

SECRETMEMORANDUM FOR CABINET BY THE PRIME MINISTER  
AND MINISTER OF ECONOMIC PLANNING AND FINANCEContract for the supply of Fuel Oil  
to the Power Station

An international call for tenders was issued by the Malta Electricity Board on the 24th March, 1964. As a result four tenders were received, i.e. from Esso, Shell, AGIP and Foreign Trade Company of Canada. The call for tenders provided for a supply of 371,000 tons of fuel oil spread over a period of five years. The tenderer was required to store at his own storage facilities in Malta sufficient fuel oil to cover delivery delays and a reserve equivalent to one month's fuel oil consumption at the current rate to ensure continuity and security supplies. Particulars of the storage available at the tenderer's own storage facilities in Malta were to be entered in the Schedule of Guarantee.

2. Of the four tenders received, only Esso and Shell have storage facilities in Malta but, as the local storage capacity was not such as to comply with the requirements and specifications stipulated in the tender documents, they each offered to increase such storage capacity at seller's depot to comply with those conditions. The offer made by Messrs. Foreign Trade Company was not acceptable as it was incomplete in many ways and tenderers have no storage capacity in Malta nor did they offer to construct any.

3. AGIP put forward a quotation for the supply of fuel oil and, as they also had no storage capacity in Malta, offered to erect at their own expense on the Board's land in Jesuit's Hill one or two tanks, at the Malta Electricity Board's option, of 4,000 metric tons each and a 12" pipeline for unloading tankers. At the end of the supply period, these installations would become the property of the Board without further payment. If the contract is terminated before its expiration for any reason whatsoever and/or should the quantity of the fuel oil supplied to the Malta Electricity Board not reach a minimum of 400,000 metric tons, the installations would become the property of the Board on payment to AGIP of their actual cost not yet written off at the time of such termination. It is worth noting that such payment would have to be made also if termination of the contract were to take place by the default of AGIP: this has been commented upon adversely by the law officers. In their letter of the 8th July, 1964, AGIP informed the Board that they were submitting this offer, even though made on a different basis as they felt that it might be of interest to the Board.

4. While the tenders received were being considered by the Board, Esso addressed a letter to the Chairman, Electricity Board, with which they informed him that they had learnt from unofficial sources that an outside Company was also being actively considered. They added that they would

naturally raise no objection to this provided this Company complies with the conditions of the tender documents. They continued to say that they understood again unofficially that this outside company had offered what is in effect terms and conditions which entail direct imports and which they suggested were not the "interpretation of the contract documents" (copy of this letter is attached). Following the receipt of this letter, an urgent meeting was held by the Malta Electricity Board on the 4th August, 1964. An extract from the minutes of this meeting, which is recorded in the relative file of the Board, reads as follows:-

"The Acting Chairman informed the Board that he received a letter from Esso's Manager who gave full details of what was actually offered by one of the other tenderers. The General Manager also told the Board that he consulted Prof. Cremona who advised that in view of the events which have taken place a fresh call for tenders should be made.

Dr. G.G. Gatt proposed that the Board should reply to Esso's letter in the sense that it cannot be considered unless Esso informed the Board from whom they received the information, subject to this being agreed to and drafted by Prof. Cremona for the Secretary's signature.

The tenders for the fuel oil are to be further discussed after the Board had seen representatives from AGIP".

5. On the 7th December, 1964, by which time negotiations were held with representatives from AGIP, another meeting was held by the Board. An extract from the minutes of that meeting, as recorded in the same file, reads as follows:-

"Following further discussions on this tender, two motions were put before the Board:-

- (i) Dr. Gatt's proposal to continue discussions with AGIP in order to reach a definite agreement with them was seconded by Mr. Oscar Agius.
- (ii) Major Fenech's proposal to make a fresh call for tenders in view of the leakage and irregular handling of the whole business was seconded by Mr. Cotsworth.

The Board passed Dr. Gatt's motion by four votes to three".

6. As the conditions of contract require, as already stated, that suppliers should maintain in their own storage facilities in Malta sufficient fuel oil to cover delivery delays and a reserve equivalent to one month's fuel consumption, and as AGIP had of course no storage facilities in Malta, suppliers asked that a quantity equal to one month's consumption at the Malta Power Station should be kept in the tanks at Jesuits Hill owned by the Board. This condition was agreed to by the Board although it ran counter to that specified in the terms under which a call for tenders was made.

7. AGIP also asked that the quantity to be supplied should be one of 400,000 tons instead of 371,000 tons as specified in the conditions of the call for tenders and that any supplies made before the new tanks were installed should be added to this quantity. This was also agreed to by the Board.



8. AGIP further asked that they should be exempted from all taxes, duties, or charges which might be levied by any Maltese authority in respect of or as a result of the contract. At a meeting held by the Board with representatives of AGIP on the 5th August, 1964, this request was agreed to. One consequence of this is that AGIP would not be required to pay income tax on their profits arising in Malta out of this contract.

9. It appears that the price quoted by AGIP, if adjusted to a common base, for the supply of fuel oil was higher than that offered by Shell and that it was more favourable than Shell's, if account is taken of the cost of the storage tanks which is redeemed at the completion of the contract, provided the contract runs its whole course. But, if AGIP are granted the tax exemption, another readjustment would be needed in order to ascertain how AGIP's prices compare with Shell's.

10. The Board issued a letter of acceptance on the 19th December, 1964. The tender by AGIP was accepted in conformity with the specifications as set out in the schedule of special conditions of the contract issued by the Board, as modified and/or amplified in two letters which AGIP had sent to the Board and at meetings held between representatives of AGIP and the Board. AGIP by their letter of the 23rd December, 1964, informed the Board inter alia as follows: "Following your request, we declare our acceptance to your letter of intent".

11. On the point as to whether the Board in awarding this contract to AGIP acted within the provisions of the Electricity Act, 1963, it is pertinent to quote section 32 of the Act which reads as follows:-

"The Board shall not enter into any contract for the supply of goods or materials or for the execution of works which is estimated by the Board to exceed one thousand pounds in value unless after notice of the intention of the Board to enter into the contract has been published and competitive tenders have been issued".

Although AGIP's tender as accepted by the Board has modified in certain substantial respects the terms of the tender as issued by the Board and they feel this might be a border-line case, the law officers incline to the view that the Board has complied with the requisite in as much as the intent was published in the Government Gazette on the 24th March, 1964, and extended by a further notice in the Government Gazette on the 19th May, 1964. Moreover, the intention to enter into the contract was also forwarded to the Embassies with a view to circulating it abroad. The law officers, however, are strongly of the opinion that, in the light of the important modifications to the tender implied in the acceptance of AGIP's tender, the Board should have followed the advice given in the first instance by the Board's legal adviser, Prof. Cremona, and that a fresh call for tenders should have been made. As a matter of fact, that would have definitely been the law officers' considered advice.

In any case, the law officers are of the opinion that the Board is now committed to place the contract with AGIP; that Government cannot interfere in the contractual relations between the Board and AGIP, and that even if

L-ARKIVI NAZZJONALI TA' MALTA

Government had the legal means to interfere and to obtain a declaration of nullity of such contract in Court, the Board, who has a distinct legal personality from the Government, might be liable to pay damages to AGIP, and that an action for such declaration of nullity would be always open to the other tenderers who have unsuccessfully competed with AGIP or to other firms who might have had an interest in the tender had it been advertised with the modifications and amendments implied in the acceptance of AGIP's tender.

12. On the point as to whether the Board was empowered to accept that AGIP should be exempt from all duties, taxes or charges which may be levied by any Maltese authority, the law officers advise that section 19 of the Electricity Act, 1963, exempts the Board "from any liability for the payment of income tax, stamp duty and customs duty under any law for the time being in force", but such exemption applies only to the Board and cannot be extended to any other body or to any person. It follows that any exemption granted by the Board is "ultra vires" in so far as the Government is concerned. In regard to income tax, it seems that the Board has been advised by its legal adviser, Prof. Cremona, that in any case, AGIP would not be chargeable to tax since it would be trading with Malta and not within Malta. The law officers have expressed in no uncertain manner the view that, since the contract in question will be signed (as it should be) in Malta, since the contract price will be paid in Malta and since the contract will be performed in Malta, there are all the principal and subsidiary elements to render AGIP a company trading within Malta and, as such, liable to Malta income tax. The law officers state, moreover, that, if the Board had the intention to obtain from the Government exemption from taxation for the successful tenderer, the Board should have done so before publishing the tender under reference, in order to be able to mention such concession in the conditions of the tender, since this is most certainly an element which would have induced the other tenderers than AGIP to quote a lower price than that actually quoted in their respective tender. Indeed, the law officers feel that, if AGIP, in one way or in another, succeed to obtain exemption from all taxes, then there will be reason to state that the question as to whether section 32 of the Electricity Act 1963, has been contravened or not will no longer be a border-line case (as already affirmed in paragraph 11), since a tender accepted in similar circumstances would not be one accepted on a "competitive" basis as required by the said provision of the Act.

13. It would appear that the Board was not justified in placing the order with AGIP in terms of the conditions and specifications of the call for tenders. The responsibility of the Board for having acted as they did lies of course entirely with the Board and Government is not at all involved. In this connection, however, it should be pointed out that on the 4th September, 1964, Messrs. Joseph Ragonesi and Son were informed by the Secretary to the Minister of Agriculture, Power and Communications that the Government was prepared to allow Messrs. AGIP S.p.a. to instal a pipeline on the new Commercial Wharf and connected with the Malta Power Station header at Bridge Wharf, Marsa. Messrs. Ragonesi were also informed that the conditions under which the permit would be granted would be communicated to them when a formal application was received.

L-ARKIVI NAZZJONALI TA' MALTA



14. It is proposed to issue the licence on payment of an encroachment fee of £20 a year and on condition that the Board should provide insurance coverage to the extent of £100,000 against any damage that may be done to property by fire or any other cause. Before this is done, however, Hon. Ministers are requested to say whether Government should take any action in a matter which, although it lies entirely within the responsibility of the Malta Electricity Board, might very well involve Government in having to reply to any justified criticisms which would place Government in a rather unfortunate situation. As regards the exemption from the payment of taxes which the Board has granted to AGIP without any authority whatsoever, it is considered that the Board should be required to withdraw this authority failing which Government would insist that AGIP should pay the taxes to which it becomes liable.

15. The law officers have also expressed the opinion that the Hon. Minister of Agriculture, Power and Communications should instruct the Board under Section 5 of the Electricity Act, 1953, to the effect that, in view of the serious consequences which may ensue as a result of non-compliance on the part of the Board with any of the provisions of the said act, the Board should not depart from the "strict" application of any such provisions before consulting the Government.

16. The risk that legal action may be taken by any one of the other tenderers for redress against the Board cannot, of course, be excluded.

1st June, 1965.

COPY

ESSO STANDARD (MALTA) LIMITED  
P.O. Box 65, Valletta.

File 21A/652.

July 31, 1964.

Confidential

The Chairman,  
Malta Electricity Board,  
Blata-il-Bajda.

Contract for the supply of Bunker "C"  
Furnace Fuel Oil  
for Generation Purposes ADV.43/64

Dear Sir,

We refer to the above tender which was submitted for your consideration on the 15th July and which we understand is now being considered with others.

From unofficial sources we have learned that an outside company is also being actively considered and naturally we can raise no objection to this provided this company complies with the conditions of the tender documents. However we understand again unofficially that this outside company has offered what is in effect terms and conditions which entail direct imports and which we respectively suggest are not the interpretation of the contract documents.

Some months ago the undersigned discussed the method of supply required by the Malta Electricity Board with the Chairman Chevalier Falson and was told clearly that direct imports would not be permitted but that we should ensure we had sufficient local storage at our Fuel Oil Plant to satisfy the board and also sufficient storage as outlined in the tender documents to guarantee a minimum of one month's reserve fuel for the Power Plants requirements. At this time the undersigned was also informed that the board were building additional storage (we understood ultimately 4 x 4000 ton tanks) for their own use and when these were complete consideration would possibly be given to direct imports of fuel. Final completion of this additional storage was anticipated to be 1969-1970. On the basis of this and the clauses contained in the tender documents we submitted our bid in which incorporated the requirements as stipulated.

It is now our understanding that consideration is being given to an outside supplier who is offering storage to be situated on the Power Plant's property and which we respectfully submit is not in accordance with the understanding that was given to the undersigned nor does this form of tender comply with the clauses as laid down in your tender documents.

In the circumstances although the information we have received is unofficial we wish, if confirmed, to formally object to this tender being progressed further and

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respectfully request that in the circumstances this business be held open and new tenders called for giving all suppliers the opportunity to submit bids on an equal basis. Failing this we request that we be given the opportunity of re-submitting our quotation on the same method of supply as offered by this outside supplier.

Yours very truly,

ESSO STANDARD (MALTA) LIMITED

(Sgd.) F.A. Bathie  
Managing Director.

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