until the conclusion of the contracting procedure. The consortium/joint venture winning this contract must include the same partners for the whole performance period of the contract other than as may be permitted or required by law." This restriction is reinforced through the General Conditions of Contract issued by the Department of Contracts (DoC), applicable to all tendering procedures by Government. According to the General Conditions of Contract, the composition of a selected joint venture or consortium was not to be altered without the prior consent in writing of the DoC.
- 8.4 The views of the DoC regarding the applicability of provisions regulating changes in consortia post tender award were sought by the NAO. In addressing queries raised, the DoC referred the matter to Enemalta. In its reply to the DoC, Enemalta maintained that the change in composition did not require the prior consent from the DoC, in view of the fact that the PPA and GSA procurement process were not governed by Public Procurement Regulations. Enemalta sustained that the procurement process for the long-term PPA and GSA was not governed by Directive 2004/17/EC, in force at the time, by virtue of, among others, Article 26 of the Directive and the corresponding regulations implementing it into Maltese law. Article 26 provided that the Directive did not apply to contracts for the supply of energy or of fuels for the production of energy, if awarded by contracting entities engaged in the production and supply of electricity. Enemalta stated that since it is active in the production and supply of electricity, and that the award of the PPA and GSA to ElectroGas Ltd was made in the context of the provision of electricity, then the Directive was not applicable. Hence, Enemalta argued, the General Rules Governing Tendering and the General Conditions of Contract were not relevant. This position was reflected in the decision by the EC regarding state aid. The DoC informed the NAO that it subscribed to that stated by Enemalta.

8.5 While the NAO acknowledges that the position adopted by Enemalta was in line with applicable legislation, the legal framework that regulates the procurement of electricity and gas does not specifically address circumstances involving changes in the composition of the winning bidder. This lacuna provides for different interpretations as to what actually constitutes a change in bidders/contractors. Case law cited in this respect is ambivalent, largely determined by the specific circumstances of each case, which varied according to whether the change was considered as the internal re-organisation of a contractual partner or an actual change of the contract partner. Although it is not the NAO's intention or remit to pronounce itself on the legal implications of the change in shareholding of ElectroGas Ltd, it is this Office's understanding that the departure of Gasol plc was in breach of the contractual obligations in force at the time.

9. The Financing Agreements

9.1 Government's involvement in assisting ElectroGas Ltd secure financing for the project first emerged in mid-2014 when it became evident that for ElectroGas Ltd to obtain non-recourse financing, that is, a loan secured by the revenue of the project that was to be funded, the SSA was to be in effect. However, Government decided that for the SSA to be entered into, this was to be cleared by the EC as not constituting state aid. In this context, discussions were held regarding the possible provision of a Government Guarantee that was to allow the multi-lateral lending agencies (MLAs) to provide ElectroGas Ltd with an Interim Bridging Facility. On 3 September 2014, the Bank of Valletta (BoV) notified MFIN that it, together with other lending agencies, was considering advancing to ElectroGas Ltd a bridging facility for the construction of the new gas power station. However, the terms of sanction required that the facility be secured by a guarantee issued by Government for up to 80 per cent of the amount, while the remaining 20 per cent was to be contributed by ElectroGas Ltd.

9.2 The BoV agreed to advance an interim bridge loan of €110,000,000 to ElectroGas Ltd in order to finance the initial project costs, with an Interim Bridge Loan Facility Agreement signed on 18 December 2014. The final maturity date of the Interim Bridge Loan Facility, which represented the date by which ElectroGas Ltd was to repay all principal as well as any interest and other costs, was set at 28 March 2015.

9.3 One of the conditions precedent stipulated in the Interim Bridge Loan Facility was that the Government Guarantee was in full force and effect. This was in line with a Cabinet decision taken on 9 December 2014, whereby Cabinet authorised MFIN to provide the necessary guarantees as required for the project. MFIN sought clearance from the State Aid Monitoring Board for the issue of the Government Guarantee in respect of 80 per cent of the €110,000,000 bridge loan, that is, €88,000,000. Indicated in this correspondence was that Government was to charge a margin of 50 basis points in respect of the guarantee, which resulted in a fee of €277,444. The Government Guarantee was entered into between Government and the BoV on 19 December 2014.

- 9.4 Due to additional payment obligations, the Interim Bridge Loan Facility was increased from €110,000,000 to €137,500,000 on 28 May 2015. Various waivers that extended the final maturity date from 28 March 2015 to 28 May 2015 were executed on the request of ElectroGas Ltd. The final maturity date for the extended Interim Bridge Loan Facility was revised to 19 June 2015. A corresponding revision to the Government Guarantee was effected, accordingly reflecting the extended facility, for which a fee of €20,472 was charged by Government.
- 9.5 Until mid-2015, the EC had not yet issued its decision regarding whether the SSA constituted state aid, which in turn prohibited finalisation of this Agreement. It was in this context that the €137,500,000 Interim Bridge Loan Facility was refinanced and replaced by a longer term facility. In the interim, BoV extended the credit term to ElectroGas Ltd while Government correspondingly authorised the Government Guarantee.
- 9.6 On 28 July 2015, ElectroGas Ltd, BoV, KfW IPEX-Bank GmbH, HSBC Bank Malta plc, Société Générale London Branch and Government entered into the €450,000,000 Bridge Loan Facility Agreement, through which ElectroGas Ltd was provided with a term loan facility. The Agreement regulated all aspects of the facility, including procedures relating to utilisation, repayments, interest to be charged and events of default. The Bridge Loan Facility Agreement also covered the accession mechanism whereby, on the occurrence of any accession trigger, such as a negative decision by the EC regarding state aid, the role of Government would automatically change from that of guarantor to borrower. In so doing, Government would assume the rights, obligations and liabilities of ElectroGas Ltd, while ElectroGas Ltd would immediately become a debtor of Government for an amount equivalent to the obligations assumed.
- 9.7 Following the refinancing of the bridge loan and the establishment of the €450,000,000 Bridge Loan Facility, changes were made to the corresponding government guarantee. In fact, on 31 July 2015, a deed was entered into between Government, BoV as the facility agent and security trustee, and ElectroGas Ltd. Through the Government Guarantee, Government irrevocably and unconditionally guaranteed to the security trustee prompt payment by ElectroGas Ltd of any amounts due and outstanding under the Finance Agreements. Furthermore, Government undertook that if and whenever ElectroGas Ltd was in default in the payment of any sum whatsoever under the Finance Agreements, then Government would pay any amounts due and outstanding together with interest thereon. In addition, Government indemnified BoV immediately on demand against any cost, loss or liability suffered by any of the finance parties if any obligation guaranteed by it was or became unenforceable, invalid or illegal. The Government Guarantee was subject to two conditions. First, the maximum liability of Government under this Deed was capped at €432,000,000. Second, that the due date for payment was the date of the relevant demand for payment by the BoV. The fee charged by Government for provision of the guarantee up to the final maturity date, that is,

31 May 2017, was €8,382,000. However, subsequent extensions to the Bridge Loan Facility up to 29 December 2017 resulted in a corresponding extension to the Government Guarantee and an additional fee of €2,655,518 levied by Government on ElectroGas Ltd.

- 9.8 Linked to the €450,000,000 Bridge Loan Facility Agreement was the Accession Compensation Agreement, which was entered into by Government and ElectroGas Ltd on 27 July 2015. In order to secure the repayment of the facility, Government provided a guarantee and undertook to replace ElectroGas Ltd under the Bridge Loan Facility Agreement in the event of certain circumstances. Under these circumstances, Government would assume, in the capacity of ElectroGas Ltd as borrower, all its rights, obligations and liabilities as per the terms of the Bridge Loan Facility Agreement, simultaneously releasing ElectroGas Ltd of the same rights, liabilities and obligations.
- 9.9 In seeking to safeguard Government's interests, a Share Call Option Agreement was entered into on 27 July 2015 between Government, GEM Holdings Ltd, Siemens Project Ventures GmbH, Socar Trading SA and ElectroGas Ltd. By virtue of this Agreement, Government was granted the option to acquire all shares in ElectroGas Ltd, provided that certain circumstances materialised. At the date of the Agreement, the shares in ElectroGas Ltd consisted of 10,000 ordinary shares of one class of €1 each, fully paid up. The circumstances whereby Government was to acquire the shares entailed failure to realise financial closing by the final maturity date, an event of default by ElectroGas Ltd, termination of the IA, or failure by ElectroGas Ltd to effect payment with respect to the Bridge Loan Facility Agreement.
- 9.10 Linked to the Share Call Option Agreement was the Share Transfer Agreement, entered into on 27 July 2015 between GEM Holdings Ltd, Siemens Project Ventures GmbH, Socar Trading SA, ElectroGas Ltd and Government. By virtue of this Agreement, GEM Holdings Ltd, Siemens Project Ventures GmbH and Socar Trading SA were to transfer to Government their shareholding in ElectroGas Ltd. The transfer of the shares was to come into effect on the occurrence of a trigger leading to accession.

Analysis of the Financing Agreements and the Government Guarantee

- 9.11 Having reviewed the financing agreements entered into by ElectroGas Ltd with various banks and the corresponding government guarantees essential to ElectroGas Ltd in securing financing for the project, the NAO considered the implications that these had on public finances. The NAO is of the opinion that the risk faced by Government in aiding ElectroGas Ltd obtain financing was significant and could have been mitigated or avoided through better planning and project management. Based on the evidence reviewed by this Office, Government/Enemalta considered the possibility of a Government Guarantee and an SSA as early as June 2013 and August 2013, respectively. In

this Office's understanding, the SSA and the Government Guarantee were intrinsically connected, as delays in finalising the SSA necessitated the guarantee as a means for ElectroGas Ltd to obtain financing. The centrality of the SSA in securing financing was due to the fact that project financing was to be on a non-recourse basis, that is, funded through revenue streams that the project itself was to generate. Notwithstanding this, Government referred the SSA for consideration by the EC in terms of conformity with state aid regulations in June 2016. The EC issued a decision on the matter by January 2017, effectively deeming the SSA as conformant with state aid regulations.

- 9.12 The NAO sought to establish the reasons for the apparent considerable delay in referring the matter to the EC. In response to queries raised by this Office, the Minister MECW indicated that while discussions were still being held with ElectroGas Ltd regarding the contracts that were to be entered into, it was not possible to refer the matter to the EC as the Commission required an evolved concept of that being proposed. This view was corroborated by the Permanent Secretary MOT, who stated that the informal engagements' process for state aid clearance with the EC had started in mid-2014, as soon as it started to become clear that the project might require state aid clearance in this respect. It was further stated that an iterative process takes place between the Commission and the Member State prior to a formal state aid submission. Once this iterative process was concluded, formal notification was submitted in June 2016.
- 9.13 The NAO is of the opinion that the period that elapsed until conclusion of the matter with the EC posed significant risk to Government, more so when one considers the magnitude of Government's exposure. In financial terms this exposure corresponded to the €432,000,000 guarantee; however, a possible default on this guarantee would have triggered cross default in all outstanding Government guarantees, resulting in significant financial implications to Government. Also noted was that the €432,000,000 guarantee represented the maximum permissible exposure to Government when consenting to guaranteeing 80 per cent of the Bridge Facility. It is in this context that the NAO's concerns regarding the risk assumed by Government are to be considered.
- 9.14 The Office sought to establish whether the Government Guarantee was in line with applicable financial regulations. The NAO noted that, at the time under review, no specific legislation regulated the issue and management of government guarantees. This matter is now regulated by the Government Borrowing and Management of Public Debt Act (Act XXII, 2017). Instead, direction with respect to government guarantees was provided by the 'Guidelines for the Granting of Government Bank Guarantees' and the 'Manual of Procedures on the Issue, Extension, Cancellation and Compilation of Data on Letters of Guarantee/Letters of Comfort' issued by MFIN in June 2013.
- 9.15 According to the Guidelines, prior to its approval for a bank loan by a government entity, MFIN was to consider various criteria, including government debt in the context of the Maastricht criteria

and state aid regulations, whether the loan was to finance capital programmes required to improve the operations of the entity concerned and to enhance its assets, and whether the government guarantee was required in the national interest. The Manual outlined procedural considerations that were to be followed in matters relating to government guarantees. Of note was that any request from a government entity for the issue of a letter of guarantee or a letter of comfort was to be referred to the SAMB for its comments and recommendations.

9.16 Having reviewed the Guidelines applicable at the time of issue of the Government Guarantees to ElectroGas Ltd, the NAO noted that no reference was made to the provision of this form of security to private entities. In fact, the Guidelines solely referred to a scenario where a government entity required financial security, through a government guarantee, to secure a bank loan. The Office confirmed this understanding through the review of guarantees in effect between 2013 and 2017, where Government had an exposure. Immediately evident was that all guarantees issued by Government in this respect, bar that to ElectroGas Ltd, related to entities that were either wholly owned by Government or where Government held a majority shareholding. Although the Office acknowledges that the guarantee was intended to support a project that was in the national interest, in the NAO's understanding, the guarantee provided by Government to ElectroGas Ltd was irregular in terms of the Guidelines applicable at the time, for the Guidelines did not contemplate assistance provided directly to private enterprises by way of security.

9.17 With respect to the determination of the guarantee fee, the NAO ascertained that the fee charged by Government to ElectroGas Ltd exceeded €11,000,000. In establishing this fee, Government made reference to a range of applicable rates obtained from multiple professional sources. The Office is of the opinion that the determination of the fee, based on the mid-point of the proposed range, was reasonable.

10. European Commission Decision on State Aid for the Delimara Gas and Power Energy Project

10.1 A decision on whether the Transaction Agreements and the SSA were compliant with EU state aid rules was issued by the EC on 11 January 2017, following referral by Government on 28 June 2016. The EC approved, under EU state aid rules, Government's plans to pay ElectroGas Ltd for providing energy to Enemalta. The measure compensated ElectroGas Ltd for the additional cost of fulfilling public service obligations. The support was to take the form of payments from Enemalta to ElectroGas Ltd, which were to provide an economic advantage to the Company as they ensured a certain rate of return and a steady revenue stream. The rate of return for ElectroGas Ltd was in line with that of similar projects. On this basis, the EC concluded that ElectroGas Ltd would not be overcompensated for the services that were to be rendered.

10.2 While the EC expressed regret over the fact that Malta applied the aid in question in breach of Article 108(3) of the Treaty on the Functioning of the European Union (TFEU), no objections were raised on the basis that the aid was in line with the internal market provisions stipulated in Article 106(2) of the TFEU.

Observations regarding the European Commission Decision

10.3 The NAO does not have any differing comments with regard to the decision by the EC that the contracts awarded to Electrogas Ltd do not, in fact, constitute unlawful state aid; however, certain points raised by the EC bear particular relevance to issues identified in this review. In its decision, the EC deemed that the SSA, included in the contractual structure during the tender procedure, had a bearing on the outcome of the tender. Of particular concern was that this late inclusion could have distorted the tendering process, and therefore, it could not be assured that the selected bid represented the least cost to consumers. The possible distortion of the tendering process through the late inclusion of the SSA is a matter discussed in greater detail in section 3 of this Report.

10.4 The NAO acknowledges reference made to the issue of security of supply, particularly in view of the distinct characteristics of the Maltese power infrastructure, typical of small systems, where a single unit provides a significant proportion of overall capacity. Under such circumstances, the EC noted that local intervention was more likely necessary in achieving adherence to the N-1 criterion. In this context, the project contributed towards security of supply.

10.5 The EC made reference to the fact that the project would compete with other sources of power, namely, renewable energy sources and the interconnector. According to the EC, the project potentially distorted competition and was likely to affect trade between Member States. Nonetheless, based on explanations provided and studies carried out by the Maltese authorities, the EC concluded that market functioning would not be adversely impacted since Malta would accept imported energy whenever this was more economical than the cost incurred with respect to local generation. This matter is addressed in more detail in section 12 of this Report.

11. Financial Closing

11.1 Following clearance by the EC that the SSA did not constitute state aid, it was possible for the parties to conclude the financing of the project through financial closing. Central in this respect was the Conversion Term Agreement, which was to regulate the contractual relationship between Enemalta and ElectroGas Ltd once the planned gas pipeline with Sicily was operational. This scenario was to be triggered through a GSA Exit.

- 11.2 Enemalta and ElectroGas Ltd entered into the Conversion Term Agreement on 30 November 2017. This Agreement amended and restated the IA and amended the PPA, the GSA, and the Site Services Agreement. The Conversion Term Agreement addressed the obligations and liabilities of Enemalta and ElectroGas Ltd in respect of the delivery by Enemalta and/or the taking by ElectroGas Ltd of gas and/or LNG for the operation, maintenance, testing and making available the facilities by ElectroGas Ltd.
- 11.3 The amended IA listed the dates of a number of key targets of the project. Acknowledged was that the Early Gas Commencement Date and the LNG Supply Term Commencement Date had occurred on 14 August 2016 and 14 April 2017, respectively, and that the expiry of the Fixed Price LNG Supply Term would occur on 13 April 2022, unless terminated earlier. The Indexed Price LNG Supply Term was to start on 14 April 2022 and end on 13 August 2026, unless ending prior on the termination date or on the GSA exit date. The amended IA elaborated on a potential Extended LNG Supply Term as part of the LNG Supply Term, which would come into effect immediately following expiry of the Indexed Price LNG Supply Term.
- 11.4 Finalisation of the Conversion Term Agreement allowed Government, Enemalta and ElectroGas Ltd to enter into the SSA on 15 December 2017. Through the SSA, ElectroGas Ltd agreed that, should any circumstance materialise which could potentially lead to the termination of the Supply Agreements, then Government would be able to ensure continuity of security of an uninterrupted supply of electrical power under the same terms and conditions of the Supply Agreements. The SSA was to continue in force until the later of 14 December 2042, or the expiry or termination of all the Supply Agreements. Stipulated in the SSA were Step-In Events and Step-Out Events. In a Step-In Event, Government would assume the rights and obligations of Enemalta, while in a Step-Out Event, Government would assign and novate its rights and obligations to a third party.
- 11.5 Finalisation of the Conversion Term Agreement and the SSA, as well as the resolution of a number of minor outstanding issues, allowed for financial closing. Through the long-term financing for the project secured by ElectroGas Ltd, the €450,000,000 Bridge Loan Facility was replaced and repaid. In effect, any amounts available under the Bridge Loan Facility that were not drawn by 29 December 2017 were no longer available after that date. Repayment of the Bridge Loan Facility subsequently released Government from all its obligations under the Government Guarantee, thereby rendering the Accession Compensation Agreement no longer applicable. MFIN confirmed that no demands for payment were raised against Government under the Guarantee.

Analysis of Developments Leading to Financial Closing

- 11.6 The NAO noted that the concept of a conversion term was not considered in the RfP and was introduced through the IA after the selection of the preferred bidder. In this Office's understanding this constituted a significant departure from the conditions established during the procurement phase of the project. In essence, through the Conversion Term Agreement, Enemalta would assume responsibility for the supply of gas for Delimara 4 as from August 2026. Assumption of this responsibility could be delayed through extensions of the LNG Supply Term or accelerated through a GSA Exit. The NAO is of the understanding that the conversion term was contingent on developments relating to the gas pipeline, which would allow Enemalta to supply the required gas to Delimara 4.
- 11.7 The divergence of the conversion term from that stipulated in the RfP assumes greater relevance when one considers that bidders were constrained to submit complete solutions for the supply of power and gas through the PPA and the GSA, respectively. The NAO is of the opinion that the conversion term supports the understanding that the PPA and GSA could have been treated separately. The Office contends that the separation of the PPA and the GSA would have contributed to better competition in bids submitted at the RfP stage, thereby allowing Enemalta to secure potential savings.
- 11.8 While the SSA did provide an element of security of supply, the NAO is of the understanding that the Agreement was fundamental for ElectroGas Ltd to secure financing. In fact, the SSA effectively replaced the Government Guarantee allowing ElectroGas Ltd to obtain long-term financing for the project. The NAO acknowledges the decision by the EC that the SSA did not constitute state aid. However, the Office maintains reservations regarding the manner by which the SSA was brought to the attention of prospective bidders. Despite the centrality of the SSA, no reference was made to it during the EoIC and in the RfP. The SSA was only mentioned in the bidders' conference and in clarifications issued late in the RfP stage, with limited reference made therein. Ultimately, the SSA was crucial in the achievement of financial closing, providing the lenders of ElectroGas Ltd with the required comfort to permanently finance the project.

12. The Malta-Sicily Interconnector Agreements

- 12.1 In its review, the NAO was requested to establish whether the rate at which Enemalta purchased electricity from ElectroGas Ltd was more favourable than that procured through the interconnector. Based on information obtained through the Mercato Giorno Prima (MGP), a day ahead auction

market through which purchases of electricity from the interconnector are made, the NAO established that Enemalta procured 906,455MWh between April 2017 and June 2018. The cost of electricity purchased in this regard amounted to €55,764,845, which implied an average rate of €61.52/MWh. When adjusted for scheduling fees charged at an average of €0.20/MWh, the average rate for electricity procured through the interconnector by Enemalta was €61.72/MWh.

- 12.2 Aside from purchases effected through the MGP, Enemalta also procured electricity through the Intraday Energy Market (MI). Purchases effected in this respect were infrequent and, according to Enemalta, contingent on the occasional immediate demand that arose. Between April 2017 and June 2018, Enemalta purchased 25,384MWh of electricity through the interconnector on the MI, at an aggregate cost of €1,593,268, implying an adjusted average rate of €62.97/MWh. The aggregation of electricity procured through the interconnector on the MGP and the MI resulted in a total consumption of 931,839MWh at a cost of €57,358,113, with an average adjusted rate for electricity of €61.75/MWh. It must be noted that Enemalta incurred an annual service charge of €360,000 and paid €707,740 in imbalance payments in 2017; however, these were not considered in determining the interconnector rate as information at hand was incomplete.
- 12.3 Energy delivery charges levied by ElectroGas Ltd during the period reviewed in respect of Delimara 4 amounted to €111,452,821 and corresponded to 1,411,496MWh of electricity. This resulted in an average rate of €78.96/MWh for electricity delivered. Limiting the cost of electricity sourced from Delimara 4 solely to energy delivery payments provides a partial account of the expense incurred by Enemalta, as for every unit of energy delivered, Enemalta pays an energy availability fee. Energy availability charges levied by ElectroGas Ltd average out at a rate of €33.43/MWh.
- 12.4 Comparing the cost of electricity sourced by Enemalta through Delimara 4 and the interconnector resulted in a notable difference in rates, with Delimara 4 costing, on average, €50.64/MWh more than the interconnector. This variance represents a conservative figure, as the NAO did not factor availability costs incurred by Enemalta for energy made available and not delivered. Take or pay deficiency payments were also not considered. Inclusion of these costs would have increased the variance between energy purchased from Delimara 4 and that sourced through the interconnector. It must be noted that capital costs incurred by Enemalta for the construction of the interconnector, and any other costs associated therewith, were not factored in the comparison.
- 12.5 Moreover, the NAO identified scope for the reduction of the rate of electricity sourced from the interconnector. The NAO analysed 10,968 hours of data captured in this respect and established that in 8,051 hours, the price of electricity through the interconnector, as quoted on the MGP, was less than €78.96, while in 2,917 hours the rate was higher. This Office established that Enemalta

made purchases through the interconnector in 9,431 hours out of the 10,968 hours analysed. The rate was less than €78.96/MWh in 6,970 hours out of the 9,431 hours, during which period Enemalta procured 668,554MWh for a total of €33,824,573. On the other hand, the rate was higher in 2,461 hours, when Enemalta purchased 238,338MWh for €21,964,839. When one considers that Enemalta purchased 668,554MWh in 6,970 hours, then the rate at which purchases were effected when interconnector prices were favourable compared to Delimara 4 rates was 95.92MWh/h. On the other hand, given that Enemalta procured 238,338MWh in 2,461 hours when interconnector rates were disadvantageous compared to Delimara 4 rates, then the rate of purchase was 96.85MWh/h. In the NAO's opinion, the proximity in rates renders evident Enemalta's approach to effecting purchases through the interconnector, with price bearing minimal influence on the decision to procure volumes of electricity.

- 12.6 In 1,537 of the 10,968 hours analysed, the NAO established that Enemalta effected no purchases. Of these, in 1,081 hours the rate of electricity supplied through the interconnector was less than €78.96, while in the remaining 456 hours, the rate was higher. Notwithstanding this, the Office acknowledges that Enemalta's options in determining the sources and extent of energy procured were limited by constraints imposed in terms of take or pay obligations arising from the PPA and the GSA.
- 12.7 The NAO compared the hourly average price recorded on the MGP with the total volumes of electricity purchased by Enemalta through the MGP, correspondingly aggregated by hour. Of interest to this Office was that the trend noted in volumes purchased by Enemalta through the interconnector followed the trend observed in the average price for electricity on the MGP, confirmed through correlation analysis. Out of the 65 weeks analysed, the NAO noted instances of medium and strong positive correlation in 26 weeks, which accounted for 40 per cent of the period under analysis. Supporting the NAO's understanding that purchases could in fact have been effected by Enemalta in a more cost effective manner are instances of strong negative correlation, noted in seven weeks of the period reviewed.
- 12.8 Enemalta informed the NAO that when interconnector rates are favourable it attempts to increase its electrical generation cost efficiency by reducing demand from Delimara 3 and Delimara 4 and increasing demand from the interconnector. In addition, Enemalta indicated that due to technical and other considerations, it was not always possible to choose the most cost-effective energy source. Notwithstanding this, concerns emerged with respect to purchasing decisions made by Enemalta following the NAO's analysis of volumes sourced through the interconnector. Had Enemalta effected more purchases through the interconnector when rates were favourable, then one would have expected a greater incidence of weeks where a significant negative correlation

existed. Further accentuating the NAO's concerns are the multiple instances where a positive correlation was registered, which indicated that more volumes were purchased as the rate of electricity sourced through the interconnector increased. This supports the Office's understanding of less than optimal procurement decisions, with ample scope for cost reduction in sourcing energy.

- 12.9 The NAO simulated a scenario wherein the total volumes of electricity sourced by Enemalta through the MGP for the period April 2017 to June 2018, equivalent to 906,892MWh, were equally distributed over the total hours in the period, amounting to 10,968 hours. Under this scenario, constant purchases of 82.69MWh were considered for each hour during the period under review, irrespective of the price, which resulted in a total cost of €55,888,651, equivalent to an average rate of €61.63/MWh. This cost was marginally lower than the actual incurred total cost of €55,970,791, equivalent to an average rate of €61.72/MWh. It is in this context that concerns regarding the effectiveness of Enemalta's purchasing decisions increase, as a passive buying strategy (one where Enemalta purchases a constant volume every hour) would have yielded savings of €82,140 over the 15-month period under review.
- 12.10 An alternative scenario was also simulated by the NAO, wherein the total volumes of electricity sourced by Enemalta through the MGP for the period April 2017 to June 2018, equivalent to 906,892MWh, were equally distributed over 8,048 hours, which represent the total hours in the period during which the price of the interconnector was lower than that of Delimara 4. This scenario represented a constant purchase volume of 112.69MWh, with buying limited to those hours during which the price of the interconnector was favourable in comparison to Delimara 4, determined by this Office as €78.96. This resulted in a total cost of €45,851,767, equivalent to a rate of €50.56/MWh. Compared to the actual cost incurred by Enemalta, this buying strategy would have yielded cost savings of €10,119,023 over the 15-month period under review.
- 12.11 Having reviewed purchases made by Enemalta through the interconnector and drawn comparison to the cost of electricity procured from Delimara 4, the NAO is of the opinion that there exists ample scope for improvement in purchasing decisions undertaken. While the NAO acknowledges that technical considerations relating to the complex electricity generation systems managed by Enemalta impinge on purchasing decisions, the existence of such limitations are somewhat contradicted by the analysis undertaken by this Office, which rendered evident instances when Enemalta procured in a cost effective manner and the feasibility of altering purchasing patterns to reduce costs incurred. The Office is of the considered opinion that Enemalta ought to invest in a system that would assist it in the optimisation of purchasing decisions and regulate such a function through the formulation of appropriate policy.

13. Conclusion

13.1 Hereunder is a timeline of the key developments registered with respect to this project.

Date	Details
11 April 2013	Enemalta issued an EoIC for the supply and delivery of natural gas and electricity.
10 May 2013	Closing date for EoIC, by which date 19 bids were submitted.
1 June 2013	EoIC Evaluation Committee recommended 11 bids to proceed to the RfP.
6 July 2013	RfP was launched, whereby EoIC shortlisted candidates were to submit proposals.
20 September 2013	Closing date for RfP, by which date three submissions were received by Enemalta.
10 October 2013	RfP Evaluation Committee recommended ElectroGas Consortium as Preferred Bidder.
4 December 2013	Enemalta published the notice of award to ElectroGas Consortium.
9 May 2014	Share Purchase Agreement entered into.
11 September 2014	Gasol plc financial statements highlighted concerns in ability to honour commitments.
9 December 2014	Cabinet authorised provision of guarantees for loans required by ElectroGas Ltd.
12 December 2014	Exclusive Berthing Rights Agreement entered into.
16 December 2014	Site Lease Deed entered into.
18 December 2014	Interim Bridge Loan Facility of €110,000,000 advanced by BoV to ElectroGas Ltd.
19 December 2014	Government Guarantee covering €88,000,000 of €110,000,000 loan entered into.
13 April 2015	Enemalta – LNG SPA Direct Agreement entered into.
13 April 2015	Multiple FSU-related Agreements and Direct Agreements entered into.
14 April 2015	IA, PPA and GSA, collectively referred to as the Supply Agreements, entered into.
14 April 2015	Site Services Agreement, Electricity Connection Agreement and LNG SPA entered into.
14 April 2015	Side Letter entered into placing Agreements in escrow pending a decision by the EC.
14 April 2015	LNG SSA entered into.
14 April 2015	Schedule Start Date of the project, with works to be completed within 24 months.
28 May 2015	Interim Bridge Loan Facility of €110,000,000 was increased to €137,500,000.
28 May 2015	Government Guarantee was correspondingly revised by €22,000,000.
16 July 2015	ElectroGas Ltd informed Minister MEH/Enemalta of Gasol plc's financial difficulties.
21/22 July 2015	MEH/Enemalta found no objection to the revised composition of the Consortium.
22 July 2015	Transfer of shares of Gasol (Malta) Ltd to the other shareholders of ElectroGas Ltd.
27 July 2015	Pre-Financial Closing Share Transfer Restriction Agreement entered into.
27 July 2015	Accession Compensation, Share Call Option and Share Transfer Agreement entered into.
28 July 2015	€450,000,000 Bridge Loan Facility Agreement entered into.
30 July 2015	Opposition MPs on the PAC requested the AG to investigate the contracts.
31 July 2015	Government Guarantee, capped at €432,000,000, entered into.

17 February 2016	Plant Manning Agreement entered into.
28 June 2016	Government submitted plans to the EC for assessment in terms of EU state aid rules.
14 August 2016	Commencement of the Early Gas Period.
14 October 2016	Scheduled Open Cycle Energy Delivery Date.
14 October 2016	Scheduled Gas Availability Date.
14 October 2016	Scheduled Phase 1 Gas Delivery Date.
11 January 2017	EC deemed the Transaction Agreements and the SSA compliant with EU state aid rules.
16 March 2017	First Gas Date and Phase 1 Gas Delivery Date achieved - €2,295,000 delay charges levied.
5 April 2017	Open Cycle Energy Delivery Date achieved - €10,440,000 delay charges levied.
5 April 2017	Commencement of the five-year fixed price period for Energy Availability Payments.
5 April 2017	Commencement of the five-year fixed price period for Energy Delivery Payments.
12 April 2017	Last Open Cycle Energy Delivery Date by which Open Cycle mode was to be achieved.
12 April 2017	Last Phase 1 Gas Delivery Date by which supply for Phase 1 Delimara 3 was to be achieved.
14 April 2017	Scheduled Energy Delivery Date.
14 April 2017	Commencement of five-year Fixed Price LNG Supply Term for Gas Availability Payments.
14 April 2017	Commencement of five-year Fixed Price LNG Supply Term for Gas Delivery Payment
14 April 2017	Scheduled Phase 2 Gas Delivery Date.
28 May 2017	Final Maturity Date for repayment of €450,000,000 Loan extended to 29 December 2017.
1 June 2017	Corresponding extension to the Government Guarantee.
10 August 2017	Energy Delivery Date achieved - €9,680,000 delay charges levied.
28 September 2017	Phase 2 Gas Delivery Date - no delay charges levied as €18,000,000 capping reached.
11 October 2017	Last Energy Delivery Date by which operation in Combined Cycle was to be achieved.
11 October 2017	Last Phase 2 Gas Delivery Date by which supply for Phase 2 Delimara 3 was to be achieved.
7 December 2017	LNG SSA Termination Agreement entered into.
14 December 2017	Various Agreements and Direct Agreements, relating to financial closing, entered into.
15 December 2017	SSA entered into.
29 December 2017	Final Maturity Date, with ElectroGas Ltd repaying the €450,000,000 Loan.
29 December 2017	Government Guarantee was released following settlement of the €450,000,000 Loan.
January 2018	Financial Closing achieved.
5 April 2022	Commencement of the indexed price period for Energy Availability Payments.
5 April 2022	Commencement of the indexed price period for Energy Delivery Payments.
14 April 2022	Commencement of the Indexed Price LNG Supply Term.
14 April 2022	Commencement of the Indexed Price LNG Supply Term for Gas Delivery Payment.
14 April 2022	First Reference GSA Exit Date.
14 August 2026	Second Reference GSA Exit Date.
14 December 2042	Expiry of the SSA.

13.2 Having reviewed the process of selection leading to the award of the contracts by Enemalta to ElectroGas Ltd, the implementation of the project and its financing, the NAO refers back to the terms of reference by way of overall conclusion.

The Selection Process

13.3 The main concern identified by the NAO in its review of the EoIC evaluation process was the inconsistent approach adopted by the EoIC Evaluation Committee in its assessment of submissions. In the NAO's opinion, while a number of submissions were appropriately eliminated on sufficient and justifiable grounds, this Office noted that other candidates were deemed eligible to proceed to the RfP despite similar shortcomings. Only candidates that were deemed eligible at the EoIC stage were allowed to proceed to the RfP, which consideration accentuates the concerns of the Office.

13.4 Although the NAO considered the RfP document as well structured and appropriately defining the intended project, the Office identified various shortcomings mainly in terms of major changes effected during the clarification process. These changes were not considered as clarifications by the Office but the introduction of new concepts, specifically the SSA, or substantial revisions to existing provisions, particularly in relation to the take-or-pay obligation, which effectively shifted risk from the selected bidder to Enemalta and/or Government. While all bidders were informed of these developments, the significance of these changes and their timing drew the NAO's concern, as the nature of the contractual relationship that was to be entered into was intrinsically revised, drastically reducing the risk to revenue for the selected bidder. Instead, this risk was transferred to Enemalta and Government, now required to purchase 85 per cent of the annual contract quantity, be it power and gas, irrelevant of requirements.

13.5 A significant concern noted by the NAO with respect to the RfP evaluation process related to the lack of appropriate due diligence undertaken. This Office is of the understanding that the due diligence undertaken was insufficient and only partially addressed the risks associated with a project of this magnitude. While the consideration of technical-related matters was adequate, other aspects of the due diligence process were lacking. The financial aspect of the due diligence process was not sufficiently robust and deemed inadequate by the Office given the materiality of the project. Verifications relating to fraud, bribery and corruption, internal controls, risk management considerations, ethical conduct and other governance issues did not form part of the due diligence carried out. In terms of the actual RfP evaluation process, the NAO is of the opinion that the exclusion of the Yildirim Consortium was justified. Moreover, despite instances of inconsistencies noted in the allocation of marks and changes to submissions made during the evaluation process, this Office concluded that these bore no significant impact on the outcome of the selection process.

Financial Standing of the ElectroGas Consortium

- 13.6 In its review of the EoIC and the RfP, the NAO noted that information relating to the financial standing of companies forming consortia was requested by Enemalta. A review of the evaluation process by this Office confirmed that these concerns were not considered during the adjudication of bids. The NAO reviewed the financial statements of Gasol plc submitted by the ElectroGas Consortium in respect of the RfP. Excerpts of the financial statements for 2010, 2011 and 2012, submitted as part of the bid by the ElectroGas Consortium, clearly indicated the existence of a material uncertainty that cast doubt on Gasol plc's ability to continue as a going concern. The attention of the Stage 2 Evaluation Committee was certainly drawn to this situation as it acknowledged that Socar Trading SA had provided a letter of commitment to cover the equity contribution of Gasol plc. The NAO is of the opinion that, although not qualified, the financial statements should have raised significant concern with respect to the role of Gasol plc in the Consortium. While the assessment of financial strength was a criteria of evaluation, the allocation of a maximum of four marks out of a possible 100 rendered evident its overall insignificant impact on the outcome of the RfP and once candidates were deemed eligible at the EoIC stage, the financial strength or otherwise of a bidding consortium was irrelevant. It is in this context that the NAO deems this a significant shortcoming in the design of the selection process, with the Office contending that the assessment of the financial standing of bidders at the RfP stage was inadequate.

Financing of the Project

- 13.7 The NAO considered the documentation relating to project financing requested at the RfP stage as comprehensive. The Office reviewed the submission by the ElectroGas Consortium and ascertained that this was generally compliant with the stipulated requirements. Notwithstanding this, instances of non-compliance were noted. In its bid, the ElectroGas Consortium had submitted letters of support that totalled €350,000,000, that is, €20,000,000 short of the total long-term funding specified. RfP evaluation reports reviewed attributed the €20,000,000 shortfall to additional costs that were to be incurred by the Consortium following a last minute concession by Enemalta to allow operation of the power plant on open cycle mode for the first six months of operations. This contradicted documentation submitted by the Consortium indicating that the €20,000,000 shortfall related to upfront costs such as bank funding arrangement fees, pre-commissioning costs and insurance. The Office contends that the shortfall in financing should have raised concerns of the RfP Evaluation Committees regarding the ability of the ElectroGas Consortium to finance the project. Similarly anomalous was the source of funding that was to be provided by Gasol plc. In its equity funding letter of commitment, Socar Trading SA indicated its ability and willingness to commit €40,000,000 as contribution, partly on its behalf and partly on behalf of Gasol plc, reflecting their respective stake in the Consortium. The NAO maintains that this matter ought to have raised concern regarding the ability of Gasol plc to contribute towards the financing of the project, more so when one considers that Gasol plc was the lead member of the Consortium.

The Government Guarantee: Fairness and Regularity Considerations

- 13.8 The NAO established that no reference was made to a possible security of supply agreement or any other form of state guarantee by Enemalta in the EoIC and the RfP. Notwithstanding this, it was evident that discussions were held by the Programme Review Board relating to the possible issuance of a government guarantee in July 2013, with the RfP already published. The Board decided that no reference was to be made to a possible government guarantee.
- 13.9 In sum, the NAO is of the opinion that favourable conditions were created for bidders still involved in the tender process at its latter stages through the introduction of provisions that substantially altered the nature of the tender, rendering it more advantageous to the bidders. The Office is of the understanding that the SSA provided assurance that Government would step in instead of Enemalta in circumstances where the latter could not honour its obligations. This substantial change, introduced at such a late stage in the RfP process, was deemed by the Office as a significant shortcoming in ensuring the required fairness of the procurement process. While the NAO acknowledges that all bidders were informed of such a development, the nature of the change and its proximity to the bid submission deadline were, in the Office's opinion, inappropriately managed, for this substantially altered the contractual relationship between the selected bidder and Enemalta. Although the documentation made available to this Office did not indicate that the conditions were created specifically for the ElectroGas Consortium, the NAO notes that it was the Consortium that ultimately benefitted from their introduction.
- 13.10 The NAO also sought to establish whether the Government Guarantee was in line with applicable financial regulations. The Office noted that, at the time under review, no specific legislation regulated the issue and management of government guarantees. Having reviewed the Guidelines applicable at the time of issue of the Government Guarantees to ElectroGas Ltd, the NAO noted that no reference was made to the provision of this form of security to private entities. In fact, the Guidelines solely referred to a scenario where a government entity required financial security, through a government guarantee, to secure a bank loan. The Office confirmed this understanding through the review of guarantees in effect between 2013 and 2017, where Government had an exposure. Immediately evident was that all guarantees issued by Government in this respect, bar that to ElectroGas Ltd, directly related to entities that were either wholly owned by Government or where Government held a majority shareholding. Although the Government Guarantee was not called and was released in December 2017, when ElectroGas Ltd repaid the bridge loan facility and secured long-term financing, possible and contingent on the execution of the SSA among others, the NAO maintains serious reservations regarding the risk that Government was exposed to when the guarantees were in effect. The Office is of the opinion that such a situation could have been avoided through appropriate planning, with referral to the EC undertaken at the earliest, possibly prior to the issuance of the EoIC and the RfP. It is in view of the serious repercussions that could

have materialised had the guarantees been called that the NAO advocates that any measure that could have mitigated the issuance of the Government Guarantees and the duration within which they were in effect should have been considered.

Withdrawal of Gasol plc from the ElectroGas Consortium

- 13.11 Having considered the developments leading to the transfer of shares from Gasol (Malta) Ltd to the other shareholders of ElectroGas Ltd, the NAO is of the understanding that this transfer was not in line with the prevailing contractual arrangements in force at the time of the transfer, that is 22 July 2015. At this point in time, the only provisions regulating transfers of shares were those stipulated in the IA, which allowed for such transfers to take place after Financial Closing, that is, January 2018. In the NAO's opinion, the consent provided by the MEH and Enemalta was in breach of the provisions of the IA. Although the parties sought to regularise this matter through the Pre-Financial Closing Share Transfer Restriction Agreement, the application of this Agreement was only valid and binding between the parties from the date of its execution, that is, 27 July 2015.
- 13.12 While the NAO acknowledges that the position adopted by Enemalta was in line with applicable legislation, the legal framework that regulates the procurement of electricity and gas does not specifically address circumstances involving changes in the composition of the winning bidder. This lacuna provides for different interpretations as to what actually constitutes a change in bidders/contractors. Case law cited in this respect is ambivalent, largely determined by the specific circumstances of each case, which varied according to whether the change was considered as the internal re-organisation of a contractual partner or an actual change of the contract partner. Although it is not the NAO's intention or remit to pronounce itself on the legal implications of the change in shareholding of ElectroGas Ltd, it is this Office's understanding that the departure of Gasol plc was in breach of the contractual obligations in force at the time.

Contractual Framework: Good Governance Considerations

- 13.13 The NAO is of the understanding that the contracts entered into were largely determined by the procurement model outlined in the EoIC and crystallised in the RfP and it is in this sense that matters of good governance must be understood. Enemalta designed its model of procurement as centred around two supply contracts, that is, the PPA and the GSA. The NAO sought to establish whether Enemalta's decision to opt for this procurement model was the result of the consideration of other models. Enemalta indicated that several options were considered, including, the internal development of the project, as well as entry into a management agreement or a tolling agreement; however, these were discarded in view of Enemalta's financial position and other considerations. Notwithstanding this, the NAO was not provided with evidence of analysis undertaken prior to the commitment to procure power and gas from one supplier. Moreover, the proximity of issue of the

EoIC to the change in administration renders the due analysis of alternative procurement models as highly unlikely, with the EoIC issued a mere one month after this change. In the absence of documentation rendering evident the consideration of alternatives, the NAO's concerns regarding the design of the procurement process emerge.

Comparison of Electricity Rates sourced through Delimara 4 and the Interconnector

- 13.14 The NAO was requested to establish whether the rate at which Enemalta purchased electricity from ElectroGas Ltd was more favourable than that procured through the interconnector. To this end, the period April 2017 to June 2018 was reviewed. This Office established that Enemalta procured 931,839 MWh of electricity from the interconnector between April 2017 and June 2018, at a cost of €57,358,113. The average adjusted rate for electricity procured in this respect, which incorporated a scheduling fee of €0.20/MWh, amounted to €61.75/MWh.
- 13.15 During the corresponding period, energy delivery charges invoiced by ElectroGas Ltd in respect of Delimara 4 amounted to €111,452,821 and corresponded to 1,411,496MWh of electricity, which implied an average rate of €78.96/MWh for electricity delivered. Energy delivery payments account for only one element of the expense incurred by Enemalta in obtaining energy from Delimara 4, as for every unit of energy delivered, Enemalta incurs an energy availability fee, which during the period under review amounted to an average rate of €33.43/MWh.
- 13.16 Immediately apparent is the difference in rates, with Delimara 4 costing, on average, €50.64/MWh more than the interconnector when excluding capital costs for the latter. In addition, the NAO identified scope for improvement in terms of when Enemalta decides to effect purchases through the interconnector and to what extent. These improvements effectively reduce the cost of purchases made through the interconnector allowing for increased cost efficiency.

Similarities to Pre-election Proposal

- 13.17 The then Leader of the Opposition alleged that the project was similar to a proposal put forward to the Opposition by Gasol plc and GEM Holdings Ltd prior to the 2013 general election, as well as to that proposed by the Partit Laburista in the run up to the election, nearly identical to the selected project, and that the parties involved in the proposal and those selected were the same, alleging prior agreement. Although the similarities noted by the NAO lend credence to the allegations made by the Leader of the Opposition, the NAO cannot comment on whether prior agreement had been reached with the Partit Laburista before the general election and if the technical specifications for the construction of the power station set by Enemalta were influenced by parties who had a direct interest in this contract. The NAO does not have evidence that supports claims made and is further limited by its mandate, which does not extend its review to political parties.

2017-2018 (to date) Reports issued by NAO

NAO Work and Activities Report

April 2018 Work and Activities of the National Audit Office 2017

NAO Audit Reports

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November 2017 Report by the Auditor General Public Accounts 2016

December 2017 Annual Audit Report of the Auditor General - Local Government 2016

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