

Commission OF Inquiry

REPORT OF THE COMMISSION

Commission of Inquiry
into the Report of the Auditor General
on the Consolidated Fund of the Government of
Bermuda for the Financial Years March 31, 2010,
March 31, 2011 and March 31, 2012

Presented to
The Honourable Michael H. Dunkley JP MP
Premier of Bermuda
February 2017

Commission OF Inquiry

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The Honourable Michael H. Dunkley, JP, MP
Premier
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28 February 2017

Dear Premier Dunkley,

I am pleased to submit on its behalf the Final Report of the Commission of Inquiry into matters arising under Section 3 of the Auditor General's Report on the Consolidated Fund for the Financial Years 2009/2010, 2010/2011 and 2011/2102 ending on 31 March 2012.

The Report with its Appendices and the documents maintained on the Commission's website, which are referred to in the Report, represent the fruits of the Commission's work during the past twelve months. As is apparent, all members of the Commission have contributed to the writing of the Report, and I express sincere thanks to my colleagues for their enormous contributions to it.

Our task is now complete. We have allowed maximum public access to our proceedings, and we hope that following review by you and your colleagues you will make the Report public as soon as you properly can.

Our documentary records are being removed to the Government's Archives, and we have taken steps to preserve the Commission's website www.inquirybermuda.com to ensure public transparency and accessibility for a period of ten years.

The Report highlights that the Commissions of Inquiry Act, 1935, under which we were appointed has not been updated in line with changes made in the United Kingdom by The Inquiries Act 2005 and The Inquiry Rules 2006. The Government may wish to consider whether the Bermudian legislation should be updated also.

It has been an honour to serve as Chairman of the Commission, and on behalf of my fellow Commissioners as well as myself we thank you for the privilege of serving the people of Bermuda in this way.

Yours sincerely,



CHAIRMAN, COMMISSION OF INQUIRY

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Foreword

We knew right from the time of our appointment that ours was no easy task. The Commission of Inquiry's Terms of Reference spanned three financial years of the Bermuda Government- 2010, 2011 and 2012 and matters of great concern to the Auditor General in her Report for those three years.

However, we were not asked to examine every matter but only those we regarded as significant upon our review of the Auditor General's Report. These then became the focus of our inquiries and the subject of our two Public Hearings.

We had our limitations in terms of resources, amongst them financial, personnel and time. We did not have a team of investigators or researchers at our disposal. Our budget did not allow for this.

As we set about our work, our over-riding goal was to try and be as fair and transparent as we could. We detail how we endeavoured to achieve this goal in Section 3 of this Report entitled Our Approach.

We also committed to maintain our independence in all our dealings, private and public. To this end we strove to engage at an arm's length all persons with whom we dealt, including the Bermuda Government and Premier the Hon. Michael Dunkley, who appointed the Commission.

From the outset, we recognised that we were bound to be the subject of some criticism. We were appointed by the Government to examine work undertaken by a previous administration. The politics that invariably followed were not lost on us.

It was perhaps inevitable that we would be the subject of a variety of attacks. Chief among them was that our investigation was nothing more than "*a political witch-hunt*".

There is nothing to be gained by repeating those accusations here or to name the critics. Exactly what was said and by whom is well known to those who have followed our proceedings.

Indeed, most of what was alleged now forms part of the public record, in the transcripts of our Public Hearings and on our website. We did not see it as our role to either stifle our critics or shut out criticism.

For our part, aware of this political narrative, our goal was not to engage but to continue to go about our work' maintaining our impartiality and approaching what we uncovered and what we heard in evidence with an open mind.

We had no other agenda than that.

It is in this spirit that we wish to express our appreciation to all those who lent us their cooperation, particularly those who willingly agreed to provide witness statements upon request and appear as witnesses at our Public Hearings. We know that for many this was a stressful experience. Without their participation and cooperation, we would have been unable to complete our task.

We are also grateful to those who chose to make submissions and about which we should like to comment:

- Some were anonymous and contained information that the writer or caller clearly thought was germane. We tried to follow up where we could on the information provided.
- However, in some cases we were simply unable to act in the absence of either documentary evidence or sworn testimony. The Commission thought it would be wrong to proceed on the strength of information that was uncorroborated and otherwise looked to be no more than rumour or innuendo.

- Still others were clearly outside our remit. In those cases we could not take them any further.

We pause here to note that we were not and could not be a roving inquiry into matters which were not within our Terms of Reference. Indeed, at one stage, the Commission came under legal challenge in respect of one matter which was thought to be outside our remit, although that challenge ultimately proved unsuccessful.

There was also the initial resistance of the current Government to the Commission's decision to examine the tendering of the controversial L. F. Wade Airport Development Project. Formal challenge was made under our Rules, after a press conference in which the Acting Attorney General declared publicly that civil servants were being directed not to answer any of our questions on that project. We ruled against the objection.

Following our public ruling, the Commission's questions on the project were answered by civil servants.

We appreciate that there were, and perhaps still are, expectations about what the Commission would uncover, again in respect of matters that were outside our remit. One of the more notable examples was the oft-repeated refrain of discovering what had become of the "missing \$800 million". Notwithstanding that this was an inaccurate and misleading portrayal of the Auditor General's actual comments, and that pursuit of this matter was outside our Terms of Reference, the Commission felt it important to respond and did so on our website, pointing out exactly what the Auditor General had had to say about this expenditure of government funds, when and why. [*Frequently Asked Questions*, www.inquirybermuda.com]

One final word on our goal and our wish for what will become of our Report:

It is largely historical. By necessity it has to be, concerned as we were instructed to be, with events and matters that generally occurred up to seven years ago. Here, the Commission was pleased to note improvements that have

been made since the last Auditor General's Report, by the Civil Service, by Ministers and by the previous Government, and of improvements that are continuing to be made today. We have highlighted some of these in our Report and credit those responsible. We felt strongly that a key part of our review was to explore and make further recommendations where we believe them to be important and necessary. This was a critical component of our work that has involved input from many and here we express our sincere appreciation to those inside and outside the Civil Service who assisted us in that regard.

Finally, in giving thanks, it would be remiss of the Commission not to single out the invaluable help that was given by our counsel from Conyers Dill & Pearman, Messrs. Narinder Hargun, Jeffrey Elkinson and Ben Adamson.

Special thanks must be given to Clerk to the Commission, Mrs. Alberta Dyer and her alternate, Ms. Jane Brett. Truly, we would have worked in vain without them.

Executive Summary

The Commission encourages readers to review the Report in its entirety. This short summary is intended to guide the reader through the Report, its Findings and Recommendations. All of the documents referred to in the Report are available at our website www.inquirybermuda.com.

In October 2014 the Auditor General published her Report on her audit of the Consolidated Fund for three years, 2010 - 2012, covering the period from 1 April 2009 until 31 March 2012. In Section 3 of her Report she expressed serious concern about what she found was mismanagement of Bermuda's finances during that period, the years 2010 and 2011 especially. The Government, she said, failed to comply with Financial Instructions that were, in her own words, the Government's own rules for the handling of public finances.

We were appointed in February 2016 to inquire into issues raised by Section 3 of her Report, as set out in our Terms of Reference dated 24 February 2016. Our appointment was made by the Premier under the Commissions of Inquiry Act 1935.

We must thank the previous Auditor General Mrs. Heather Jacobs Matthew and her successor Mrs. Heather Thomas and their respective staff for their invaluable assistance throughout the work of the Commission.

We began work on 1 April 2016 and we have conducted our Inquiry in public so far as it has been practicable to do so. Three Public Hearings were held in June, September and November 2016 when we heard fourteen days of evidence and submissions from interested parties. We established a public website in May 2016 and have maintained it to date.

Our Report contains the following Sections:

- **Section 1: Appointment and Terms of Reference**
- **Section 2: Report of the Auditor General – Our Task**
- **Section 3: Our Approach. This describes the breadth of the work undertaken by the Commission**
- **Section 4: Governance. This section reviews how Government and the Civil Service work, as well as Financial Instructions, Delegation of Authority and Codes of Conduct.**

- **Section 5: Evidence**
 - Twelve Contracts reviewed by the Commission
 - Accounting /Procedural Issues raised by the Auditor General.
- **Section 6: Findings**
 - Violations
 - Referrals
- **Section 7: Current Safeguards**
- **Section 8: Recommendations**
- **Section 9: Acknowledgements**

Findings

Our Terms of Reference (TOR) required us to consider: first, whether violations had occurred of Financial Instructions and related laws, rules and regulations, and whether there was evidence of possible criminal activity, which should be referred to the Police, or of other matters, which should be referred to other appropriate authorities; secondly, whether the laws and regulations currently in force are satisfactory and in particular, provide adequate satisfactory safeguards against repetition of any violations that we find have occurred in the past.

Violations

We have found that there were indeed widespread breaches of Financial Instructions. Given the constraints of time and resources under which we have operated, we concentrated our attention on one aspect of the Financial Instructions, namely, that Government contracts be publicly tendered, and approved by the Cabinet when exceeding in value the relatively low figure of \$50,000 (recently increased to \$100,000), and that public money is not paid out unless contracts are made and signed on behalf of the Government. We selected and examined twelve transactions of that kind; these are detailed in Section 5 (1).

We also considered issues raised in other parts of the Auditor General's Report regarding internal accounting matters and our findings and comments are set out in Section 5 (2) under the heading Accounting/Procedural Issues.

We found numerous violations, some of which were serious and persistent. These are summarised in Section 6.1 (Violations)

Referrals

Proceeding to consider what, if any, referrals to make under TOR paragraphs 2 and 3, we have concluded that there is evidence of possible criminal activity requiring referral to the Police under TOR paragraph 2 as shown in Section 6.2 (Referrals)

Sanctions re Civil Servants

For reasons given in Section 6.2, we have made no referrals for civil servants under TOR paragraph 4, nor have we referred any civil servant for possible disciplinary proceedings.

Recommendations

Turning to the current position and safeguards for the future (TOR 7 and 8), we were heartened to find clear evidence that in recent years the prior administration, the current Government and the Civil Service have taken positive steps to remedy the previous situation where the violations we have identified had occurred. The process began in early 2010, when the then Minister of Finance, the Hon. Ms. Paula Cox JP, instructed the consultancy firm KPMG to carry out an analysis of six selected contracts, some large, some small, which had been concluded before that date. Following on from KPMG's Report, and other research, various changes were implemented including: the Internal Audit Act 2010 and two Good Governance Acts, dated 2011 and 2012 respectively, under which a new government department was created in 2012—the Office of Project Management and Procurement (OPMP). We express disappointment with the slow rate of progress that there has been in fully implementing these measures, particularly with regard to OPMP. It is yet to be fully established and delay may be due to lack of political will or to bureaucratic reluctance to embrace change; see Section 7.

In Section 7 (Current Safeguards) we have taken account of steps that have been taken since 2010 to safeguard against the risk of further violations, of the kind we have identified, and we have identified four particular areas, where we consider that these may still be lacking, and where potential problems exist.

In Section 8 (Recommendations) we list the following:

- Ensure that Ministers and Senior Civil Servants have More Effective Relationships
- Improve Transparency and Strengthen Safeguards against Conflicts of Interest
- Improve the Effectiveness of Financial Instructions
- Clarify Accounting Officer Responsibility
- Strengthen the Offices Responsible for Safeguarding the Public Purse
- Enhance Parliamentary Oversight of Government Spending
- Hold Civil Servants Responsible with Regard to 'Ownership' of Responses to the Auditor General's Reports
- Increase Transparency and Make Government's Financial Reporting More Timely
- Urgently Review Personnel and Processes in the Civil Service
- Hold QUANGOS More Responsible

Finally, TOR paragraph 9 permits us to investigate matters which, in our opinion, are relevant to those matters listed in paragraphs 1 to 8. We have not sought to extend our Inquiry in this way, but if it were contended that we have done so, we would say that we have been entitled to do so under the power given to us by paragraph 9. We are not aware that any part of our Inquiry has not been relevant to any of the matters listed in paragraphs 1 to 8.

1: Appointment and Terms of Reference

Appointment

On 24 February 2016 the Premier of Bermuda, the Hon. Michael H. Dunkley, appointed us under section 1A of the Commission of Inquiry Act 1935 (as amended) (“the 1935 Act”) to inquire into any matters arising under Section 3 of the Report of the Auditor General on the Consolidated Fund of the Government of Bermuda for the Financial Years ending 31 March in 2010, 2011 and 2012 (“the Auditor General’s Report”).

A copy of the Appointment and Terms of Reference is attached as Appendix 1. A copy of Section 3 of the Report of the Auditor General is attached as Appendix 2.

We accepted the Appointment and pursuant to section 4 of the 1935 Act, each took and subscribed to an oath in the form of the First Schedule thereto before the Premier.

Directions

The Appointment required us to commence the Inquiry “as soon as is practicable from the date of this appointment”. We were informed by the Hon. Premier and by Secretary to the Cabinet Dr. Derrick Binns that the bulk of the cost of the Inquiry would be provided under the national budget for the year commencing 1 April 2016. We agreed to start the Inquiry on that date but, with leave from the Premier, to carry out work before that date insofar as we might seek to do so.

The Appointment further required us to “submit findings and recommendations to the Premier within twenty weeks of the date of appointment or such longer period as the Premier may from time to time direct”.

The original twenty-week period ended on 19 August 2016. The Commission wrote to the Premier on 27 July 2016 requesting an extension in time and budget and the Premier responded by letter dated 15 August 2016 confirming that after discussion with Cabinet, an extension until 31 December 2016 was warranted, along with an increase in budget. In December 2016 the Premier, at our request, further extended the period until 28 February 2017.

The Appointment directed us that we should conduct the Inquiry in Hamilton, Bermuda “or any other location(s) as might be

necessary or appropriate”. We have in fact conducted the whole of the Inquiry in Hamilton, Bermuda, including all correspondence with the Commission Secretariat.

The terms of Appointment authorised the Commission “to conduct such parts of the Inquiry that it may deem appropriate in camera”. At the initial Press Conference at the time of our Appointment on 24 February 2016, the Chairman undertook on behalf of the Commission that we would hold our proceedings in public so far as we properly could. We have requested evidence in private correspondence with potential witnesses and the holders of documents, mostly held by Government Departments or in official archives. With few exceptions all documents produced in evidence at Public Hearings, and witness statements by all the witnesses who gave evidence at the Public Hearings, together with full and unedited Transcripts of the Public Hearings, have been published on the Commission’s official website which was established at an early stage in May 2016.

No application was received or made for any witnesses to give evidence privately or for any part of the Public Hearings to be heard in camera.

Budget

The Commission was given an initial budget of \$480,000. In August 2016 when the likely cost of Public Hearings in September 2016 and potentially in November 2016 could be estimated, we requested an increase in the budgeted amount to \$1,168,160. By letter dated 15 August 2016, the Premier agreed this amount but “encouraged [us] to ensure that the Commission retains a very sharp focus on the Terms of Reference as provided to minimise any required increase in time and expenditure” The later extension until 28 February 2017 did not involve a further budget increase.

Appointment of Secretary (Clerk)

Pursuant to section 5 of the 1935 Act, the Clerk and Alternate were appointed to “record proceedings, keep papers, summon and minute the testimony of witnesses, and generally to perform such duties connected with such inquiry as the Commission may proscribe”.

Appointment of Counsel

On 28 February 2016 the Commission appointed Conyers Dill & Pearman as Counsel to the Commission on terms that had been agreed by them with the Secretary to the Cabinet. On 14 April 2016, Conyers Dill & Pearman confirmed their understanding and the nature of their instructions to the Attorney General's Chambers.

Statutory background

The 1935 Act provides what can at best be described as a framework for the conduct of a Commission of Inquiry appointed under the Act. There is express provision for the Duties of Commissioners (section 6), for Commissioners to make Rules for the conduct and management of proceedings before them (section 8), for Commissioners to have certain powers of the Supreme Court in relation to the summoning of witnesses and requiring the production of documents etc. (sections 9 -11), for representation by counsel (section 12) and other matters.

The corresponding provision in England and Wales was the Tribunals and Inquiries (Evidence) Act 1921. (More accurately, perhaps, the 1935 Act was derived from the earlier statute.) Many Public Inquiries in England and Wales were appointed under that Act and there were numerous Court decisions which had the effect of regulating their procedures, for example, by requiring them to respect the rights of witnesses and persons who might be affected by their findings.

Many of those safeguards, and other procedural matters, were incorporated in fresh legislation, the Inquiries Act 2005 ("the 2005 Act") and the Inquiry Rules 2006 made under it. These requirements place a heavy burden on Public Inquiries, in terms both of the length and costs of their proceedings, so much so that a leading textbook observes that the UK Government may now be deterred by those factors from appointing them (Public Inquiries, by Jason Beer QC and others, paragraph 1.77 et seq).

There has been no further legislation in Bermuda, and the 2005 Act does not extend to Bermuda. We are not aware of any judgments of the Bermuda Courts concerning the practical application of the 1935 Act. However, many of the United Kingdom judgments are relevant to the operation of the 1935 Act, not least the overriding principle of fairness which has been established by them; and we have taken the view that we should have regard to them in conducting this Inquiry under the 1935 Act, in Bermuda. In the Opening Statement at our Public (Witness) Hearing on 28 September 2016 we said this –

"Over the years, a number of high profile inquiries were held under [the 1921] Act, (in England and Wales) and rules and

practices were developed for the protection of witnesses and interested persons generally, alongside the public need for the issues to be thoroughly explored, so far as possible. In 2006 there was fresh legislation, the Inquiries Act 2005 and the Inquiry Rules 2006, which gave statutory force to many of these rules; but there has been no corresponding enactment or updating of the rules in Bermuda. In these circumstances, we have thought it right to learn from the British, and in one case, Irish, authorities, and to interpret and apply the Bermuda Act in accordance with the principles developed there."

The Commission has approached its work accordingly.

2: Our Task

The Commission's starting point for the Inquiry is Section 3 of the Auditor General's Report, with particular regard to the matters listed in paragraphs 1-9 of our Terms of Reference. They are listed under four heads:

- (1) *Scope of Inquiry (paragraph 1);*
- (2) *References to other agencies (paragraphs 2-6);*
- (3) *Recommendations for the future (paragraphs 7-8); and*
- (4) *Any other matter (paragraph 9)."*

We shall consider these in turn.

First however, it should be noted here that the validity of the Commission's Appointment was challenged in Supreme Court proceedings brought by Bermuda Emissions Control Ltd. ("BECL") on 29 August 2016 against the Premier of Bermuda, the four members of the Commission and the Attorney General for Bermuda (Supreme Court of Bermuda, Civil Jurisdiction, 2016 No. 322). The challenge failed.

The Chief Justice of Bermuda, having held that he should proceed to finally determine the issue at the initial stage when leave was granted to pursue the claim for Judicial Review (of the decision to appoint the Commission) (Judgment para.9), analysed the Terms of Reference as follows:

"[Paragraphs 1-9 of the Terms of Reference] ought not to be read in a contextual vacuum but, rather, as being subservient to the 'umbrella' definition of the matters to be inquired into which is set out in the governing words which they follow".

The powers conferred by [numbered paragraphs 1-9] are accordingly inextricably linked with the Auditor General's Report on Financial Years 2010, 2011 and 2012 and the matters arising under Section 3 thereof....."

BECL appealed against this judgment, but the appeal was dismissed by the Court of Appeal on 24 November 2016 "for reasons to be handed down" and judgment was issued on 20 December 2016. Both judgments are available on the Commission's website.

The Commission therefore was free to proceed under its Terms of Reference.

Scope of Inquiry (Terms of Reference paragraph 1)

Our task is to inquire into "any potential violation of law or regulations...by any person or entity, which the Commission considers significant" and to "determine how such violations arose". We focus, therefore, on "any potential violation of law or regulations" with specific reference to "the Civil Service Conditions of Employment and Code of Conduct, Financial Instructions, and Ministerial Code of Conduct".

Section 3: Period to be covered

A preliminary issue arises with regard to the period that we are required, or entitled to consider. Although the Auditor General's Report covered three Financial Years, commencing on 1 April 2009 and ending on 31 March 2012, the matters arising under Section 3 extend both before and after that period. Two examples will suffice at this stage. First, Section 3.1 of the Auditor General's Report under the general heading "Failure to comply with Financial Instructions and related rules" lists under "Departmental Expenditures not approved by Cabinet" the sum of \$2,068,106 paid in respect of "Transport Control" in the year 2011. That sum was paid to BECL under a contract that was negotiated and agreed in 2008. In the Supreme Court proceedings referred to above, BECL "complained that it contracted with the Government before the period covered by the Report" (Judgment paragraph 29). The Chief Justice gave this argument short shrift. He continued:

"The COI (Commission of Inquiry) very convincingly counters that its contract is potentially relevant because, pursuant to the governing contract, funds paid to [BECL] are referred to in the relevant section of the Report.....While there may be room for argument about the scope of documents to be produced.....(which is an entirely different matter) the suggestion that the Emissions Decision is wholly invalid on relevance grounds is in my judgment unsustainable"(ibid.)

The Commission's Opening Statement at the First Public Hearing on 27 June 2016 included this:

"Paragraph 9 of our Terms of Reference includes 'any other matter which the Commission considers relevant to any of

the foregoing'. Our present, provisional view is that we will be assisted by considering certain Government contracts that were awarded before, or after, the period of Financial Years 2010 - 2012 where... payments made during those years represented Government outgoings under earlier contracts...".

In his Judgment, quoted above, the Chief Justice did not refer to paragraph 9 of the Terms of Reference and it is unnecessary for us to consider whether the relevance of, for example, the BECL contract could also be established under paragraph 9 of the Terms of Reference as *"any other matter relevant to any of the foregoing"*. On either basis, we took the view that we were required, or entitled to inquire into contracts made before 2009 including the following:

- (1) the Motor Vehicle Safety and Emissions Testing Programme (BECL)
- (2) the Port Royal Golf Course Improvement Capital Development Project
- (3) the Magistrates Court and Hamilton Police Station (Dame Lois Browne Evans Building)
- (4) Royal Naval Dockyard Cruise Ship Pier - Heritage Wharf

The second example of matters we have inquired into outside the three Financial Years 2010-2012 is the current L.F. Wade Airport Development Project. We included this in the Opening Statement made on 27 June 2016 (quoted above), which continued:

"...or the Government's practice[s] during Financial Years 2010-2012 may have.....continued after that period. For those reasons, we propose to inquire into contracts where questions may arise with respect to the award of the contract and tendering process in respect of:

- (5) *the current L.F. Wade Airport Development Project "*

No formal objection was received to this proposal, but when two witnesses whom we had asked about the L.F. Wade Airport Development Project tendered their witness statements they included the following paragraphs:

"L.F. Wade International Airport Project"

"1. On advice of the Attorney General's Chambers, I have been asked to hold on responses to such questions until the Commission and Chambers have resolved any outstanding questions pertaining to the scope of the Commission's Terms of Reference."; and

"21. I have been advised by the Attorney General's Chambers that I am not permitted to consider any question

or provide any documentation in relation to the L.F. Wade International project."

There were no formal discussions between the Commission and the Attorney General's Chambers and no documents or evidence relating to the Airport project were received by the Commission. On 23 September 2016 without notice to the Commission, the Acting Attorney General held a press conference at which he announced:

"The Government has been consistent in its representation to the Commission that the L.F. Wade project is not within their Terms of Reference" (The Royal Gazette 23 September 2016)

The Commission next received formal objection from the Attorney General's Chambers on behalf of the Government, pursuant to our Rules (Appendix 3). The Commission ruled against the objection (Appendix 4). We then received further witness statements from the two witnesses referred to above, giving full and detailed answers to the questions we had asked, together with full documentation. It appears, therefore, that the Attorney General accepted the Commission's contentions regarding the scope of the Inquiry, in this respect.

Section 3 – Content

In the words of the Auditor General, Section 3 *"includes... those matters arising from the audit which are significant enough to warrant the attention of the House of Assembly"* [to whom the Report was made]. She continued:

"Many of the observations point to a general failure to follow the rules (Financial Instructions) established by Government for the safeguarding of public assets.

"Financial Instructions are rules that govern the custody, handling and accounting of public money including the management of capital development projects. Financial Instructions and related rules are designed to ensure that public money is managed effectively for the intended purpose."

Quoting from our Opening Statement at the First Public Hearing on 27 June 2016:

"We find that Section 3 contains seventeen (17) headings, numbered 3.1 to 3.17, and that these can be subdivided into two (2) groups."

The first group consists of transactions, which involved third parties outside the Government, whether as contracting

parties or as recipients of payments made by the Government, or as both. These headings are:

- 3.1 Failure to comply with Instructions and related rules, listing individual projects under sub-paragraphs 3.1.1 - 3.1.7.
- 3.2 Millions paid without signed contracts or agreements.
- 3.3 Significant contracts not tendered.
- 3.4 Duplicate payments.
- 3.5 Overpayments.
- 3.12 Millions paid for professional services without prior approval.

We shall refer to these six headings as “*third party issues*”.

The remaining headings in Section 3 are concerned with what we may call internal governmental accounting/procedural issues, where it is not alleged (except possibly under headings 3.7, 3.8 and 3.17) that the failure to comply with relevant standards resulted in improper payments or over-payments to third parties, or in direct loss to the Government itself. These are as follows:

- 3.6 Supplementary Appropriation Bills not tabled.
- 3.7 Inadequate procedures over bank reconciliations.
- 3.8 Completeness and accuracy of accounting for Employee Benefits.
- 3.9 Inadequate provisioning.
- 3.10 Inadequate procedures over amounts receivable from or payable to other Government agencies.
- 3.11 Lack of ministerial authorisation for inter-fund transfers.
- 3.13 Bank limit exceeded by \$24 million.
- 3.14 Inappropriate application of or lack of accounting policies.
- 3.15 Presentation issues.
- 3.16 Overspending of Supplementary Estimate limits.
- 3.17 Information Technology (IT).

These may be referred to as “*Internal Accounting/Procedural issues*”.

In connection with third party issues, the Opening Statement noted:

“This is an area of obvious public concern. One of the principal complaints made in the Auditor General’s Report concerns the way in which large and important Government contracts were awarded without the appropriate (or any) tender process. The Commission will likely focus, at least initially, on how these contracts came to be awarded as they were.”

Like all the Commission’s Public Statements, this one was immediately published on the Commission’s website no later than the day after it was made. That becomes relevant when considering representations and complaints by or on behalf of

individual witnesses that they had insufficient prior warning that their evidence would be required.

In examining the ‘third party issues’ defined above, we found it necessary to concentrate on **twelve contracts**. That was for two reasons. First, because we were working under a time limit. Secondly, because following our initial examination of available records, and after consultation with counsel, we decided that our limited resources would be best employed by an in-depth examination of a limited number of cases, which in the event became the twelve contracts listed in Section 5.

The Auditor General based her general conclusions in paragraphs 3.1, 3.1.1, 3.1.7, 3.2, 3.3 and 3.12 on the statistical analyses described in her Report. We have not attempted to check the results of her analyses, let alone to repeat her work, but we should place on record that it was the Commission’s impression, based on the evidence we saw and heard, that there was a widespread departure from and disregard of the Financial Instructions formulated by the Government itself for the proper conduct its financial affairs and in order to safeguard the public purse. That was particularly the case during the first part of the three-year period: after late 2010, attempts were made to bring the situation under control. We shall refer to them when we come to consider Current Safeguards (Section 7) and our recommendations for the future (Section 8).

References to other agencies (Terms of Reference paragraphs 2 to 6)

To the Director of Public Prosecutions and the Police (Terms of Reference paragraph 2)

Paragraph 2 of the Terms of Reference requires us to “*Refer any evidence of possible criminal activity, which the Commission may identify, to the Director of Public Prosecutions (DPP) and the Police*”.

We have been conscious throughout of the need to exercise the utmost care and discretion with regard to this part of our assignment. First, because of the inherent seriousness of making any such reference, even if it is only of ‘possible criminal activity’ without any finding or even any suggestion of guilt, the reference alone might be taken by some as an indication that in the eyes of the Commission there is at least *prima facie* evidence of guilt, but it should not.

Secondly, it was rumored and even common knowledge in Bermuda, at and before the time of our Appointment, that police investigations might be pending into some at least

of the matters which we were appointed to inquire into. We thought it necessary at an early stage to discover whether and, if so, to what extent that might be correct. We therefore listed the transactions which we were inquiring into at that stage and asked the Commissioner of Police whether any of them were the subject of ongoing police enquiries at that time (June 2016). He replied that all of them were.

Apart from some general discussion about the fact that our Inquiry and the police investigations necessarily had to be separate and independent of each other, about which we were in agreement, there was no further exchange of information between us. He did not tell us what stage the police investigations had reached, what other matters he might be investigating, nor what evidence, if any, the Police had obtained from them, nor did we ask him to disclose it to us. It was agreed that the Commission's counsel would meet the (newly appointed) DPP or his representative to discuss legal issues generally. We understand that a meeting or telephone discussion did take place between them, but nothing resulted from it and we have received no evidence or further information from the police.

Thirdly, with one exception, we did not know what individuals are the subject of police investigation, except by inference from the transactions that we identified to the Commissioner. The exception was Dr. The Hon. Ewart Brown, former Premier. He asserted through his counsel, Mr. Jerome Lynch QC, that he was under investigation by the police and on that ground he claimed to be excused from giving evidence or alternatively, the right to claim privilege in response to any questions he might be asked as a witness before us.

This made it necessary for us to consider the relationship between our Inquiry and the police investigations that were taking place into at least some matters that are relevant to both. We noted, first, that we were positively not required, or entitled, to make any finding of innocence or guilt. We were required only to refer to the police and the DPP any evidence of "*possible criminal activity*".

Secondly, the fact of an ongoing police investigation does not prevent us from conducting our Inquiry, provided there were adequate safeguards for witnesses from whom we seek to obtain evidence. The traditional safeguard in the Courts is the 'privilege against self-incrimination', more accurately described as the witness's right to refuse to answer a question when the answer might serve to incriminate him of a criminal offence (see generally *Halsbury's Laws* etc.) (and better known in the USA at least, as the right to 'plead the Fifth'). We made it clear that any witness appearing before us was entitled to claim the right, or privilege, as if the evidence was being given in Court.

We were satisfied that this gave adequate protection against self-

incrimination to any witness before us who was or might be the subject of investigation by the police. We also considered the implications for our Inquiry if any witness were to claim that his answer to a question might tend to show that he was guilty of a criminal offence. Claiming the right not to answer is no evidence of guilt; that we can regard as an elementary proposition of law. But we were not concerned with the issue of innocence or guilt. We had to refer to the authorities any evidence we may find of "*possible criminal activity*". It might be said that by claiming the privilege, the witness effectively has admitted that "*possible criminal activity*" might be revealed by his answer, but we do not go that far. We have proceeded on the basis that there must be some evidence of 'possible criminal activity' which is separate from and independent of the claim for privilege, and if there is, the witness' claim neither adds to the weight of that evidence nor detracts from it, although his evidence might have added to it if he had answered the question and denied that he was guilty of any offence.

Possible other references, etc

Paragraphs 3-6 of our Terms of Reference read as follows:

3. Refer any evidence of possible disciplinary offences, which the Commission may identify, to the Head of the Civil Service;
4. Draw to the attention of the Minister of Finance any matter, which the Commission may identify, appropriate for surcharge under section 29 of the Public Treasury (Administration and Payments) Act 1969;
5. Draw to the attention of the Minister of Legal Affairs (as the Enforcement Authority for Bermuda) any matter, which the Commission may identify, appropriate for civil asset recovery under Part III A of the Proceeds of Crime Act 1997;
6. Draw to the attention of the Attorney-General any matter, which the Commission may identify, appropriate for civil proceedings before the courts."

For reasons which are set out in our **Findings and Referrals** (Section 6), we have concluded that it would not be appropriate for us to make any Referral to the Head of the Civil Service, under paragraph 3, or to draw any matters to the attention of the authorities listed in paragraphs 4-6. We need say no more about them here.

Recommendations for the Future (Terms of Reference paragraphs 7-8)

Paragraph 7 requires us to *“consider the adequacy of current safeguards and the system of financial accountability for the Government of Bermuda”* and Paragraph 8 *“to make recommendations to prevent and/or reduce the risk of recurrences of any violations identified to mitigate financial, operational and reputational risks to the Government of Bermuda”*.

Our consideration of *Current Safeguards* and our recommendations for the future are contained in Sections 7 and 8.

Any other matters (Terms of Reference paragraph 9)

Apart from its possible relevance to our consideration of matters occurring before and after the three Financial Years covered by the Auditor General's Report (referred to in Section 1, above), we have not sought to extend our Inquiry under this head.

3: Our Approach

The investigative work that is carried out at the start of an Inquiry is extremely important because the information, documents, witness statements and evidence obtained become the “lifeblood” of the Inquiry.¹

Our Terms of Reference and Section 3 of the Auditor General’s Report determined the extent of our investigative work as well as the limited timeframe and available resources. The Commission had no investigators at its disposal, forensic or otherwise, as the budget simply did not provide for this.

Commission Chairman Sir Anthony Evans said at our second Public Hearing: *“In summary, we shall try to establish all relevant facts and expose them to the public gaze, so far as lawful privilege - private as well as public - will allow. That is something which a police inquiry cannot do”*.²

In all our dealings, the Commission strove to be independent, fair and transparent. We set out to confirm whether the facts as shown in the Auditor General’s report were correct and, if they were, determine why breaches occurred and what could be done in the future to prevent them occurring again.

The Commission issued a Procedural Statement on 13 June 2016 which described, among other matters, the Commission’s overall approach, our powers, the documentation we had received, the documents we were continuing to seek, and our proposed course of action.³

From 4 April 2016, when our first internal meeting was held, until the second (and substantive) Public Hearing on 28 September 2016, we sought to obtain all relevant documents. We reviewed the initial set of documents from the Auditor General and undertook a key scoping exercise. This allowed us to identify that the focus of the Inquiry should be **the tendering** of significant contracts as identified by the Commission (and included in the sample of Section 3 items discussed by the Auditor General.)

This meant that other aspects of contracts beyond tendering were not reviewed in detail. These contracts are only discussed in our Report where they provide relevant background information. The Commission was able to identify a list of issues/matters, which then formed the basis for preparing witness bundles. Witness bundles were provided to all Ministerial and Civil Service witnesses from whom we sought evidence.

In general, we were gratified with the level of cooperation we received from witnesses with respect to the retrieval of material, which was so important to the success of the Inquiry. The Auditor General’s Office was professional and efficient in responding to the numerous requests made of them. Through the Secretary to the Cabinet, we were able to obtain additional records from Heads of Department within the Government with good cooperation, and we note that all civil servants were encouraged to assist the Commission when asked. In almost every instance, the requested assistance was forthcoming.

As information and documents were acquired, they were reviewed in detail and the material was catalogued and paginated within a document management system. Specific thanks must be given to Mr. Ben Adamson and his team at Conyers Dill & Pearman for their assistance in this matter.

As a result, the Commission amassed thousands of pages of documents which have been included on the Commission’s website to allow complete transparency for the public.

Below is a more detailed description of the Commission’s activities prior to, during and after the Public Hearings.

1. Prior to the hearings

Establishing Rules

The UK Inquiries Act 2005 led to the Inquiries Rules 2006. As noted in Section 1 of this Report, the Bermuda Act does not contain any provision for Rules but we applied the principles developed in the UK and published Rules for the Commission on our website.⁴

The Commission Rules covered matters under the following key headings:

Evidence: This section dealt with requesting evidence from witnesses in writing.

Oral Evidence: described the roles with respect to questioning of witnesses by Counsel to the Inquiry, the Commissioners and legal representatives during the Public Hearings.

Opening and Closing Statements: Only the Commission and Counsel to the Commission were allowed to make opening statements at the Public Hearings but legal representatives were allowed to make closing statements with the permission of the Chairman.

Disclosure of Documents: This section dealt with the disclosure of documents in the possession of the Commission to witnesses, as well as redactions and withholding of confidential material (e.g. Cabinet Memoranda).

Public Access: The Commission confirmed that, to the greatest degree possible, it would provide public and media access to all documents.

Warning Letters: This section described the “Maxwell” process where anyone criticised within the Final Report must receive a warning letter from the Commission.

Records Management: The Commission confirmed that it must have an appropriate system to maintain the records it obtained and created, and ensure that they were available for transference to a Public Records authority at the end of the Commission, as directed by the Premier.

Power of Subpoena: This Rule dealt with how subpoena information would be collected at public and non-public sittings and the need for witnesses to apply in writing if they could not comply with a subpoena, as to do so would be unreasonable or was contrary to the public interest.

The Commission began its document retrieval efforts with the Office of the Auditor General where copies of original government documents existed.

Retrieval of Existing Documents: Auditor General

The Commission was assisted greatly by an initial large binder of documents provided by the Office of the Auditor General and collated by Counsel to the Commission in time for our first meeting in early April 2016. This binder contained supporting documents for the following Section 3 items, which have been referred to in our opening statements as Third Party Issues.

They were:

- 3.1.1 Millions paid without the prior Approval of Cabinet
- 3.1.2 Commercial Courts Ministry of Finance renovations
- 3.1.3 Maintenance and stores building
- 3.1.4 Purchase of Sand and Rock
- 3.1.5 Renovations - Department of Human Resources

- 3.1.6 Central Laboratory Building project (NOTE: this was subsequently combined with the Southside Laboratory Contract)
- 3.1.7 Departmental expenditures
- 3.2 Millions paid without signed contracts or agreements
- 3.3 Significant contracts not tendered
- 3.4 Duplicate Payments
- 3.5 Overpayments
- 3.12 Millions paid for professional services without prior approval

In some instances, we found that certain contracts selected fell into more than one subsection in Section 3. i.e. no tendering and no Cabinet approval (3.1.1 and 3.3).

The remaining 11 headings were concerned with what the Commission called “*internal governmental accounting/procedures issues*”. We received some documents from the Auditor General concerning these items in the initial binder but we were also able to follow up at a later date and receive more detailed information in support of these Section 3 findings.

The Accounting /Procedural issues were:

- 3.6 Supplementary Appropriation Bills not tabled
- 3.7 Inadequate procedures over bank reconciliations
- 3.8 Completeness and accuracy of accounting for Employee Benefits
- 3.9 Inadequate provisioning
- 3.10 Inadequate procedures over amounts receivable from or payable to other Government agencies
- 3.11 Lack of Ministerial authorisation for inter-fund transfers
- 3.13 Bank limit exceeded by \$24 million
- 3.14 Inappropriate application or lack of accounting policies
- 3.15 Presentation issues
- 3.16 Overspending of Supplementary Estimate limits
- 3.17 Information Technology (IT)

We also received copies of the Auditor General’s Special Reports at this time with respect to:

- Motor Vehicle Safety and Emissions Testing Programme October 2010
- (Bermuda Emissions Control Ltd)
- Magistrate’s Court and Hamilton Police Station (Dame Lois Browne Evans Building) February 2009
- Port Royal Golf Course Improvements Capital Development Project October 2014
- Royal Naval Dockyard Cruise Ship Pier - Heritage Wharf March 2015

The Auditor General used sampling techniques during the course of her audit. Sampling is the application of an audit procedure

to less than 100% of items of expenditure within an account for the purpose of evaluating some characteristics which, it may reasonably be concluded, could apply to the whole account.

We recognise that the number of transactions that the Commission reviewed in detail was a very small percentage of the total number of transactions for 2010, 2011 and 2012 and, in fact, a small sample of the items that the Auditor General reviewed in detail. However, these transactions do include many of the major Works & Engineering contracts entered into by the Government from 2000 to date.

The Commission's remit also extended to considering the adequacy of current safeguards and the system of financial accountability for the Government of Bermuda (paragraph 7 of the Commission's Terms of Reference). The Commission believed that this mandate included obtaining information on the safeguards and processes in place for dealing with the tendering of the L. F. Wade Airport Development Project, which is the largest capital project currently under negotiation by the Government of Bermuda.

Having reviewed the Auditor General's documents described above, the Commission then undertook to access as many original sourced documents as possible. With the assistance of the Secretary to the Cabinet, we approached current Permanent Secretaries and Heads of Departments to obtain original documents from various Departments.

Retrieval of Existing Documents: Government Heads of Departments

Letters were sent to the following Ministries and Departments requesting assistance in obtaining original documentation and in answering a number of questions raised as a result of the review of documents from the Auditor General in Section 3:

- The Cabinet Office
- The Office of the Tax Commissioner
- The Accountant General
- The Ministry of Education
- The Ministry of Finance
- The Ministry of Public Works (Works & Engineering)
- The Ministry of Tourism and Transport

In general, the Departments assisted to the best of their capabilities to fulfill the requests. However, it became clear that document retention policies and filing systems varied enormously between Departments and, in general, the resulting responses were disappointingly incomplete. The Department of Education was the exception and was most notable in its detailed response. As a result, the one contract (GET Limited) we were considering

investigating in that Ministry did not warrant further scrutiny.

From this document retrieval exercise, we were able to consider what documents were relevant to our Inquiry. These would form the basis for the preparation of the witness bundles of evidence to be provided to each witness.

The relevance exercise was an important review process to determine what should be shared with witnesses and then, to the greatest extent possible, what might be shared with the public.

Witness Bundles

Following on from this retrieval and relevance exercise, the Commission created a bundle of documents which became the evidence that was central to the whole of the Commission's Public Hearings.

Commission of Inquiry Public Binder 1 contained the following tabs. A combination of some or all of these documents was shared with the witnesses in "bespoke" bundles, depending on the witnesses' various roles within the Government or the Civil Service.

Tab 1 (3.1.2) Commercial Courts Ministry of Finance Renovations (Finance Headquarters FHQ Documents)

Tab 2 (3.1.3) Maintenance and Stores Building (Department of Public Transportation PTB Documents)

Tab 3 (3.1.4) Purchase of Sand and Rock (Aggregate and Sand Purchase A&S Documents)

Tab 4 (3.1.5) Renovations Department of Human Resources (Department of HR DHR Documents)

Tab 5 (3.1.6) Central Laboratory project (Forensic Lab Marsh Folly FLMF Documents)

Tab 6 (3.1.6) Southside Laboratory (Central Lab Southside CLS Documents)

Tab 7 (3.1.7/3.3) Departmental Expenditures/Significant contracts not tendered (Global Hue GloH Documents)

Tab 8 (3.3) Significant contracts not tendered (Ambling Documents)

Tab 9 Special Report Motor Vehicle Safety and Emissions Testing Programme (Bermuda Emissions Control BEMISS Documents)

Tab 10 Special Report Magistrates Court and Hamilton Police Station (Dame Lois Browne Evans Building Documents)

Tab 11 Special Report Port Royal Golf Course Improvements Capital Development Project Documents

Tab 12 Special Report Royal Naval Dockyard Cruise Ship Pier Heritage Wharf Documents.

Additional documents were posted to the Commission's website on the tendering of the L.F. Wade Airport Development Project as they were received at a later date from the Accountant General.

Salmon Warning Letter

Our Inquiry decided that all potential witnesses who were being asked to provide a witness statement were given what has come to be known as a Salmon Warning Letter. This is a procedure identified in the Inquiry Act 2005 and 2006 Rules in the UK and is intended to help the witness who may be criticized to understand what he or she may have to address when he/she gives evidence. The following wording was used in the Commission's warning letters:

"You should be aware that the Commission is considering not only whether Financial Instructions were properly followed but also whether Ministers and/or senior civil servants potentially breached and/or countenanced breaches of Financial Instructions in the award of Government contracts and/or in the processing of payments to contractors out of public monies.

If the Commission concludes that Financial Instructions were not properly followed and/or that this took place for inappropriate reasons that may lead to criticism of the individuals involved or other action as required by our Terms of Reference. The Commission has requested your assistance because you appear able to help it to establish relevant facts. The Commission cannot say at this stage what criticism, if any, may be justified, but we should remind you that criticism, possibly of you personally, may be involved".

Once the Public Hearings were completed and the Report drafted, the Maxwellisation process ensued for all witnesses criticised in the Report (see below).

Witness Statements

Witness statements are a key part of any Inquiry. They build upon information received through the document retrieval process and assist in providing the Inquiry with insight into issues being addressed at the time the contracts were put in place. They also help in an analysis of which witnesses should come before the Public Hearing(s) for cross-examination. Twenty-one witness bundles were sent to potential witnesses. Two witnesses were deemed not to be required to come before the Hearing.

The Commission took the view that counsel should assist in the drafting of the witness statements and offered the services of Conyers Dill & Pearman to the witnesses. Alternatively, the Commission was equally agreeable if witnesses wanted to instruct independent counsel. The letters to witnesses said: *"In short, the Commission is happy to assist you in the provision of a statement or for you to provide such a statement independently."*

The Commission noted that Liberty Chambers, a Bermuda law firm, assisted 14 of the 21 witnesses who were asked to provide a statement. These witnesses were either current civil servants or retired civil servants. Liberty Chambers greatly assisted in the completeness and timeliness of those witnesses' statements.

Four other witnesses were represented by instructed counsel and three other witnesses provided statements without the apparent assistance from counsel.

The Commission made the decision not to seek to call witnesses who were outside the Bermudian jurisdiction, taking into account our limited resources and time constraints.

Subpoenas/ Affidavits

The Commission's Rule 8 deals with the issue of subpoenas. The Commission issued subpoenas in order to collect documents from individuals or companies which it believed were relevant to the Commission's Inquiry. If an individual or company felt unable to comply with the request, a written request had to be made to the Chairman who, after consulting with Commission members, could revoke or vary the subpoena.

Affidavits were received from seven individuals as a result of the subpoenas. Two individuals (not Ministers or civil servants) gave oral evidence to the Commission.

Website (www.inquirybermuda.com)

An inquiry's website is an important tool for the public, participants and witnesses. The Commission established its website early in its process and has endeavoured to provide complete and timely information to the public using this vehicle.

The website contained important documents including:

- Terms of Reference
- Biographies of the Commissioners
- Commission Rules
- Press Releases
- Frequently Asked Questions

This material was posted prior to the start of the Public Hearings and updated throughout the Commission's investigation.

Once Public Hearings had begun, additional documents were added. These included Opening and Closing Statements, Public Binders concerning contracts under review, Rulings, Witness Statements, Affidavits and Transcripts of the proceedings.

Press Releases

The Commission of Inquiry was greatly assisted on a pro bono basis by Mrs. Wendy Davis Johnson who acted as the Commission's media contact. Mrs. Davis Johnson assisted in our communication strategy using traditional media and social media forums. She was instrumental in ensuring timely communication with the press through press releases and regular posts to the website and Facebook page.

Submissions from the Public

The Commission regularly asked for assistance from the public with respect to any matters under our Terms of Reference that individuals felt should be brought in front of the Commission. However, as has already been noted, we were not and could not be a roving inquiry into matters which were not within our Terms of Reference. Indeed, at one stage the Commission came under legal challenge with respect to one matter which was thought to be outside our remit, although that one challenge proved unsuccessful.

We gratefully appreciated the public's interest and belief in the proceedings and useful information was received. However, in some instances, the submissions were anonymous via our hotline or email address. Although some of the information appeared relevant, we were unable to follow up. Others provided very comprehensive submissions but which were clearly outside our remit. We could not take these submissions any further.

Non-public Documents and Redactions

To the greatest extent possible, the Commission has provided all documents that were utilised in the hearings to the public via the website. There were a very few documents which were non-public. These mostly represented Cabinet Memoranda and Cabinet Minutes. Certain documents, particularly those from the Auditor General's working papers, were redacted with respect to the individual auditors' names, which were not relevant to the Inquiry.

Challenge to the Validity of the Commission

(See also Section 2)

Bermuda Emissions Control Ltd. brought a proceeding before the Supreme Court in Bermuda that challenged the validity of the appointment of the Commission.

This summons was issued on 29 August 2016. The Chief Justice heard the summons on 2 September 2016 and gave his ruling on 7 September 2016. There was a second hearing before him

on 6 October 2016 which proceeded on the basis that the only significant remaining issue was whether the summons could properly require production of documents to fewer than all four of the Commissioners. BECL appealed against the Chief Justice's Ruling. The appeal was heard and dismissed by the Court of Appeal on 24 November 2016.

Challenge to the Scope of the Inquiry to include the L.F. Wade Airport Development Project (See also Section 2)

Consideration of the L.F. Wade Airport Development Project was met with objection made public by the Government by way of a press conference and statement⁵ issued on Friday, 23 September 2016 by Acting Attorney General, the Hon. Michael Fahy JP. Subsequently, the Government followed procedure and lodged a formal objection per the Commission Rules. The Commission considered the objection and, upon deliberation, provided a ruling⁶ that we would continue in our efforts to look at the L.F. Wade Airport Development Project's tendering process.

Additional Meetings

Meetings, deemed relevant to the Inquiry, were held outside of the Commission's Public Hearings. They included:

Meeting with the Commissioner of Police: This meeting was held to advise the Commissioner of Police, Mr. Michael De Silva, of the contracts that we had decided, at that time, were within the scope of our review. We asked if he was aware of any investigations by his staff with respect to these matters and he confirmed that all of the contracts we had identified to him were under review by his investigators. There was no sharing of information or files during or subsequent to that meeting.

Chairman of the Public Accounts Committee: This meeting was held with the former Chairman, the Hon. David Burt JP MP to allow the Commission to better understand the workings of the Committee and the challenges it faces with respect to the timeliness of reviews and resources.

Secretary to the Cabinet and Civil Service Executive: This meeting was held to allow the Commission to better understand current Civil Service activities and to be updated on the status of the SAGE Commission recommendations.

Prior to the Commission initiating any review of documents, various Commissioners held meetings with the Bermuda Public Service Union, the Chamber of Commerce, the Association of Bermuda Insurers and Reinsurers and the Association of Bermuda

International Companies to inform them of the Commission's work and Terms of Reference.

2. During the Hearings

The Commission held three Public Hearings: 27 June 2016; 28 September until 12 October 2016; and 28 November until 1 December 2016.

First Public Hearing

The first Hearing was short and the Opening Statement from the Chairman aimed at achieving the following:

- Confirming to participants and the public at large that the Inquiry was proceeding with its work
- Making an early public statement as to the issues with which the Inquiry was most concerned
- Indicating the procedures that the Inquiry would adopt
- Identifying the expectation with respect to cooperation from participants
- Consideration of any applications for representation for witnesses.

Counsel to the Inquiry also made a statement outlining their role and the work it had undertaken to date.

Second Public Hearing

A second and more substantive hearing occurred between 28 September and 12 October 2016.

Twenty-one witnesses were called to give evidence and 19 did so under oath. Their witness statements were posted to the Commission's website at the end of each day's testimony.

Four different Counsel represented 15 witnesses.

Four witnesses were unrepresented.

The two witnesses who did not appear were dealt with as follows by the Commission's Rulings:

One witness asked to have his subpoena set aside. After deliberation, this request was rejected by the Commission. However, the witness was granted additional time to prepare a statement and the subpoena was adjourned until 28 November 2016.

A second witness asked to have his subpoena set aside. After

deliberation, this request was rejected by the Commission.

The witness's Counsel claimed lawful privilege that to answer the three questions posed would be self-incriminating. The Commission accepted the witness's right not to give evidence on the grounds of self-incrimination.

The Chairman and Counsel to the Commission provided Opening Statements.

Counsel conducted the majority of questioning of witnesses with Counsel for witnesses (where they existed), also undertaking cross-examination.

Commissioners asked questions of all witnesses after the Counsel to the Commission and Counsel for witnesses had completed their examinations.

Only one witness was recalled after application from another witness's Counsel.

Five Rulings were issued during the course of the second Public Hearing. Two with respect to witnesses are noted above; the other three were:

- Bermuda Emissions Control Ltd. (as noted previously)
- L.F. Wade Airport Development Project (as noted previously)
- Adjournment of subpoena for one witness from 5 October 2016 until 10 October 2016 as a result of non-appearance of the witness. The second subpoena was complied with.

Transcripts for each day of the second Public Hearing were made by Doris Goodman Recording and Transcription Services. These were posted to the Commission's website as soon as they were received.

The Commission made available generous seating for the public but did not make arrangements for the hearings to be "streamed". However, we were grateful that Bernews chose to provide almost real-time streaming of the Hearings. Along with other local media support, this ensured that the public had access to real-time information regarding evidence being provided.

Third Public Hearing

The third and final Public Hearing occurred between 28 November and 1 December 2016.

Three witnesses were called to give evidence under oath. Two witnesses complied.

A third witness, who had asked for the extension in time at the second Hearing, asked to have his subpoena set aside. His Counsel claimed lawful privilege and that to answer the questions posed by the Commission with respect to seven contracts would be self-incriminating. The Commission accepted that the witness would not give evidence on the grounds of self-incrimination but required that an affidavit be received from the witness stating that he would not give evidence. The signed affidavit was received by the Commission.

Closing Statements were made by Counsel to the Commission and a Counsel to two of the participants.

The third and final Hearing concluded with thanks from the Chairman to all those who had assisted in ensuring the efficient running of the Inquiry.

Transcripts were made each day for the final Public Hearing by MG Court Recording and Transcriptions Bermuda and were available and posted to the Commission's website as soon as they were received.

3. After the Hearings

There is little reason to hold an Inquiry unless the outcome is recorded fairly and accurately in a final Report. This also applies to any criticism that is to be leveled in such a Report. The Commission was very focused on this aspect of its mandate as the eleven months of its work came to its conclusion.

Maxwell Process

One aspect of fairness is a process more commonly referred to as the Maxwellisation process. UK law allows that persons who are to be criticised in an official report be allowed to respond prior to publication, based on what criticism they may receive. The process takes its name from the publisher Robert Maxwell who in 1969 was criticised in a report as being *"unfit to hold the stewardship of a public company"*. Maxwell took the matter to court and official policy was altered to ensure prior notice would be given of critical findings. The Commission determined that it would issue Maxwell letters.

In fact, 13 Maxwell letters were sent to former Ministers and current and former civil servants. Replies were received from all but 2 recipients of the letters.

While the 2006 Rules do not impose any obligation on an inquiry receiving a response from an individual to a Maxwell letter to revisit their criticism, not to do so would appear nonsensical. Therefore, reviews of the responses received to the Maxwell process have

been undertaken in arriving at this final report.

Records Management

At the end of an Inquiry, the Commission, in accordance with our Rules, must transfer custody of all the Inquiry records back to the Government. The Commission will seek to ensure that all public documents continue to be available digitally to the public to the greatest extent possible and all physical documents have been transferred to the Government's Archives Department.

Closure

The end of the Inquiry occurs when the Final Report has been delivered to the Premier and the Chairman confirms that the Commission has fulfilled its Terms of Reference. The publication of this Report is determined by the Premier and his advisors. We hope that in accordance with the Inquiry's principle of fairness, independence and transparency, the Report will be made available to the public as soon as is practicable.

An important part of this Inquiry is to make suggestions to prevent a recurrence of similar events in the future. We have documented our Recommendations in Section 8 of this Report. There is no legal obligation on the Government to implement our recommendations but it is our hope they will be acted upon. The Commission believes the recommendations can only add to better governance in Bermuda and the improvement in public service leadership across the Government and the Civil Service.

4: Governance

Introduction

The Commission believes that readers of the Report will be assisted in knowing how the Government of Bermuda is expected to function and operate, whether by reference to the Bermuda Constitution Order 1968 (“the Constitution Order”) or any other applicable legislation as well as by Codes of Conduct. In the case of the civil servants, this also includes Financial Instructions and their Conditions of Employment and Code of Conduct.

The Commission wishes to acknowledge that to a large extent it drew upon the outlines for both the Organisation of the Government of Bermuda and of the Civil Service, found in the document known as the Conditions of Employment and Code of Conduct, prepared by and for the use of civil servants. The Commission found this to be a very helpful and handy reference.

(1) Organisation of the Government of Bermuda

The Government of Bermuda consists of a Governor, a Deputy Governor and the Cabinet.

The Legislature of Bermuda, which consists of Her Majesty the Queen, the Senate and the House of Assembly, is established under Section 26 of the Bermuda Constitution Order. Subject to the relevant provisions of the Constitution Order, it is the Legislature that is charged with responsibility of making laws “for the peace, order and good government of Bermuda”.

The Governor, appointed by Her Majesty, is responsible for defence, including armed forces, external affairs, internal security and the police. The Governor also appoints the following officers: Chief Justice; Director of Public Prosecutions; Auditor General; Secretary to the Cabinet; Commissioner of Police; and Deputy Commissioner of Police.

Bermuda’s system of government has fairly been described as one that is based on the Westminster model of parliamentary democracy. The party which wins a majority of seats at a general election forms the government, and the member who, to the Governor, “appears to him best able to command the confidence of a majority” of those elected members, is appointed Premier.

The Premier chooses a Cabinet which is collectively responsible to the Legislature under the Constitution Order for advice given or actions taken under the general authority of the Cabinet or by any Minister in the execution of his or her office.

The Cabinet consists of the Premier and not less than six other Ministers, up to a maximum of 12.

The functions of the Cabinet have been [roughly] described as follows:

- (i) The final determination of policies;
- (ii) The strategic control of Government; and,
- (iii) The co-ordination of Government Ministries and Departments.

Cabinet meets in private and its proceedings are confidential. Its members are bound by oath not to disclose information about Cabinet business. Cabinet typically meets once a week.

Ministers are responsible collectively for Government policy and individually to the Legislature for their Ministry’s work. The doctrine of collective responsibility means that the Cabinet acts unanimously even when Cabinet Ministers do not all agree on a position or policy. Ministers are also answerable to the Legislature for all acts and omissions of the Ministries and Departments for which they are responsible and bear the consequences for any of those acts or omissions.

Bermuda’s Cabinet operates in accordance with the Constitution Order as well as within a framework of standards and practices (otherwise known as conventions) which have been observed by successive Governments over the years since 1968, when responsible government was first introduced. Many of those conventions have been codified and can be found in the Ministerial Code of Conduct (“the Code”) which was updated and published in April 2015. It was previously last revised in 2002.

According to its preamble, the Code is intended not only to guide Ministers, but to reflect “a world-wide trend on the part of citizens to demand greater accountability and transparency from their Governments.”

The Premier is stated to be the person responsible for upholding and ensuring that the requirements of the Code are met by Ministers.

The Legislature also has a key role to play: to ensure that the Cabinet, and by extension the Government, is held accountable for its decisions and actions.

In this regard, one of the main functions of the Legislature is to scrutinise Government policy and administration, particularly the expenditure of public funds, actual and proposed.

This important exercise is meant to be achieved through parliamentary questioning and debate as well as through the Public Accounts Committee ("PAC") of the House of Assembly. The PAC is established under the Official Standing Orders of the House of Assembly. Its prescribed purpose is to examine, consider and report on any or all of the following: -

- "(a) the accounts showing the appropriation of the sums granted by the Legislature to meet the public expenditure of Bermuda;*
- "(b) such accounts as may be referred to the Committee by the House; and*
- "(c) the report of the Auditor General for any such accounts."*

The PAC is chaired by a member of the Opposition but the majority of members are drawn from the Government backbench. All members of the PAC are appointed by the Speaker of the House.

(2) Organisation of the Civil Service

Ministers, and by extension the Government, require the services of an efficient, impartial non-political Civil Service which is an essential and integral part of Bermuda's system of government.

In short, civil servants are employed to:

- provide Government with advice on the formulation of policies;
- carry out the decisions of the Government of the day; and
- manage and deliver the services for which Government is responsible.

The two most senior officers of the Service are the Secretary to the Cabinet and the Head of the Civil Service. Their respective duties and roles are set out succinctly in the Conditions of Employment and Code of Conduct ("the CECC"), a document that is intended to assist and guide everyone in the Civil Service.

The Secretary to the Cabinet

- (a) is the Premier's principal advisor on policy matters;

- (b) provides strategic and business planning management to the Cabinet;
- (c) provides secretarial and administrative support to the Cabinet;
- (d) is the functional manager of the Central Policy Unit of Government (now the Policy and Strategy Section); and
- (e) is the Co-Chair of the Civil Service Executive.

The Head of the Civil Service

- (a) is responsible for all matters internal to the operations of the Civil Service;
- (b) is the strategic manager of the Internal Service Unit (Management Consulting Services, the Department of Communication and Information, the Department of Statistics and the Department of Human Resources);
- (c) is responsible for the development and maintenance of the Conditions of Employment and the Code of Conduct;
- (d) is responsible for the recruitment, training and career development of officers in the Civil Service.
- (e) is responsible for matters of discipline; and
- (f) is the Co-Chair of the Civil Service Executive.

The Commission understands that although the current Secretary to the Cabinet has also assumed the role of Head of the Civil Service, it is the Deputy Head of the Civil Service who carries out many of the functions ascribed to the Head of the Civil Service on a day to day basis.

The Civil Service Executive is comprised of all Permanent Secretaries and those Heads of Department who do not report to a Minister through a Permanent Secretary. Its members meet weekly and the body is responsible for *"the strategic management of the Civil Service"*.

A Permanent Secretary, or PS for short, reports to the Head of the Civil Service on matters related to the internal operation of the Civil Service and on all other matters to the Secretary to the Cabinet.

Heads of Department report either to a PS or to the Head of the Civil Service on matters related to the internal operation of the Civil Service. On all other matters, a Head of Department reports either to a PS or to the Secretary to the Cabinet.

It is important to set out, as the CECC does, the duties and responsibilities of PS' and Heads of Department. These civil servants are responsible for:

- (a) the implementation of policies set by Cabinet;
- (b) the day-to-day management and operation of their Ministry/Departments, including the efficient delivery of services;
- (c) all fiscal matters related to their Ministry/Departments,

including compliance with Financial Instructions issued by the Accountant General;

- (d) ensuring an efficient organizational structure for their Ministry/Department, including the efficient utilisation of all human and other resources; and
- (e) ensuring that training is given a very high priority and that assistance is provided wherever possible.

With respect to Financial Instructions ("FI"), it should be noted at this stage that they provide that Permanent Secretaries or Heads of Department will serve as Government's Accounting Officers. Put simply, their duties set out in FI [Clause 2.4] as Accounting Officers are to ensure that:

- up-to-date FI are readily available for the information of all Government employees;
- Departmental policies, procedures and staff comply with FI on a continuous basis;
- Departmental staff are fully aware of their responsibilities under FI; and
- staff comply with all applicable legislation.

While as Accounting Officers they may delegate departmental financial accounting functions, it is also made clear that *"they will not be relieved of accountability and responsibility by such delegation"*. [Clause 2.7]

In this regard, it was pointed out to the Commission that the accounting function within Government has been for a number of years now *"decentralised"*. Financial Secretary (FS) Anthony Manders explained in his witness statement that:

"to assist with this process, the Accountant General's Department has assisted in placing Financial Comptrollers in each Ministry and in key revenue-generating and large departments. These comptrollers work under the direction of the Permanent Secretary, to manage, control, supervise and enhance the operations of the Accounts section of his/her respective Ministry and ensure that accurate and timely financial information is available and adequate controls are applied in accordance with Financial Instructions."

For the three-year period under review by the Commission, the Accountant General ("ACG") was Ms. Joyce Hayward who described in her evidence what she termed *"custom and practice"* and how it actually worked.

"... the Accountant General is responsible to issue Financial Instructions under the authority of the Minister of Finance, the Ministry of Finance and to make sure that we are working with the departments to make sure they're adhered to, which is why the section 2.7, the delegation of the Accounting Officer's responsibility, the Accounting Officers have quite

a lot of responsibility for the Financial Instructions, and they can also delegate their responsibility, because we cannot do it alone. There were 80, 70 ... between 60,70, 80 Government departments at any one time ... so there is no way we could be responsible for every single person following Financial Instructions."

According to the former ACG, the practice was to delegate this responsibility to financial controllers within Ministries or Departments. They would in turn report to either the Ministry's Permanent Secretary or to the Head of Department, as the case might be.

It was a widespread failure to adhere to FI that concerned the Auditor General in her report and which, in turn, concerned the Commission in our review. However, the Commission learned during its proceedings that steps have been taken before and after the Auditor General's report was published to improve awareness and adherence to FI. Chief among them, the Commission was told, was the development and introduction of an enhanced FI training programme at all levels of the Civil Service which remains on-going. According to Secretary to the Cabinet Dr. Derrick Binns ("Cab Sec"), *"the attitude, the culture, and the means to monitor and deliver compliance with FI has changed significantly."* Current ACG Mr. Curtis Stovell said that he also could detect *"heightened awareness."*

(3) Financial Instructions

FI are issued under the Public Treasury (Administration and Payments) Act 1969 ("the 1969 Act"), specifically section 3(1) thereof which states: -

"Every person concerned in or responsible for the collection, receipt, custody, issue or payment of public monies, stores, stamps, investments, securities or negotiable instruments, whether the property of the Government or in deposit with or entrusted to the Government or any public officer in his official capacity either alone or jointly with any public officer or any other person shall obey all instructions that may from time to time be issued by the Minister [of Finance] or by direction of the Minister in respect of the custody and handling of the same and accounting therefor." [Emphasis ours]

FI are the direct responsibility of the ACG whose office is required to have *"general supervision in respect of the arrangements under which payments out of or into public funds are made by or to Government Departments"*. [Section 4 (3)]

Indeed, FI in clause 1.3 describe the ACG as *"the principal Accounting Officer of Government"* who is responsible for:

- preparation of all accounting statements required by the Legislature or the Minister of Finance; and
- general supervision and review of all Departmental financial accounting functions.

As the Commission came to learn from its inquiries, the ACG has a key role to play in ensuring that FI are followed. We highlight four of them here:

2.6. Interpretation

"Any questions arising from the interpretation of FI will be determined by the Accountant General".

2.12 Departure from Financial Instructions

"Permission to depart from FI must be sought from the Accountant General in writing with the reason and the mitigating controls. Departure from these instructions without the written permission of the Accountant General is not permitted".

2.14 Notification of Breach of Financial Instructions

"Government employees must immediately notify the Accountant General of any breaches of FI. Notification is required even if the breach does not result in financial loss to the Government".

6.3 Role of Accountant General

"The Accountant General will call attention to any significant cases where money was expended without due regard to economy or efficiency, or satisfactory procedures were not established to measure and report the effectiveness of programmes, where such procedures could appropriately and reasonably have been implemented".

The Introduction to the most recent edition of FI sets out that they are: *"The foundations of [a] control framework [that] have been designed to ensure that there is a primary focus on accountability, value for money, fairness, transparency, equal access and compliance to prescribed policies and procedures".*

Further, it is pointed out that: *"Financial Instructions should form the minimum standard for financial controls in every department, ministry, or QUANGO [Quasi non-governmental organisation] with additional procedures formulated at the Departmental level."*

With respect to QUANGOS, there is also this note, which appears in every relevant edition of FI that the Commission reviewed:

"If a QUANGO chooses to use these Financial Instructions, any modifications must be documented in writing. If a QUANGO chooses not to utilise these Financial Instructions, the organisation must have written financial procedures in

place. These financial procedures must be provided to the Accountant General's Department and the department or agency that provides funding to the QUANGO."

Unfortunately the status of FI's is unclear. It is stressed in the introduction to FI that *"FI cannot override the requirements of governing legislation"*. The Commission also heard FI variously described by current or former senior civil servants in evidence as either policy or guidelines to be followed, or not, as the case may be.

Former Secretary to the Cabinet Donald Scott stated that in his view: *"Financial Instructions is a policy document. It is neither law nor regulations."* His predecessor as Cab Sec Marc Telemaque opined in evidence that FI constitute *"a guide and a strong guide for how the public purse should be managed."* Current Cab Sec Dr. Derrick Binns also told the Commission that any breaches of FI are to be regarded by Civil Servants as serious and matters for discipline under the CECC.

The system currently in place is largely self-reporting: see above clause 2.14. The emphasis on self-reporting is also reflected in the CECC. Clause 7.2.1 requires employees to:

"Report any unethical behaviour or wrong-doing by any other officer to an appropriate senior officer. This may include behaviour that you believe violates any law, rule or regulation, or represents gross misconduct or gross mismanagement, or is a danger to public health or safety."

"Comply promptly with all lawful directions you are given. If you have grounds for complaint arising out of such directions, whether ethical or otherwise, you should discuss and attempt to resolve the matter with your supervisor. If you are still dissatisfied, you may lodge a personal grievance to have the matter resolved. You must continue to carry out lawful directions that you may be given until the matter is resolved."

The Commission asked for a record of breaches. FS Manders produced a list of 14 breaches for the period September 2014 through to 9 September 2016. The Commission was further advised that *"there is only a record of reported breaches for the period that the current Accountant General has been in office"*.

The 1969 Act under which FI are issued, does not at this time provide for any specific penalty for failures to comply with FI, although there is provision for the Minister of Finance to levy a surcharge in appropriate cases which may or may not involve non-compliance with FI.

On surcharges, the Commission requested, but was not provided with, a record of instances where action has been

taken. FS Manders said that the Ministry of Finance does not have “a record (or files) of how many actions have been taken by the Minister of Finance to levy surcharges on civil servants pursuant to section 29 of the Public Treasury (Administration and Payments) Act 1969”.

FI themselves have also always spelled out potential penalties for non-compliance in addition to surcharges. They are:

- Disciplinary proceedings against the employee concerned and/or the Accounting Officer;
- Accountability by the Accounting Officer to the Secretary to the Cabinet, and to the Head of the Civil Service;
- Withdrawal of signing authority; and
- Re-charging the Department concerned for time spent on non-compliance issues.

However, and this is important to note, the Act was amended in 2011 under Good Governance legislation, to allow the Minister of Finance to give FI statutory effect and thus subject to breaches of criminal prosecution where there has been a failure to comply “without reasonable excuse”.

The Commission understands that this regulatory power has yet to be invoked and FI have not yet been made statutory regulations and any breaches thereof an offence.

Some of the other key FI provisions with which the Commission was concerned are also worth highlighting here.

4.2 Responsibility of Accounting Officers

“Accounting Officers are responsible for:

- “(1) maintaining adequate systems of internal control,*
- “(2) stewardship of the resources committed to their care. Stewardship requires that assets be properly safeguarded, managed and accounted for,*
- “(3) seeking the advice of the Accountant General when reviewing/implementing financial or internal control systems.”*

Some of their specific duties as set out in FI include:

7.2. Additions, Changes and Deletions

“Accounting Officers must immediately inform the Accountant General, in writing, of required additions, changes or deletions to financial approval authority.”

7.5 Duty of Accounting Officer

“It is the duty of Accounting Officers to ensure that the financial signing authority listing is current and complete. Accounting Officers must review their delegation of financial authority at least quarterly.”

7.7 Duty of Care

“Accounting Officers have a duty of care to ensure that delegates who review and authorize documents are aware of their responsibility and are not merely ‘rubber stamping’ approval.”

As can be noted from the above, Accounting Officers may delegate financial signing authority to “Authorised Officers” (Clause 9.3) who are then charged with the following specific duties under FI (Clause 9.4.):

- Certifying the validity and correctness of every payment to be made by the Accountant General;
- Ensuring payment is made in accordance with FI;
- Carefully reviewing supporting documentation prior to approval for payment;
- Ensuring appropriate documentation is attached for all payments prior to submission to the Accountant General; and
- Exercise care and implement proper controls to prevent duplicate payments by ensuring that invoices have not been previously presented for payment.

FI also caution civil servants against conducting themselves in any way that might be interpreted as being in contravention of laws and regulations. To this end, whenever they are in any doubt, they are encouraged to consult with their Accounting Officer who in turn, and if necessary, should seek the advice of the Attorney General (Clause 3.2.).

There is also this on the matter of any potential conflict of interest in FI:

3.3 Conflict of Interest

“Employees must perform their duties conscientiously, honestly and in accordance with the best interests of the Government.

“Employees must not use their position or the knowledge gained through it, for private or personal advantage, or in such a manner that a conflict or the appearance of a conflict arises between the Government’s interest and their personal interest. A conflict of interest is created when an obligation, interest or distraction exists which would interfere with the independent exercise of judgment in the Government’s best interest”.

“If an employee feels that a course which he has pursued, is pursuing or is contemplating pursuing, may involve him in a conflict of interest, he should immediately make all facts known to his superior.”

There are also clear guidelines on the purchase of goods and services outlined in Clause 8 of FI. All departments are expected to comply to ensure a “consistent approach”.

Some of the more notable requirements for goods and services in excess of \$5,000 (clause 8.2.3) include that:

- at least three quotations are obtained
- quotations are provided from a range of suppliers as wide as practicable;
- a closing date/time for submission of quotations be stated and strictly observed;
- the lowest price be accepted or reasons for not accepting the lowest price be documented; and,
- unsuccessful bidders not be allowed to re-submit a lower quotation price. The first quotation must be accepted.

For purchases over \$50,000, tighter controls are introduced which require a minimum of three recorded written quotations or tenders, using the Invitation to Tender or Request for Quotation: Clause 8.3.1. The recommended quotation or tender must be documented in a written agreement or contract that is first vetted by the Attorney General’s Chambers.

We pause here to note that until 1 November, 2016, all contracts totaling over \$50,000 had to have the prior approval of the Cabinet. The Commission was advised that prior Cabinet approval is no longer required for contracts up to \$100,000 providing they “do not relate to or form part of Capital Development Expenditure”. But Ministerial sign-off is required and must be included for all agreements/contracts between \$50,000 and \$100,000.

But as it now stands, according to revised Clause 8.3.3: “All agreements/contracts totaling over \$100,000 (including those with multiple payments) must be approved by Cabinet before the agreement or contract is executed”.

Capital expenditure by the Bermuda Government is also governed by FI and is defined in Clause 12.1 as “the acquisition, construction or development of any tangible capital asset valued in excess of \$5,000”. Accounting responsibility for these two types of capital expenditure is clearly set out in the current, applicable 2016 FI:

12.1.1 Capital Acquisitions

“The accounting responsibility for capital acquisition expenditure falls exclusively on the Permanent Secretary or Head of Department as being the Accounting Officer for that Department. The accounting responsibility may only be delegated to another officer on the express written authority of the Minister of Finance.”

12.1.2 Capital Development

“The accounting responsibility for capital development

expenditure rests with the Permanent Secretary of Public Works, who is the Accounting Officer for all projects falling within the ambit of the Capital Development Estimates. The exception of the assigned accounting responsibility includes capital development projects for which the Minister of Finance delegates the responsibility for expenditure to a Ministry other than Public Works wherein the applicable Permanent Secretary or Head of Department shall be regarded as the Accounting Officer for such projects.

“The Permanent Secretary of Public Works is obligated to ensure that proper consultation with the Head of the client department and the Head of the Project Management and Procurement Office in the Ministry of Finance is maintained throughout all phases of the project.”

The latter provision recognises the introduction of the Office of Project Management and Procurement (“OPMP”) in October, 2011. The OPMP was a key part of the Good Governance Act 2011 (made effective in October of that year). In short, its purpose was to add another layer of independent oversight of Government expenditure and of capital projects in particular, so as to ensure compliance with Government policies and procedures.

The legislation required the production of a Code of Practice for Project Management and Procurement that would be the basis upon which the OPMP would operate and evaluate expenditure. The code would also be employed by all public officers concerned with obtaining goods and services for the Government. However, a code in this regard has yet to be adopted and implemented, although a draft was recently made public for review and comment. [For a further discussion on the OPMP see Section 7: Current Safeguards.]

(4) Delegation

A major issue arises as to the accounting responsibility for major capital projects. FI throughout have been clear that this rests with the Permanent Secretary for the Ministry of Works and Engineering. (The Ministry has been called at various times “Works and Engineering” and now “Public Works”). Until December 2009, there was no express provision regarding “delegation” or the granting of “special permission” to the PS of any other Ministry.

Nevertheless, there were cases where the responsibility was in fact undertaken within another Ministry, in each case the Ministry of Tourism and Transport, and the PS of W & E was excluded. It was suggested to us that this “delegation” was permissible provided that it was implicitly assented to by the Minister of Finance.

At this stage we will set out, first, the terms of FI 12.1.2 as they were before December 2009 and as they were modified later

in December 2009 and March 2011; and secondly, some of the evidence we heard on this issue from the former Minister of Finance (and Premier), the Hon. Paula Cox JP, and from Donald Scott JP who was Financial Secretary from 2000 until November 2010.

12.1.2 Capital Development (FI December 2008)

“The accounting responsibility for capital development rests with the Permanent Secretary for the Ministry of W&E, who is the Accounting Officer for all projects in the Capital Development Estimates, with the exception of Minor Works. For Minor Works, the accounting responsibility remains with the applicable Accounting Officer.

“The Permanent Secretary of W&E is obligated to ensure that proper consultation with the applicable Accounting Officer is maintained throughout all phases of the project.”

12.1.2 Capital Development (FI December 2009)

“The accounting responsibility for capital development rests with the Permanent Secretary for the Ministry of W&E, who is the Accounting Officer for all projects in the Capital Development Estimates, with the exception of (i) the respective Permanent Secretary of any other Ministry within the Bermuda Government, outside the Ministry of W&E, which has been granted special permission from Cabinet Office to engage in capital development, and (ii) Minor Works.

“The Permanent Secretary of W&E is obligated to ensure that proper consultation with the applicable Accounting Officer is maintained throughout all phases of the project.”

12.1.2 Capital Development (FI March 2011)

“The accounting responsibility for capital development expenditure rests with the Permanent Secretary of Public Works, who is the Accounting Officer for all projects falling within the ambit of the Capital Development Estimates. The exceptions of the assigned responsibility include (i) capital development projects for which the Minister of Finance delegates the responsibility for expenditure to a Ministry other than Public Works wherein the applicable Permanent Secretary or Head of Department shall be regarded as the Accounting Officer for such projects, and (ii) Minor Works. For Minor Works, the accounting responsibility remains with the relevant Head of Department.

“The Permanent Secretary of Public Works is obligated to ensure that proper consultation with the Head of the client department and the Head of the Project Management and Procurement Office in the Ministry of Finance is maintained throughout all phases of the project.”

It has long been recognised that the Ministry of Public Works has the necessary expertise as well as the necessary experience to manage capital projects.

This much has always been reflected in FI where, in the provisions addressing the purchase of goods and services, the Ministry is stated to be exempt from the procedures set out therein – and, we think, for good reason. The relevant clause reads:

8.2 Procedures

“To ensure this consistent approach, departments must comply with the procedures outlined below. The exception to this is the Ministry of Works and Engineering (W&E) who, because of the nature of their operations, adopt more rigorous and complex procedures. (Refer to the following W&E internal publications: P.F.A. 2000 – Purchase of Goods & Materials and P.F.A. 2002 - Procurement of Contract Services.)”

The latter document is particularly important as it was developed by the Ministry to provide for additional procedures pertinent to the procurement of capital projects. The procedures identify the “responsibilities, documents, means and methods of procuring contract services in varying financial categories”. (Clause 2.1)

By necessity, Management Procedure and Policy P.F.A. 2002 (as it is described)⁷ details inter alia how to handle such matters as: obtaining quotations, tendering, and the evaluation of tenders. The procedures developed might safely be regarded as supplemental to those set out in FI, and not derogation. This expertise is in addition to the experience the Ministry and its technical staff have built up over the years providing oversight not just in the drafting and administration of capital project contracts, but over actual construction and the authorisation of expenditure.

Former Minister of Finance (and Premier) the Hon. Paula Cox shared her views on delegation with the Commission. She held the post of Minister of Finance from mid-January 2004 until December 2012.

In her witness statement [paragraph 2], Ms. Cox said that she had no recollection of ever having been asked to authorise any Minister and/or PS with responsibility for W&E to delegate their functions in respect of capital projects for Port Royal Golf Course remediation works, Heritage Wharf or Bermuda Emissions Control Limited (BECL); and in addition no direction was given by her for any such delegation “in respect of any or all of these capital projects.”

Ms. Cox also went on to make the point in her statement [paragraph 3] that in any event under the Public Lands Act 1984, the Minister for W&E was assigned the charge and management

of all public lands and buildings, and any construction thereon. The Commission believes this reinforced the argument that regardless of what may or may not have happened, the Ministry of W&E nonetheless retained a statutory obligation and duty to oversee any works on Government property.

For example, Ms. Cox further made the point when asked about the BECL project, and she referred to an exchange of emails between Ms. Cherie-lynn Whitter, in her capacity as PS for the Ministry of Tourism and Transport, and PS Robert Horton of W&E. Ms. Whitter was looking to W&E to 'sign off' on the completion of the BECL centre at the Transport Control Department and W&E was resisting on the grounds that it had not been involved in the project. [See Public Binder 1, Tab 9 at p. BEMISS 1-121 et al].

As far as Ms. Cox was concerned, there was "a shared responsibility" and W&E was not relieved of its responsibility for oversight of any capital project on Government land. She termed it "the inherent responsibility of the Ministry of W&E". (Cox Transcript 6 October 2016, p. 164).

Ms. Cox also recalled the exchange of letters between W&E PS Binns and Cab Sec Marc Telemaque over the Heritage Wharf contract which had been reviewed by W&E staff and on which they signed off:

"...I think you also had something from the former W&E PS, who's now the Cabinet Secretary which says, look, we dealt with the contracts but we now assume you in Tourism will run with it. But it still didn't obviate the W&E involvement.

"And I can't speak to what was agreed or talked about at the senior civil service level. But what I will say as Minister of Finance, I didn't delegate the work to a particular Minister".
[Transcript p.193]

The significance of Ms. Cox's evidence is this: it is a clear refutation of those explanations which were advanced that delegation had been approved. In this regard, the Commission had been referred to

- Explanatory Notes in the Estimates of Revenue and Expenditure; and
- 'Approval' by way of discussion by a Cabinet Capital Expenditure Committee.

Of the first explanation above, Ms. Cox said: "I didn't think that ... in and of itself can be an effective delegation" [Transcript p.160]. Of the second, she said that committee that was largely concerned with prioritising proposed capital projects [Transcript pp.190-191].

Finally, Ms. Cox was also clear on this: "If the Minister of Finance [hasn't] delegated in writing, there can be no delegation." [Transcript p. 164]. That any delegation be evidenced in writing is,

incidentally, a practice which the current ACG Stovell insisted be done with respect to the proposed L. F. Wade Airport Development Project, and which was in fact subsequently provided by Minister of Finance the Hon. E. T. (Bob) Richards.

Donald Scott, who was Financial Secretary when Ms. Cox was Minister of Finance, appeared to share her view with respect to the role of W&E when it came to oversight of capital projects.

Mr. Scott said that he thought it "deplorable" that W&E would wash its hands completely of any capital project and instead said that there should be "an open and collaborative approach to a Ministry for which a delegation had been given", such that W&E would form part of an oversight management team. [Scott Transcript, 5 October 2016, pp.156-157].

Indeed, he thought that should have been the case with projects like Port Royal Golf Course Improvements Capital Development, and Royal Naval Dockyard Cruise Ship Pier- Heritage Wharf.

(5) Codes of Conduct

The Commission learned of the conflict that can sometimes occur between a Minister and his or her PS when it comes to the application of FI. It is a source of concern. By the very nature of their duties and their responsibilities, Ministers and Permanent Secretaries and Heads of Department are obliged to have a close working relationship.

Invariably there may be matters of disagreement.

For civil servants, there is guidance in the Conditions of Employment and Code of Conduct (CECC). It has some strong advice for PS' and Heads of Department on the need to follow FI. The following passage is found in a section headed "General Policies":

8.0 Business Related Expenses

"Financial Instructions outline the requirements and obligations of any officer spending public funds. They also outline the penalties for any officer issuing public funds. Summarised below are key points to keep in mind when spending public money. They should not however, be considered exhaustive and cannot be used as a defence for inappropriate expenditure."

8.0.1

"Permanent Secretaries and Heads of Department have a responsibility to ensure that Government receives the best possible value for money spent. They must also put appropriate procedures in place to ensure control and proper approval processes and the accurate recording and

disbursement of public funds. Permanent Secretaries and Heads of Department must allocate signing and approval authorities carefully and on a need only basis. The Accountant General's Department is available for specific advice and guidance in this regard."

The Commission thought it unusual to find such strong advice confined to a section entitled "Business Related Expenses", rather than as overall stand-alone advice, notwithstanding that the directive is clear.

As far as the Commission is concerned, based on all the evidence that we heard, these two provisions warrant far greater prominence.

It is also clear how this can lead to conflict between a civil servant and a Minister or the Government on whose behalf the Minister is acting. There may be times when adherence to FI and good practice requires a PS or Head of Department to stand up to a Minister and to insist on adherence. It is his or her duty to do so.

The Commission was keen to note that such a possibility, and what to do, was once addressed in the 2002 Ministerial Code of Conduct. The relevant section read:

"12.3 Accounting Officers have a particular responsibility to see that appropriate advice is given to Ministers on all matters of financial propriety and regularity. If a Minister in charge of a Department is contemplating a course of action which involves a transaction which the Accounting Officer considers would breach the requirements of propriety and regularity, he will record in writing his objection to the proposal and the reasons for that objection. If the advice is overruled, the matter should be brought to the attention of the Auditor General. If the Minister decides nonetheless to proceed, the Accounting Officer will request a written instruction to take the action in question and will send the relevant documentation to the Auditor General. A similar procedure will apply with respect to the Public Accounts Committee if the Accounting Officer wants to ensure that the Committee will not hold him personally responsible for the action being taken."

This Code was relevant and in force for the three year period under review. Cab Sec Binns was asked why he did not avail himself of this provision, in what appeared to the Commission to have been an appropriate case, during his tenure as PS of W&E. The simple answer was that this particular provision was in the Ministerial Code and not in the CECC to which civil servants would refer.

The further irony, the Commission learned, is that this provision has been dropped completely by the current Government from the new Ministerial Code of Conduct which was revised and published in April 2015.

Cab Sec Binns explained that the new Code was the work of the Cabinet and while "advice and feedback" was sought from the Civil Service on the revised Code, he had "no idea" why the provision was dropped from the new Code of Conduct for Cabinet Ministers.

It has, however, also been suggested that the use of any such provision could seriously impair the relationship a PS has with a Minister – and as a result there may be a reluctance to invoke the option by a PS. While understandable, the Commission would regard such action as a last resort when all other options have failed.

Such provision and action should be regarded for what it offers: the ultimate check on possible inappropriate or wasteful use of public money. It also gives civil servants the opportunity to record their position without refusing to carry out an instruction of a Minister.

The Commission further notes that this issue was a matter of concern and recommendation of the SAGE Commission. In its Report, the SAGE Commission disclosed that revised versions of both the Ministerial Code of Conduct and the CECC (renamed "Public Service Code of Conduct") were drafted in 2012 to address shortcomings, but were not implemented due to the change in Government.

A draft Public Service Code of Conduct 2012 apparently cross-referenced a draft Ministerial Code of Conduct 2012, Section 10 of which read: "A special protocol exists to cover instances where a Minister directs a public officer to carry out an action which, although not illegal, does potentially involve the Accounting Officer breaching the above responsibilities. Details of the steps the Accounting Officer should take in such instances are contained in Ministerial Code (section 10)."

The draft Ministerial Code of Conduct 2012, reviewed by the SAGE Commission, reportedly detailed those written procedures that were to apply whenever a Head of Department or Permanent Secretary believed that an instruction from a Minister may run afoul of the above:

"s.10.3 Accounting Officers have a particular responsibility to see that appropriate advice is given to Ministers on all matters of financial propriety and regularity. If a Minister in charge of a Department is contemplating a course of action which involves a transaction which the Accounting Officer considers would breach the requirements of propriety and regularity, represents poor value for money, involves a potential breach of Financial Instructions or involves expenditure which has not been voted in the Appropriation Act he will inform the Minister in writing of his objection to the proposal and the reasons for that objection. He will also copy the correspondence to the Financial Secretary, the Accountant General and the Internal Auditor."

“If the Minister decides nonetheless to proceed, the Accounting Officer is obliged to comply with the instruction – provided in doing so the Public Treasury (Administration and Payments) Act 1969 is not contravened – but will request a written instruction from the Minister to take the action in question and send the relevant documentation to the Auditor General. A similar procedure will apply where the Accounting Officer has concerns about whether the proposed course of action offers value for money. The notification procedure does not justify the Accounting Officer refusing to comply with a Ministerial instruction; it merely enables the Public Accounts Committee to see that the Accounting Officer does not bear personal responsibility for the actions concerned and protects him or her from surcharge.”

The SAGE Commission commented in its Report: *“If implemented, these rewritten procedures would go a long way to improving financial accountability and documentation of decision-making.”*

This Commission agrees.

What currently exists for civil servants is the following advice found in their CECC:

“7.0.9. Officers should never seek to frustrate or to influence the policies, decisions or actions of Ministers by the unauthorized, improper or premature disclosure of any information to which they have had access. Nor should officers seek to frustrate the policies, decisions or actions of the Government by declining to take, or abstaining from, action which follows decisions by Ministers. Where an officer feels unable to carry out the action required and a resolution to the matter cannot be achieved, the officer should either carry out the instruction, or resign from the Civil Service and observe his or her duty and obligation to maintain confidentiality.”

Resignation strikes the Commission as an extreme step to have to take and the above provision stands in stark contrast with what was once in the Ministerial Code of Conduct by way of suitable action when there is disagreement between a Minister and civil servant and what was proposed by the previous Government.

There is however, this additional advice for civil servants in the CECC under the heading: *“How should I report unethical behavior?”* [Clause 7.2.1]

The answer is as follows:

“Report any unethical behavior or wrong-doing by any other officer to an appropriate senior officer. This may include behaviour that you believe violates any law, rule or regulation, or represents gross misconduct or gross mismanagement, or is a danger to public health or safety.”

“Comply promptly with all lawful directions you are given. If you have grounds for complaint arising out of such directions, whether ethical or otherwise, you should discuss and attempt to resolve the matter with your supervisor. If you are still dissatisfied, you may lodge a personal grievance to have the matter resolved. You must continue to carry out any lawful directions that you may be given until the matter is resolved.”

The Commission heard no evidence that any civil servant exercised or sought to exercise this option in any of the matters which we had under review.

On the other hand, the CECC advises civil servants on how they should expect to be treated in paragraph 7.0.10 that follows:

“Similarly, officers have a right to expect to be able to undertake their duties and responsibilities without fear or favour, to be treated with respect for their professionalism, to expect fair and reasonable treatment by the Government and not to be required to act in any manner which:

- (a) Is illegal, improper, immoral or unethical.*
- (b) Is in breach of the Constitution or a professional code.”*

The above is in addition to their duties under the CECC to *inter alia*:

- Assist the duly elected Government with integrity, honesty, impartiality and objectivity regardless of any personal political affiliation [7.0.4];
- Give full information to Ministers and provide informed and impartial advice and not either knowingly or negligently deceive or mislead Ministers [7.0.5]; and,
- Conscientiously fulfill duties and obligations to, and impartially assist, advise and carry out the lawful policies of the duly elected Government [7.0.6].

The 2015 Ministerial Code of Conduct has only this to say about the working relationship Ministers should have with civil servants:

“Ministers have a duty to give fair consideration and due weight to informed and impartial advice from Civil Servants in reaching policy decisions. They also have a duty to uphold the impartiality of the Civil Service and should refrain from asking Civil Servants to act in any way which would bring them into conflict with the Civil Service Conditions of Employment and Code of Conduct.” [Paragraph 12]

The above hardly seems sufficient given the challenges that can, and do occur, between the Civil Service and those elected to govern, and of which the Commission became aware during its Inquiry and on which we have reported.

The Commission has therefore made recommendations in Section 8 of this Report to enhance accountability of both Ministers and civil servants in the event of a disagreement.

5. Evidence: (1) Twelve Contracts

A - Commercial Courts/Ministry of Finance Renovations (3.1.2)

Date: August 2008

Description: Construction of the Commercial Courts and renovation of the Ministry of Finance Headquarters

Contractor / Principals: Bermuda Drywall & Ceilings / Mr. Devree Hollis

Minister(s): The Hon. Derrick Burgess JP MP - Works & Engineering (W&E)

Civil Servants: Financial Secretary Mr. Donald Scott JP, Permanent Secretary Mr. Robert Horton (retired), Chief Architect Mr. Lawrence Brady, Architect Ms. Lucy Chung (left Civil Service)

Other Parties: Conyers & Associates

Contract Value: \$1,696,000

Final Cost: \$1,863,000

Relevant Regulations: Financial Instructions 2007; P.F.A. 2002

Introduction

The Auditor General's report highlighted that this "contract for the construction of the Commercial Courts and renovation of the Ministry of Finance Headquarters was awarded to a company (the successful bidder) without the prior approval of Cabinet and the related tender process was compromised."

Evidence

There was an open tender for this project through advertisement in a local newspaper in late August 2008, with responses due on 19 September 2008. Seven companies responded to the request for tender, with an incomplete bid from Bermuda Drywall & Ceilings and bids from five other companies considered valid. The seventh company did not submit a bid. Technical officers evaluated the submissions and this resulted in a Contract Award Recommendation⁸ dated 15 October 2008 in favour of DeCosta Construction for \$2,334,000.

Queries were raised about the reasons for disqualifying Bermuda Drywall & Ceilings, as reflected in an email⁹ from the Permanent Secretary (PS) Horton to the Chief Architect (CA) Brady, dated 4 November 2008. Architect Chung explained in an email¹⁰ that the bid was disqualified due to incomplete paperwork.

In an email¹¹ dated 27 November 2008, Architect Chung documented learning of efforts to "help reduce the cost of the project" following a meeting on 26 November 2008, attended by herself, Minister Burgess, and PS Horton.

On 28 November 2008, Architect Chung received an email¹² from a junior Ministry employee, indicating that Minister Burgess had taken plans and/or other documents from her desk:

"...Lucy, Minister Burgess with an unknown person came in this morning about 8:35 asking for you. I have told them that you are not in yet. And then he asked where you sat. When I showed him your desk, he said that he was taking the plans for what I believe to be the Magistrate's Court/Hamilton Police Station. However, he may have meant Ministry of Finance and the Commercial Courts as these were the plans that he took with him... Minister Burgess then introduced himself as Mr. Burgess, the Minister, on his way out..."

An email¹³ from CA Brady to PS Horton reflects his concern:

"...Needless to say this action causes me great distress that someone, be it a Minister or any other member of Government or the public could enter into any government office and remove documents without a request from the PS or Head of Department being made. In light of our meeting with the Auditor General this week we are entering a very risky approach in best practice and procedures."

When questioned by the Commission about his understanding of the Minister's reasons for removal of documents, PS Horton responded "I would be remiss if I endeavoured to explain or try to explain the Minister's reason for taking those drawings from that office."¹⁴

Minister Burgess denied to the Commission that this incident took place.¹⁵

Financial Secretary (FS) Scott expressed concern around progress of the project, as expressed to PS Horton in an email¹⁶ also dated 28 November 2008. "PS, please explain what is going on. The project was tendered and I understood an award of the contract was imminent. The delays are impacting MOF's (Ministry of Finance) business operations. When will the contract be awarded? I have to say that my patience is at an end."

PS Horton, in an email¹⁷ dated 2 December 2008 asked Architect Chung to assist with sharing bid documentation from one bidding architectural firm to another so that the recipient could perform a "...value engineering exercise". Architect Chung responded¹⁸ that this was an inappropriate course of action. "Please note that the approach you and/or the Minister is proposing through Conyers & Associates is not considered good practice in the industry and is putting our Department at risk. We would advise against it and if cost savings is the goal then we would suggest approaching all the current stakeholders (client, consultants and perhaps the bidders) on ways in which this can be achieved."

PS Horton agreed with her perspective.¹⁹ "I am persuaded 100% by your e-mail! You may be assured that UNDER NO CIRCUMSTANCES [sic] would I request that you act in contempt of the professional ethics set out... The cost saving methodology that you set out in your second paragraph is clearly the correct way forward. I shall apprise the Minister."

An email²⁰ dated 18 December 2008, from Architect Chung records that "the Minister instructed the Architects' Department to ask all the bidders to re-bid the project based on a reduced scope of work", with responses to be submitted by 23 December 2008 with bidders prepared to begin work on 1 January 2009 or earlier. PS Horton noted that the request for the re-bid should be framed in the context of Government wishing to reduce spending given the economic environment. He also gave instructions to include all previous bidders and to allow them to make corrections to any irregularities that may have disqualified their initial bids.

PS Horton told the Commission why the project was rebid. "The Minister wished for... Bermuda Drywall, a small contractor, to be given the further opportunity to bid. I would have emphasized that to the Minister that we must proceed with a level playing field... you couldn't simply ask one of those bidders to submit a revised bid. You would have to do so with all of them... that's why the revised Contract Award Recommendation would have referred to all bidders having the opportunity to submit revised bids. It was an unusual step."²¹

When questioned by the Commission about his views on the Minister's actions, PS Horton indicated that he had initial concerns "... I don't know that I supported the Minister initially in this because the process had been carried out efficiently, I thought, and the technical officers had recommended DeCosta."²²

PS Horton gave his understanding of the Minister's justification for rebid "...one of the things that he said repeatedly, it was his refrain; when we went to the Ministry of Works and Engineering, we must provide opportunities for a greater cross section of the Bermuda workforce. He emphasised small business, in particular... And I remember and he quoted from this regularly,

the Progressive Labour Party platform... They talked of the empowerment of the people. They talked of expanding the economic pie. And he felt, I can only emphasize this... the Minister felt, and he didn't waiver from this view, that within the Ministry of Works and Engineering, too often work went to establish large, already successful companies... I think this was a part of his rationale for expressing concern about the cost... But also, it was his wish to involve smaller businesses."²³

The Commission noted that Minister Burgess was clear in his testimony to the Public Accounts Committee (PAC) that he did 'interfere' and viewed this as part of his duties. "... I did 'interfere'. I believed that the 'Rolls Royce' refurbishment proposed was too elaborate and directed that the tender documents be modified and the job re-tendered. I did not wish to see unwarranted spending of Government funds. As a result of my 'interference', Cabinet approved a Contract Award Recommendation".²⁴

W&E technical officers neither reviewed nor provided a recommendation for the second round of bids. The successful bidder, as chosen by Minister Burgess, was Bermuda Drywall & Ceilings, who had initially been disqualified due to an incomplete submission. Bermuda Drywall & Ceilings had submitted a revised bid of \$1.696m and DeCosta Construction (the previous successful bidder) submitted a revised bid of \$1.725m. The final amount paid to Bermuda Drywall & Ceilings, including change orders, was \$1.863m.

On 2 January 2009, FS Scott emailed²⁵ PS Horton, querying whether the award of this contract was in compliance with Financial Instructions. "...Please advise whether the award complies with Financial Instructions in the following respects: 8.2.1(3) the same supplier should not be used repeatedly without good reason, 8.2.3(8) unsuccessful suppliers should not be allowed to resubmit a lower quotation price, 8.3.1 contracts totaling over \$50,000 must be submitted to Cabinet for approval before acceptance. In addition, please provide information pertaining to the principal(s) of the company which has been determined to receive the contract." There is no record of any response to that email.

On the same date, Architect Chung emailed²⁶ PS Horton listing serious matters involving the project, concluding "...this is a highly irregular way of running a project, and I am concerned that the lack of coordination and, more importantly, construction drawings will create problems that may end up costing us more money in the end."

PS Horton responded via email²⁷ that "I concur with your observation and report; this is not how Projects should be run. It should be noted that a review of the recent Tender was not carried out by this Department nor any recommendation put forward by this Department or Cabinet approval given to my

knowledge. The decisions to award any contracts were carried out at a higher level. I am also concerned that "additional works" are going to be added and that the final expenditure is going to exceed the original Tender amount and that the quality is going to be compromised."

PS Horton also indicated to the Commission, via his witness statement, that he wrote an email of 4 January 2009 to CA Brady stating, *"You are right. The award of this tender to Bermuda Dry Walling has not yet been approved by Cabinet. It is the Minister's expectation that it will be approved retroactively."*²⁸

On 7 January 2009, PS Horton confirmed via email²⁹ to CA Brady and Architect Chung, that the Minister had approved the award of the contract to the successful bidder in the amount of approximately \$1.7 million. The next day, PS Horton wrote³⁰ to Devree Hollis of Bermuda Drywall & Ceilings informing him that their bid was successful. This was without Cabinet approval as required by Financial Instructions. Retroactive approval was later obtained from Cabinet on 10 February 2009.

Findings

- Minister Burgess ignored technical recommendations and compromised the tender process; He awarded the contract without consulting the technical officers in his department and without obtaining prior Cabinet approval. Minister Burgess' actions ran counter to the requirements of clause 6.7.3 of P.F.A. 2002, which require that technical experts provide a recommendation and that the recommendation be forwarded / submitted to Cabinet for approval.
- PS Horton, as Accounting Officer, failed to notify the Accountant General of breaches of Financial Instructions associated with this project, as required by FI 2.14.

B – Maintenance and Stores Building (3.1.3)

Date: November 2007

Description: Construction of a Maintenance and Stores Building

Contractor(s) / Principal(s): Central Construction Ltd. / Mr. Victor Walters

Minister(s): The Hon. Dennis Lister JP MP - Works & Engineering (W&E)

Civil Servants: Permanent Secretary Dr. Derrick Binns-W&E, Permanent Secretary Mr. Robert Horton (retired)- W&E

Other Parties: n/a

Third Parties: n/a

Contract Value: \$1.6 M

Final Cost: unknown

Relevant Regulations: Financial Instructions 2007; P.F.A. 2002

Introduction

The Auditor General's report highlighted that *"In 2010, Cabinet's prior approval for a \$1.6 million contract for the construction of a Maintenance and Stores building was not obtained... Cabinet recommended that consideration of the contract award should be carried over to the next meeting to ensure that the estimate for the works was updated"*. The Commission learned that this project was actually awarded in 2007. It is unclear when the project was completed and/or related payments made.

Evidence

The Maintenance and Stores Building project saw Ministerial involvement in a process that would ordinarily be driven by civil servants, specifically the technical officers of the Minister of Works and Engineering (W&E). When the original bids were received, Works and Engineering staff recommended GEM Construction, the lowest bidder (who had submitted a bid of \$1.494 million) in their contract award recommendation³¹. The basis for this recommendation included cost, schedules provided in the bidder's submission, experience and other factors.

When the contract was first presented to Cabinet on 13 November 2007, per the Cabinet Minutes, it was noted that

the Minister of W&E expressed a position contrary to that of his technical officers and voiced concerns about GEM's ability to achieve the deadline. He noted that all tender prices were significantly above the estimate presented by the technical officers in the Ministry. He also expressed concerns about GEM's ability, suggesting that they had performed poorly on previous projects, as well as concerns that the project deadline would not be met. The Commission did not see evidence that supported these assertions.

The Minutes record that the Minister recommended the second lowest bidder, Central Construction, to Cabinet. Cabinet did not approve the award of the contract at that time. Instead, Cabinet recommended a consideration of the contract award be carried over to the next meeting to ensure that the Ministry's own estimate for the award was updated. Nevertheless, the Contract was awarded to Central Construction, as shown by a letter³² from Permanent Secretary (PS) Binns to Mr. Victor Walters of Central Construction, dated 27 November 2007.

Mr. Walters gave a sworn affidavit that "I did not speak to the Minister. I don't even remember who the Minister of Works and Engineering was at that time."

The records show that the relevant Minister was Mr. Dennis Lister, who was succeeded by Mr. Derrick Burgess on 20 December 2007. Minister Lister in his initial evidence³³ indicated, *"... that didn't take place under my watch..."* He was subsequently sent further documentation for review and advised the Commission³⁴: *"... I have reviewed the documents related to the Maintenance Building. I stand by my original position in that I can offer no helpful information to your investigation. I note the date of the said Cabinet paper however I honestly cannot recall this item at all."*

The Commission was concerned to find, not only that Minister Lister was unable to recall the details of the contract, but the PS at the time, Dr. Binns, subsequently advised that he too was unable to recall the circumstances surrounding the awarding of this contract.

PS Binns wrote *"such a letter would not have been issued without the direction of the Minister and I can only assume that sufficient justification had been provided to me to satisfy me that the letter would be issued"*.

The Commission wrote to the current PS of W&E, Mr. Francis Richardson on 8 July 2016. He was unable to locate any record of Cabinet approval, but did confirm “GEM Construction was recommended” by W&E as per the contract award recommendation. PS Richardson was unable to tell us who chose the successful bidder or when the decision was made.

The Commission requested confirmation of the Cabinet’s subsequent approval, but neither W&E nor the Cabinet Office provided evidence that the contract was, in fact, returned to the Cabinet for approval. It appears that the contract was awarded, but the matter was never returned back to the Cabinet for approval. There is however an unusual lack of records or documentation in relation to this contract and it is accordingly difficult to know precisely what happened.

PS Horton, who succeeded PS Binns on or about 21 December 2007 told the Commission³⁵ that he had no involvement with the award of this contract and further, *“I do not recall its details being part of my briefing when I commenced my duties at the Ministry of Works and Engineering”*.

Findings

- This contract was awarded while Minister Lister was in office, without Cabinet approval and contrary to recommendation of the technical officers of the Department, and not to the lowest bidder.
- Contrary to FI 8.2.3 (7), there was no documentation, such as a Cabinet conclusion, for the decision not to accept the lowest bid (although the files appear to be incomplete).
- PS Binns failed to notify the Accountant General that this contract was awarded without Cabinet approval and therefore there was in breach of Financial Instructions associated with this project, as required by FI 2.14.
- As successor PS, Mr. Horton (who was responsible for authorising payments as Accounting Officer) failed to notify the Accountant General of breaches of Financial Instructions associated with this project, as required by FI 2.14.

C – Purchase of Sand and Rock (3.1.4)

Date: April 2009

Description: Purchase of Aggregate for Asphalt

Contractor(s) / Principal(s): Harmony Holdings Ltd. /

Mr. Eugene Ball / Mr. Walter Greene

Minister(s): The Hon. Derrick Burgess JP MP -Works and Engineering (W&E)

Civil Servants: Permanent Secretary Mr. Robert Horton (retired) - W&E, Accountant General Ms. Joyce Hayward, Purchasing Officer Mr. Vic Ball - W&E

Third Parties: n/a

Contract Value: \$1.4 Million

Relevant Regulations: P.F.A. 2000³⁶, Financial Instructions 2008³⁷

Introduction

The Auditor General's report highlighted this April 2009 transaction, because it was entered into without a contract or agreement, and without Cabinet approval. W&E were also unable to provide original evidence of receipt of goods to the Auditor General.

Evidence

The Purchasing Officer at the relevant time in W&E was Mr. Vic Ball. He retired from the Civil Service in 2012 and was appointed as a Government Senator in November 2014.

Mr. Ball was responsible for making a recommendation for this transaction to the PS of W&E Mr. Robert Horton who the Commission noted signed the relevant purchase order.

The Commission heard that:

- Government had traditionally (40 years or more) bought most of its aggregate from East End Asphalt Bermuda Ltd for use in road repairs.
- During 2009 there was a projected shortage of asphalt, with two and a half months' supply remaining and an urgent need to supplement supplies.
- The reason given for the low supplies was that W&E had paved more roads than had been budgeted.

Mr. Ball said in evidence "...it was determined at that point that it was an emergency ...I would have taken it on to the Permanent Secretary and the Minister so that they could make a decision to bypass the regulations that normally govern purchasing so that we can get it in urgently"³⁸

The Commission notes that there is a provision in P.F.A. 2000 which allows for emergency purchases at clause 7.4.6. The Commission further notes that clause 7.5 of PFA 2000 allows for the Government to evaluate quotations using a range of criteria and not just costs: "When all other factors are equal, the lowest quote will be awarded the order."

Other than cost, the only other listed factor relevant to this contract was 'delivery lead time'.

The Commission notes the potential inconsistency between P.F.A. 2000 and Financial Instructions with respect to accepting the lowest quote. It is not entirely clear whether PFA 2000 must be adhered to instead of FI or as well as the requirements of FI.

Mr. Ball went on to explain that in this case, "it was combination (sic) of decisions between the Technical Officers at the Quarry, the Permanent Secretary and the Minister." Mr. Ball maintained that the department had "never gotten Cabinet Approval for any of our aggregate purchases." Notwithstanding the decision to bypass the regulations due to the emergency, Mr. Ball sought three quotes. He advised that this wasn't a formal process as that would require an advertisement to be placed and would take an extended amount of time.

Three companies provided bids to the Department: East End Asphalt (EEA) at \$46 per ton, DM Rogers at \$47.12 per ton (this was an overseas quarry from which the government had from time to time acquired aggregate directly from in the past) and Harmony Holdings (HH) at \$51.50 per ton (negotiated down from \$53 per ton).

The Commission learned that HH was not actually incorporated until 8 May 2009, however a representative responded to the Purchasing Department's request for bid on behalf of HH. The Commission reviewed a purchase order for HH dated 6 May 2009 for this contract some two days before the company was formally incorporated.³⁹

HH was owned 50% by Mr. Walter Kenneth Greene and 50% by Mr. Eugene Thelbert Ball. The Company was dissolved on 29 December 2014. Mr. Eugene Ball is Mr. Vic Ball's father.

According to Mr. Ball's witness statement a junior colleague, "... Shawne Tuzo⁴⁰ ran the process in terms of collection the quotations (sic) and putting together a spreadsheet of the options. East End Asphalt's price was lower than the price of importing directly..."

In later testimony Mr. Ball confirmed that that he asked Mr. Tuzo to call HH (Mr. Greene) for a quote, even though the company was not yet incorporated. He confirmed that Mr. Tuzo was not aware that his father owned 50% of HH.

Referring to the spreadsheet of options, Mr. Ball said: *"I remember talking to Shawne Tuzo about this [the EEA quote] and we could not understand how the price could be so low. I was very concerned by this. I thought that there was little chance East End Asphalt could carry through on the delivery at such a price. I suspected that they would, after we had signed, insist on a higher price. I was also concerned that the delivery date was outside the stipulated delivery date."*

Mr. Tuzo's witness statement clarifies that he *"was a trainee Logistics Coordinator during that particular time and I was not responsible for signing or approving the successful or unsuccessful bidders. The decision was the responsibility of my superior Mr. Vic Ball and the Minister of the department of Works and Engineering Mr. Derrick [sic] Burgess"*.

Later in evidence Mr. Ball indicated that historical pricing from EEA had been as high as \$85 per ton, and that he believed the current quote of \$46 per ton was below the direct cost.

However the Commission learned that the price per ton was based on a number of factors including the cost of the commodity, the exchange rate and shipping costs. The latter was likely to be influenced by the price of fuel and the competitive advantage of a long-term shipper like East End Asphalt. It is therefore reasonable to conclude that East End Asphalt may have been able to provide a more competitive quote compared to the direct quote from DM Rogers because of a combination of the factors outlined. The Commission is of the opinion that it was not appropriate to conclude, that East End Asphalt was making a loss at this price and therefore wrong to assume that they would raise their price.

We received an affidavit⁴¹ from Mr. Nick Faries Chief Executive Officer of the East End Group, which includes East End Asphalt in which he noted, *"Bulk prices also of course vary depending on the strength of the Canadian dollar (given the supplier charges in Canadian dollars) and shipping costs. We were able to quote \$46 per tonne, because the Canadian dollar was lower and we were at this time bringing in seven or more ships a year, approximately*

150,000 tonnes of aggregate per year, and so we could negotiate low shipping rates and better terms with the quarry".

Mr. Ball's oral evidence showed that along with the issue of perceived concerns about EEA's pricing and the inability of EEA to meet the target delivery date, he also wanted to give consideration to the stated government policy of developing local suppliers and involving Bermuda businesses. This negated a direct purchase from D M Rogers even though the quote was approximately 10% lower than the bid from HH. Mr. Ball said later in his evidence that the government can at any time "go direct" for a cheaper spend but that doesn't benefit the local economy. For these reasons he decided to recommend HH to PS Horton. Mr. Ball was then asked whether he instructed Mr. Tuzo to ask EEA whether they could speed up the delivery of the aggregate, to meet the deadline of mid June. He confirmed that he had not.

Mr. Ball was asked if he had provided PS Horton with relevant information on the principals of the company he was recommending. Mr. Ball stated *"...in my view if I were to reveal that Harmony Holdings who as far as I was concerned was just another company, if I was to reveal that Harmony Holdings was 50% owned by my father then that would have automatically prejudiced the whole process."* When asked if he thought he should disclose the ownership to avoid an appearance of conflict of interest he advised, *"There was no appearance of conflict in my mind because I was not affiliated with Harmony Holdings in any way shape or form."* Mr. Ball told the Commission that if he had revealed this information, he would have prejudiced the process. By withholding the information, he indicated that he felt that he was protecting the process.

Mr. Ball was shown section 3.3 of Financial Instructions 2009⁴² and P.F.A. 2000⁴³, both of which deal with conflicts of interest.

Financial Instruction 3.3 reads: *"Employees must not use their position or knowledge gained through it for private or personal advantage or in such manner that a conflict or appearance of a conflict arises between the Government's interest and their personal interest. A conflict of interest is created when an obligation, interest or distraction exists which would interfere with the independent exercise of judgment in the Governments best interest. If an employee feels that a course which they have pursued, are pursuing, or are contemplating pursuing, may involve them in a conflict of interest, they should immediately make all facts known to their superior."*

Mr. Ball was asked in light of this Financial Instruction, whether he should have disclosed the ownership of HH. He responded, *"No, I didn't think that"*.

P.F.A. 2000 states *"Employees engaged in any purchasing transaction are expected to be free of any interests or relationships*

which are actually inimical or detrimental to the best interests of the Ministry and shall not engage or participate in any commercial transactions involving the Ministry in which they have a significant undisclosed financial interest."

When asked again, whether he believed under this Management Procedure he thought that the recommendation for HH gave rise to a conflict, he stated *"I didn't feel that this particular contract was in the detrimental [sic] to the best interests of the Ministry and neither did I feel... I definitely didn't have an undisclosed financial interest in Harmony Holdings as the record shows... I wanted the process to remain objective in all ways and I didn't want anyone to do me or my Dad a favour or to prejudice them in any way shape or form."*

The Conditions of Employment and Code of Conduct⁴⁴ also addresses how to avoid a conflict of interest *"Conflict of interest with official duties may arise for various reasons and as an individual you may have private interests that from time to time conflict with your public duties. However there is a reasonable public expectation that where such a conflict occurs it will be resolved in favour of the public interest rather than your own."*

When asked if this applied in this case, he replied *"I don't feel that in this particular instance... in fact it was in the public interest rather than my own interest because... it was the best price that the government had received in ten years."*

The code of conduct goes on to say: *"... it is not possible to define all potential areas of conflict of interest and if you are in doubt as to whether a conflict exists raise this with the appropriate manager. In some circumstances the appearance of a conflict of interest could itself jeopardize your public integrity. You are required to declare to the Permanent Secretary or Head of Department any conflict of interest that arises or is likely to arise. You should stand down in any decision making process where you may be compromised."*

When asked about his reaction to this section Mr. Ball said *"I was only dealing with Harmony Holdings as a company. I wasn't dealing with it because it's my Dad. I'm dealing with it objectively and professionally as a company."*

When asked whether his failure to disclose the principals of HH to Permanent Secretary Horton was tantamount to suggesting that the PS was unable to make an objective decision, if he knew that Harmony Holdings was 50% owned by a close relative Mr. Ball advised *"I chose not to prejudice Harmony Holdings."*

When asked if in hindsight he would have done anything differently, Mr. Ball said the contract performed on time on budget and efficiently and *"if I had the choice to do it over again I would do it the exact same way."*

The Commission notes for the record, that it received a response

from the Purchasing Officer Vic Ball's Counsel which stated *"Our client does accept that it would have been better in the circumstances to have disclosed his father's interest in HHL which would have allowed him to be fully compliant with the Code of Employment and Code of Conduct (CECC)."*

Financial Controller Andrew Morille confirmed in his witness statement that purchase orders could be generated by the purchasing officer (Mr. Ball) and that there were built in dollar approval limits. However *"Purchasing Officers within the Ministry could generate purchase orders for the purchase of goods and services and attribute such purchases to the individual with the corresponding approval limit"*.⁴⁵

It is the Commission's understanding that the Accountant General made payment on these 3 transactions based on the purchase orders being signed by an approved signatory on file (i.e. without evidence of cabinet approval). Based on the Commission's review of transaction documents,⁴⁶ 2 of the purchase orders were apparently signed by PS Horton – the Accounting Officer.

As Mr. Ball explained in his witness statement of 22 September 2016 to the Commission [paragraph 13], purchase orders could be regarded as contracts, reiterating why the purchase for \$.1.4m never went to Cabinet. *"There was a written contract"*, he maintained. *"Every purchase order has, on its back, our standard terms and conditions. These are set out in appendix 6 and 7 of P.F.A. 2000. The reason there was no Cabinet approval was because this was an emergency purchase. Cabinet approvals are not necessary if the purchase is an emergency."* Mr. Ball relied upon P.F.A. 7.4.6 for this statement. The Commission however notes that Andrew Morille, then the Controller at W&E, when asked about the lack of Cabinet approval, informed the Auditor General that *"this was inadvertently not submitted to Cabinet for approval."*⁴⁷ This suggests that at least some civil servants believed that Cabinet still needed to approve large expenditures even in an emergency, presumably retrospectively.

Lastly, the Commission notes that W&E gave a written explanation in an email dated 10 September 2010 for the decision to award the contract to Harmony Holdings in an email exchange with the Auditor General. It is unclear if this written rationale for the decision not to award the contract to the lowest bidder was documented at the time or whether this email was the first time it was formally documented.

Findings

- A Purchase Order is considered an agreement under P.F.A. 2000 and therefore the Commission does not concur with the Auditor General's finding of no contract or agreement. However the Commission cautions, for

a purchase of this magnitude, a proper contract would safeguard the Government to a greater degree.

- Notwithstanding that this was treated as an emergency, given the size of the contract (\$1.4 Million), the Commission considers that Cabinet approval ought to have been sought, pursuant to Financial Instruction 8.3.1.
- A clear conflict of interest existed for the Purchasing Officer Ball, with no disclosure of identity of principals to Permanent Secretary – in breach of Financial Instruction 3.3 and with reference to Civil Service Conditions of Employment and Code of Conduct 7.2.3 .

D – Renovations – Department of Human Resources (3.1.5)

Date: 2008 / 2009

Description: Renovations to the Department of Human Resources

Contractor(s) / Principal(s): Greymane Contracting Ltd. / Mr. Thomas & Ms. Allison Smith

Minister(s): The Hon. Derrick Burgess JP MP -Works and Engineering (W&E)

Civil Servants: Head of Civil Service (HoCS) Major Kenneth Dill (retired), Permanent Secretary Mr. Robert Horton (retired)-W&E, Architect Ms. Lucy Chung (left the Civil Service)

Third Parties: n/a

Contract Value: ~ \$257,000

Final Cost: ~ \$958,000

Relevant Regulations: P.F.A. 2002, Financial Instructions 2008

Introduction

The Auditor General's Report states that "In 2010, a contract for renovations to the Department of Human Resources did not receive Cabinet's prior approval nor was it put out to tender. Works and Engineering (W&E) confirmed that the project was not properly tendered and noted that the Head of the Civil Service agreed to proceed with negotiating a cost with a contractor. As such, there was no Cabinet Award Recommendation document issued to Cabinet and no Cabinet approval was obtained for the award of this contract..."

Evidence

In late 2008 / early 2009, renovations were made to the Third Floor of the Ingham & Wilkinson Building at 129 Front Street, for the purpose of moving the Department of Human Resources (DHR) to new premises.

The Commission learned that these renovations occurred almost a year after the original lease for the premises was signed. Plans had been made throughout the year for these premises to house different departments, but these plans kept changing. After a July storm, HoCS Dill's office was badly damaged and relocation of his offices became a matter of urgency.

Permanent Secretary (PS) Horton gave evidence⁴⁸ about how projects were typically dealt with, saying "normally as Permanent Secretary, I would have little involvement in the tendering process. It would be agreed that a project would go out to tender and thereafter the tendering process would be managed by the technical officers."

The Commission saw no evidence that this project went out to tender and PS Horton confirmed that the requirements of P.F.A. 2002 were not met.

Written evidence⁴⁹ from PS Horton indicated: "I am unaware of any justification in this instance for negotiating directly with the contractor and not following the tendering process, except perhaps to expedite the process given the urgency that accompanied the need to relocate the Department of Human Resources."

PS Horton was also unable to explain why Cabinet approval was not obtained. His evidence⁵⁰ was that "... under normal circumstances, Ministry of W&E technical officers would have prepared a Contract Award Recommendation which, following my review, would have been forwarded to the Minister who in turn would have presented it to his Cabinet colleagues for approval. Because the Head of the Civil Service assumed direct responsibility for the project, I was not positioned to provide the required oversight."

PS Horton further explained,⁵¹ "I do not recall the exact circumstances of the Head of the Civil Service assuming overall responsibility for the renovations project, but can confirm that he soon assumed authority for it communicating directly with and issuing instructions to officers of the Department of Architectural Design and construction, Mrs. Lucy Chung, Architect, in particular, regarding the renovations project. I recall that the Head of the Civil Service communicated directly with the Minister of W&E regarding the project."

In response to a suggestion that there "may well have been a degree of confusion as to who was responsible", PS Horton replied⁵² that "there was no confusion in my mind at the time".

HoCS Dill disputed PS Horton's contention that he (Dill) had at any time assumed responsibility for this project. As a result, he asserted⁵³ that he could not answer the Commission's questions about this project regarding: i) justification for negotiating directly with the contractor and not following the tender process ii) whether or not the requirements of P.F.A. 2002 were met iii) why

Cabinet approval was not obtained and iv) why payments were made for this project if Financial Instructions and/or P.F.A. 2002 had not been followed.

However, Architect Chung appeared to be seeking and arguably taking instructions from HoCS Dill in an email⁵⁴ dated 9 September 2008, replying to Mr. Dill's email of the same date: "1. Are we to apply the 'reduced scope' to DHR's section as well? 2. If so, should we advise them of this change or would you be doing that? 3. Should we advise them that we will be eliminating one of their training rooms or should we? 4. There was mention that it may be possible to eliminate the Building Permit process and the Tender Period. The latter is straightforward in that, with your permission, we will negotiate a cost with a Contractor who we are confident can work very quickly As for the Building Permit – would you or our Minister take this up at a higher level?"

But, HoCS Dill said at the Hearing⁵⁵: "I did not have the authority to direct the Permanent Secretary or any member of his staff. As evidenced in an email from the Ministry's Architect Lucy Chung... I was asked four questions, which I answered... At no time was the word 'contract' used, as the issuing of contracts is the responsibility of the Ministry of W&E. As Head of the Civil Service, I have no budget so the responsibility for all such budget items would be with the PS of W&E. I was simply asked an operational question and I gave my opinion – that it seemed reasonable to negotiate a cost with a contractor."

HoCS Dill gave further context regarding his response⁵⁶ to questions prompted by Architect Chung's email⁵⁷: "I think it's important to point out that at the time, I was Head of the Civil Service, but I had the strategic management of the Department of Human Resources and, therefore, I responded that I will tell them because I had that responsibility... and three other Departments at that time and each Department had their own Director... and they each had their own Accounting Officer. I simply took care of the strategic direction... and therefore, it was reasonable to ask me rather than go to the Department Head."

HoCS Dill also commented that at the time, he received no indication of concern from the Department, though he did confirm that PS Horton was not copied on those emails. "I would like to say that is, if we look closely at Ms. Chung's email, she copied to our Technical Officers. I responded and included the same too. It would seem to me that if there were an impediment to any of these that at least one of them would say, stop, this is not correct, but I suspect that it was their standard operational procedure."⁵⁸

The record shows that on 4 December 2008, PS Horton wrote an email⁵⁹ confirming that the project had "the full authority of the Hon. Derrick V. Burgess, JP, MP, Minister of Works & Engineering."

Minister Burgess, in his witness statement stated that PS Horton must have kept him apprised of difficulties with the project: "However, I have little, if any, independent recollection of this matter."⁶⁰

Findings

- The Commission accepts that there was confusion as to the responsibility between the Permanent Secretary Horton and the Head of the Civil Service Major Kenneth Dill. We do criticise the fact that two senior civil servants (Dill & Horton) allowed this situation to arise, with the result that Financial Instructions, particularly the requirement for Cabinet approval, were ignored. The Commission also notes that there appears to have been no Ministerial involvement in this case.

E – Central Laboratory Building Project (3.1.6) – note this was subsequently combined with the Southside Laboratory Project

Date: 2008/09

Description: Pre-design Consulting & Architectural services
 Contractor(s) / Principal(s): Carruthers Shaw & Partners (CS&P);
 Concorde Construction Mr. Vernon Burgess
 Minister(s): The Hon. Derrick Burgess JP MP- Works & Engineering (W&E)

NOTE: Both Mr. Vernon Burgess and Minister Derrick Burgess told the Commission that they are not related, but that they did know of each other.

Civil Servants: Permanent Secretary Mr. Robert Horton (retired)-W&E, Chief Architect Mr. Lawrence Brady, Architect Ms. Lucy Chung (left the Civil Service), Financial Controller Mr. Andrew Morille

Third Parties: n/a

Contract Value (Forensic Lab Marsh Folly): ~\$46,000

Final Cost: ~\$902,000

Contract Value (Central Lab Southside): ~\$974,500

Final Cost: ~\$1,771,788

Introduction

The Auditor General's Report indicates that the Central Laboratory Building project "did not receive prior Cabinet approval. Additionally, Works and Engineering (W&E) noted that the services were not tendered but were negotiated with the knowledge of the Permanent Secretary PS."

In fact, there were two projects: the first for our purposes is called the Marsh Folly project and the second the Central Lab Southside contract.

Contract # 1: Marsh Folly Project

Evidence

The Commission found that the contract for the Marsh Folly project was entered into without prior Cabinet approval and it was not put out to tender. This was not in dispute in evidence

before the Commission. The contract was originally estimated at \$46,000 but ended up costing an additional \$856,000 or a total \$902,000.

The Commission learned that the plan was to build a new state of the art facility at the Marsh Folly site of the former waste solid waste disposal facility. It was intended to house the Ministry of W&E headquarters, Department of Health laboratories, W&E waste management staff and a new depot for garbage trucks there. Later the proposal was expanded to include accommodation for the Ministry of Health headquarters, the Ministry of Health's Vector Control unit and the forensic laboratory of the Bermuda Police Service.

According to former PS Horton, the project had the support of the W&E Minister Burgess.

There was common agreement on the reason why the contract was never put out to tender. From the outset, it was regarded as a matter of some urgency.

Chief Architect (CA) Brady recalled⁶¹ that: "The project was a result of the closure of the old hospital location for laboratories in preparation for the new hospital building. Our instructions were that the project was critical, and needed to be completed as a matter of urgency." PS Horton held the same view. They each referred the Commission to the rules, which allow for the requirement to tender to be waived in such circumstances and specific reference was made to P.F.A. 2002, 6.11.3 and 6.11.4 and the "special circumstances" which were said to pertain with reference to this project.

In exercising the option to waive the tendering process, PS Horton said that he took into account the following factors in making his decision:

- The familiarity of the Department of Architectural Design and Construction with CS&P Partner's Ltd., the firm selected to undertake the design of the project, and which firm was already engaged on the Dame Lois Browne-Evans building ;
- CS&P Partners' proven ability to access specialised services that would be required to design a multi-purpose facility of the kind proposed; and,

- The need to move forward as expeditiously as possible, given the urgent need to relocate the Environmental Health laboratory of the Health Department as its home at the old hospital was set for demolition.

Notwithstanding the above, the urgency of the project did not obviate the need for prior Cabinet approval under Financial Instructions, when it was clear that this project was going to exceed \$50,000 in total. CS&P Partners first provided a quotation of \$46,000 for what they described as the initial phase of the work, but a week later in a more comprehensive letter to CA Brady they were estimating a total of more than \$1,000,000 for a further five phases of the job.

There was no issue as to whether or not PS Horton was informed.

In fact, the PS was candid in his evidence before the Commission and said that the failure to obtain Cabinet approval on this contract was *“a regretful oversight on my part.”* He said⁶² that he was unable to explain why Cabinet approval was never sought and that under *“normal circumstances”*, technical officers within W&E would have prepared a Contract Award Recommendation which, following his review, would have been forwarded to the Minister for presentation to Cabinet.

A question arises however, as to why payments were made on this contract in the absence of critical documentation in support, specifically evidence of both the contract and Cabinet approval. The former was never produced either upon request of the Auditor General or for the Commission. On the fact that payments were nonetheless paid, PS Horton said: *“I can only surmise that payments had been made because work had been completed, services had been delivered and the Authorised Officers believed that all the necessary due diligence had been carried out.”*

PS Horton explained in his witness statement⁶³ *“the due diligence”* to which he was referring: *“.... all requests for payments, having been prepared by the Project Manager [A Ministry of Works and Engineering technical officer] would be forwarded to the Finance and Administration Department of the Ministry of Works and Engineering where they would be vetted by a management accountant before being processed. The Project Manager would include with his payment request a Payment Certificate and relevant supporting documentation, including a copy of the contract, proof of work completed to date, original invoices, etc. The management accountant would ensure that the invoices matched the Payment Certificate prepared by the Project Manager, that the Payment Certificate reflected the correct signing authority and that the invoice was in accordance with the applicable contract or agreement.”*

However, the records actually show that the Payment Certificates

for professional services were in the event all signed off by PS Horton and project manager Lucy Chung. It appears that this was regarded as sufficient authorisation for payments to be made. This view was reflected in Andrew Morille’s witness statement⁶⁴: *“Payments could have been authorised on a purchase order/ agreement or a contract, if the contractor’s invoice was produced... and the payment certificate was duly signed by the relevant Technical Officer or the Project Manager and the Permanent Secretary or his or her designate in accordance with section 9.5 of Financial Instructions.”*

CA Brady also offered by way of explanation in his witness statement the following:

- That in reviewing services provided, he and technical staff were guided by the recommended scale of fees of the Institute of Bermuda Architects (IBA) to ensure that the fees charged were fair and reasonable; and,
- That the proposed fees were purposely divided into phases, *“allowing Government to cancel the design work at any time without further liability other than the percentage completed in the phase that was underway at the time of cancellation.”*

Notwithstanding the above, and in any event, as the Auditor General noted in her Report, the final bill was \$902,000.

The Commission learned that the Marsh Folly project as originally planned was abandoned. According to PS Horton *“for fiscal reasons”* the Government *“chose to move in another direction.”* Although a portion of the plan, he said, was used to develop accommodation at the Marsh Folly site for the solid waste staff of W&E, equipment and vehicles.

(ii) Central Lab Southside

Introduction

The abandonment of the Marsh Folly project led to the search for another site for the construction of the Environmental Health Laboratory. The need was apparently still urgent given the plans for construction of the new hospital.

Evidence

The first alternate site was identified as a privately-owned warehouse with an estimated fit-out cost of \$1,375,000 for which tenders were this time invited. Minister Burgess intervened, explaining⁶⁵ that he did so for two reasons: (1) it made poor fiscal sense to spend public funds on private property for which

Government would then pay rent as well; and (2) he thought money could be saved by building on Government owned property.

A building was identified at Southside owned by the Bermuda Land Development Company. Tender bids were once again invited and the lowest bidder was Concorde Construction at \$866,000, approximately 30 percent less than the next lowest bidder. The technical officers were concerned to know whether Concorde had included in its bid all work that was required.

A site visit was arranged with Mr. Vernon Burgess⁶⁶ of Concorde Construction, Minister Burgess, the PS Horton and technical officers from the Ministry. Further changes were made to the specifications, with Minister Burgess succeeding in having some of the re-fit work undertaken by the Bermuda Land Development Company. This led to a reduction in construction costs.

Concorde Construction re-submitted its bid, with an upward revision to \$974,500. No further attempt was made to invite the other bidders to revise their bids in light of the revisions to the specifications. Technical staff at W&E disagreed with this approach, and said so.

Architect Chung went even further and compared⁶⁷ the bids on a like-for-like basis, which underscored the need to re-tender. According to her calculations, the next lowest bidder to Concorde, DeCosta Construction, would have worked out to be \$967,000, slightly less than that of Concorde's revised bid. However, Minister Burgess said in evidence that the first time he saw this email or analysis was when he received his witness bundle from the Commission.

Notwithstanding Architect Chung's representations to PS Horton, and via him to the Minister, the Minister was of the view that the contract should be awarded to Concorde. *"The Minister was adamant"*, according⁶⁸ to Mr. Horton. Moreover, Minister Burgess did not want to share⁶⁹ with Cabinet the views and concerns of the Ministry's technical officers. Some of those concerns were that Concorde did not have the necessary experience to carry out the works.

The Commission notes a conflict of evidence at various points between the evidence of PS Horton and Mr. Burgess. In particular, Mr. Burgess denied that Concorde had received any special treatment. According to Mr. Burgess, he told the TOs to revise the bid parameters for all the bidders.

In his evidence before the Commission, Minister Burgess explained that the Progressive Labour Party had won the Government based on a platform of enfranchising the disenfranchised, which to him in his capacity as Minister of W&E meant extending opportunities to small black businesses to obtain Government work; to the extent that he would prefer them if their bid was \$10,000 to \$20,000 more than another bidder⁷⁰ *"depending on the size*

of the contract." Minister Burgess did not believe that technical officers consistently followed or employed this policy when making recommendations. For that reason, and others, the Commission heard evidence that there was a growing mistrust and lack of confidence on the part of the Minister in the Ministry's technical officers.

A Contract Award Recommendation⁷¹ was drafted which included the revised tender of Concorde Construction, as well as the original, unrevised bids of other bidders, who had not been given the same opportunity to respond to the changes in bid requirements. PS Horton said⁷² that he acquiesced to Minister Burgess' request that the Contract Award Recommendation be drawn that way, even though on the face of it, he agreed that the information that was thus being provided to the Cabinet was misleading. Although he added: *"...what we don't know is what the Minister might have shared with his colleagues when this was presented to Cabinet."*

The Commission endeavoured to obtain, without success, a copy of the Memorandum that was presented to Cabinet. The Commission was however able to have sight of the relevant Cabinet meeting minute of 4 May 2010 which authorised the award of the contract to Concorde Construction on the Minister's recommendation.

According to the minute, the Minister shared with his colleagues that there had been a tender process and that four bids were received: Concorde, DeCosta Construction, Greymane Contracting and Coleron Construction. Further, that he reported that Concorde had submitted the lowest bid and that he was satisfied Concorde had the experience and expertise to complete the work satisfactorily and within the agreed time.

There was no mention of the contract sum in the Minute or the Cabinet Conclusion.

The end result, the Commission learned from its inquiries is that while the Contract Award Recommendation for Southside was for \$974,500 the final Certificate of Payment for the project dated 18 January 2012 showed that a total of \$1,771,788 was paid which was said to include Change Orders totaling \$797,288.50.

Findings

- Notwithstanding the urgency, which initially propelled the Marsh Folly project forward, Cabinet approval could still have been sought, as it should have been, a point, which PS Horton acknowledged was a regretful oversight on his part.
- The tender process was defective for Central Lab Southside. Only one bidder, the successful bidder, was

told about the reduced bid requirements, giving that bidder an unfair advantage.

- Ministerial interference by Minister Burgess in the drafting of the Contract Award Recommendation to Cabinet for Central Labs Southside, and acceptance of this course of action by the PS. This forgoing criticism of the PS remains valid in the Commission's view, notwithstanding any reservations and concerns PS Horton may have expressed to the Minister at the time.
- Apparent non-disclosure by Minister Burgess to the Cabinet of the concerns and recommendations of the technical officers on the Central Lab Southside award contrary to P.F.A. 2002, clause 6.7.3.
- An absence of clear guidelines on what a PS ought to do in circumstances where he disagrees with the course of action a Minister proposes to take, short of resigning. It is clear in this case that PS Horton had misgivings at the interference in the bidding process by the Minister. A PS placed in this position is in a difficult position. However, the FI are clear that Accounting Officers, like any other civil servant, must inform the ACG of any breaches of the FI. In the Commission's view, this includes a failure to adhere to P.F.A. 2002. No notification was ever made to the ACG by PS Horton or any other civil servant.
- Justification by Minister Burgess, that this project was a case of contractor empowerment is accepted by the Commission. However, the Commission notes that appropriate procedure should still have been followed and documented accordingly.

F – Global Hue:3.1.7 - Departmental Expenditures; 3.3 - Significant Contracts Not Tendered

Date: 2009

Description: Contract for Advertising & Marketing Services
Contractor(s) / Principal(s): Global Hue – Mr. Donald Coleman
Minister(s): Premier Dr. the Hon. Ewart Brown JP MP - Tourism & Transport (T&T), The Hon. Paula Cox JP MP - Finance
Civil Servants: Secretary to the Cabinet Major Marc Telemaque, Permanent Secretary / Director of Tourism Ms. Cherie-lynn Whitter-T&T

Third Parties: Cornerstone Media

Contract Value: ~ \$14,000,000 per annum

Final Cost: ~ \$14,000,000 per annum

Relevant Regulations: P.F.A. 2002⁷³, Financial Instructions 2008⁷⁴

Introduction

The Commission identified the Global Hue contract, which appeared in table 7 of Section 3.3. of the Auditor General's report⁷⁵ as a significant contract not tendered. This two year contract was signed effective 1 April 2009. The amount paid was \$14.1m part of a total of \$18.1m under the heading of payments within the Department of Tourism and Transport. Whilst there was no tendering, Cabinet approval had been obtained for this contract, however the context in which the approval was obtained prompted examination.

Evidence

The Auditor General had strongly criticised the original 2006 Global Hue contract, via a 2008 Special Report issued in February 2009, just two months before the new contract was signed.

The new contract was undertaken via a letter agreement dated 13 March 2009, which was signed and executed on 26 May 2009. It was expressed as a stand-alone agreement for two years effective April 1 2009. As noted here had been a previous agreement covering a three-year period from 1 February 2006 to 31 January 2009 ("the 2006 Agreement").

The new contract was presented to Cabinet by the Minister as a "single source tender; though Cabinet is reminded that the initial awarding of the contract was as a result of a full agency review wherein several tender submissions were considered" (quoted from the Contract Award Recommendation dated April 2009).

As background, Global Hue, an American advertising agency provided "... services in connection with the preparation and placement of advertising for leisure travel group and incentive travel and travel trade." The original three-year contract was signed by the Department of Tourism and approved by the Cabinet.

The Commission learned from the 2008 Special Report of the Auditor General⁷⁶:

- From 2006 to 2009 the Government paid to Global Hue approximately \$10 million per annum for the preparation and placement of advertisements and a fee of \$1.4 million per annum.
- Global Hue had pre billed for the purchase of advertising placements using Cornerstone Media as their agent.
- Ongoing financial reconciliations were undertaken by Global Hue in respect of what Cornerstone Media had pre-billed and the actual costs.
- The Auditor General was unable to obtain the underlying invoices to support the placement by Cornerstone Media for the advertisements. These totaled approximately \$33 million over three years.
- Cornerstone Media and Global Hue took the position that they did not need to provide the invoices to the Department.
- The Auditor General noted that members of the New York branch of the Department of Tourism had tried to obtain the invoices on numerous occasions without compliance from Global Hue and had advised the Auditor General accordingly.

The Auditor General's efforts to obtain invoices were frustrated. The Auditor General informed the Finance Minister that the inability to obtain these invoices limited the audit scope and could result in a qualification in the Financial Statements.

- Invoices were eventually provided which showed that the margin varied from a minimal level to as high as a 186% mark up.

- The Auditor General was able to review a schedule of all invoices from Cornerstone Media, which showed an average mark up of 51%.
- If the actual mark up had been at an average industry level of 15% it was estimated⁷⁷ that the Department would have paid \$1.8 million less in media buying during 2008.

For the relevant period, Major Telemaque was Secretary to the Cabinet (Cab Sec) and retained responsibility for matters in the Department of Tourism and Transport with respect to hotel development. Premier Dr. Brown was the Minister. Major Telemaque previously had been Permanent Secretary (PS) of Transport from 2002 and PS for the combined Ministry of Transport and Tourism, again with Dr. Brown as the Minister from 2004.

Cab Sec Telemaque told the Commission that the contract with Global Hue in April 2009 was considered a renewal of the previous contract. He explained *"it has been a source of criticism as part of the rationale for the formation of the Bermuda Tourism Authority that too frequent changes of Agency partners either in compliance with the rule of government or owing to changes in Ministerial outlook caused undue confusion in the marketplace and resultant negative impact on Bermuda tourism."* In his testimony he also commented *"... in the absence of some failure to perform or obvious dissatisfaction with that company, best practice would suggest that the relationship be maintained."*

The question arose: did the lack of transparency regarding Global Hue and Cornerstone Media invoicing render the contract as 'failure to perform'? When asked why it was deemed appropriate for the Cabinet to agree to the new contract without tendering Major Telemaque said the decision was *"... not a matter for me. The Cabinet made the determination."*

He was asked further about the provision in the Global Hue contract that allowed for inspection of invoices. Although he was PS at the relevant time, he indicated that questions should be directed to then Director of Tourism, Ms. Cheri-lynn Whitter.

He explained that the Department of Tourism was separate from Transport until 2004 when the two Ministries were combined. He said that the expertise for Tourism was resident in that department (Tourism) and therefore they contracted with suppliers. His role as PS was *"to exercise some degree of oversight and to shepherd matters through Cabinet as required based upon the needs expressed by the department."*⁷⁸

Ms. Cherie-lynn Whitter was Director of Tourism from September 2004 until May 2007. In April 2008, she became PS of Tourism and Transport where she remained until January 2011. She spent the intervening period as Acting Assistant Cabinet Secretary. Ms. Whitter is now (2016) the Deputy Head of the Civil Service.

Ms. Whitter acknowledged in her witness statement: *"Heads of Departments make every effort to adhere to Financial Instructions, given the volume of transactions during the period in question however errors sometimes occurred."*⁷⁹

Ms. Whitter confirmed that the Minister /Premier (Dr. Brown) made a policy decision not to conduct an agency review and the Cabinet reviewed the Global Hue as a *"single source bid"*.

She said that the Technical Officers *"sought to advance the policy decision of the Minister whilst adhering to Financial Instructions"* but there is *"no evidence to support that the Ministry obtained specific authorisation from the Minister of Finance not ... to adhere to the tendering process"*.

When pressed about the decision to agree to a new contract given all of the concerning issues raised by the Auditor General Ms. Whitter said she did not give any advice to the Minister with respect to the new contract and it was *"... the Minister's view"* that the contract be entered into.

It should be noted there were modifications to the new contract as a result of the negative Auditor General's report. In her witness statement, Ms. Whitter identified that the new contract was strengthened by including clauses relating to 'Dealings with Third Party Suppliers' and 'Operating Procedures'. In addition 'the Consideration and Compensation Schedule' clauses were strengthened with respect to invoicing requirements as well as requiring all third party invoices. *"all of these changes served to reduce the risks that could lead to abuse."*

In addition Ms. Whitter confirmed that no subcontracting could take place by Global Hue under the new contract without the prior consent of the Department of Tourism. She also agreed these provisions in the contract were added as a result of the experience with Cornerstone Media. The Commission's review of documents revealed that in fact Cornerstone Media was no longer involved under the new contract.

Ms. Whitter added that *"during the course of the Audit by the Office of the Auditor General, Technical Officers stopped paying Global Hue because there was no supporting documentation and brought to the attention of the Auditor General that they didn't have supporting documentation"*

She was also asked to comment on the Cornerstone Media markups, *"I can't speak to that... I don't know what the commissions are or were being charged by other media companies so I can't answer the questions"*.

Ms. Whitter confirmed she had met with principals from Cornerstone at a meeting in Bermuda but couldn't recall their names (a man and a woman) or where they were located although she later confirmed she believed they were from the US. She said that the Department

had done some research into the company but she wasn't able to recall any outcome.

Under the second contract, Ms. Whitter confirmed that Global Hue had assumed the media buying for Bermuda and was questioned about the value added by Cornerstone Media. She replied that Global Hue had previously been able to subcontract under its agreement and the department had played no role in those decisions, although she expected that the Department was notified. *"There is no formal notification. It may have been something an agency representative or the President of the Agency Don Coleman mentioned..."*

Ms. Whitter was asked whether any funds were returned to Global Hue and hence the Department, as a result of the reconciliation of Cornerstone invoices. Ms. Whitter said that she had left the Ministry by that time and did not know the outcome of the reconciliation.

When asked if the person responsible for the contract was the Director of Tourism and not herself a Permanent Secretary she responded that the responsibility resided with the *"Accounting Officer"* who in this instance was the Director.

The Commission understood that the then Director of Tourism was Mr. William Griffiths, who is resident overseas. The Commission made a decision not to seek to call witnesses who were outside Bermudian jurisdiction, taking into account our limited resources and time constraints.

The Minister responsible at the time of this contract former Premier Dr. Brown exercised his right of privilege and therefore offered no evidence to the Commission.

Findings

- The Contract was not tendered. The Commission agrees with the Auditor General's findings that this was a new contract not a renewal. However it was treated as a renewal by the Minister and Permanent Secretary. The Commission learned that the second contract was not renewed at the expiration of the second two-year term.
- The Premier as Minister for Tourism recommended the contract to Cabinet as a straightforward renewal with no evident concern shown over the serious criticisms raised in the Auditor General's report. There is no evidence that the criticisms of Global Hue were brought to the notice of Cabinet when the 2009 Agreement was approved.
- This new contract was agreed after the 2008 financial crash and the Commission believes that environment would have been conducive for a competitive tender among advertising agencies, likely enhancing value for money.
- The Commission understands that the Director of Tourism

reports to the PS of T&T.⁸⁰ The PS of T&T appeared to provide no oversight to the Director of Tourism who in turn failed to ensure requisite tender information was obtained or a waiver of the tender requirement. The PS failed to notify the Accountant General of this breach of Financial Instructions.

- Payments were made by the Accountant General's Department on the basis of sign off by the Accounting Officer without evidence of tendering or a request for a waiver.

Noted by the Commission:

The Commission recommends that the Permanent Secretary for Transport and Tourism be identified as an Accounting Officer.

The Commission recommends that a review be made to consider whether or not it is advisable to have multiple Accounting Officers in Ministries. The Commission understands that oftentimes Heads of Department and others are designated as Accounting Officers. This dilutes the accountability and authority of the Permanent Secretary as Accounting Officer.

G – Ambling 3.3 Significant Contracts Not Tendered

Date: 2008 /2010/2011

Description: Various planning, works and engineering and hotel consultancy services

Contractor(s) / Principal(s): Ambling Development Partners (also shown as Ambling International Consulting Inc.) Mr. Eddie Benoit.

Minister(s): Premier Dr. the Hon. Ewart Brown JP MP - Tourism & Transport (T&T), The Hon. Paula Cox JP MP - Finance

Civil Servants: : Secretary to the Cabinet Major Marc Telemaque, Permanent Secretary/Director of Tourism Ms. Cherie-lynn Whitter-T&T, Permanent Secretary Mr. Robert Horton (retired)-W&E

Contract Value: ~ \$400,000 per annum retainer (with total fees shown in Auditor Generals report of \$3.2m)

Relevant Regulations: P.F.A. 2002⁸¹, Financial Instructions 2008⁸²

Introduction

The Commission identified the Ambling Contract, which appears in Table 6, and Table 7 of Section 3.3 of the Auditor General's report as a significant contract not tendered by the Tourism Department. The figures for the Ministry of Tourism are \$3,634,805 (2010) and \$18,116,485 (2011). These include payments made under two contracts, the first being with Ambling Development Partners (possibly LLC), and the second with an associated company, Ambling International Consultancy Inc.

Evidence

This was a transaction that was first presented to Cabinet by the Premier (also holding the position of Minister of T&T) for approval in March 2008. This first contract appeared to be in place for 2 years from 10 March 2008 until 12 March 2010.⁸³ A further contract appeared to be signed from May 2010 until March 2011. Ambling Development Partners was the name mentioned in the Cabinet conclusion. The second contract was with Ambling International Consulting Inc., which was a related Company.

The services to be provided were set out in Annex 1 of the Draft

Agreement provided to Cabinet. The Premier informed Cabinet. *"that with the special development orders and the provision of Government's assistance preparatory to actual development, the demolition and construction phases on various developments was set to begin in earnest and that the provisional expert advice at the pre-development stage had been critical to the success of the hotel development and similar oversight and advice on the construction and site management was most desirable."*

The Premier highlighted that in particular the Ministry of Works and Engineering (W&E) required a variety of consultative services and project management style oversight on the following projects: Dame Lois Browne Building, asbestos abatement and demolition of the former Club Med site and remediation and pre-development phases of Morgan's Point.

He also noted that the Ministry of Environment and Sports (E&S) required a complete strategic review of the Department of Planning, and in conjunction with the Ministry of T&T would need to devise a formula to assess the impact fees payable to the Government as a result of development of new hotels.

The Premier informed Cabinet that he had proposed that Ambling Development Partners whose principal was Mr. Eddy Benoit, would be engaged to provide these various services pursuant to the Consultancy Agreement with the Government.

The Commission noted in the second agreement the duties of the consultant also included:

- Oversee the implementation of Ambling's recommended operational and internal policy changes to Planning Department.
- Assist the Minister with the presentation of new financial fee model for increased revenue generation within the Department for Cabinet's approval.
- Oversee the development of a new building control fee billing process, and assess the need for fee increases in the Departments of Environmental Protection and Marine and Ports.
- Develop a new impact fee model that would be assessed on proposed larger commercial projects on the Island that would exceed a minimum of 50 million dollars in total cost of value. These fees would be collected by both Ministry of Works and Engineering and the Ministry of Environment and Supports.

- Provide general consultancy services during the development and consultation of the Grand Atlantic Hotel and affordable housing residences.
- Provide programme management services for the development agreement negotiations, land lease structure, land swap, Southlands and the master planning overview of Morgan Point's envisioned five-star hotel development at the P.G.A. golf course.
- Provide programme management services with Bazarian Group during the development, closing and construction phases for the former Club Med site, which was to be the new Park Hyatt five-star resort hotel and golf course in St. George's Parish.
- Assist the Ministry of Tourism and Transport with the final development agreement and closing process for the construction of St. Regis Hotel and Condominiums on Par-la-Ville Road
- Provide consultancy services on other special assignments by Government Cabinet committees or special hotel developments including Tucker's Point and S.D.O.s for Monroe Beach and Lantana condominium projects.

In June 2010, a member of the staff of the Auditor General sought to obtain details of payments made under the first contract. He said on 23 June 2010, *"To date the Government has paid the company \$3.2 million..."*. He said that he had just received *"a copy of an Ambling contract: \$1,380,000 contract"*⁸⁴ which clearly was the second contract, signed on 20 May 2010.

In the first contract the costs associated with this broad array of services to be performed by Ambling were to be borne equally by Ministries of T&T, W&E and E&S and as such the costs would be covered by existing allocations.

The Minister of Finance Ms. Cox, was noted as not approving the transaction on the basis that the contract had not been tendered.

She also noted that the role of project manager for the Dame Lois Browne Evans building had already been tendered and a project manager engaged. This contract would duplicate that work.

The Minister of E&S also raised concerns that a recommendation for the planning work as outlined by the Premier, was in the process of being prepared for the Cabinet by his department. Again this contract would duplicate that work.

Despite the Minister of Finance's objection and the concerns of other Ministers, the Cabinet did approve the agreement. As Ms. Cox observed during oral evidence, *"it's collective responsibility"*.⁸⁵

The Cabinet memo also noted that the Premier suggested that the principal of Ambling, Mr. Eddy Benoit would have been known to the other members of the Cabinet, but it is unclear how that was

the case. The Commission noted that many of the services to be provided by Ambling would be more appropriately managed in the Ministry of W&E yet the contract was being pursued by the department of T&T.

The PS of T&T at the time Ms. Cherie-lynn Whitter, said that she had not seen any reports personally prepared by Ambling but she was aware of reports that had been produced by them. Although this contract was signed by the Department of Tourism (Mr. William Griffiths and witnessed by Mr. Anil Chattergoon, Controller for Tourism),⁸⁶ Ms. Whitter explained it really was the responsibility of hotel development, which was retained by the Premier in Cabinet Office. Ms. Whitter explained that for a period there was no PS in T&T and so the oversight for the department was undertaken by the Cab Sec (Mr. Telemaque) and the Premier during that time. When she was appointed as the PS for the Ministry, hotel development which was seen as a national priority continued to be retained by the Premier and Cab Sec and *"there was a special Cabinet Committee that deliberated with respect to the Hotel Development."*⁸⁷

The *"retainer"* fees for Ambling under the contract signed by the Department of Tourism and as discussed at the Cabinet meeting were \$400,000 per annum but additional fees were paid to Ambling totally \$3.2m during the period under review by the Auditor General.⁸⁸

Ms. Whitter advised during the hearing that the \$400,000 was not split between departments as perhaps could be concluded from the Cabinet memo but that each department entered into their own arrangement with Ambling. She suggested it was *"somewhat convoluted."* The Chairman said he was *"rather lost in the maze"* but asked for her to clarify the basic proposition, that there were three Ministries, each one of which made a separate arrangement with Ambling as a result of one Cabinet resolution, to which Ms. Whitter confirmed, *"That's correct."*⁸⁹

Mr. Horton, who was PS of W&E during the time of the contract, had not seen the documents prepared by the Commission on Ambling prior to providing oral evidence, so his evidence by necessity was therefore limited. However, he did confirm that he recalled Ambling being included in the demolition of Club Med and the clean-up of Morgan's Point, but could not provide any specifics.

Mr. Burgess, Minister of W&E, also confirmed in his oral evidence that Ambling was involved in consulting on the decision to implode Club Med rather than a physical demolition.

Mr. Chattergoon, who was the Financial Controller in the Department of Tourism from 2009, was asked by the Chairman how he was able to process payments for Ambling when he had stated in his witness statement *"I am not aware what the work was for"*. He clarified that when he prepared a payment request he was

relying on the Authorised Officer who “would have performed the due diligence and checks before signing off on the invoice.” Despite having made payments to Ambling for more than two years he was unable to recall any services provided by Ambling other than “consultancy services”. He explained if the invoice did not show the work performed he would have reverted for some explanation of the services provided.

Mr. Telemaque, who was Secretary to the Cabinet at the time of the Ambling Contract being approved but not tendered, recalled that Ambling produced a report on Tuckers Point, which he believed led to the important new relationship with Rosewood. He could not recall if the Special Development Orders for Monroe Beach or Lantana Condominiums, as outlined in the work to be undertaken, was ever completed. He confirmed that he was not responsible for negotiating the retainer fee for Ambling of \$400,000.

Mr. Telemaque was asked whether the Premier had ever demanded an improvement in perceived low standards in W&E to allow important projects to remain in the Department. Mr. Telemaque said he did not recall anything specific. The Premier had initiated an Efficiency Strike Force to create greater efficiency, but that was for all Ministries. There was also a project to attract and retain Bermudian engineers but there was no specific plan articulated with respect to W&E.

The Commission understood that the then Director of Tourism was Mr. William Griffiths, who is resident overseas. The Commission made a decision not to seek to call witnesses who were outside Bermudian jurisdiction, taking into account our limited resources and time constraints.

The Minister responsible at the time of this contract, former Premier Dr. Brown, exercised his right of privilege and therefore offered no evidence to the Commission.

Findings

- The contracts agreed with Ambling in 2008 and in 2010 were not tendered.
- It appears that the Premier negotiated the contract directly with Ambling with no input from the Cabinet Secretary or Permanent Secretary.
- Substantial sums were paid to Ambling but there are no coherent records of any services they performed.
- This is another contract that should sensibly reside in the Ministry of W&E but was moved by the Premier to T&T (others included Bermuda Emissions construction, Heritage Wharf, and Port Royal).
- The PS said multiple agreements were put in place with Ambling but only one Cabinet approval appeared to have been sought.
- The Commission understands that the Director of Tourism reported to the PS of T&T.⁹⁰ The PS of T&T appeared to provide no oversight to the Director of Tourism, who in turn failed to ensure requisite tender information was obtained, or a waiver of the tender requirement. The PS failed to notify the Accountant General of this breach of Financial Instructions.
- Payments were made by the Accountant General’s Department on the basis of sign off by the Accounting Officer, without evidence of tendering or a request for a waiver.
- The Financial Controller was unable to recall any services that had been provided under the contract(s) and the Commission was unable to locate any reports or work product.

Noted by the Commission:

The Commission recommends that the Permanent Secretary for Transport and Tourism be identified as an Accounting Officer.

The Commission recommends that a review be made to consider whether it is advisable to have multiple Accounting Officers in Ministries. The Commission understands that often Heads of Department and others are designated as Accounting Officers. This dilutes the accountability and authority of the Permanent Secretary as Accounting Officer.

H – Motor Vehicle Safety and Emissions Testing Programme: 3.3 Significant Contracts Not Tendered; Auditor General Special Report

Date: 2001 – current

Description: Motor Vehicle Safety and Emissions Testing Programme

Contractor(s) / Principal(s): Bermuda Emissions Control Ltd./ Mr. Donal Smith, Mr. Joel Madeiros

Minister(s): Premier Dr. the Hon. Ewart Brown JP MP - Tourism & Transport (T&T)

Civil Servants: Permanent Secretary Marc Telemaque - T&T, Accountant General Ms. Joyce Hayward, Financial Controller Ms. Julie Grant - T&T

Other Parties: Entech; Correia Construction;

Contract Value: \$5.3M (construction); unclear – originally anticipated to be ~ 1.8M annually / \$18M+ over 10 years (operations)

Final Cost: \$15.23 M (construction); unclear – understood to be \$2.4M+ annually / \$24M+ over 10 years (operations)

Relevant Regulations: Financial Instructions 1999

Introduction

The Auditor General noted under ‘Contracts not tendered’ that payments of \$2,081,170 and \$2,081,694 were made in 2010 and 2011, respectively, by the Department of Transport Control, part of the Ministry of Tourism and Transport.

These payments were made to a company, Bermuda Emissions Control Ltd. (“BECL”) under an Operating Agreement⁹¹ dated 9 December 2008 which received Cabinet approval. As found by the Auditor General, the contract was not put out to tender. There was already a close relationship between the Ministry and BECL regarding vehicle emissions testing and inspection which had developed since 2001, or even earlier.

The history has been set out in a Special Report by the Auditor General in October 2010 (“the BECL Special Report”). That Report was considered by the Parliamentary Standing Committee on the Public Accounts (“PAC”) which made its Report to Parliament on 15 July 2011 (“the PAC Report”). The Minister of Finance (Ms. Paula Cox) responded on behalf of the Government on 22 July 2011.

What follows is a summary of that history taken from the BECL Special Report and was confirmed by documentary evidence that was available to us.

The Motor Car Amendment (No.2) Act 2001 gave the Government powers to require motor vehicles to comply with various international emissions standards and to introduce an emissions testing programme.

On 17 August 2001 the Minister of Transport, Dr. Ewart Brown, wrote⁹² to Mr. Donal Smith, the Marketing Director of BECL, as follows “*This letter will confirm that a decision has been made by the Government to waive the requirement to advertise for tendering and award any contract for services dealing with vehicle emissions testing to Bermuda Emissions Control Ltd.*”

The Commission noted that Mr. Smith is cousin to the former Premier Dr. Brown.⁹³

On 30 October 2003 the Acting Permanent Secretary of the Ministry of Transport, Mr. Kevin D. Monkman, wrote⁹⁴ to Mr. Donal Smith as President and CEO of BECL: “*This will confirm that the Bermuda Government has agreed to contract with [BECL] to provide the following services on behalf of [the Ministry] and the [TCD] –*

- *BECL will construct a new building, in a central location.....to provide facilities for the testing of vehicle emissions and for performing vehicle safety inspections [this became known as ‘the headquarters building’].*
- *BECL will construct two new facilities [which became known as the two ‘satellite facilities’].*
- *BECL will implement, staff, and operate an inspection/ maintenance programme to test the emissions of all vehicles that are licensed for use on Bermuda’s roads.*
- *BECL will take over, from TCD, the responsibility for performing vehicle safety inspections on all [such] vehicles...”.*

The letter concluded “*The details of the above services will be laid out in a contract between the Bermuda Government and BECL.*”

BECL was not and never had been a construction company. It was a small operation gaining expertise in the field of vehicle

emissions inspection and testing. It was, however, associated with a construction company, Correia Construction Company Ltd. ("CCCL") and from February 2003 Mr. Denis Correia was a director and a shareholder in both companies.

In May 2005, Cabinet approved the construction of the two satellite facilities subject to "an open tender process". Previously, on 7 February 2005, the Ministry had written to the Accountant General⁹⁵ Ms. Joyce Hayward (ACG) saying "This whole contract was approved by Cabinet in June 2003" and asking whether it could "be argued that that the construction of the building and the installation of the equipment are all one specialist entity thus allowing [CCCL] to deliver this and effectively negating normal Financial Regulations? If so building costs from Correia which would be checked by a third party, say Government Architects, to make sure a fair price is obtained." However, the ACG had indicated that there was no case to "contravene Financial Instructions" (meaning, waive the tender process) because the buildings were of simple construction and several contractors could do the work.⁹⁶

Notwithstanding Cabinet's requirement of an "open tender process", the Ministry and BECL approached the ACG again. A meeting between them took place on 20 February 2006. On 8 March 2006, BECL wrote "BECL and TCD are effectively a joint venture to provide automated vehicle testing for Bermuda".⁹⁷ BECL acknowledged that Mr. Dennis Correia was a director of both companies, a fact which it presented "as a distinct advantage to the project". On 10 April 2006, an internal email⁹⁸ from Bryan Walker, an Estates Surveyor from the Ministry of W&E (Department of Land Buildings and Surveys) to, among others, Permanent Secretary (PS) Telemaque, the PS stated, "...to take this forward we need the following: Something in writing from the Accountant General stating the building process can be done by Correia without a tender process due to the specialist nature...".

BECL obtained "Cost Estimates" from Construction Consultants (dated 7 March 2006) and from Engineering Consultants (dated 13 April 2006) and submitted these to the Ministry together with a "cursory cost estimate" by Correia Construction at a slightly lower figure (calculated as about 6%), also dated 13 April 2006. The ACG noted in an email⁹⁹ to the PS dated 18 April 2006 that, based on the Estimates received (with one to follow) BECL was in compliance with Financial Instructions (FI) regarding "7.1 Value for Money 9.3.1 Documentation for Goods and Services in excess of \$50,000" and with FI section 13.2 "the tendering process must be in accordance with FI Section 9...".

The Auditor General asked the ACG about this when she was preparing the BECL Special Report in July/August 2010. The ACG explained what she meant: "BECL had provided three 'quotes' in accordance with Financial Instructions but could not

verify whether the quotes were compliance, as no supporting documentation (to evidence the quotes and to prove that an independent expert had reviewed the quotes for propriety) was provided."¹⁰⁰ (Memo dated 16 July 2010). She was asked about it again on 17 August 2010, when her replies were noted as follows:

- "The ACG stated that the then Ministerial Controller said to her 'make it happen'
- "It related to the already decided upon construction process
- "She stated that she felt like the MoTT had already made up their minds on what sort of process would be followed."

(N.B. We had no evidence from "the then Ministerial controller" therefore we make no finding as to the person by whom those words, as she understood them, were spoken to the ACG).

It seems clear to us that the three estimates did not comply with Cabinet's earlier requirement of an "open tender process" and that the requirement was deliberately ignored, if not willfully circumvented, by the MoTT. In a later 2009 Memorandum, Mr. Walker from the Ministry of W&E wrote "Although this project is now substantially complete, the path taken by the Ministry of Transport would seem to contradict what was agreed in Cabinet Conclusion 20(05)6 regarding an open tender process."

A consultancy agreement between the Government and BECL was signed in December 2006. This made BECL "responsible for" the construction of the two satellite facilities. In the same month, BECL entered into two lump sum contracts with CCCL for the construction of those facilities, and in May 2007 BECL entered into an \$8.95 million lump sum contract with CCCL to build the main testing facility. Meanwhile, in March 2007 BECL had contracted with Systech International to supply and install the testing equipment at all three facilities, at a cost of \$1.3 million.

In December 2008, Cabinet approved an operating agreement with BECL for an annual fee of \$2.4 million. By April 2009 construction of the three facilities was complete, and BECL began carrying out safety and emissions inspections there.

The cost of the project was noted by the Auditor General, as follows: "Initial budget of \$5.3 million; final cost to taxpayer was \$15.23 million... In addition, the contract to operate the three facilities has the potential to cost Government in the region of \$24 million over a ten-year period."¹⁰¹

The Commission notes that the 2013 SAGE Report made a Recommendation to: "Eliminate testing of vehicles by TCD and outsource it to licensed garages who would charge their

customers for their testing and pay the Government a fee to be licensed to do so. This has been done in the US and UK. Government would still receive the substantial fees from vehicle licensing but the garages would compete for the testing revenues. This arrangement also delivers substantially more convenience to the customer. This will also save the Government \$2.3 million on the emissions contract.”¹⁰²

We have not seen nor sought to obtain evidence whether this policy issue was discussed in Cabinet on the occasions between 2001 and 2006 when approval was given to the arrangements made with BECL, nor whether there were reasons why it was in the public interest for them to be made.

Evidence

The Minister of Transport throughout the period from 2001 until 2010 was Dr. Ewart Brown, including after he became Premier in October 2006. The Commission received no evidence from him having accepted his right to claim privilege on the ground of possible self-incrimination.

The Commission sought to obtain evidence regarding BECL, specifically its finances and share ownership at relevant times. Its efforts were unsuccessful apart from company documents (shareholders register, etc.) that were already in the public domain.

History of Court proceedings etc.

On 11 July 2016 the Commission issued a subpoena to Mr. Donal Smith, requesting information about company finances, minute books etc. He attended at the Commission's offices on 15 August 2016 accompanied by his business partner. He was seen by one Commissioner and by counsel for the Commission. He raised concerns about confidentiality of financial and other information required by the Commission, and produced no documents. On 16 August 2016, by email, the Commission requested production of documents on 19 August 2016 and assured him that they would be received in strict confidence. By letter dated 18 August 2016, Mr. Donal Smith stated that the records belong to the company, BECL, and could not be produced by him.

The Commission issued a further subpoena on 22 August 2016 addressed to Mr. Delroy Duncan, a director of Trocan Ltd. the corporate administrators for BECL. On 29 August 2016 pursuant to the subpoena Mr. Duncan produced an envelope containing documents but they were taken and removed by Mr. Donal Smith. At 2pm Mr. Duncan returned to the Commission's offices and said that he had been threatened with legal action if he were to comply with the subpoena against the wishes of BECL.

On the following day, 30 August 2016, BECL commenced legal action against the Premier and all Commission members, seeking (1) leave to issue Judicial Review proceedings claiming that the Commission was not lawfully established, and (2) that its decision to investigate BECL and its subpoenas addressed to BECL and to Mr. Duncan were invalid and unlawful.

On 7 September 2016 the Chief Justice ruled on the substantive issue raised by (1) and dismissed BECL's challenge to the lawfulness of the Commission's proceedings. BECL appealed against the Chief Justice's Ruling. The appeal was heard and dismissed by the Court of Appeal on 24 November 2016.¹⁰³

With regard to issue (2) above, the Chief Justice held that the Commission is entitled to inquire into BECL, and refused leave to challenge that decision¹⁰⁴ (Judgment para.30). Regarding the subpoenas, the Chief Justice held that one ground was arguable, namely, that the [subpoena] was unlawful because it required BECL / Trocan to appear at a hearing where only one Commissioner was present (paragraph 32). He therefore gave leave to make the application for judicial review of the lawfulness of the subpoena. However, he added: *“It is possible that these points may not have to be formally determined by this Court because the COI, in the interim, elects to adopt procedural rules which make these points largely academic.”*¹⁰⁵

The Commission issued Procedural Rules which inter alia required complaints against the validity of subpoenas to be made in writing and that they would be determined by the Chairman. A fresh subpoena was issued by the Chairman on behalf of the Commission on 11 October 2016, that the documents should be produced. Meanwhile, there were further Court proceedings involving Mr. Delroy Duncan (in his own right and for Trocan Ltd.) at which BECL continued to be represented by Mr. Eugene Johnson of counsel.

On 10 November 2016 Mr. Delroy Duncan informed the Commission that he continued to be threatened with a lawsuit by BECL if he were to produce the documents. Mr. Donal Smith and Mr. Johnson maintained BECL's unwillingness to produce them.

The Commission decided not to pursue its request in the face of this intransigence and decided to release Mr. Duncan from the subpoena, and to make no further order in relation to it.

Mr. Donal Smith told the Commission at its public hearing that neither he nor BECL nor any company owned or controlled by them had made political contributions or provided economic or other benefits outside the normal course of business to individuals linked with the Government.

In the result, the Commission has no evidence as to the financial affairs of BECL other than the fee of \$2.4 million paid to it annually under the Operating Agreement since 2008/9.

Witnesses

Evidence was given by the former ACG, Ms. Joyce Hayward, and by Major Marc Telemaque who was Permanent Secretary from 2002 until 2008.

When giving evidence at the Hearing, former ACG, Ms. Hayward made it clear that quite a bit of time had passed since her involvement in the project. The Commission noted that she did not appear to have a clear recollection of details and events surrounding this project, that dates back over 10 years.

Ms. Hayward was first referred to the following excerpt¹⁰⁶ from the Auditor General's special report, which reads:

"This proposal was referred to the Accountant General, who suggested that a detailed business case needed to be made to support the sole-sourcing of the satellite facilities construction contracts. On 10 April 2006 BECL submitted a letter to the Accountant General explaining the reasons why they believed CCCL should be chosen to construct the satellite facilities. As part of their analysis, BECL compared CCCL's construction cost estimates to two cost estimates prepared by two independent construction consulting firms.

"In an April 10, 2006 e-mail to the Ministry of Tourism and Transport's Controller, the Accountant General concluded that BECL was in compliance with Financial Instructions because BECL obtained three quotes – one from CCCL and the other two from the two construction consulting firms. However, our audit reveals that the consulting firms did not bid on the satellite construction contracts. Instead, both firms were engaged by BECL to assess the reasonableness of the construction rates used by CCCL. In our view, these two assessments cannot therefore be considered legitimate bids for the purposes of Financial Instructions, which require a full and open tender process.

"Although the Accountant General went on to state that 'typically experts in the field will review the estimates to ensure the three quotes are comparing 'apples and apples', the Accountant General failed to recognise the need to follow an open tender process. It is important to note that the inability of the Accountant General to bring this project back in-line with Financial Instructions can somewhat be explained by the pressure exerted on the Accountant General to just make it happen".

"The desire to openly tender the satellite facilities building construction contracts was confirmed in part by Cabinet's approval in May 2005 to move ahead with the construction of

the two satellite sites, following an "open tender process". I question why the Permanent Secretary in the Ministry of Tourism and Transport ignored the direction of Cabinet. Furthermore, we were not provided with any evidence that Cabinet specifically approved the go ahead of the construction of the main facility."

Ms. Hayward confirmed that prior to its publication, she had been asked to comment on the draft of the Auditor General's special report and she was referred to her email of 16 July 2010¹⁰⁷ sent to the Auditor General which is excerpted as follows.

"In regards to the draft special report on 'Government's management of a Motor Vehicle Safety and Emissions Testing Programme' dated July 3, 2010, I provide the following points of clarification.

"On page 8 it is 'noted' that in April 2006: The Accountant General indicates that BECL is in compliance with Financial Instructions as BECL obtained three quotes on the cost of satellite facilities.' Please see the email correspondence included below (in italics) to the then controller, Julie Grant." In that email, I noted it appears they satisfied Financial Instructions, BUT I went on to say that I did not see the supporting information attached. I also added that experts should have reviewed the estimates to ensure that quotes were proper/comparable. You will also note I then indicated that I am not an expert in this area, and as such could not ascertain if the estimates are sufficient, and that the financial instruction requirement would be met IF there was documentation provided."

Ms. Hayward was asked about her involvement in the process and responded: *"I'm trying to remember or recall... there was, I guess, question about how the process was moving forward... they wanted to get some comfort that... meaning the department that was responsible for this Tourism and Transport... that they could get approval or buy in or confirm that they were following Financial Instructions."*¹⁰⁸

Ms. Hayward recalled meetings with account officers in the Department as well as PS Telemaque and PS Horton. The Commission heard later from PS Horton, who indicated that he had *"no recollection of the meetings to which Mrs. Hayward refers; however, it is possible that Technical Officers from the Ministry of Works and Engineering attended some meetings..."*¹⁰⁹

In this regard, she was referred to an email¹¹⁰ dated 10 April 2006, sent from Bryan Walker, of the Ministry of Works and Engineering, to various recipients including PS Telemaque, Mr. Smith, Ms. Grant and Mrs. Hayward.

An excerpt from the email reads: *"Further to my email of 10*

February and subsequent meeting with Correia/BECL and the Accountant General on Monday 20th February, there seems to have been little movement with this project. Just to summarise, as far as I am aware, to take this forward, we need the following: Something in writing from the Accountant General stating the building process can be done by Correia without a tender process due to the specialist nature..."

It was put to Ms. Hayward and she agreed that it appeared that (i) Correia Construction had been selected without an open tender; (ii) there was unease about whether that was the appropriate procedure; and (iii) comfort was sought from her that the selection was acceptable. It was further put to ACG Hayward, and she confirmed her recollection¹¹¹, that it was in that context that Entech, the company hired by BECL to manage the construction project, wrote letters to her explaining why it made sense that Correia Construction could be regarded acceptable in accordance with Financial Instructions.

Ms. Hayward was asked if she recalled a meeting held on 17 August 2010, and was referred to a memorandum arising.¹¹² Mrs. Hayward confirmed vague recollection of the meeting. ACG Hayward was asked about a handwritten note on the memorandum stating *"The Accountant General stated that the ministerial controller said to her 'make it happen.'"*

Ms. Hayward shared her recollections with the Commission. *"In a discussion with Ms. Grant, she [Ms. Grant] had explained that they needed to move forward on this as quickly as possible, so that she was being instructed that she needed to make it happen, that we needed to figure out how to put things in place to get this to move forward."*¹¹³

When asked who was instructing Ms. Grant, Ms. Hayward was unsure. *"I am not sure. I see Mr. Telemaque is cc'ed on this email, so it may have been, but I'm not sure who specifically would have said that."*¹¹⁴

Ms. Hayward was then referred to another handwritten note on the memorandum which stated *"She stated that she felt the Ministry of Transport and Tourism had already made up their minds on the sort of process that would be followed."* Mrs. Hayward confirmed that the 'she' referred to was probably herself. Mrs. Hayward clarified *"... they knew what they wanted to do or how they wanted to do what they wanted to do, and so they were trying to get that to move forward."*¹¹⁵

ACG Hayward added *"...I was letting them know I could not make that determination. I'm not the Accounting Officer in the area, and I'm not an expert on this... at the time I did not know the... inter-relationships between Correia and BECL and Entech... what I was provided made it look like they were different entities. So that's why I used the words 'appear' and it 'seems like' and*

*then qualified it to say, 'I'm not an expert', but from what you're giving me... if the documentation was provided and given to the experts, then it would look like it would follow Financial Instructions..."*¹¹⁶

ACG Hayward was asked if she was aware that these were not open bids at the time and replied: *"No...I'm thinking the Accounting Officers and the experts involved were doing that due diligence... that's where I said I needed to call Julie Grant to find out if she was making sure all of those things were in place with those experts."*¹¹⁷

Ms. Hayward then confirmed that she did not know at the time that Correia Construction had been selected. When questioned by the Commission if she would expect the 'experts' to whom she had referred to reside in the Ministry of Works & Engineering and not the Ministry of Tourism and Transport, she agreed with a caveat *"... except what I was informed, again from recollection... was that there were certain things with these emissions that were transport-related that those persons [in Tourism & Transport] had knowledge of."*¹¹⁸

Ms. Hayward was asked about her recollection of Mr. Horton's involvement, given the suggestion that the project had been delegated to Tourism and Transport. Ms. Hayward's evidence was unclear: *"It seemed like they were working together. There was the introduction... it seems like there was a meeting that I was asked to attend and I thought Mr. Horton had asked me to attend that meeting, so I assumed they were working together – the Ministries."*¹¹⁹

ACG Hayward was asked about the genesis of the project and she was referred to a letter¹²⁰ dated 7 February 2005 from the Ministry of Works & Engineering, signed by Mr. Walker and addressed to her. The letter communicates that *"Further to a discussion with Philip Holder" of the Attorney General's Chambers, Mr. Walker was seeking her "advice and direction"*. The Commission noted that the letter appeared to be asking ACG Hayward to opine on whether or not the project should be separated into separate phases of design, construction and equipment installation.

The letter read:

"I am writing to ask for your advice and direction regarding the above. Two satellite emission testing facilities are proposed... These stations are to support the main TCD unit in Hamilton.

"This whole contract was approved by Cabinet in June 2003 (Conclusion 23(03)2). At that time, Bermuda Emissions and Correia Construction were to supply the up and running facilities with Government buying the facility and equipment back from them at an agreed price. However, due to advice from the

Attorney General and with reference to financial regulations, it was decided that this was the most cost-effective way to proceed. This was due to proposed works not being tendered for, in particular, the construction of the buildings and therefore not knowing if a fair price is obtained.

"The whole contract is essentially to be in three separate parts:- 1) design, 2) construction, and, 3), equipment supply and installation. It is suggested that due to the specialised nature of the contract, Bermuda Emissions prepare and deliver, on a consultancy basis, all specifications for works and for all stages. In order to comply with financial regulations, it is proposed that the construction phase be tendered, although this preparation has raised concern by this Ministry's purchasing section. This is because Correia Construction and Bermuda Emissions have directors who are partners in both Correia, and Correia would be tendering for the work.

"The buildings to be constructed are to be a simple construction and it is fair to say that several contractors on the island could do the work. However, I have been informed the equipment to be installed into those buildings is an integral and specialist part.

"Equipment installation and the construction of the buildings can be done in separate phases but this will take longer. As Correia Construction have been working with Bermuda Emissions on this project for several years at this stage would be expedited much quicker if they were the chosen contractor. The question I am asking is could it be argued that the construction of the building and the installation of the equipment are all one specialist entity thus allowing them to deliver this and effectively negating normal financial regulations? If so, building costs from Correia, which would be checked by a third-party, say Government Architects, to make sure a fair price is obtained."

Ms. Hayward confirmed that it was in that context that she wrote the email to former Controller, Ms. Grant, where she was expressing the view that *"It doesn't appear that there is a case being made to contravene Financial Instructions."* Nevertheless, Correia Construction was instructed to build the two satellite emissions testing buildings, forgoing the bid process.

Ms. Hayward's recollection was that she did not think she was aware at the time that BECL were taking her email to Julie Grant as in effect, her permission to proceed. Under questioning, she confirmed that her position was that her email was not one of giving consent.

ACG Hayward was then asked whether upon seeing criticism from the Auditor General, she considered taking action in relation to not authorising further payments. ACG Hayward suggested that this was not her role. *"That would have been for the Minister of Finance and/or Financial Secretary. So those kinds of discussions*

*would have occurred with a Financial Secretary, and they would make those determinations, because of the Government's risk involved with moving ahead or not moving ahead."*¹²¹

When asked if she reached out to the Minister of Finance upon recognizing that her email appeared to be taken as consent when it wasn't intended as such, ACG Hayward stated *"I never meet directly with the Minister of Finance on things like that. The chain of authority is that the civil servants don't get direction directly from Ministers, but I would take it to the Financial Secretary. So, whenever an auditor's report is done, there is a discussion with the Financial Secretary. So there were discussions with the Financial Secretary about the report and how we respond to the Auditor General's report, and we take direction from the Ministry of Finance through the FS (Financial Secretary)."*¹²²

The Commission questioned Ms. Hayward further on the project, her understanding of the Accountant General role and responsibilities, including questions about her duties under the Public Treasury (Administration of Payments Act) and why she felt comfortable with continuing to make payments but Ms.¹²³ Hayward believed that was outside her remit.

"We take authority from the Minister of Finance through the Financial Secretary. That's our reporting chain. So there are recommendations that I can make, there is information that the Financial Secretary is aware of, and privy to, but they make the ultimate decisions. I wouldn't have that authority to stop work for anything on the island."

The Commission noted that Ms. Hayward did not appear to view due diligence and verification of supporting documentation for payments as part of her role or that of her team. Her perspective was that this would be done at the Ministerial level, by the financial controllers. She viewed the Accountant General team's responsibility as to simply confirm that the appropriate signatures were in place, and if those signatures were present, payments could be processed.

"Q: So when were payments refused at the Accountant General level?

A: If we did not have the applicable authorisation on the payments.

Q: And that authorisation is simply down to a signatory at the right level?

*A: Correct."*¹²⁴

*"I'm sorry, I can't really remember that at this time. It's been a while ago. I know we received paperwork that would have their initials on them, or signatures, or when we moved to the new system, that would be approved in the system, but what the actual documentation we received, I'm not sure at this time."*¹²⁵

"The signatures would tell us that those things were in place, so that was the... the control that we had in place at that time."¹²⁶

In his evidence, PS Telemaque confirmed that he was not the Permanent Secretary when the original August 2001 decision to waive the tendering process was taken. For that reason, he said he was unable to comment on why the Ministry chose BECL as the preferred contractor.

PS Telemaque was questioned as to why the project was not tendered in 2006 when he was Permanent Secretary, ignoring the conditions of the 2005 Cabinet approval, which required that the project to go to tender. He was further asked what action he had taken to ensure that BECL complied with Cabinet's requirements.

PS Telemaque confirmed for the Commission that it had been his view and the view of colleagues at the time that this requirement for tendering was incongruent with the 2003 Cabinet decision. He told the Commission, *"I think this was canvassed extensively because I think it would be fair to say that this is perhaps the fifth inquiry into this matter. This has been canvassed extensively in the record of Public Accounts Committee... And as I indicated at that time, this was the subject of some discussion... as I indicate in my witness statement, I recall the internal discussions between the Ministries there and the individuals there about how to deal with this."¹²⁷*

PS Telemaque was asked whether he thought he should have gone back to Cabinet to seek clarification and responded *"I accepted and, I think, indicated and the record of Public Accounts Committee will indicate, I accepted some years ago that with hindsight, it would have been prudent to return and seek a clarification where we had that particular issue."¹²⁸*

PS Telemaque was referred to a PAC report¹²⁹ dealing with this issue. He sought to clarify the report and told the Commission *"I did not ignore the direction of Cabinet. The addition of the open tender process to the 2005 conclusion contradicted the nature of the global approach to the project which had previously been approved by Cabinet. Whilst I accept that on its face this contradiction should have been clarified, the rigour of the process and vetting through which the project was put withstands scrutiny. It was not carte blanche. The Accountant General and others were attempting to adhere to Financial Instructions and the time taken to do that supports that contention."¹³⁰*

Later in his testimony, PS Telemaque affirmed that he did not recall being aware at the time that Correia Construction was a 30% shareholder in BECL¹³¹. When asked if on the face of it, this would give rise to a conflict of interest, he responded *"Well, some would say in Bermuda where there is no conflict, there is no interest. But I mean, I understand what you mean, but I think that part of*

what Cabinet goes through in the consideration of contracts is a disclosure of the principals of any particular entity."¹³²

PS Telemaque was questioned at length about the apparent conflict of interest. The example of an engineer submitting a million dollar change order and it being approved the next day was drawn to his attention. PS Telemaque was asked if he was aware of that change order and stated that he did not recall that. When asked who was involved at the Ministry at this level of detail, he recalled that it may have been either of two directors of TCD but did not wish to speculate.

PS Telemaque sought to emphasise his lack of involvement in the original selection of BECL and the chronology of his involvement when considering conflict of interest concerns.

"There is a point which I think is consistently being missed and which is not helpful dealing with this in a vacuum... The Commission kindly wrote to me to ask certain questions. And on the basis of the questions that were posed, I answered those questions in the witness statement. And I think it is important to note that in my statement at paragraph 7 and 8, I set out chronologically that I was not in post at the time and that when I was appointed in September of 2002, this project was in train. That is to say the approval had already been secured. So these discussions about ownership and conflicts of interest and so forth, if they happened, they predated me. If they did not, they predated me. That's a very important point to make."¹³³

PS Telemaque further explained that he was of the view that this was *"an issue that was settled when I arrived in the Ministry."* PS Telemaque did agree that information brought to his attention subsequent to his appointment should not be ignored.

The Minister responsible at the time of this contract, former Premier Dr. Brown, exercised his right of privilege and therefore offered no evidence to the Commission.

Findings

- Assurances (2001 and 2003) and contracts were provided (2005 to 2009) to BECL without an appropriate tender process.
- The selection of BECL was the personal choice of the Minister of Transport and Tourism (Brown)
- The delegation of this project from Works and Engineering to Transport and Tourism was unclear and inappropriately documented contrary to Financial Instructions 2.7 and 12.1.2.
- PS Telemaque failed in his oversight of the Department of Transport whereby the Director of Transport failed to ensure requisite tender information was obtained

per the 2005 Cabinet decision , or a waiver of the tender requirement. PS Telemaque failed to notify the Accountant General of this breach of Financial Instructions as required by FI 2.14.

- ACG Ms. Hayward, as the Principal Accounting Officer for Government, failed to comply with Financial Instructions. Specifically, she (i) failed to implement/ permitted Ministry to circumvent Cabinet requirement (2005) of open tender process, and (ii) approved payments without sight of requisite approvals.

Noted by the Commission:

The Commission recommends that the Permanent Secretary for Transport and Tourism be identified as an Accounting Officer.

The Commission recommends that a review be made to consider whether it is advisable to have multiple Accounting Officers in Ministries. The Commission understands that oftentimes Heads of Department and others are designated as Accounting Officers. This can dilute the accountability and authority of the Permanent Secretary as Accounting Officer.

I – Magistrates Court and Hamilton Police Station (Dame Lois Browne-Evans): Auditor General Special Report

Date: 2007/2008

Description: Building of new Police Station and Magistrates Court

Contractor(s) / Principal(s): Landmark Lisgar (Contract #1) – Mr. E. Matvey, Mr. B. Mcleod, Mr. G. Bilfochi, Mr. J Bilfochi; LLC (Contract #2) – Mr. E. Matvey, Mr. B. Mcleod, Mr. W. Burgess, Mr. V. Hollinsid

Minister(s): Premier Dr. the Hon. Ewart Brown JP MP - Tourism & Transport (T&T), The Hon. Paula Cox JP MP - Finance, The Hon. Dennis Lister JP MP - Works & Engineering (W&E), The Hon. Derrick Burgess JP MP - Works & Engineering (W&E)

Civil Servants: : Secretary to the Cabinet Major Marc Telemaque, Permanent Secretary Dr. Derrick Binns-W&E, Permanent Secretary Mr. Robert Horton (retired)-W&E, Chief Architect Mr. Lawrence Brady

Other Parties: Carruthers Shaw and Partners (Contract #1); Conyers and Associates (Contract #2)

Contract Value: ~ \$72 Million

Final Cost: ~ \$89 Million

Relevant Regulations: P.F.A. 2002¹³⁴, Financial Instructions 2007¹³⁵

Introduction

As the Commission confirmed in its Opening Statement, “Paragraph 9 of our Terms of Reference include ‘any other matter which the Commission considers relevant to any of the foregoing’.”¹³⁶

Our view remains that “... we will be assisted by considering certain Government contracts that were awarded before, or after, the period of Financial Years 2010-2012 where either payments made during those years represented Government outgoings under earlier contracts or the Government’s practice during Financial Years 2010 to 2012 may have emerged before the period began and may have continued after it ended.” This is another project taken into consideration by the Commission, as payments for the building were made during the relevant period under review.

This project was the subject of a Special Report of the Auditor General – on qualification of the Consolidated Fund – dated February 2009¹³⁷. The Commission took note of the report and its findings as it sought to examine more closely the Government’s tendering process in respect of this major capital project.

The Commission’s evidence is split into two sections; the original contract with Landmark Lisgar dated 7 December 2007, when the W&E Minister was Mr. Dennis Lister and the second contract with LLC Bermuda, when the W&E Minister was Mr. Derrick Burgess. The Permanent Secretary for Minister Lister was Dr. Derrick Binns, now the Cabinet Secretary and Head of the Civil Service. The Permanent Secretary for Minister Burgess was Mr. Robert Horton. In order to understand the project from inception to completion both contracts need to be reviewed.

Evidence

Contract#1: Landmark Lisgar

The relevant Minister for contract #1 was Minister Dennis Lister and the Permanent Secretary (PS) was Dr. Derrick Binns.

The contract did go out to tender. There were several bids and those bids were evaluated¹³⁸ by Ministry Technical Officers. The Technical Officers recommended that the contract be awarded to Apex Construction Management Limited (“Apex”). The evaluation was framed in the usual manner: the officers shared the analysis of all the bids received and concluded by “inviting” the Cabinet to adopt their recommendation.

Minister Lister did not share the technical officers’ recommendation with his Cabinet colleagues and instead put forward his own recommendation for an alternative bidder, Landmark Lisgar Construction Limited (“Landmark Lisgar”), whose bid had been described by the technical officers as incomplete. Landmark Lisgar was a joint venture between Bermudian firm, Landmark and a Canadian firm, Lisgar.

There was admitted disagreement between the Minister and his PS on what should be recommended to the Cabinet. In the event, there were two papers that came to the Cabinet for consideration from Minister Lister.

The first paper made no recommendation at all. It simply listed the bidders and focused on two bids, those of Apex and Landmark Lisgar. Their bids were reported alongside the Ministry's estimate for the total cost of the project: \$73,947,247. Apex's bid was \$73,022,766 and Landmark Lisgar's was \$72,000,000. However, it was pointed out in the paper that Landmark Lisgar's bid was incomplete with the comment: *"Without this information it is difficult for the Ministry to assess their bid."*

According to the Cabinet Minutes of the meeting (October 23 2007) at which the first paper was presented, the Minister was reported as having described the two bids as "... evenly balanced" and stated that he was recommending Landmark Lisgar.

Two Ministers were minuted as indicating support for Landmark Lisgar on the basis that the overseas partner firm had *"the expertise and experience to complete the project"*. One of those Ministers was the Minister for Immigration and Labour (Mr. Derrick Burgess), who would subsequently be appointed the Minister responsible for Works & Engineering by Premier Dr Brown in December 2007, following the election. This appointment was after the contract #1 was awarded, and the project was underway.

The Minister, who was responsible for Public Safety and Housing, was reported in the minute as not prepared to support the recommendations contained in the Memorandum "in its present form" as the bid from Landmark Lisgar had not been completed.

The Cabinet of then Premier Dr. Brown decided to carry the paper over until it was amended to reflect a clear rationale for the recommended company and a clear recommendation from the Minister.

A second paper was prepared and presented to the Cabinet one week later, with a recommendation from Minister Lister that Landmark Lisgar be awarded the contract.

The Cabinet minute recorded that Ministers were informed of the two bids of Landmark Lisgar and Apex and their respective totals, as set out in the tender evaluation originally prepared by the technical officers. However, that evaluation and the technical officers' recommendation was not shared with the Cabinet. Instead, the Minister was recorded as having told Cabinet again that while the two bids were evenly balanced; he was satisfied Landmark Lisgar offered *"the best option"*.

The minute recorded that Ministers noted that of the two bids Landmark Lisgar's was the lower and that Cabinet decided to approve the award of the contract to Landmark Lisgar.

The absence of the technical officers' tender evaluation and recommendation was not viewed as unusual by Dr. Binns; in fact, his evidence was that it was *"not normally attached"* [to a Cabinet

paper]. He further explained that his position was that the Cabinet paper was the Minister's memorandum and that "he decides what he wants the content to be."¹³⁹

But Dr. Binns said he was nonetheless concerned and that he expressed that concern to the Minister prior to helping draft the paper.

The Commission heard from Dr. Binns: *"the Minister who is making recommendations should be giving Cabinet full information so they can make an informed decision, in the same manner as a Permanent Secretary should be giving full information to the Minister."*¹⁴⁰

Dr. Binns explained that he saw it as his duty to ensure that the Minister fully understood the consequences and implications of any choice, but the choice in the end remained that of the Minister. Dr. Binns referenced the Conditions of Employment and Code of Conduct for the Civil Service¹⁴¹ in his oral evidence.

Clause 7.0.9 of that Code makes it clear: *"Officers should never seek to frustrate or influence the policies, decisions or actions of Ministers by the unauthorised, improper or premature disclosure of any information to which they had access. Nor should officers seek to frustrate the policies, decisions or actions of the Government by declining to take, or abstaining from, action, which flows from, decisions by Ministers. Where an officers feels unable to carry out the action required and a resolution to the matter cannot be achieved, the officer should either carry out the instruction, or resign from the Civil Service and observe his or her duty and obligation to maintain confidentiality."*

There is one other provision in the 2002 Ministerial Code of Conduct that might have assisted, namely clause 12.3 thereof which suggests that where there is disagreement over a proposed course of action the civil servant concerned should reduce his objection to writing and where his advice is overruled the matter be brought to the attention of the Auditor General.

But as Dr. Binns pointed out in evidence to the Commission, the Code was that of Ministers and that there was no corresponding provision in the civil servants' Conditions of Employment and Code of Conduct.

Dr. Binns did say in his evidence that he went further and cautioned the Minister for not adopting the recommendation of the Ministry's technical officers. By ignoring their advice, he told the Minister that the propriety of the decision might subsequently be challenged and allegations made as to why he had decided to go with *"the riskier of the two bids."*¹⁴²

Minister Lister said¹⁴³ that to the best of his recollection "... it has been ten years" and there were "...disagreements" with the

technical officers and Dr. Binns, but he was adamant that he was never cautioned by Dr. Binns: *"We have a stern disagreement on that."*

Dr. Binns said that Minister Lister told him that he had done his own analysis, to come to the different position than that recommended by the PS and the Ministry's technical officers. Dr. Binns told the Commission that he had no details of that analysis.¹⁴⁴

Minister Lister said that he did not do any analysis as suggested by Dr. Binns¹⁴⁵. Rather he weighed up the two bids, Apex and Landmark Lisgar, in the context of what he explained was the mandate on which the Progressive Labour Party had won the Government and that was *"to give opportunity where there hadn't been opportunity before... small Bermudian, in the main... black Bermudian companies, black Bermudian individuals..."*¹⁴⁶ He further explained that this meant extending opportunities to *"... the smaller guys who may not have had an opportunity in the past to do projects of this size..."* and who had partnered *"... with an overseas company..."*¹⁴⁷ to be in a position to take on a job.

The Commission however, had difficulty in understanding how it was thought that Landmark Lisgar qualified on that basis. We also took note of the fact that the Landmark Construction Company had also been successful in obtaining prior work with the Bermuda Government with the Hamilton Bus Terminal and the Sessions House.

The Commission also noted no reference in either Cabinet papers, or minutes of Cabinet, to any policy which the Progressive Labour Party was employing in consideration in the evaluation and award of this contract.

Contract#2: LLC Bermuda – formerly Landmark (of the joint venture Landmark Lisgar)

As a result of a deterioration in the relationship with Lisgar, the joint venture between Landmark and Lisgar was terminated and Landmark alone assumed the role of contractor for the project.

Mr. Derrick Burgess became Minister of W&E in December 2007. He had no obvious involvement with the initial contract with Landmark Lisgar, other than being a member of Cabinet where he was Minister for Labour and Immigration when the first contract was presented.

The principals of Landmark changed the company name to LLC Bermuda to assume the role formerly held by Landmark Lisgar, for the new contract.

The Commission learned that the second contract, dated 1

December 2008, was not submitted for Cabinet approval, nor were the new principals in LLC, namely Mr. Winters Burgess and Mr. Vincent Hollinsid, disclosed to Cabinet. There was no evidence that the Department had undertaken a financial review to see if LLC was financially able to undertake the whole project.

Minister Burgess appeared to take the position that the new contract was an extension of the first contract and therefore did not require Cabinet approval.

The Commission learned that the previous contract with Landmark Lisgar was rescinded, and terms of contract #2 were different from the original contract in three material respects. First, in addition to the construction contract price, Landmark Lisgar was employed as 'project manager' for a fixed fee of \$6.9 million; that arrangement was not continued for LLC but the construction price was increased by a corresponding amount. Secondly, the contract no longer required the contractor, now LLC, to provide a Performance Bond, meaning a form of guarantee by a bank; instead, the government as employer was permitted to retain 10 per cent of future payments as a retention fund. Third, the Government undertook to make immediate cash payment of \$600,000 to LLC, on account.

When asked about these changes Minister Burgess answered that as Minister he was not the person who would be involved with this level of detail.¹⁴⁸

The Commission had sight of minutes of a Cabinet meeting of 4 November 2008, which recorded Mr. Burgess reporting in detail that:

- Lisgar were not as proficient as had been hoped
- the project was four months behind schedule
- the relationship between the Department and Lisgar personnel was strained with various acrimonious exchanges of emails.
- Lisgar had departed from the project between the time the memorandum to Cabinet had been drafted and the time of the actual meeting.
- Carruthers Shaw and Partners, (CSP) who were responsible for attesting that work on the project had been performed, had been terminated.
- CS&P would be replaced by local firm Conyers and Associates, who would take on the attestation role so that payments could be made.

Notwithstanding this detailed update, Minister Burgess did not seek Cabinet approval, then or later, for the contract #2. Failure to seek Cabinet approval meant that the principals of the new contract were never disclosed to his colleagues. This disclosure would have been standard practice to avoid conflicts of interest.

Minister Burgess was asked at the hearing, whether he understood that LLC would be financially challenged given that the larger Canadian partner Lisgar, who had previously provided funding, would no longer be part of the project. Minister Burgess replied¹⁴⁹ that all these matters were dealt with by Technical Officers before any information comes to Cabinet.

Minister Burgess was also asked if he understood that Winters Burgess and Vincent Hollinsid were principals in LLC and about his knowledge of the two individuals. He said he called Mr. Winters Burgess 'uncle' and he knew Mr. Hollinsid as the ex Fire Chief. Minister Burgess maintained that he didn't know that either man was a principal at LLC but Counsel was able to refer Mr. Burgess to a Royal Gazette article dated 10 January 2009 in which Minister Burgess is reported to have confirmed that Winters Burgess was a principal.

He was further asked to confirm when he first became aware that Mr. Hollinsid was a principal and again Minister Burgess answered he didn't know. However Counsel showed him minutes for the Public Accounts Committee (PAC) meeting on 26 May 2016, in which Minister Burgess was reported to have told the committee the principals were Lee Matvey, Brian McLeod, Winters Burgess and Vincent Hollinsid.

At the Commission hearing, Minister Burgess was unable to confirm when between 2008 and 2016 he became aware that Mr. Hollinsid was a principal: *"I don't know when these guys became principals for LLC. How would I know that."*¹⁵⁰

The Commission received a copy of a credit memorandum from HSBC (Bank of Bermuda) dated October 2008. The Commission noted that the meeting referred to in this memorandum occurred prior to the Cabinet update of 4 November 2008. The credit memorandum described a new credit line for \$1.25 million being negotiated by LLC Bermuda. This line of credit was required by LLC to enable a 'buyout' of Lisgar's interest in the first contract.

The meeting was attended by Messrs. Matvey and McLeod along with Mr. Julian Hall who was described as *"Consultant to the Minister of Works and Engineering"*. The Commission noted that Mr. Hall was described in this manner on a number of additional documents in connection with this matter.

The memorandum and risk analysis described a new contract with LLC, where the principals were listed as Matvey, McLeod, Winters Burgess, Hollinsid. It also noted that the CEO of the Bank Mr. Phillip Butterfield was excluded from the decision on this request for credit as he was a relation of Mr. Hollinsid. Mr. Hollinsid is also a relation of the former Premier Dr. Brown. In the bank's analysis document, the profit margin of the project for LLC was shown as approximately \$6 million.

Previous evidence from Mr. Matvey¹⁵¹ showed that Mr. Winters Burgess and Mr. Hollinsid were receiving salaries of \$11,000 and \$6,000 per month respectively as well as receiving 22% and 20% of any profits made. This was compensation for providing collateral by way of the equity in their homes. If the project lasted for approximately 30 months and the profit was \$6 million it could be reasonably estimated that this would result in compensation to Messrs. Burgess and Hollinsid as; approximately \$330,000 and \$180,000 respectively in salaries and \$1.32 million and \$1.2 million in profit margin respectively.

Minister Burgess was repeatedly asked questions about his personal knowledge of the contract details and principals, in response to which he was either evasive or refused to respond. He was finally asked by the Chairman to answer the question *"if two gentlemen have a 42% interest in a bidding party do you as a former Minister agree that this information ought to be brought before the Cabinet"* he again declined¹⁵² to respond.

Subsequent to the Hearing, Minister Burgess forwarded a second statement to the Commission in which he contended,¹⁵³

- *"The internal HSBC memo and documents are not ones that he would have seen;*
- *That while he was aware of the falling out and the need for Messrs. Matvey and McLeod to secure "additional temporary funding to buy out the shares of Lisgar Construction," with a view to severing the relationship with Landmark "the detail of the internal arrangements made by the company to buy out their former partners was of no real concern to me beyond their continued viability to carry out their contract."*
- *As for a letter written to HSBC and copied to himself and Mr. Hall, he described this as "a relatively routine letter to a contractor's bankers setting out the existence and value of a government contract and the state of progress." While he has no recollection of the letter, he said that he would likely have been aware of its contents "but I would not have regarded it as important."*
- *He notes that neither he nor PS Horton attended the meeting with HSBC. As for Mr. Hall's role: "I anticipate that Hall's attendance was to give some comfort to the bank as to the arrangements for the new contract before they were about to extend further financial facilities to LLC".*
- *On whether it was necessary to draft a new contract or not, Mr. Burgess replied that this was "not a matter I was overly concerned with and left that to be agreed between the AG's Chambers, the PS and LLC and their lawyers".*

Counsel asked Minister Burgess if he was aware that Mr. Winters Burgess and Mr. Hollinsid were principals of LLC when the company was awarded two further Government contracts,

namely for Marsh Folly and Veritas Place. His position was that he thought they were all partners and therefore would share in the profits or losses of those two projects.

The Commission has been able to review the contract between the Ministry and the late Mr. Julian Hall dated 29 February 2008. As confirmed by the PS Mr. Horton, Mr. Hall met on a regular basis with the Minister and the PS, he also met with the Minister alone.

The Commission was later shown Cabinet Minutes where Cabinet approval was sought for the two later contracts relating to the Veritas House and Marsh Folly projects in September 2010 and March 2011 respectively. The name of Mr. Winters Burgess was disclosed as a 'principal' but the name of Mr. Vincent Hollinsid was not, although Mr. Matvey indicated his relationship with LLC remained the same. The Commission understands that both men continued as principals of LLC until the company was wound up in 2014.

In his further statement to the Commission, Minister Burgess accepted that Mr. Winters Burgess was named in a Cabinet Memorandum on the subsequent projects as a principal of LLC, but maintained that he was *"never entirely clear what principal actually means"*, and that: *"I did not know what arrangements he had with LLC or MMM [Messrs. Matvey and McLeod] save that he is indicted as a principal of LLC on this Cabinet paper. I had no reason to question that."*

With respect to Mr. Hollinsid, he said he was unaware of his involvement prior to the signing of the second contract of 1 December 2008 and that he never brought this to the attention of the Cabinet because he did not know. Moreover, he wrote: *"I should point out that it was my understanding that the process for Cabinet memorandums in relation to contract awards recommendations was that the names of company principals be included in the Cabinet documents by the PS who must then send the memo to the Cabinet Secretary who prepares the final documents before delivering them to Ministers. If Mr. Hollinsid's name is not included then I guess he would not have been regarded as a principal. The responsibility for informing Cabinet of who the principals in a company are lies with the PS."*¹⁵⁴

During her evidence, Ms. Paula Cox, Minister of Finance at the time of both contracts was asked if she was aware of the principals of LLC. She replied *"So far as I can recall, no"*. She added *"it does not need to be conclusive because... Ministers travel..."* When asked if Cabinet was told the names of the principals, she said *"I can't recall that being mentioned"*.

The Commission heard oral evidence from Mr. Lawrence Brady, Chief Architect of the Department of W&E. It became apparent that during 2008 he became sidelined on this project. This was

confirmed in evidence to the Commission from both Minister Burgess and Mr. Brady. In the Auditor General's special report, he also notes that under the first contract the department of Architecture received all correspondence progress reports etc. under the second contract technical control at the Architectural level was removed and all information went directly to the PS.

Mr. Brady was re-called for further questioning by Mr. Lynch on behalf of Mr. Derrick Burgess. It was suggested to him that he, Mr. Brady, resented the fact that the Department's recommendation had not been preferred by the Minister (Mr. Lister) in 2007, that his resentment increased during 2008 and that was the reason for what, it was alleged, was an attempt by him (Mr. Brady) to discredit both Mr. Derrick Burgess and Dr. Brown in December 2008/January 2009. That was called the incident of the two cheques.

We have considered this matter with great care and have decided that it is not necessary for us to make any further reference to it. It is simply not relevant to any findings that we have to make, relating to the award of the contracts in question, and we do not rely on Mr. Brady's evidence in making them. We make no findings as to innocence or guilt in relation to any criminal or disciplinary offence. We have not been asked to find that there is evidence of any "possible criminal activity" in relation to the cheques by any person, including Mr. Brady, and we do not do so.

Former Premier Dr. Brown, exercised his right of privilege and offered no evidence to the Commission on these contracts.

Findings

Contract #1

- Minister Lister's non-disclosure to Cabinet of the technical officers' recommendation ran counter to the requirements of clause 6.7.3 of P.F.A. 2002, which requires that this recommendation be submitted to Cabinet for approval.
- There is an absence of practical guidelines on what a PS (in this case PS Binns) ought to do in circumstances where he has misgivings about with the course of action a Minister proposes to take. The current guidance offers civil servants a simple choice – carry out the instructions or resign. The ultimate decision rests with Cabinet but Cabinet must be properly informed. Cabinet was not fully informed in this case. The Commission notes that the FI expressly requires that the Technical Officer's recommendations be submitted to Cabinet for approval. If a Minister fails, or refuses to submit the TO's recommendations, the appropriate step is for the PS, as Accounting Officer, to inform the ACG of a breach of the

FI pursuant to paragraph 2.14. This was not done in this case. Indeed, it appears that paragraph 2.14 is rarely if ever invoked.

Contract # 2

- The second contract was not submitted by Minister Burgess and PS Horton for approval by Cabinet, nor were principals disclosed as required.
- It was clear that Minister Burgess' consultant Mr. Julian Hall was aware in October 2008 of Burgess and Hollinsid's involvement. The Commission cannot accept that Minister Burgess did not know of their involvement.
- The level of compensation for providing collateral by Messrs. Burgess and Hollinsid appears on its face to be excessive. Commission estimates suggest that if the project lasted for approximately 30 months with a \$6 million profit, they would have received \$300K and \$180K respectively in salaries and \$1.32M and \$1.2M in profit margin respectively, in return for provision of collateral (home equity) valued at approximately \$1.6M but no actual cash outlay.

J – Port Royal Golf Course Improvements Capital Development Project - 3.1.7 Departmental Expenditures

Date: 2007

Description: Remediation to Port Royal Golf Course

Contractor(s) / Principal(s): Island Construction and others

Minister(s): Premier Dr. the Hon. Ewart Brown JP MP - Tourism & Transport (T&T), The Hon. Paula Cox JP MP - Finance,

The Hon. Derrick Burgess JP MP - Works & Engineering (W&E)

Civil Servants: Permanent Secretary Ms. Cherie-lynn Whitter - T&T, Permanent Secretary Mr. Robert Horton (retired) - W&E,

Accountant General Ms. Joyce Hayward, Controller Mr. Curtis Stovell - T&T

Other Parties: Port Royal Golf Course Board of Trustees

Contract Value: ~ \$7.7 Million (initial)

Final Cost: ~ \$24.5 Million (final, approved)

Relevant Regulations: Public Treasury (Administration and Payments) Act 1969; Golf Courses Consolidation Act 1998, Financial Instructions 2007

Introduction

The Commission identified the Port Royal Golf Course (PRGC) Capital Improvements Development Project as a contract for review because it featured in the Report under Departmental Expenditures that had been made without prior Cabinet Approval (See Section 3.1.7, Table 4). The table specifically identified the sum of \$1,373,000 under 'Transport HQ' of the T&T.

It is unclear whether that sum, identified by the Auditor General as "grants and contributions", was for operational expenses or continued payments for the remediation project or both. But, and in any event, the Commission had sight of a Cabinet Minute dated 27 January 2009 in which the Premier was reported to have advised Cabinet that the Total Authorised Funding for renovation work at the Port Royal Golf Course was then approaching \$13.6 million "with that number expected to increase as a result of cost over-runs". Funding therefore clearly extended into the three years the Commission has under its review.

In addition, as the Commission confirmed in its Opening Statement, "Paragraph 9 of our Terms of Reference includes 'any

other matter which the Commission considers relevant to any of the foregoing'."¹⁵⁵

Our view remains that "... we will be assisted by considering certain Government contracts that were awarded before, or after, the period of Financial Years 2010-2012 where either payments made during those years represented Government outgoings under earlier contracts or the Government's practice during Financial Years 2010 to 2012 may have emerged before the period began and may have continued after it ended."

Evidence

This project was the subject of a Special Report of the Auditor General – Port Royal Golf Course Improvements Capital Development Project¹⁵⁶ – dated October 2014. The Commission is mindful that this report has been the subject of review by the Public Accounts Committee (PAC), in connection with which there have been three public meetings (30 April 2016, 7 May 2016 and 21 May 2016), but on which PAC has still to report.

Nonetheless, the Commission considered it important to examine this project in light of the Auditor General's key findings and their relevance to the issues under review by the Commission. A summary of those findings¹⁵⁷ is set out below:

- The Board of Trustees did not follow procedures to control the expenditure of public money
- The Board of Trustees did not adequately account for the Project
- The Board of Trustees did not adequately monitor the Project
- The Government did not adequately monitor the Project
- The Government did not correctly account for the Project
- The Government did not follow its processes to approve all Project costs

The Commission does not propose to repeat here the detailed criticism, which is set out in the special report. The Commission was however, concerned to know how the above occurred and whether the findings offered any insight into the matters which come within the Commission's Terms of Reference. It was a major capital project that grew from an approved estimated figure of \$7.7 million in the fiscal year 2007/08 to a final authorised figure of \$24.5 million. The Auditor General was unable to account for

\$4.4 million of that total (a sum which the Trustees said was used to cover operating deficits).

The Commission notes that the special report of the Auditor General highlighted the consequences of not having appropriate processes in place to manage major capital expenditures and of not following established guidelines which exist to protect the public purse.

Some of the findings were that: contracts over \$50,000 were entered into without Cabinet approval, without vetting by the Attorney General's Chambers, and in some cases without written contracts and reliance only on purchase orders, although the Commission heard evidence that purchase orders are often regarded as contracts pursuant to P.F.A. 2000 (appendices 6 and 7). Consultants were also retained without the necessary approval of the Secretary to the Cabinet.

There were also noted conflicts of interests in the Special Report (pages 15-16):

- For one contract there was no tender and one bid and the bidder who was successful was a company in which one trustee had an ownership interest;
- Another contractor who successfully obtained work sub-contracted work to a firm of which a trustee was a director; and
- The trustees paid \$10,000 in excess of an invoiced price to a company so that the company could in turn pay a \$10,000 commission to a trustee.

The Commission further took note of the Auditor General's observation in her Special Report that when there are no rules or procedures, or where they are not followed, *"there is a risk that money will be spent for unintended purposes, or spent imprudently, in error or fraudulently."* (page 25)

With respect to the remediation work undertaken at PRGC, the Commission first sought evidence of any Cabinet approvals and was advised by the current PS¹⁵⁸ of the Ministry of Tourism, Transport & Municipalities (T&T), that *"I could not find the Cabinet conclusion authorising the contract, but it should be noted that no expenditure could occur without Cabinet approval, as invoices for payment could not be processed. I hope to procure the relevant Cabinet conclusion through Cabinet office and if successful, I will provide it to the Commission as soon as practicable."*¹⁵⁹

No such document or documents were produced.

The Commission also took note of the fact that this was another major capital project which featured a delegation of responsibility and oversight of the works from the Ministry of W&E to the T&T and, for a part of the time, the Cabinet Office.

The issue of delegation is one that exercised the Commission. Neither the Cabinet Office, the MoTT, nor the Board of Trustees had demonstrated that they had the capacity, the systems, or the qualified personnel required for the oversight or management of a project of this magnitude. This stands in contrast to the expertise and experience residing in the Ministry of W&E, which has over the years developed governance structures and other rules and procedures for managing major capital projects.

Financial Instructions made it clear that responsibility for the management of capital development projects resided in the Ministry of W&E. However, former FS Donald Scott maintained ¹⁶⁰ *"The Ministry of Transport was assigned the accounting responsibility for capital development projects within its Ministry in the 2002/2003 budget year – see explanatory notes to Capital Estimates in 'Approved Estimates of Revenue for the Year 2002/03'."*

It was also his position that this delegation of accounting responsibility *"... was maintained in place in subsequent years up to and including fiscal year 2010/2011."* He went on to say that *"The Golf Courses (Consolidation) Act 1998 was amended in 2006 to replace the Ministry of Works and Engineering with the Ministry of Tourism and Transport as the oversight ministry;"* adding *"... when Cabinet approved the capital remediation project for Port Royal Golf Course in November 2007, there was no express direction in the Cabinet Conclusion for any ensuing contracts to be submitted to Cabinet for approval."*¹⁶¹

However, as the Auditor General noted in her Special Report, section 10 of the above Act requires the Board of Trustees to obtain the prior approval of both the Minister in charge of golf courses and the Minister of Finance for any capital projects. As she also pointed out in the Report, the Act further requires the trustees to follow Financial Instructions or any other instructions issued by the Minister in charge of golf courses. In this regard, the Auditor General reported that her office was not aware of and were not provided with any instructions issued by the Minister in charge of golf courses.

As Mr. Scott observed, that Minister would have been the Minister responsible for Tourism and Transport, the governing Act having been so amended in 2006.

In her evidence, Finance Minister Cox stated *"I have no recollection of ever being asked to authorise any Minister and/or Permanent Secretary with responsibility for Works & Engineering to delegate their functions in respect to capital projects for... the Port Royal Golf Course remediation works... and no direction was given by me in my capacity as the Minister of Finance for any such delegation..."*¹⁶² Moreover, Minister Cox's position was that the Ministry of W&E would in any event retain some responsibility under the Public Lands Act 1984.

W&E Minister Burgess became Minister in December 2007 and for his part said¹⁶³ that he "... had little or no knowledge of this project's path through government."

PS Horton explained that the delegation from W&E to MoTT occurred before he joined W&E in December 2007. "Additionally..." he said, "since this project was the responsibility of the Ministry of Tourism and Transport, its details would not have been part of my briefing when I commenced my duties at the Ministry of Works and Engineering."¹⁶⁴

Former PS Whitter drew to the Commission's attention in both her witness statement and in oral evidence to the Golf Courses Consolidation Act 1998, specifically section 10 sub-section(2) which reads:

"Any funds appropriated by the Legislature for the operation or maintenance of golf courses or for capital development shall be applied, subject to the terms of the appropriation, in accordance with (a) any instructions issued by the Minister of Finance or direction issued by him under Section 3(1) of the Public Treasury (Administration and Payments) Act 1969; or (b) any other instructions issued by the Minister."

However, there is the following advice found in the introduction to the relevant Financial Instructions issued under the authority of the Minister under the above Act:

*"Financial Instructions should form the minimum standard for financial controls in every department, ministry or *QUANGO (Quasi non governmental organisation) with additional specific procedures formulated at the department level." and as footnoted: "* If a QUANGO chooses to use these Financial Instructions, any modifications must be documented in writing. If a QUANGO chooses not to utilise these Financial Instructions, the organisation must have written financial procedures in place. These financial procedures must be provided to the Accountant General's Department and the department or agency that provides funding to the QUANGO."*

No issue was taken as to whether the Board of Trustees for PRGC was a QUANGO for the purposes of Financial Instructions. The question is what financial procedures did they have in place? The answer appears to have been none or none that were documented.

This much was confirmed by a subsequent internal audit undertaken by the Government Department of Internal Audit (IA) dated 18 November 2011.¹⁶⁵

IA reported on "...deficiencies and areas for improvement in all areas that we reviewed. The audit observations that were noted throughout the report are partly attributed to undocumented policies and procedures."

Specific criticisms were leveled that itemised among other things:

- No approved policy of special rates and discounts given to customers
- No evidence of a tendering process in the sample contracts reviewed, raising doubts as to whether value for money is being obtained
- No evidence of Cabinet approval for contracts totaling over \$50,000.

The Commission was informed that the Board of Trustees accepted both the findings and the recommendations of IA.

The question remains: How were millions of dollars of public funds advanced to the Board of Trustees in the absence of the required documented procedures?

Counsel for the Commission pressed Ms. Whitter on the point. She was appointed PS for the Ministry of Tourism and Transport after the PRGC remediation works had begun, but was there for the period April 2008 to January 2011. Her immediate predecessor as PS for Tourism and Transport Major Marc Telemaque was asked questions about this project but said in his witness statement that he was unable to assist "as I played no material role in this project."

Ms. Whitter explained in her evidence: "Our role... was to provide them [Board of Trustees] with the capital expenditure. Their role was to manage the project in accordance with their financial procedures."¹⁶⁶

As to whether the PS had ever had or seen a copy of those financial procedures, Ms. Whitter also explained: "I cannot tell you that I reviewed specifically the instructions. My assumption, having assumed responsibility for the Ministry, was that they were there... during my review of this matter and in consultation with the Ministry of Finance, I was advised based on Financial Instructions and specific to the paragraph we noted earlier in the Financial Instructions introduction... that Port Royal had its own financial procedures, they were a QUANGO, and they were not required to follow specifically Financial Instructions."¹⁶⁷

Ms. Whitter was asked if she would search Ministry files to ascertain whether there ever were any written documented procedures that she assumed were in place. No such documentation has been received by the Commission.

It was subsequently explained to the Commission that the position is that no record of financial procedures could be found in the Ministry of Tourism and Transport files in 2016 "relative to a project that commenced in 2007 and concluded in 2009 or thereabout." It was also pointed out that during the period 2009 to 2016 the responsibility for the Port Royal Golf course and all of the associated files "had moved between Ministry portfolios

and physical locations on a number of occasions.” However, as far as the Commission is concerned, the fact is, that no written documented procedures were produced by either the relevant Government Ministry or the Trustees for both the internal audit in 2011 and for the 2014 special audit of the Auditor General. We therefore reasonably conclude that was because they never existed.

On the question of how the Ministry was able to provide oversight of expenditure by the Board of Trustees, Ms. Whitter replied:

“It was our responsibility to disburse the funds in accordance with the Financial Instructions. They were required to submit certain documentation in order to support the disbursement of the funds. And we were required to do that in accordance with Financial Instructions.”

“How they used those funds once they received those funds, they had a responsibility to ensure that they were using those funds in accordance with financial procedures that they were operating under.”

“Q. Did you feel whether the Ministry had any responsibility in terms of supervision?”

“A. The Ministry had a responsibility to perhaps identify any deficiencies, the Ministry has a responsibility to ensure that the funds we were distributing were being used for the purpose for which we were distributing them, yes.”

“Q. How did you do that?”

“A. We did that by ensuring that they provided reports, ensuring that the supporting documentation that was required to approve the disbursement was attached.”

“Q. And did you ensure that he contracts which they were entering into for substantial amounts of money, say 2 or 3 million dollars, they were appropriately tendered?”

“A. We did not review their contracts or their tendering process, no. That was not our responsibility. The Board is a body corporate, that’s their responsibility”.¹⁶⁸

One of the things Ms. Whitter did do upon appointment was to direct the then Ministry Controller Mr. Curtis Stovell to attend meetings of the Board of Trustees. This was on or about July 2009 when the project was well underway, and according to a minute of a meeting of the trustees, he was there *“to report to Government what is occurring at Port Royal.”*

According to Ms. Whitter in her testimony, it was Mr. Stovell’s job as Controller to make sure all documentation was in order when it came to requests for payment and to report to her in the event he had any concerns. The two of them met “regularly” and Ms. Whitter could not recall that he ever brought any concerns about PRGC to her attention.

Mr. Stovell had been the Controller for the Ministry since November 2007. His appointment came after the remediation project at PRGC had begun. He, too, recalled in his testimony that the Board of Trustees had the ability to regulate their own proceedings and that they were managing their own capital projects. He did not recall ever seeing a written set of financial procedures.

Mr. Stovell was candid in his replies to questioning as to whose responsibility it would have been to ensure proper procedures were being followed: *“... the understanding would have been that that would have been the responsibility of the Board of Trustees at the time. If what you’re asking is who’s making sure that they’re making sure, I guess that would have been me... My view was that they had the authority to conduct their matters. And if you’re asking, well, did you make sure that they did it in accordance with their own procedures, I suppose you could say no, that wasn’t done.”*

When asked who had responsibility for ensuring that Financial Instructions or other appropriate procedures were followed by QUANGOs, Mr. Stovell replied *“... because you’re talking about ensuring that a QUANGO, or a semi-autonomous government unit, is following its own procedures. It should be the Financial Controller and the accounting officer who has responsibility for the QUANGO.”¹⁶⁹* He confirmed that would be the PS or the department head.

The Accountant General at the time, Ms. Joyce Hayward, told the Commission that she could not recall whether the golf course trustees provided her office with a modified set of Financial Instructions: *“I don’t recall for sure”,* she said. (Transcript p.47)

Her view was that what QUANGOs used would *“actually be the responsibility of the accounting officer of the department”* and *“that they are really the ones responsible to make sure all policies and procedures, and so forth, as they worked on them with the QUANGOs, were followed, and we would again use the authority of the accounting officer, whoever they delegated to in the Accountant General’s Department to make payment.”* (Transcript pp. 35-36)

Ms. Hayward also referred to what she termed as “custom and practice” being followed back then and that was that if payment requests were signed by the appropriate person that was taken to mean that requisite and necessary paperwork and approvals were in place and had been met. (Transcript p. 42)

The Commission did seek further information about the project from one of the contractors who worked on the project. A subpoena was served on Mr. Allan DeSilva of Island Construction Limited requesting answers to the following questions:

- (i) What discussions and/or communications if any did he or anyone else associated with the Company have with Government Ministers prior to the awarding of the Contract by the trustees for the Port Royal Golf Course?;
- (ii) Did he or the company, or any company owned or controlled by the Company or himself, make any political contributions in the period 2006-2009?; and
- (iii) Did he or the Company, or any company owned or controlled by the Company or himself, provide (whether directly or indirectly) economic or other benefits outside the normal course of business to individuals in or linked to Government in the period 2006-2008?

In reply, counsel for Mr. De Silva, Jerome Lynch Q.C., informed the Commission that because of their knowledge of what he termed “*a parallel criminal investigation*”, Mr. DeSilva wished to exercise his right of privilege and offer no evidence; a position which the Commission was duty bound at law to recognise and accept.

The Minister responsible at the time of this project, former Premier Dr. Brown, exercised his right of privilege and therefore offered no evidence to the Commission.

Findings

- The delegation of responsibility for this major capital expenditure – was unclear, unsatisfactory, and inappropriately documented.
- No documented financial procedures were adopted and followed by Port Royal Golf Course Trustees contrary to the ‘Introduction’ section of Financial Instructions.
- Inappropriate level of financial oversight of a QUANGO by the Ministry of T&T, contrary to FI 2.7 ‘Delegation of accounting officers’ responsibility’.
- Poor assumption of responsibility when a handover occurs and a PS assumes responsibility for a new Ministry.

K - Royal Naval Dockyard Cruise Ship Pier - Heritage Wharf: Auditor General Special Report¹⁷⁰

Date: 2007

Description: Building of new wharf with related infrastructure for super size cruise ships

Contractor(s) / Principal(s): Correia Construction

Minister(s): Premier Dr. the Hon. Ewart Brown JP MP - Tourism & Transport (T&T), The Hon. Paula Cox JP MP - Finance, The Hon. Derrick Burgess JP MP - Works & Engineering (W&E)

Civil Servants: Secretary to the Cabinet Major Marc Telemaque, Permanent Secretary Dr. Derrick Binns - W&E, Permanent Secretary Mr. Robert Horton (retired) - W&E, Permanent Secretary Ms. Cherie-lynn Whitter, Accountant General Ms. Joyce Hayward, Controller Mr. Curtis Stovell - T&T

Other Parties: Entech

Contract Value: ~ \$39 Million

Final Cost: ~ \$60 Million,(included change orders)

Relevant Regulations: PFA 2002¹⁷¹; Financial Instructions 2007¹⁷²

Introduction

The Commission noted in the Opening Statement,¹⁷³ Our view remains that "... we will be assisted by considering certain Government contracts that were awarded before, or after, the period of Financial Years 2010-2012 where either payments made during those years represented Government outgoings under earlier contracts or the Government's practice during Financial Years 2010 to 2012 may have emerged before the period began and may have continued after it ended."

The Commission identified the construction of the Heritage Wharf as one such contract. The initial estimate for the contract was approximately \$39m with a final cost of approximately \$60m. The Auditor General identified in her special report that payments of \$1.6m were still being made on this contract in the 2010/11 financial year.¹⁷⁴

Evidence

The Auditor General issued a Special Report in March 2015 on the Royal Naval Dockyard Cruise Ship Pier Heritage Wharf. As

background this was one of the most significant civil engineering contracts undertaken by the Bermuda Government in the last 10 years.

The Auditor General found the Government did not use effective practices in planning and managing the spending of public money to build Heritage Wharf and its related infrastructure. Inadequacies in the management of the Project did not protect the Government's interests or provide the Government with the ability to measure whether value for money was achieved in many areas. The blatant disregard for the policies, rules and procedures designed to protect the public purse was deemed unacceptable and violated principles of good governance, accountability and responsibility.

The Commission found that the project represented another example of a large capital project where responsibility for its execution was diverted from W&E (where knowledge and expertise resided within Government) to T&T led by the Premier Dr. Brown.

The template that had been established for the Bermuda Emissions Control Project appears to have been repeated again here. That is a transfer of the responsibility away from W&E, appointment of an outside project manager and in effect third parties become the control for the payment of government funds with the Accountant General (ACG) simply paying invoices as presented as long as they were signed.

The Commission also noted that the appointment of both the project manager and the construction company did not follow an open tender process, but there is some question whether open tendering was required under the Financial Instructions in place at that time. This was a project originally estimated to cost approximately \$39m and which ultimately cost approximately \$60m of taxpayer's funds.

Former Permanent Secretary (PS) and Cabinet Secretary (Cab Sec) Major Telemaque was closely involved in the projects. He was appointed as PS in Ministry of Transport in September 2002. In August 2004 he became PS of the combined Ministry of T&T. He followed Dr. Brown from the Ministry and was appointed Secretary to the Cabinet in December 2006 when Dr. Brown became Premier. He continued as PS as well Cab Sec until mid-2007.

The Commission heard from Major Telemaque that at the time Heritage Wharf was a national priority, of the utmost urgency and that the project was overseen directly by the Premier.

He explained *"it took a virtual seismic event in order to get the requisite level of attention around this particular project. And that event was the change, the withdrawal of the last cruise ship calling at Hamilton which was ultimately deemed to have significant negative consequences for the tourism industry, particular within Hamilton and ultimately within St. George."*¹⁷⁵

The PS quickly determined that a project manager was needed to manage the construction of the pier, terminal and ground transportation areas. Specifically, the project manager's responsibilities included:

certifying the preliminary design to include a registered engineer's stamp overseeing the permission process through the Department of Planning; developing the construction tender to include detailed design; pre-qualifying suitable contractors to conduct the construction work; performing site inspections during construction; and providing sign-off services for various construction works.

While the project management contract was not publicly tendered, three companies were invited to submit bids for the contract. Two of these companies submitted bids of \$1.1m and \$1.0m respectively. Entech was chosen as the successful bidder and they were then charged with hiring a construction firm to execute on the project.

The Ministry instructed the project manager to recommend a suitable local marine contractor for the construction project. A public tender process did not take place but three contractors were invited for interviews in January 2007 with the project manager. Each contractor was asked a series of questions regarding their knowledge, experience, staff levels and capacity to complete a \$35m project prior to the deadline (April 2009). None were asked to provide a quotation on what the project would cost or any other financial information. Based on the contractors' responses in the interviews, the project manager recommended the preferred contractor and Cabinet was asked to approve the selection of Correia Construction. This was based on Entech's view that they were the only local marine contractor with an adequate track history, capacity and capability to do the work in the proposed time frame.

From the onset, there were substantive concerns raised regarding the selection process for contractors. Questions were raised and concerns expressed not only at Cabinet level but also by senior officials in W&E. They highlighted that the contracting process did not adhere to Financial Instructions and noted that there were significant unmanaged risks. They warned that the lack of

a detailed design as well as proceeding with a contract without sufficient information (such as geotechnical, environmental and other types of surveys and analyses) could detrimentally affect the cost and delivery of the Project.

Contractors invited for interview themselves said that in order to get value for money the Government should use a formal tendering process. One contractor acknowledged that though it would add some time to the process they believed it would save the taxpayer millions of dollars. Another contractor noted while the idea of being involved in a negotiated rate contract was interesting they personally believed that the best possible value for the Government would be achieved through a competitive tender process. This did not occur.

Despite these concerns and based only on the project manager's recommendation, Cabinet approved the selection of the preferred contractor; and authorised the Premier as Minister responsible for T&T to negotiate the terms of the contract with the preferred contractor subject to the further approval of Cabinet.

The final contract was never brought back to Cabinet and therefore Cabinet did not approve the negotiated contract terms. The Auditor General was told that this was "an administrative oversight".

PS Cheri-lynn Whitter (who became PS in T&T in April 2008) explained in a letter¹⁷⁶ dated 2 March 2010:

"Records show that the failure to return to Cabinet for final approval of the contract was likely the result of an administrative oversight. It should be noted that the contract was prepared and executed by the Ministry of Works and Engineering after which it was assigned to the Ministry of Tourism and Transport. This project evolved as a joint venture between the two Ministries with the leadership role being transferred between Ministries for various project phases; as a result, it appears that final approval of the contract was inadvertently not secured. That said, it should be noted that Cabinet did approve the selection of the vendor."

As Counsel to the Commission noted in his opening statement *"What effectively happened because the Ministry of T&T didn't have the expertise to manage a project of this sort, the entire conception, tendering, management and overview of payments is bypassed. So the Government in effect in the end ceases to have any control over this project."*¹⁷⁷

Former Cab Sec Telemaque was asked about the delegation of the contract to the Ministry of T&T and he said he believed it was because *"The Ministry of Tourism and Transport had a direct interest as a steward of this policy."*¹⁷⁸

But Counsel suggested as the “steward” of the policy the Premier also had access to the Ministry of W&E, which was on the face of it, the appropriate Ministry to handle that matter.

Major Telemaque believed this ignored the engagement of the project managers Entech who did have the requisite level of expertise. However this raised a further question of whether it would have been better for the project manager to be engaged by W&E who at least spoke the same language.

He said there was always context with respect to these decisions and in fact there was a current example where a similar decision had been made. i.e. outsourcing According to Major Telemaque the current Government is attempting to effect upgrades to King’s Wharf, which is the adjacent wharf to Heritage Wharf. As part of that process, the current government has outsourced the project management, although the Commission noted that the project manager will be accountable to the Ministry of Public Works. In addition to construction costs the budget would also include project management, design development by an experienced, external, overseas consultant, site investigations led by local consultants with overseas assistance, planning and environmental approvals for an estimated total of \$1.75 million.

Counsel explained to him that the Commission was not disputing the need to utilise outside parties to supplement in house expertise, or help with capacity issues, the fundamental question was that if speed was the issue, would he not accept, that it was probably better that the department which had the expertise to actually engage outside resources be used and that would be the W&E Ministry and not the Ministry of T&T.

Major Telemaque was emphatic and said, “I don’t accept that”¹⁷⁹

Dr. Binns was PS at W&E (March 2006 until December 2007) during the period that the contract for Heritage Wharf was being finalised.

Dr. Binns’ witness statement noted his first and limited involvement on Heritage Wharf involved a Friday evening telephone call from Major Telemaque requesting that he sign a contract with Correia Construction based on the recommendation of the Attorney General’s Chambers.¹⁸⁰

The timeline of the project showed the construction was being discussed in Cabinet in November 2006 and the approval for the contract was not given until April 2007 a full year after Dr. Binns was in situ at W&E. Dr. Binns said there was no discussion of the project when he assumed the PS role in March of 2006 despite this being the largest capital project undertaken by the government for some years. In his witness statement he said “it was not then and is not now the responsibility or obligation of an incoming Permanent Secretary to check the work of their predecessors.”¹⁸¹

In his evidence, Dr. Binns described his role as service provider to a sister Ministry and after his Technical Officers reviewed the contract and made amendments, the Contract was signed by him in his role as PS. The review by Technical Officer according to Dr. Binns did not involve any commentary on pricing of the contract.

In a letter to Major Telemaque Dr. Binns made clear his reservations about the fast tracking of the project.¹⁸²

“Fast-tracking a project of this magnitude does not come without risks, and it is important that these risks be stated. Firstly, fast tracking has not permitted sufficient time to conduct site investigation to mitigate as far as reasonable the risk of unforeseeable conditions from the design process. Such conditions could be geotechnical, environmental, or other kinds. The most likely cost implication would be a large increase in cost due to the ground conditions being different from those anticipated. Further environmental considerations are the works could have a significant impact on the project schedule causing additional costs both as to construction of the project and to the form of lost revenue due to late delivery ”

He also noted:

“The cost of a performance bond to 50% of the contract value is estimated to be in the region of BDA \$ 3m. This has not been required in the contract and will not be purchased by Correia Construction Limited.”

Dr. Binns said he needed to bring to the attention of the Minister responsible any concerns that the W&E department had noted and any qualifications that the department needed to attach to the contract.

Technical officers also identified there was an advance payment of \$ 8.9 M. W& E noted that this was counter to normal procedures and that the exception had been made on the authority of the Cab Sec Mr. Telemaque.

The PS also noted “we have now discharged this task in keeping with the original intent that this project should be managed by the Minister of Tourism and Transport. We are pleased as agreed between us to assign all responsibility for further management of the contract including all of its conditions and vetting and approvals to the Ministry of Tourism and Transport”¹⁸³

Dr. Binns was asked why did it make practical sense to have a capital project, which required the expertise resident in W&E to be delegated to a Ministry that didn’t have the expertise. He responded that the timelines were critical and outside resources were required but he had no insight as to why the project was transferred to Tourism.

The Commission saw no evidence suggesting that this project had been delegated as a result of lack of capacity in W&E.

Dr. Binns agreed in oral testimony¹⁸⁴ that the Ministry of W&E housed the engineers/quantity surveyors etc. who provided the expertise to capital projects and that from time to time they would also “hire in” expertise.

He confirmed that Entech provided the oversight and sign off on payments for the project not his W&E experts. In addition despite extensive questioning Dr. Binns could not confirm if civil engineers existed in the Ministry of T&T (and who could oversee this project) at this time. He was also unable to confirm if they exist in that Ministry of T&T today.

In evidence both oral and written provided by Ms. Cox who was Finance Minister at the time that the contract was executed, she confirmed that no delegation of authority had been sought from her on this project and indeed in her view even if another Ministry has an interest *“that doesn’t remove the inherent responsibility of the Ministry of Works and Engineering.”*¹⁸⁵ Counsel asked *“So would you say that in relations to where there’s shared responsibility the legal responsibility continues to remain with Works and Engineering?”* Ms. Cox confirmed, *“yes.”*

This project was included in a diagnostic review by KPMG initiated by the Minister of Finance in 2010¹⁸⁶ which noted procurement policies were not complied with, contractor hiring did not include price ,only qualitative factors. It also highlighted value for money was diminished, planning approvals were not coordinated, and concluded that poor planning was self imposed as the need for the project and deadline had been known for some time.

The Minister responsible at the time of this contract, former Premier Dr. Brown, exercised his right of privilege and therefore offered no evidence to the Commission on this matter.

Findings

- The delegation of this project from Works and Engineering to Transport and Tourism was unclear, unsatisfactory and inappropriately documented contrary to Financial Instructions 2.7 and 12.1.2.
- The final terms of the construction contract were not submitted for approval to Cabinet, as required by FI 8.3.1, by the Premier, although Cabinet did apparently approve the selection of the vendor. The contract did not allow the right to audit nor did it require a performance bond.
- Selecting a contractor without a bid price did not allow price competition to prevail.
- Expertise that resided in the Ministry of W&E which could have added value was bypassed.
- This was another example where the handover between a new PS and the predecessor appeared inadequate.
- The Accountant General was not notified of the breach of Financial Instructions with respect to Cabinet approval required by FI 2.14.
- Payments were made by the Accountant General’s department without evidence of Cabinet approval of the contract.

L – L. F. Wade Airport Development Project: Terms Of Reference – Paragraph 7 (Current Safeguards)

Date: 2014 to current

Description: L. F. Wade Airport Development Project

Contractor(s) / Principal(s): Canadian Commercial Corporation (CCC); Aecon Group Inc.

Minister(s): The Hon. Everard T. Richards JP MP- Finance / Deputy Premier, The Hon. Trevor Moniz JP MP - Attorney General and Minister of Legal Affairs, Sen. the Hon. Michael Fahy JP

Civil Servants: Financial Secretary Mr. Anthony Manders, Accountant General Mr. Curtis Stovell, Airport General Manager Mr. Aaron Adderley

Other Parties: unknown

Contract Value: unclear, believed to be \$250M+

Final Cost: n/a

Relevant Regulations: Financial Instructions 2013

Introduction

Paragraph 7 of the Commission's Terms of Reference requires us to "Consider the adequacy of current safeguards and the system of financial accountability for the Government of Bermuda." Paragraph 8 of our Terms of Reference also requires us to "Make recommendations to prevent and/or to reduce the risk of recurrences of any violation identified and to mitigate financial, operational and reputational risks to the Government of Bermuda." This in our view necessitated that we consider current as well as past Government practice, including in relation to the Airport project, which is the largest capital project currently under negotiation by the Government of Bermuda.

The Commission did not think it necessary or appropriate to examine issues, which are confidential to the parties in terms of their negotiating posture. In that context, the purpose of looking at the airport project was not to determine the commercial wisdom of the transaction, nor to look at any proprietary or confidential documentation of any sort.

As elsewhere, the Commission confined our Inquiry to the requirement for a tender process to be carried out, unless a suitable waiver¹⁸⁷ was obtained from the Accountant General

(ACG). It was not disputed that Financial Instructions did apply to this transaction, notwithstanding the size and unique nature of the project. It was common ground that no tender process was carried out. The issue was whether an appropriate waiver was sought by the Government and obtained from the ACG Mr. Curtis Stovell. Mr. Anthony Manders, the Financial Secretary (FS), was the Government representative concerned. Both he and Mr. Stovell gave evidence before the Commission.

The Commission is acutely aware that the Airport project has drawn concern from stakeholders and various segments of the Bermuda community and is a politically charged subject. The Commission is also aware of community dialogue around this project including the various public statements of the current Minister of Finance, the special report from the People's Campaign entitled 'Airport Redevelopment – a bad deal for Bermuda', Craig Mayor's report entitled 'Bermuda Airport Development – Exigent Economic Risks and Inadequate Due Diligence', ongoing Public Accounts Committee (PAC) meetings around this project and in January 2017, the 'Blue Ribbon Panel' put in place to review the transaction.

The Commission's consideration of the airport project initially was objected to by the Government. This was publicised without notification to the Commission by way of a press conference and statement issued on Friday, 23 September 2016 by Acting Attorney General the Hon. Michael Fahy. Subsequently however, the Government lodged a formal objection as per the Commission Rules¹⁸⁸. The Commission considered the objection and upon deliberation, issued a Ruling¹⁸⁹ that we would continue in our efforts to look at the Airport project's tendering process.

Evidence

The context in which the waiver issue arose was that the Government proposed to contract with CCC, a Canadian Crown Corporation, that was prepared to undertake the role of Prime Contractor for the construction and delivery of the Airport Project. CCC undertook "to source premier Canadian development and construction expertise to develop and implement the project under the CCC umbrella." as noted in a Letter Agreement executed November 2014, effective 1 June 2014.¹⁹⁰ The choice of contractor for the construction of the airport therefore lay with CCC. It chose Aecon, a Canadian contractor, with whom it had been associated in a previous airport project at Quito, Ecuador.

In neither case was a tender process carried out, as regards either the selection of CCC as Prime Contractor or the selection (by CCC) of Aecon for the construction contract. Therefore the question was whether the Government required a waiver of the Financial Instructions requirement of a tender process as regards both contracting with CCC and also the selection of Aecon.

FS Manders provided background¹⁹¹ on how CCC and Aecon came to be involved in the Airport Project. He shared that in early 2014, when attending a conference of other airport directors, the LF Wade Airport General Manager became aware of the successful development of the airport in Quito, Ecuador by CCC and Aecon. In June 2014, *“a contingent from Bermuda, including the Attorney General, Minister of Finance, [the Financial Secretary] and the Airport General Manager...” met with CCC at their offices in Toronto “...to explore the option of redeveloping the Airport.”*

“Following that meeting, more due diligence was done by the Department of Airport Operations and the Ministry of Finance. The Minister of Finance decided that he wanted to explore this option further... the first thing he did was prepare a Cabinet memo to get Cabinet’s approval on the CCC approach, listing the various benefits... How it works is that you procure expertise from Canada through Canadian Commerce Corporation. They select the vendor; they select the contractor; they do significant due diligence on that vendor... one of the main reasons why the Minister was intrigued with this was that the Canadian Commerce Corporation actually guarantees the actual building of the Airport on time, on spec, and on budget.”

FS Manders shared his understanding of CCC’s role. *“CCC is the Prime Contractor. They’re responsible for the actual building of the Airport; and what they do is, they would hire or they would appoint another Company to actually build it, but they do guarantee the performance of that Company... If the development of the Airport ultimately goes off-track, they would be responsible for any shortfalls.”*¹⁹²

*“The contractor, they raise debt... they go out to the capital markets, raise debt, and they’re responsible for getting the Airport built... they have the debt to pay for the Airport, and they would also have an equity stake in the Company that’s going to build the Airport...”*¹⁹³

FS Manders also shared how the Prime Contractor gets remunerated *“The contractor is paid by revenues from the Airport. It’s a thirty year concession... they’re responsible for designing, building, financing, maintaining, and operating the Airport. To do that, they need a revenue source, and the revenue source is the passenger fees. So, basically, the passenger is paying for development of the Airport over a thirty-year period.”*¹⁹⁴

FS Manders expressed his confidence in CCC, *“...the full faith and credit of the Canadian Government is backing CCC... a triple-*

*A-rated country.... It’s in my opinion better than a performance bond.... Here, you have a triple A-rated country guaranteeing the procurement of a key asset, namely, the Bermuda Airport.”*¹⁹⁵

The Commission noted that, as pointed out by FS Manders, *“... there are no guidelines currently, no procedures, no instructions on how to procure for a public-private partnership...”*¹⁹⁶ and that while the Minister of Finance appears to have the power, as per clause 3 of the Public Treasury (Administration and Payments) Act 1969, to give instructions to proceed, overriding Financial Instructions, he did not do so.

However, it is also clear – and this is important to note – that per clause 2.6 of Financial Instructions 2013, *“Any questions arising from the interpretation of FI will be determined by the Accountant General.”*

ACG Stovell gave evidence that he was initially approached with a request from FS Manders to provide a waiver to Financial Instructions, applicable to the Airport Project. ACG Stovell responded via a Memorandum¹⁹⁷ dated 25 September 2014 (“Memorandum 1”) citing the relevant sections of Financial Instructions. The cited sections, including 2.12, 8.2.3, 8.3.1, 12.1.2 and 12.2, broadly instruct that:

- permission to depart from Financial Instructions must be sought from the Accountant General in writing
- a minimum of three written quotations or tender responses should be obtained
- accounting responsibility for capital development expenditure rests with the Permanent Secretary of Public Works unless the Minister of Finance delegates this responsibility to another Ministry and
- the tendering process must be in accordance with Financial Instructions, Section 8 or Public Works’ written procedure.

ACG Stovell’s Memorandum 1 states that his *“analysis is restricted to the relationship between CCC and Government. It is premature to consider contracts that will be awarded under the project so far in advance of even procurement service agreements being established by CCC and Government. ACG Stovell confirmed¹⁹⁸ at the public hearing that his waiver at this stage was restricted to “...the agreement with CCC, not for any further contracts entered into by Government, say for example, with a contractor.”*

Factors relevant to his analysis, as noted by ACG Stovell are that:

- the Minister of Finance *“...detailed the urgency of and national importance of the project...”*
- any debt issued for the financing structure of the project would not be *“...attributed to Bermuda’s indebtedness...”*

- *“The Government holds that the reputability and experience of CCC support the likelihood that they will bring in the project successfully.”*
- *“The fee structure for the remuneration of CCC appears to be still under discussion. As such it is difficult to evaluate value for money until terms are solidified.”*

ACG Stovell’s Memorandum 1 concluded that *“...I give permission to waive the requirement for 3 quotations for the services to be provided...”* under the Letter Agreement between CCC and the Government, *“...on the condition that when available, further information be provided on CCC’s fees, even at a high level, to enable an evaluation of value for money for their services.”* The Memorandum also states that Financial Instructions *“...require that the Minister of Finance formally delegates responsibility for the projects to the managing Ministry if it is not Public Works. This delegation of responsibility must be documented in writing and provided...”* to the Accountant General *“...at earliest convenience.”*

The Commission learned via witness statements and evidence given at the public hearing, more about the fundamental difference in perspective between the ACG and the Ministry of Finance around the breadth of this waiver.

The Commission also noted that ACG Stovell appears to not have been fully informed at the time he was asked for the waiver. He made his position clear in a 20 November, 2014 email to FS Manders: *“I’m not comfortable with the term ‘project’ when it comes to the discussion of FI. My review was limited to the issue of engaging CCC to manage this process. I did not give the green light for them under the assumption that the project would be given automatically. I would steer clear of putting ‘project’ and FI in the same breath.”*¹⁹⁹

Referring to the Letter Agreement, ACG Stovell stated, *“What was critical to me when I read this document was that [the first phase] results in a decision which is a go/no go. It’s at that point that the Government and CCC make a determination on whether the project will go forward, feasibility, affordability, finance ability, all of those questions would have to have pretty much definitive answers at that point. From my perspective, those were the services that I was giving permission for, because at that stage once that go/no go decision is made... then further agreements follow from that.”*²⁰⁰

ACG Stovell responded to questions from the Commission stating, *“The consent I gave at this stage could not have been for a construction contract because I was not aware that there was a construction contract.”* This was supported by his communications with FS Manders that *“...at this point I cannot confirm the ability of projects to sustain their related debt, but that will be addressed at the end of the first phase when the decision on whether to*

proceed with the development is taken...”

FS Manders was asked to comment on a Memorandum dated 11 May 2015 (“Memorandum 2”) from ACG Stovell, which directly addresses the difference in perspective around the breadth of the waiver, *“Additionally, note that, based on the information available, I consider the use of a General Contractor, hand-picked by CCC, to also be a sole-source requiring Accountant General approval to waive financial instructions requirements for multiple quotes. It is my expectation that a formal request to sole-source will be forthcoming to me in writing to that effect, allowing me and the Office of Procurement Management sufficient time to digest, query and respond.”*²⁰¹

FS Manders considered that ACG Stovell’s waiver was sufficient for the project to move ahead and that no further waiver was needed for the selection of a contractor. *“The transaction is an agreement between Bermuda Government and the Canadian Commerce Corporation... we do not select Aecon. It’s selected by CCC... the permission that was granted – in our opinion – was for the whole transaction, Government contracting with CCC... that’s always been the Ministry’s position that CCC has sole-procurement discretion. They selected Aecon... they’re the ones that take the risk with the supplier that they choose.”*²⁰²

The Commission also noted an email exchange between Mr. Graham Simmons of the Office of Project Management and Procurement (OPMP) and ACG Stovell that clarifies OPMP’s perspective on the breadth of the waiver. *“The Letter Agreement(LA) provides in part that ‘CCC will source premier Canadian development and construction expertise... Any firm or firms so selected shall have been subjected to CCC’s due diligence and vetting... and shall be subject to prior due diligence and approval to be completed by Bermuda’ [sic]... your approval of Aecon’s participation in the project would have been required in order for the Government to satisfy its obligations under the LA. The language of the LA suggests that CCC had not [sic] selected Aecon, (and Bermuda had not approved any such selection) on the date when the LA became effective That being the case, the sole source waiver you granted could not have covered the selection of Aecon.”*

Toward the end of his testimony, after repeated back and forth, FS Manders was asked by the Commission to explain *“how it came about that...”* ACG Stovell *“...was not given the full story... that Aecon were on the scene, certainly at the same time as CCC and, possibly, before CCC...”*²⁰³

FS Manders responded, *“I can’t say. We were doing a Government-to-Government approach and that’s... it didn’t even cross my mind to say who was being selected.”*²⁰⁴ FS Manders confirmed that it remains his position that notwithstanding the difference in perspective regarding the original waiver, ACG Stovell had agreed to provide a waiver to Financial Instructions for the Airport

Project, provided the Bermuda Government can give satisfactory assurances around value for money.

Involvement of Foreign and Commonwealth Office (FCO)

The Commission noted that the Foreign and Commonwealth Office became involved with the project. FS Manders shared details: *“When we initially brought this to the FCO’s attention they, obviously, wanted to ensure that we had value for money, so, the FCO and the Ministry of Finance actually engaged Deloitte... One of the suggestions they had made was that we should get an independent appraisal of the CCC approach. At that time, we were a long way from making an investment decision and financial close... They compared the procurement strategies that we were using to the UK’s Treasury’s Green Book...”*²⁰⁵

In an email dated 12 April 2016, the FCO expressed some concerns *“...The measures that the Government of Bermuda proposed to remedy gaps in the Commercial case help but do not necessarily guarantee a full, robust, Commercial case... The proposed Assessment Report is welcome, but must include an assessment of how to drive value and minimise risk from a Government of Bermuda perspective, rather than just from the perspective of your commercial partners... there is no mention of two deficiencies highlighted in the Report, namely, the need for a peer review for the financial model and the need for the financial model to be updated to study concession structure and all costs to the Government of Bermuda related to the Airport.”*²⁰⁶

The Commission questioned FS Manders about whether or not the concerns raised by the FCO had been addressed, how they had been addressed and whether or not the Commission would be able to see evidence that they had been addressed. The Commission also asked whether appropriate analysis had been performed, such that the Bermuda Government could understand what was being given up in terms of potential revenue and fees and what was being gained by way of return.

FS Manders stated that, *“...we have the final sign-off from the Foreign & Commonwealth Office, to say that we agree with the initiatives Government’s going to take to improve the value for money and risk-strength throughout the Project.”*²⁰⁷ He did however note that this sign-off was conditional on the provision of an evidence-based report that looked at various areas including value for money.

However, FS Manders confirmed that this condition had yet to be met. *“A lot of these reports, you can’t really complete, until all of the terms have been finalised, because you’ve got to do value for money analysis, all sorts of analysis, so a lot of them really can’t be completed until the deal actually closes... The Minister*

*just posted one [report], where he gave three options of how we could have procured this Airport, either by the typical design build, where Government borrows; Traditional 3-P where you go out to tender; and the government-to-government approach... value for money is not just NPV numbers; he’s looking at all the benefits... we’re getting an independent [report] now... that’s going to be produced by, not the external consultants, who obviously have an interest in the project but they’re independent. They’re going to look at this deal, compare it to other Airport concession deals and say: ‘Is this market standard? Is this not market standard?’*²⁰⁸

FS Manders indicated that ACG Stovell was aware of the FCO involvement, *“The Accountant General notes it in his latest memo that we have agreed with the FCO the reports that we’re going to produce to ensure and add credibility to the whole process. So, these are reports that Government agree to do and we’re in the process of producing these reports and the Minister of Finance will table them in the House of Assembly before the deal closes.”*²⁰⁹

The Commission noted the Memorandum from ACG Stovell to FS Manders, dated 7 March 2016²¹⁰ (“Memorandum 3”) that states *“... If it is fact that Aecon was in train prior to the engagement of CCC and the intent was far more forward looking than I could appreciate at the time, I can understand the Minister’s view that my sole source comments encompassed the breadth of the project. However, based on my limited awareness with respect Aecon at that time, that certainly could not have been my intent. I have reviewed the correspondence I have in hand, and did not find any mention of Aecon leading up [to] the sole source memo I issued in 2014.... My interpretation of CCC’s selection document is that my original impression was incorrect. However, based on my understanding at that time that there was no contractor selected, I was not providing permission through the construction phase of the project...”*

AGG Stovell goes on to say: *“...Notwithstanding my comments above... it is clear that CCC thoroughly vets its counterparts using a fairly rigorous set of procedures... this testifies to the rapid ability and soundness of Aecon... [and] supports the likelihood of satisfactory execution of the project. What it does not provide clarity on, is whether there were, or are, alternative suitable entities capable of similar execution that CCC might have worked with and that is ordinarily one of the key elements of a sole source request...”*

Memorandum 3 concludes *“... With there having been measures identified to address deficiencies per the 2015 entrustment letter, I look forward to the following: 1. Agreement of the UK on the measures proposed by Government to address the key gaps; 2. The required evidence-based report from Government on the completion of the agreed-upon measures; Once the two above*

items are complete, I am satisfied that the conditions to provide sole source permission for the project will have been met.”

FS Manders shared the current stage of the Airport Project “We have had the approval for the MOU – Memorandum of Understanding, Letter of Agreement, Airport Development Agreement. The next stage in the process is to sign off on the Definitive Project Agreement. That is the final Agreement, to say what Government is committed to, and what the private sector is committed to.” He further stated that the “Airport Development Agreement has been tabled in the Legislature; and that report clearly shows all of the obligations of Government and all of the obligations that CCC, through Aecon, are responsible for with regard to this project.”²¹¹

Role of Office of Project Management and Procurement

With reference to the involvement of the OPMP, the Commission noted a 26 September 2014 email from ACG Stovell to FS Manders, asking about the involvement of the OPMP in this project. In his email response of the same date, FS Manders indicated by way of a reply, that the OPMP had asked about the choice of Canada and “... if any other countries had similar models”.

At the witness hearing, the Commission asked FS Manders further questions about the involvement of OPMP. FS Manders stated that “They’ve asked questions, providing oversight, which is required under the Act ...”²¹² and that the Acting Director had been asking questions about the project on an oversight level prior to November 2014. “...even before the LOA was started.” The Commission noted that per FS Manders’ own evidence, OPMP was not fully staffed and remains without an approved Code of Practice to follow and employ.

Delegation

The Commission inquired about delegation of authority for the Airport project. FS Manders noted²¹³ that there had been formal delegation and that the Permanent Secretary of Tourism and Transport would be the Accounting Officer going forward. The Permanent Secretary’s role would be to work with the Director of Airport Operations to manage funds budgeted by the Ministry for the Airport project. FS Manders made clear that the funds referred to here would be for non-construction items – largely consultant fees.

The Commission noted a series of emails between FS Manders, Airport GM Adderley and ACG Stovell, dated 2 February 2015

that raise questions about timing of the formal delegation. The wording for the delegation appears to be agreed on 2 February 2015 but the formal delegation Memorandum²¹⁴ is dated 26 September 2014. The Commission asked FS Manders about this incongruity and he replied via an email dated 21 December 2016 that this was an error and then supplied the Commission with a Memorandum dated 16 February 2015.

FS Manders gave evidence that “... the Civil Aviation [Airports] Act clearly gives responsibility for redeveloping the Airport to the Minister responsible for the Airport. That would be the Minister of Tourism & Transport. Financial instructions says that every capital project must be dealt with by Public Works and the Permanent Secretary of Public Works. All of the Airport projects have always been done by the Airport, not through the Public Works, so that was just regularising what the Civil Aviation Act already provides for.”²¹⁵ The Commission notes however that the Civil Airports Act²¹⁶ indicates that the Minister responsible for the Airport may work with the Minister of Works & Engineering and the Commission notes that the Minister of Public Works is a member of the Project Board, chaired by the Minister of Finance.

FS Manders communicated that it is intended that a QUANGO will oversee the concession and construction phase on Government’s behalf, but that CCC “would have the ultimate oversight during the thirty-year concession and the construction period.”

Present Status

Subsequent to the hearings, the Commission followed up with ACG Stovell to confirm whether the terms of his waiver had as yet been met. He indicated that he was still in the process of reviewing the Entrustment Report and that subject to the completion of his review, he did not foresee a denial of sole source per the conditions in his March 2016 Memorandum, assuming the report is accepted favourably by the FCO.

In an email dated 22 December 2016. ACG Stovell indicated that he had received and was in the process of reviewing the value for money report and indicated that the report along with appendices and other pertinent information is available online.²¹⁷

Findings

- The Commission commends ACG Stovell for his response to the Government’s request for a waiver, first made in September 2014.
- FS Manders failed to make clear that the waiver he sought for CCC would extend to approval of the whole project including the selection of Aecon as contractor. The Commission further notes regarding the difference in perspective regarding the waiver between the FS

Manders and ACG Stovell that it is for the ACG to determine in any event on what basis a waiver should be issued.

- There appears to be no express provision or provisions in Financial Instructions that address proposed public private partnerships.
- The OPMP played a more limited role than might have been expected had it been fully staffed and resourced at the time.

(2) Accounting/ Procedural Issues

Section 3.4 Duplicate Payments

Introduction

The Auditor General highlighted a number of payments, which were made twice over the three years under review. There were three in the financial year 2010 totaling \$6,413,845 and one each in the years 2011 (\$571,421) and 2012 (\$807,000).

Each duplicate payment was made contrary to Financial Instructions (FI) that require authorised officers “to exercise care and implement proper controls to prevent duplicate payments by ensuring that invoices have not been previously presented for payment.” [FI 9.4(4)]

The Auditor General noted in her report that no explanations were ever provided and recommended investigations into the circumstances that gave rise to these duplicate payments. There was the additional recommendation as well that the Accountant General (ACG) implement “more robust controls and procedures” and “take all steps necessary (including any legal action) to recover any amounts overpaid”.

Evidence/ Findings

The Report and these findings were not disputed.

The largest overpayment was made in the year 2010 in the sum of \$5,175,55 to the Bermuda College. The Commission learned that the amount overpaid was subsequently recovered.

A second incidence involved a cheque in the amount of \$59,041 payable to the Bermuda Telephone Company that was both issued and cashed twice. However, upon investigation, one of the duplicate cheques was thought to have been counterfeit and, the Commission was told, remains under police investigation. By way of an update, current ACG Mr. Curtis Stovell has advised that this overpayment was applied as a credit to the account concerned in the following month and thus there was no loss. While it remains unclear as to exactly how and why this occurred, it was the ACG’s view that given the resolution of the matter “no charges or discipline would have been applicable in this case.”

A third reported overpayment of \$1,179,252 by the Ministry of Works and Engineering was investigated and found to be a duplicate payment which the Ministry was able to recover by way of an offset for future payments that were due under contract for refurbishment of the Tynes Bay incinerator. However, ACG Stovell also told the Commission that he was not able to find any information on file in the ACG’s office relating to any investigation into this particular duplication.

In 2011 there appeared to have been three double payments to various suppliers totaling \$571,421 for which no explanation was given to the Auditor General and in respect of which she had recommended that there be investigation “and record any Accounts Receivable if applicable”.

The final duplicate payment was that of \$807,000 made to Sandys 360.

The Commission learned that the matter of the overpayment to Sandys 360 had been investigated. According to ACG Stovell Sandys 360 “does not possess the liquidity to repay the funds” and, as far as he is aware, no one has been called to account for the error.

The ACG at the time, Ms. Joyce Hayward, recalled in her evidence that the matter was referred to the Financial Secretary (FS) for resolution.

FS Mr. Anthony Manders told the Commission the duplicate payment was in respect of a capital grant that Government had committed to make to Sandys 360 and that the funds were paid over to the centre’s bank for payment on its capital debt account.

FS Manders also confirmed that there was no record of anyone having been disciplined in respect of the duplicate payment.

Former ACG Ms. Hayward posited - “from memory” - that more often than not the errors of duplicate payment were a result of “human error”. By way of examples, she outlined instances where someone had gone on leave and the person filling in missed a payment that had previously been made.

It was also her recollection that steps were taken to recover the money once the errors had been spotted: “So most often, and I don’t know for sure, but most often, if there was a duplicate payment

made we either got that money back or fixed it the next time.”

As to potential discipline, Ms. Hayward recalled that the persons concerned were more likely to have been given warnings, either verbal or written, and greater emphasis put on training and developing a better working knowledge of FI.

Both Ms. Hayward and her successor as ACG, Mr. Stovell, were satisfied that the new computer accounting system, JD Edwards Enterprise-One (JDE E1) which is now in place, and which was introduced during the three-year period under review, goes a long way to cutting down on, if not eliminating, duplicate payments. However, it will not completely eliminate “the possibility” of an invoice being paid twice, according to Mr. Stovell who cautioned that:

“even with a significantly reduced probability of duplicated payment, it could still occur where there is an interruption of continuity of personnel at the department and/or pressure exerted by management to hastily deal with what is perceived to be an outstanding item, where the appropriate checks are not carried out by the department prior to their approval. The ACG does not currently conduct any independent procedures to detect duplicate payments. As mentioned previously, initiatives are being considered, but the ACG section responsible has been severely understaffed since my arrival in the department, precluding the implementation of such a change.”

Section 3.5 Overpayments

Introduction

The Auditor General's Report identified one instance of overpayment in 2009. The Department of Airport Operations (“DAO”) overpaid \$256,336. to a project contractor (Lagan Construction). The amount remained outstanding as at 31 March 2010.

When a retention under the contract of \$759,721 was subsequently released to Lagan, no account was taken of the outstanding overpayment or of outstanding payroll tax by the contractor in the sum of \$321,277.

The retention funds were also erroneously paid to the wrong party, but were subsequently redirected to Lagan by the DAO. The Auditor General once again highlighted the failure to follow Financial Instruction (FI) 9.4(4).

Evidence/ Findings

The Auditor General's Report's findings were not disputed.

The record does not show that anyone was disciplined in connection with this matter. But there was an explanation as to why this overpayment had occurred and why such overpayments should not occur in future. According to the current Accountant General (ACG) Curtis Stovell:

“The reason for the occurrence of the overpayment was that the process of creation of bank transfers (in a bank's proprietary online banking system) was distinct from the entry of a payment request in the JD Edwards World accounting platform (in use at that time). The payment identified was entered into JDE World correctly, but once the hard copy support arrived at ACG for entry, the payment amount was entered into the banking system incorrectly. With the implementation of JDE E1 referred to in previous responses [See 3.4 Duplicate Payments], in 2011, the two distinct processes were joined up. JDE E1 creates data files that are transmitted to a bank for processing. The error in the Report cannot reoccur.”

This overpayment was therefore described as “a keying error” which occurred in the Accountant General's Department. At last report, by way of an email reply to questions from the Commission, ACG Stovell said: “By the time it was discovered, I had stepped away from direct supervision of the Department of Airport Operations, but I was left with the clear impression that the matter was being addressed by the ACG Department. None of the ACG personnel involved remain employees of Government. It will take some time to determine whether the amount remains due and owing to the Bermuda Government. I am not abreast of the payroll tax item and have made an inquiry with the Department of Airport Operations on both matters. I am not aware of any disciplinary action having taken place.”

Section 3.6 Supplementary Appropriation Bills Not Tabled

Introduction

The Auditor General highlighted a delay in the presentation of supplementary estimates to the House of Assembly for approval. These are estimates that are required where there has been an expenditure of public monies over and above that approved by the House of Assembly in the annual budget or where there has

been expenditure for an unforeseen or unexpected expense.

Supplementary estimates are provided for in the Bermuda Constitution Order 1968 in cases where the above circumstances apply: Section 96(3).

However, as the Auditor General pointed out in her Report, s.96(4) also requires that supplementaries (as they are also known) be introduced in the House of Assembly “as soon as practicable” after the year end of the financial year in which these expenditures became necessary.

During 2010, the Auditor General observed that supplementary appropriation bills were not introduced in the House of Assembly for estimates dating as far back as the year ended 31 March 2001. It was not until the next year, 2011, that these supplementaries were presented to the House of Assembly and approved.

Evidence/Findings

The above observations of the Auditor General were not disputed.

The Ministry of Finance advised the Commission that there are now procedures in place which should obviate, if not eliminate, any such delays in presentation of supplementaries.

Financial Secretary (FS) Anthony Manders explained that these procedures currently require all Ministries to seek supplementary estimates before any actual overspend in cases where approved budgets are likely to be exceeded.

Mr. Manders detailed those procedures as follows:

- Departments must first attempt to identify, where possible, offsetting savings within their Departments and/or Ministry for transfer (known as virement) before submitting a request for a supplementary.
- Departments may identify offsetting savings within current account estimates for capital and vice versa. In these cases, a “Technical Supplementary Estimate” will apply.
- A Technical Supplementary Estimate indicates that the requirement for additional funding can be met within the original approved estimates. However, the monies cannot be transferred since they are appropriated within another Ministry and/or account.
- Departments must advise and seek the written approval of their respective Minister(s) and the Minister of Finance before making any commitments, and prior to any over or unanticipated expenditure.
- Request(s) must be submitted via completion of

Supplementary Estimate Request Form(s) or a Cabinet Memorandum. All supplementary Estimate Request Forms must be signed by the responsible Ministers and the Minister of Finance.

- The Minister of Finance then presents the total Supplementary Estimate Request to Cabinet and, in turn, the Legislature for final approval before the end of the financial year.
- Approval of the Legislature must be obtained before any over-expenditure of the Department’s and/or Ministry’s total budget can occur.
- In what are termed “extraordinary cases”, where any over-expenditure of total budgets is required prior to Legislative approval, the Ministry concerned must receive preliminary approval in writing from the Minister of Finance.

The Commission has learned that these new procedures have been codified and made a part of Financial Instructions as of 1 November 2016, with the warning that: “if an Accounting Officer overspends/commits funds without obtaining the prior approval of the respective Minister and the Minister of Finance, the Accounting Officer is subject to penalties per FI”.

In his evidence before the Commission, FS Manders said that current procedures appear to be working well: “We typically do supplementaries in February, so supplementaries are approved before the money is actually spent... that’s been the case for the last three or four years.”

However, that has not completely eliminated the need for supplementaries after the financial year-end.

“We do two supplementary estimates”, FS Manders went on to explain. “The majority ... before March 31, and we’ve been strict with that right over the last three or four years and then, after the accounts get signed off, it might be a need for a second supplementary, just to take care of any other overages that might happen from, like I said, accruals that were underestimated, or things of that nature.” [Transcript, 11 October 2016, pp. 204-205]

As FS Manders pointed out to the Commission, the Bermuda Constitution Order 1968 does appear to have been drafted to recognise and allow for the dynamic nature of budgets and plans for funding in any given year. As previously noted, Section 96 allows for supplementaries for sums which have already been spent. The only proviso would appear to be that those supplementaries must be presented and approved by the House of Assembly as soon as practicable after the end of the financial year in which the money was spent.

The Commission recognises that there are periods of time when the House of Assembly is not sitting, most notably over the summer recess, which can run for three months or longer.

However, the Constitution Order appears to present an inconsistency when it comes to money spent prior to the approval of the House of Assembly.

Section 95(1) declares that, “no money shall be withdrawn from the Consolidated Fund except upon the authority of a warrant under the hand of the Minister of Finance”.

Sub-section (2) of section 95 then states:

“No warrant shall be issued by the Minister of Finance for the purpose of meeting any expenditure unless: –

- (a) the expenditure has been authorised for the financial year during which the withdrawal is to take place–*
 - (i) by an Appropriation law; or*
 - (ii) by a supplementary estimate approved by resolution of the House of Assembly.”*

It may be that this inconsistency, and the Commission puts it no higher than that, requires not just a procedural overhaul (which appears to have occurred) but constitutional reform to add greater clarity to what is and is not permitted and under what circumstances.

Section 3.7 Inadequate Procedures Over Bank Reconciliations

Introduction

The Auditor General noted a number of issues with the reconciliation process including lack of support for reconciling items, duplicate payments, stale dated cheques not cancelled, unsupported transactions, unrecorded foreign exchange transactions, deposits and wire transactions improperly or not recorded in the general ledger, disbursements not recorded, and deposits not made on a timely basis.

Bank reconciliations are an essential internal control tool and are necessary in preventing and detecting fraud. It is normal for a company’s bank balance as per accounting records to differ from the balance as per the bank statement due to timing differences. The reconciliation helps identify accounting and bank errors by providing explanations of the differences between the accounting record’s cash balances and the bank balance position per the bank statement.

Evidence/Findings

The current Accountant General (ACG) Mr. Curtis Stovell has advised that “the following items are no longer a concern; lack of support for reconciling items, duplicate payments, stale dated cheques, unrecorded foreign exchange, deposits and wire transactions and disbursements not recorded”

He then went on to describe the process used by his Department for the reconciliation of specific bank accounts:

- Download bank activity for medium and high activity complexity bank accounts from banks sites where applicable on a daily basis
- Download merchant reports on a daily basis.
- Reconcile bank activity to general ledger on a daily basis.
- Communicate outstanding transactions with Department contact person via email on a weekly basis until items are cleared.
- Provide list of stale dated cheques (uncashed over 1 year) to Compliance and Disbursement Manager and Compensation Benefits Manager by the 25th of each month.
- Submit assigned low activity/complexity bank reconciliation files with all supporting documentation by the 15th of each month.
- Submit assigned medium activity/complexity bank reconciliations files with all supporting documentation by the 25th of each month.
- Submit assigned high activity/complexity bank reconciliations files with all supporting documentation by the 25th of each month.
- Provide consolidated fund bank reconciliations files to the Auditor General by May 31st (2 months after year end).
- Provide responses to the Office of the Auditor General with queries within 24 hours of receiving query.

During the tenure of the previous ACG, there were two fraudulent events resulting in the Bermuda Government being deprived of funds in excess of six figure amounts in each instance. Whilst bank reconciliations alone may not have prevented the frauds as other factors may have contributed, it would have identified earlier that a problem existed.

Under Section 20 of Financial Instructions, the ACG... is responsible to ensure accounting officers reconcile bank accounts.

We understand from the current ACG that significant progress has been made in this area as can be seen above.

However we support the Auditor General’s recommendation that the environment is continually enhanced to ensure the most robust control exists around all Government bank accounts.

Section 3.8 Completeness and Accuracy of Accounting for Employee Benefits

Introduction

The Auditor General found that testing of the completeness and accuracy of the liability relating to the Public Service Superannuation Fund (PSSF) and the Government Employees Health Insurance Fund (GEHIF) revealed the following:

During 2011, terminated, retired and temporary employees as well as summer students were erroneously included in the actuarial valuation. This resulted in a \$2.5 million miscalculation of the accrued benefit obligation for PSSF and \$10.5 million for GEHIF;

An inappropriate method of loss calculation was used which required a \$21.5 million valuation adjustment; and incorrect Cost of Living Adjustments were included in the actuarial valuation resulting in a \$15 million overstatement.

Evidence/Findings

The current Accountant General (ACG) Mr. Curtis Stovell was able to share the following update with respect to Employee Benefits:

“The Accountant General’s Department has invested in a comprehensive Pension Administration system. The system has improved efficiency, reduced incidence of error, and increased the level of customer service. The system has also ensured that the data is relevant, reliable, timely and accurate which results in improved reporting and which facilitates the actuarial valuations, which as noted in the report have encountered problems in the past due to lack of reliable participant data.

“The current process is as follows. Demographic data and contributions for all employees contributing to the PSSF and the Ministers and Members of the Legislature Fund (MMLF) are downloaded from the JD Edwards Enterprise 1 (JDE E1) financial platform payroll module into the pension administration system. The demographic data is downloaded on a weekly basis. The employee contributions are downloaded weekly for weekly paid employees and on a monthly basis with for monthly paid employees.

“When a new employee starts work for the Government their core data which is comprised of their employee number, name, department cost centre, start date, salary pension enrollment date and address, are downloaded onto the system. The benefits administrators review the JDE E1

starters report and reconciles the new starters in the Pension Administration system. Once the reconciliation is complete and the dependent/beneficiary information has been updated in the pension system, the benefits administrator sends membership certificates out to all new employees to ensure the system data is correct.

“When an employee terminates government service they are entitled to one of, a refund of contributions, a deferred pension or a pension commencing immediately. The benefit administrator reviews the Leavers Report to determine into which category the terminating employee falls. The benefits administrators ensure that all the correct paperwork is received before processing the employee’s termination for the PSSF or the MMLF pension plans. The pension administration system processes all terminations under either the Pension Act 1970 or the PSSF Act 1981. The system will calculate an employee’s contribution refund and interest as of their termination date. If an employee is a deferred pensioner the system will calculate the value of the pension and the date on which the pension is due to commence, or calculate the pension immediately due to the retiring employee. All data is maintained within the system.

“Pensioner proof of life information is maintained in the system. Proof of life is the annual process to confirm that all listed pensioners are still alive. Cost of living calculations are performed in the pension administration system. The annual pension amounts are then sent to the JDE E1 payroll to make payment and the update the general ledger. On a monthly basis reconciliation is performed between the pension system and the JDE E1 payroll module to ensure that pension benefits are paid correctly in both the pension administration system and the payroll module.”

The ACG also added:

“In the pension system a module was created to better account for one QUANGO employees that are members of the PSSF. The system tracks the QUANGO employees and their salaries. The system is then able to create invoices for the QUANGOs on a monthly basis. This allows the Accountant General’s Department to track the contributions of the employees and to accounts receivables for the QUANGO. The active members, deferred pensioners and pensioners are reconciled on an annual basis. Additionally at the time contributions for the financial year are reconciled to the JDE E1 payroll module to ensure the information is correct before the year-end process is complete. Once the year-end process is completed the system produces a report for the external actuaries to properly evaluate the pensions fund obligations.

“The report for the external actuaries is provided on an annual basis with a summary of the funds activities i.e. actuarial data is compiled and provided each year regardless of whether it is a valuation year. The establishment of the annual routine was critical in ensuring that when the valuation year does occur the provision of the necessary information is part of a proven process.”

It appears that the ACG Department has addressed the Auditor General’s recommendation to maintain a robust system to ensure completeness and accuracy of data provided to the actuary when performing calculations of the liability for the PSSF and the GEHIF.

Section 3.9 Inadequate Provisioning

Introduction

The Auditor General highlighted inadequate provisioning for doubtful tax accounts, which the Office of the Tax Commissioner (the “OTC”) reported had been set at \$20 million in 2011. She also regarded as unreasonable the assumptions underlying this provision.

While provision was subsequently raised to \$31.7 million, the Auditor General recommended that the OTC implement a sound methodology for estimating the provision in future years and that the appropriate level of review be carried out by the Accountant General (ACG)

The Auditor General also noted in her Report the absence of “a well-founded plan of action” for collection of outstanding taxes, bearing in mind the historical and statistical record of collection.

Evidence/ Findings

The observations of the Auditor General were not disputed and her recommendations have been acted upon, according to the current Tax Commissioner, Ms. Lucia Peniston.

A comprehensive methodology for the provision of doubtful tax receivables was developed and documented in a written accounting policy during the 2013 audit of the Consolidated Fund. A copy of the policy was shared with the Commission.

The policy is said to be in line with Canadian Public Sector Accounting Standards for Tax Revenue and allowance for doubtful accounts and is reviewed annually.

The most current provision for doubtful taxes is \$81.6 million - the amount included in the unaudited financial statements dated 31 March 2016.

The Tax Commissioner was however, cautious as to whether or not the current methodology, and current provision, are now viewed as adequate, explaining:

“in the absence of Audit Exit Conference Point observations for the fiscal years ending 31 March 2013, 31 March 2014 and 31 March 2015, regarding the issue of ‘Inadequate provisioning’, the OTC cannot confirm whether the policy is adequate. However, verbal conversations with the Office of the Auditor General (OAG) staff indicate that this policy and the resulting provision are now considered adequate.” [Letter to the Commission dated 7 July 2016, paragraph 1 (b)]

The Tax Commissioner was not able to give the Commission a precise figure on exactly how much the Government is owed in back taxes. The difficulty arose, she explained, from the fact that while the financial year ended 31 March, the tax-filing deadline was 15 April. However, Ms. Peniston did disclose that as of 31 March 2016, the amount outstanding was \$219 million and that following subsequent collections, that sum in April 2016 totalled around \$101.5 million.

Collection of tax arrears is the primary focus of a Debt Management Section (“DMS”) within the OTC. It has a staff of three and works with a Debt Enforcement Unit (“DEU”) in the Attorney General’s Chambers.

The DMS has its challenges, according to Ms. Peniston, not the least of which is, in her view, the current economic climate and the inability of companies to settle tax arrears which have built up over years of non-compliance.

The Tax Commissioner explained in evidence:

“We are always encouraged to work with taxpayers because we have to balance the needs of collection with we’re not in the business of closing businesses down which will have a domino negative effect.” [Transcript 11 October 2016, p.9]

The OTC has also stepped up coordination with other Government departments and agencies with the introduction of a programme known as “Smart Cooperation”, according to the Tax Commissioner. By way of example, this programme features:

- A requirement in the work permit policy of the Department of Immigration of confirmation by any work permit applicant company that it is in good standing with the OTC.
- A similar policy and requirement at TCD with respect to the relicensing of company vehicles and taxis.

The DMS also continues to vet requests by Government departments seeking to contract for the supply of goods and services, pursuant to Financial Instruction 8.2, which reads as follows:

"For all Contracts, the Office of the Tax Commissioner, the Department of Social Insurance and the Accountant General's office should be contacted for clearance and/or information regarding Government indebtedness before the contract is awarded and this must be documented and kept with the contract. If the debt exists, arrangements for repayment must be agreed and included in the contract (as appropriate for offset) before the contract is awarded."

The Commission has since learned that clearance by the OTC is documented and kept with the contract and that the Office of Project Management and Procurement (OPMP) developed a standardised form to show that the requirements of Financial Instructions (FI) 8.2 have been met.

The Commission has also been told by the OTC that FI 8.2 also continues to apply to all contracts- as it should, in the Commission's view.

The OTC currently has some 736 companies or individuals in active repayment schemes.

The Commission endeavoured to obtain a list of those who owed \$25,000 or more, but the request was denied on the basis that the OTC has a legal obligation to maintain confidentiality pursuant to the Taxes Management Act 1976, specifically section 4 thereof.

On questioning, the Tax Commissioner said that neither she nor her office have ever been pressured by politicians or anyone else for that matter, with respect to their collection efforts.

"We are not pressured to go easy on any particular taxpayer," said Ms. Peniston. *"We do have pressure to collect, obviously that's pressure from even the taxpaying public. I know that they feel strongly about the level of tax arrears and companies that don't comply. And there are companies that do. And so we do get pressure from that aspect but that's general."* [Transcript p.9]

Regarding the OTC repayment schemes, the Tax Commissioner explained that:

- DMS tries to secure a payment plan which will see the debt settled "as quickly as possible" with an initial payment of one third of the outstanding debt and monthly payments not exceeding 18 months for the balance.
- This however, is often not feasible "since it will likely result in bringing [a] business to its knees and a loss of jobs".

- By way of contrast, it has been their experience that "court-ordered plans are less fruitful."
- As a consequence, all repayment schemes are six month plans so they are regularly reviewed "with the intent of increasing the monthly payment amount".

Asked how the OTC determines what a company or individual is capable of, Ms. Peniston conceded that it was "a bit subjective", pointing out the office's challenges in that regard:

"It's not easy to make that determination because we don't have the ability to go in or we don't go in and review a full set of financial statements for the individual company. We don't even have the resources to do that if we could. So we have to take it on face value and continue to work with the taxpayer." [Transcript p. 16]

As a final footnote, the Commission took note of the fact that during its proceedings the Tax Commissioner joined with the Director of Public Prosecutions (DPP) in making a public announcement that threatened delinquent employers with prosecution for unpaid taxes. The Tax Commissioner was quoted as saying that there was an estimated \$47 million outstanding for payroll tax alone.

The DPP was reported to have said his Chambers would be reviewing files referred by various government departments, including the OTC, and that "we will soon prosecute companies and individuals for any relevant offences seeking appropriate sentences and orders for arrears to be paid. However, we do encourage employers to contact the relevant Departments, make payment arrangements and make actual payments." (*The Royal Gazette, 16 November 2016*)

The Commission recommends that:

- The Smart Cooperation programme should be maximised by extension to more Government Departments so as to also reach any business or individual requiring a Government service to ensure that they are in "good standing" with the OTC and, for that matter, the Department of Social Insurance and the ACG's Department. By "good standing", we accept that they must either be paid up or addressing any outstanding debt with an active payment plan.
- The necessary resources are needed to make the above happen and be effective.
- The governing Act must be amended to allow publication of delinquents and the sums owed when they reach a certain sum owed e.g. \$100,000, and/or fail to maintain their payment plan.
- A formal review or audit of the effectiveness of OTC debt collection should be conducted, as the Commission understands that there has not been one in over four years.

Section 3.10 Inadequate Procedures Over Amounts Receivable From or Payable To Other Government Agencies

Introduction

In this section the Auditor General highlighted weak accounting procedures which included grants and expenses from the Confiscated Assets Fund (CAF) not appropriately being reflected in the accounts, and amounts due to and from the Bermuda Hospitals Board not being reconciled on a timely basis.

Evidence/ Findings

The current Accountant General (ACG) Mr. Curtis Stovell gave the following feedback:

“The example cited in the report of grants from the Confiscated Assets Fund is no longer an issue. When written approval is received by the ACG regarding the dispensation of CAF funds the entries are processed in both sets of books i.e. the CAF general ledger and the Consolidated Fund general ledger. Amounts due to and from other government agencies are to be reconciled first at the Department level by the respective Departments and then on an annual basis at a global level as part of the ACG’s year-end process. Constant efforts are underway to ensure more timely reconciliation of amounts due to/from the Bermuda Hospitals Board. ”

The Commission believes this is another example of the historical lack of focus on important reconciliation activities.

We support the Auditor General’s recommendation of timely and accurate reconciliation of balances and believe that there has been significant progress in this area, as demonstrated above.

This area will no doubt be tested again by the Auditor General during its annual audit to ensure the reconciliation processes as described above are performed.

Section 3.11 Lack of Ministerial Authorisation for Inter-Fund Transfers

Introduction

The Auditor General found that inter-fund transfers for \$11m and \$12m respectively in 2010 and 2011 were not authorised for transfer by the Minister of Finance.

Evidence/ Findings

The Financial Secretary (FS) Mr. Anthony Manders responded to this issue by clarifying:

“The process for interfund transfers is governed by Section 23 of the Public Treasury (Administration and Payments) Act 1969 which stipulates.....

“The Accountant General (ACG), subject to such general or specific directions as may from time to time be given by the Minister of Finance, may make such temporary advances from one public fund administered and managed by him to any other public fund and vice versa as appears to him expedient and economical ...”

“It has always been the practice of the Ministry of Finance to process these advances on the basis of general instructions relayed from the Ministry of Finance on behalf of the Minister to the Accountant General.”

“In accordance with the 1969 Act the Ministry will ensure that written general directions are provided by the Minister to the ACG for such temporary advances or interfund transfers. The reason the Act allows for general or specific directions is that it would be inefficient for the Minister to provide authority for each and every interfund transfer.”

The Commission supports the Auditor General’s recommendation of improving procedures so that all inter-fund transfer receive “sign off” by the Minister of Finance prior to the transfer occurring.

Section 3.12 Millions Paid for Professional Services Without Prior Approval

Introduction

The Auditor General reported on the testing of \$2 million in payments for “consultants” during the fiscal year 2012 out of a total \$33 million for the year and that her office found that none of the payments showed that the prior approval of the Secretary to the Cabinet had been obtained as required by Financial Instructions (FI).

FI 10.4.2 states: *“To retain any consultant, the Accounting Officer must obtain the approval of the Secretary to the Cabinet with a completed application form.”*

Attention was also drawn to FI 10.4.3: *“Accounting Officers may be surcharged under FI Section 2.9. if consultants are retained without proper approval.”*

In light of her findings, the Auditor General went on to recommend *“the establishment of robust controls, heightened scrutiny, the establishment of an oversight committee for the retention of consultants and the application of surcharges.”*

Evidence/ Findings

The Commission learned very early on in its inquiries that the above findings were disputed.

First, the Ministry of Finance pointed out that this line item for professional services did not represent overseas and local consultants. It was an apparent misdescription that led to a misunderstanding.

This is what the Ministry had to say when first apprised of the Auditor General’s findings:

“The payment of \$99M for professional services in 2012 covers all government contracts for cleaning, security, legal aid, Works and Engineering maintenance, contracted services for the Department of Airport Operations, health insurance portability claims, war pensioner medical claims and other locally contracted services.”

Further to this, the Ministry of Finance added that: *“it is believed that the items tested were not consultants as defined in FI 10.4.”*

FI 10.4.1 reads: *“This section applies to self-employed individuals, both local and foreign, who perform Government duties on a fee for service basis.”*

The Commission had sight of the list of consultants that were in fact tested and none of them were self-employed individuals. They were all companies.

The Commission therefore took the matter no further, except to inquire as to what steps were in place to ensure that, where and when appropriate, prior approval is obtained for the retention of consultants.

The Commission was told that current practice is that the Cabinet Office provides the Accountant General’s (ACG) Department with copies of each approved consultant contract. The ACG’s Department in turn maintains a log of all consultant contracts.

However, the current ACG Mr. Curtis Stovell also advised in response to inquiries by the Commission that:

“The ACG process of reviewing all payments in excess of \$5k to ensure there is a consultant contract on file has temporarily been suspended due to severe staffing shortages in the ACG section responsible. Once the section reaches a full complement, checks will be reinstated.”

That seems to the Commission to be a matter, which ought be addressed and corrected forthwith.

We would also endorse the Auditor General’s recommendation of an oversight committee on the retention of consultants, whether individuals, foreign or local, as well as companies.

Section 3.13 Bank Limit Exceeded by \$24 Million

Introduction

The Auditor General identified that the Temporary Loans Act 1973 limited the borrowing from any bank by way of overdraft to 10% of annual budget estimates of expenditure approved by the House of Assembly.

As at March 31, 2012, Government was not in compliance with Section 2 of the Temporary Loans Act 1973 as the bank overdraft of \$121 million exceeded the legislated limit by \$24 million.

Evidence/ Findings

We heard from the current Financial Secretary (FS) Mr. Anthony Manders who noted:

“The Ministry does not accept the findings of the report for the following reasons. The sum of \$121m was borrowed under the authority of the Government Loans Act 1978, not the Temporary Loans Act 1973. Section 2 of the Government Loans Act, which provides the Minister of Finance the authority to borrow in such manner and on such terms and conditions as may be agreed with Lenders provided overall borrowing does not exceed \$2.5 billion. The \$2.5 billion limit was increased by way of an amendment section 2A to the Act in 2013. In 2012 the limit was \$1.45 billion.”

He further added,

“Please note the Temporary Loans Act 1973 was repealed in 2015 as it was considered to be in conflict with the 1978 Act.

“If the “bank limit” refers to the limit imposed by Section 2 of the now repealed 1973 Act that limit was never exceeded before or after 2012.

“The 1973 Act was repealed by the 1978 Temporary Loans Repeal Act 2015 and since all borrowings have always been made under the 1978 Act, compliance procedures for the 1973 Act do not apply.”

The Commission accepts the FS's clarification and supports the continuing monitoring procedures to ensure compliance of the relevant borrowing Act.

We understand that all findings are discussed with the relevant Department before the final Auditor General Report is released. We have seen a least one example where the discussion apparently did not occur. We assume this is one of those same situations and the Commission recommends that there is sign off on all issues by the relevant parties before the Auditor General's Report is published.

Section 3.14 Inappropriate Application of or Lack of Accounting Policies

Introduction

The Auditor General noted inappropriate application of, or lack of accounting policies and noted that the importance of selection of appropriate accounting policies in order to provide fair and accurate representation.

Evidence/ Findings

The Auditor General's report noted that “appropriate accounting policies had been selected but misapplied in the following instances:

- *“Betterments were not added to related capital assets as required by accounting standards. Instead, they were separately capitalised resulting in inaccurate amortisation charges; and ”*
- *“Customs duty was capitalised resulting in an overstatement of the cost of capital assets and inventory.”*

The Auditor General also noted that “formal policies had not been established to address:

- *“the capitalisation of computer software resulting in \$7.6 million being incorrectly recorded; ”*
- *“the treatment of interest costs on capital projects; ”*
- *“the transfer of capital assets to quangos; and ”*
- *“the impairment of capital assets. As a result, the Assets under Construction balance included several items which no longer contribute to Government's ability to provide goods and services.”*

To remediate these concerns, the Auditor General's report recommended that:

- *“Betterments should be recorded and calculated in a manner that is consistent with the accounting policy and recommendations contained in the CPA Canada's Public Sector Accounting Standard PS 3510; ”*
- *“A policy should be developed and applied consistently for the treatment of Customs duty; and ”*
- *“Formal policies should be developed based on Canadian Public Sector Accounting Standards. These policies should be documented in Financial Instructions and communicated to all department and ministry comptrollers.”*

Current Accountant General Mr. Curtis Stovell replied to Commission queries, indicating that there is currently no policy in place regarding treatment of Customs Duty as pertains to capital assets. For all other issues raised by and recommendations from the Office of the Auditor General (OAG), applicable policies are currently in place in Financial Instructions or elsewhere (note – Betterments are recorded in accordance with Public Sector Accounting Standards).

The Commission finds that the Auditor General's concerns appear to be largely addressed, with the sole remaining highlighted issue being the current lack of policy regarding treatment of Customs Duty as pertains to capital assets.

Section 3.15 Presentation Issues

Introduction

The Auditor General's report highlighted concerns about the timeliness and accuracy of financial information being presented for audit and indicated that this was a concern in previous years as well.

Evidence/ Findings

The Auditor General's report notes that:

- Multiple revisions to the financial statements were required as a result of hundreds of adjusting journal entries (2012 – 269, 2011 – 193, 2010 – 84);
- Expenses were not reported by function; and
- Interdepartmental transactions were not eliminated.

The report also stated that *"The Accountant General (ACG) needs to improve its financial reporting process by evaluating present procedures relating to timeliness and accuracy. We recommend that procedures be enhanced to improve the year-end financial processes and the review of financial statements."*

The Commission sought a reply from the current ACG Mr. Curtis Stovell subsequent to the hearings. He indicated that *"An observation along these lines remains in the Office of the Auditor General's (OAG) 'Exit Conference Points' for the three years 2013, 2014, and 2015, provided to the Accountant General's Department for the first time in December 2016. Changes have been made, but there remains room for improvement by both the OAG and ACG. In my short time in the ACG Department, it has proven difficult to coordinate efforts with the OAG. There has been improvement certainly, as for example the ACG engaged a firm to perform an independent review of the annual financial statements prior to OAG doing so. ACG continues to make efforts to improve."*

Findings

- The Commission recommends that the ACG's office as well as the OAG pursue this issue on a timely basis.

Section 3.16 Overspending of Supplementary Estimate Limits

Introduction

The Auditor General reported that spending approved by the House of Assembly was exceeded in several instances for the year ended 31 March 2010. They were detailed as follows: -

- \$35.8 million was overspent on current expenditures by twenty-four departments without prior legislative approval.
- Nine capital development projects exceeded the Total Authorised Figure (TAF) approved in the budget by \$400,000.
- Approximately \$9.4 million was overspent on capital projects by various Departments without prior Ministerial approvals *"as the required virements (transfers between estimates within a department) were only approved after the year-end. A virement is a transfer of a specific budget amount from one or more approved estimates within the department's total budget."*

Reference was drawn to Financial Instruction(FI) 2009 5.5, which pertained at the time, the relevant part of which stated:

"There may be circumstances when there is an urgent and unforeseen need for an expenditure that cannot be funded by offsetting savings in other areas. The approval of the Legislature must be obtained before committing to an over-expenditure. The Minister of Finance will consider supporting Supplementary Estimates in the Legislature for over-expenditure, but only after he is convinced that offsetting savings cannot be achieved."

"Except for a catastrophic event (e.g. spending required on an emergency basis in the event of a hurricane) approval of the Legislature must always be obtained in writing before making any recommendation."

The Auditor General complained in her Report that the Ministry of Finance had in the past agreed to enforce Supplementary Estimate procedures, with sanctions where appropriate, but that the record showed otherwise. She repeated her recommendation that procedures be enforced.

Evidence / Findings

The Ministry of Finance accepted that these overspends had occurred, but with one qualification, wrote current Financial

Secretary (FS), Mr. Anthony Manders: *"It should be noted that the Report deals with departmental overspends, not Ministry overspends. It is critical to explain this distinction."* [Undated letter of July 2016]

He referred the Commission to a 2004 amendment to The Public Treasury (Administration and Payments) Act 1969 which in his view allows *"senior government officers who have responsibility for managing appropriated budget provisions the ability to transfer a part of a Department's approved budget to another Department within the same Ministry subject to the consent of the Minister of Finance."*

FS Manders did not identify the section in his letter, but the Commission believes he was referring to section 11A, which reads as follows: -

"(1) Subject to subsection (2) a Permanent Secretary or a Head of Department may, after obtaining the approval of the Minister, transfer part of the appropriated budget provisions, between the Heads of Expenditure within a Ministry as identified by the Appropriation Act for that financial year.

(2) The total sum appropriated against a Ministry shall not be exceeded in the transfer referred to in subsection (1)."

As a result, according to FS Manders, the Ministry of Finance takes the position that, *"so long as each Ministry does not exceed its own total appropriation, there is no need for a Supplementary Estimate. Within each Ministry, the Permanent Secretary is allowed to transfer budget allocations from one department to another subject to the approval of the Finance Minister."*

Further, Mr. Manders added that while the Ministry of Finance encourages virements (appropriation transfers) before each year-end, *"the 1969 Act imposes no deadlines for processing virements"*.

The Commission was also advised of the new procedures and practices in place that are intended to curb over-spending (see Section 3.6 Supplementary Appropriation Bill not tabled)

In addition, the Commission was further informed by FS Manders of the following additional steps that have been taken:

- *"The Ministry of Finance has enhanced its on-going budget monitoring and control exercises by reporting to Cabinet and the Civil Service Executive (CSE) on a quarterly basis on the overall financial performance of the Government's expenditures and revenues. It is anticipated that CSE and Cabinet will have an early indication of any overspends and take the required actions to eliminate or reduce any potential overspends".*
- The implementation of a new Enterprise Resource

Planning (ERP) system (E1) in November 2011 which *"has facilitated stronger control over the use of budgeted funds by ensuring that Ministries and Departments have budgeted funds available before committing to the procurement of goods and services."*

The Ministry shared with the Commission a summary of overspends for not only the three years under review but the three years following which, in the Ministry's view, underscore improvement: -

2009/2010

Current Expenditures:

- In 2009/10 the original budget estimate was \$966.9 million.
- The House of Assembly approved a supplementary estimate of \$22.1 million for 2 Ministries before the year-end of March 31.
- The House of Assembly approved another supplementary estimate of \$22.4 million for 5 Ministries and 1 Department after the year-end of March 31. This amount would be considered as being spending without the approval of the House of Assembly.
- The total actual spend for 2009/10 was \$1.0 billion, \$34 million or 3.5% above budget.

Capital Expenditures

- In 2009/10 the original budget estimate was \$150.8 million.
- The House of Assembly approved a supplementary estimate of \$0.966 million for various capital projects before the year-end of March 31.
- The House of assembly approved another supplementary estimate of \$0.389 million for various capital projects after the year-end of March 31. This amount would be considered as being spending without the approval of the House of Assembly.
- The total actual spend for 2009/10 was \$125.1 million, \$25.4 million or 16.9% below budget.

2010/2011

Current Expenditures

- In 2010/11 the original budget estimate was \$1.058 billion.
- The House of Assembly approved a supplementary estimate of \$50.0 million for 3 Ministries before the year-end of March 31.
- The House of Assembly approved another supplementary estimate of \$22.6 million for 6 Ministries after the year-end of March 31. This amount would be considered as being spending without the approval of the House of Assembly.

- The total actual spend for 2010/11 was \$1.124 billion, \$65.8 million or 6.2% above budget.

Capital Expenditures

- In 2010/11 the original budget estimate was \$143.9 million.
- The House of Assembly did not approve any supplementary estimate before the year-end of March 31.
- The House of Assembly approved a supplementary estimate of \$0.883 million for various capital projects after the year-end of March 31. This amount would be considered as being spending without the approval of the House of Assembly.
- The total actual spend for 2010/11 was \$121.0 million, \$22.9 million or 15.9% below budget.

2011/2012

Current Expenditures

- In 2011/2012 the original budget estimate was \$1.002 billion.
- The House of Assembly approved a supplementary estimate of \$70.4 million for 8 Ministries before the year-end of March 31.
- The House of Assembly approved another supplementary estimate of \$25.3 million for 7 Ministries after the year-end of March 31. This amount would be considered as being spending without the approval of the House of Assembly.
- The total actual spend for 2011/12 was \$1.083 billion, \$81.0 million or 8.1% above budget.

Capital Expenditures

- In 2011/12 the original budget estimate was \$77.1 million.
- The House of Assembly did not approve any supplementary estimate before the year-end of March 31.
- The House of Assembly approved a supplementary estimate of \$8.4 million for various capital projects after the year-end of March 31. This amount would be considered as being spending without the approval of the House of Assembly.
- The total actual spend for 2011/12 was \$59.5 million, \$17.6 million or 22.8% below budget.

2012/2013

Current Expenditures

- In 2012/13 the original budget estimate was \$1.005 billion.
- The House of Assembly approved a supplementary estimate of \$38.5 million for 7 Ministries before the year-end of March 31.
- The House of Assembly approved another supplementary estimate of \$10.3 million for 3 Ministries after the year-end

of March 31. This amount would be considered as being spending without the approval of the House of Assembly.

- The total actual spend for 2012/13 was \$1.029 billion, \$23.9 million or 2.3% above budget.

Capital Expenditures

- In 2012/13 the original budget estimate was \$76.2 million.
- The House of Assembly approved a supplementary estimate of \$25.0 million for various capital projects before the year-end of March 31.
- The House of Assembly approved another supplementary estimate of \$0.036 million for various capital projects after the year-end of March 31. This amount would be considered as being spending without the approval of the House of Assembly.
- The total actual spend for 2012/13 was \$64.5 million, \$11.6 million or 15.8% below budget.

2013/2014

Current Expenditures

- In 2013/14 the original budget estimate was \$1.118 billion.
- The House of Assembly approved a supplementary estimate of \$50.1 million for 5 Ministries before the year-end of March 31.
- The House of Assembly has not approved any further supplementary estimates.
- The total actual spend for 2013/14 was \$1.118 billion, which is in line with the original budget estimate.

Capital Expenditures

- In 2013/14 the original budget estimate was \$84.6 million.
- The House of Assembly approved a supplementary estimate of \$2.1 million for various capital projects before the year-end of March 31.
- The House of Assembly has not approved any further supplementary estimates.
- The total actual spend for 2013/14 was \$65.4 million, \$19.2 million or 22.8% below budget.

2014/2015

Current Expenditures

- In 2014/15 the original budget estimate was \$1.107 billion.
- The House of Assembly approved a supplementary estimate of \$17.9 million for 7 Ministries before the year-end of March 31.
- The House of Assembly has not approved any further supplementary estimates.
- The total actual spend for 2014/15 was \$1.094 billion, \$12.6 million or 1.1% below budget.

Capital Expenditures

- In 2014/15 the original budget estimate was \$61.9 million.
- The House of Assembly approved a supplementary estimate of \$4.9 million for various capital projects before the year-end of March 31.
- The House of Assembly has not approved any further supplementary estimates.
- The total actual spend for 2014/15 was \$49.7million, \$12.2 million or 19.7% below budget.

The complete list and further detail may be found in the FS's letter to the Commission of July 2016 posted on the Commission's website.

The Commission noted that FIs have been amended since 2009 to make explicit reference in the relevant section to the possible imposition of penalties where unauthorised over-spending occurs, namely that:

"Accounting Officers are subject to penalties per F.I. 2.9 if an over-expenditure occurs without the prior approval of the Legislature."

This statement first appeared in the 2011 FIs; but no such explicit reference could be found in the 2009 FIs dealing with "Overspending".

Finally, FS Manders wrote that unapproved overspends are regarded as "serious financial violations" by the Ministry of Finance, and while the Commission has asked for a record of instances where civil servants have been held to account, none was produced. Upon further questioning by the Commission, FS Manders said that he was unable to confirm whether anyone in the Civil Service had ever been referred and/or made the subject of possible surcharge in connection with unauthorised overspends for the relevant years.

"However," he wrote, "as I explained in my July 2016 letter to the Commission, discipline in relation to unapproved overspends is being addressed in the annual review of performance in the performance appraisal process."

Section 3.17 Information Technology (IT) Deficiencies

Introduction

The Auditor General noted "risks to the delivery of services as well as protection of the accuracy, confidentiality and integrity of information collected" and noted that "... it is critical that these deficiencies are rectified."

Specific areas of concern identified in the Report included:

- Weaknesses in access rights/privileges;
- Lack of password policies;
- Formal change management and problem/incident management procedures were not in place;
- Disaster recovery plans and Business Continuity Plans were not finalised and updated;
- One open-ended contract resulted in significant modification costs as well as undue reliance on one individual;
- Weaknesses in the Virtual Private Network;
- Security Policy not implemented;
- Operations and emergency procedures not documented;
- A Risk Assessment and Risk Assessment Plan have not been prepared; and
- Lack of a policy on disposal of IT devices.

Evidence/ Findings

The Commission received a letter response dated 6 September 2016, from Mr. Michael Oatley of the Information Technology Office (ITO) (available on Commission website). The response noted that "When responding, it is important to explain that some of the IT deficiencies and recommendations were addressed to the Accountant General. Where the deficiencies and recommendations were addressed to the ITO, the ITO generally agrees with and has addressed the deficiencies, but it should be recognised that IT security remains a challenge in the modern business environment."

The Response further noted that "IT Security has been identified as priority in the ITO business plan and consequently the procedures and technology for the management of IT Security have been improved as recommended.." as well as that "An IT Security Programme has been established to monitor risk, set priorities and implement. A Security Manager and Security Analyst have been hired. The Security policy has been updated and approved by Cabinet. Separate budget line items have been established for the management and improvement of IT Security."

The Commission noted a further point-by-point narrative explaining how deficiencies have been addressed, as well as significant documentary evidence (attached to the ITO response) detailing the efforts taken.

6: Findings

Part 1: VIOLATIONS (Terms of Reference paragraph 1)

Paragraph 1 of our Terms of Reference reads –

“Scope of Inquiry

1. Inquire into any potential violation of law or regulations..., by any person or entity, which the Commission considers significant and determine how such violations arose;...”

Relevant Regulations include:

- The Civil Service Conditions of Employment and Code of Conduct;
- Financial Instructions;
- The Ministerial Code of Conduct;
- Management Procedure PFA 2000 of the Ministry of Works and Engineering re: Purchasing of Goods and Materials;
- Management Policy and Procedure PFA 2002 of the Ministry of Works and Engineering re: Procurement of Contract Services.

We have described in Section 5(1) how we came to inquire into twelve individual contracts, referred to by letters (A) to (L). Our Findings with regard to each transaction conclude the narrative in each case.

For the purposes of the subsequent Terms of Reference, specifically paragraphs 2 and 3 (below), we shall consider the twelve contracts in the following order –

- (1) Contracts entered into by the Ministry of Works and Engineering (“W& E”) between 2007 and 2010 –
 - (A) Commercial Courts
 - (B) Maintenance & Stores Building
 - (D) Renovations Department of Human Resources
 - (E) Central Laboratory Building Project and Southside Laboratory Contract

In November 2007, the Minister was Mr. Dennis Lister JP MP and the Permanent Secretary Dr. Derrick Binns. From December 2007, the Minister was Mr. Derrick Burgess JP MP and the

Permanent Secretary Mr. Robert Horton. Contract (D) (the HR Department) also involved the then Head of the Civil Service, Major Kenneth Dill.

- (2) Contract (I) – Magistrates Court and Hamilton Police Station (Dame Lois Browne Evans Building (“DLBE”). Two contracts were entered into, in November 2007 and November/December 2008. The Ministers and Permanent Secretaries, respectively, were as stated in (1) above.

- (3) Contracts entered into by the Ministry of Tourism and Transport. These were –

- (H) Motor Vehicle Safety and Emissions Testing/ Bermuda Emissions Control Ltd. (“BECL”)
- (K) Royal Naval Dockyard Cruise Ship Pier Heritage Wharf
- (J) Port Royal Golf Course Improvements Capital Development
- (F) Global Hue
- (G) Ambling

The Ministry, formerly the Ministry of Transport, became Tourism & Transport in 2004. Dr. the Hon. Ewart Brown JP was the Minister from 2001. He continued as Minister when he became Premier in October 2006, until he retired from both posts in November 2010. The Permanent Secretary was Major Marc Telemaque from 2002 and he continued in that role after he became Secretary to the Cabinet in December 2006. Ms. Cherie-lynn Whitter was the Permanent Secretary from April 2008 until January 2011.

- (4) Contract (C) the Purchase of Sand & Rock
The contract was made by the Ministry of W & E. in April 2009. The Minister, Mr. Derrick Burgess, was not involved. The Permanent Secretary was Mr. Robert Horton and the Purchasing officer was Mr. Vic Ball.
- (5) Contract (L). L. F. Wade Airport Development Project
The relevant negotiations regarding obtaining a waiver of Financial Instructions took place between Mr. Anthony Manders, the Financial Secretary, and Mr. Curtis Stovell, the Accountant General, in 2014-2016.

Our Findings with regard to these contracts for convenience are repeated here –

Contract	Findings
A - Commercial Courts / Ministry of Finance Renovations (3.1.2)	<ul style="list-style-type: none"> Minister Burgess ignored technical recommendations and compromised the tender process; He awarded the contract without consulting the technical officers in his department and without obtaining prior Cabinet approval. Minister Burgess' actions ran counter to the requirements of clause 6.7.3 of P.F.A. 2002, which require that technical experts provide a recommendation and that the recommendation be forwarded / submitted to Cabinet for approval. Permanent Secretary (PS) Horton, as Accounting Officer, failed to notify the Accountant General of breaches of Financial Instructions associated with this project, as required by FI 2.14
B - Maintenance and Stores Building (3.1.3)	<ul style="list-style-type: none"> This contract was awarded while Minister Lister was in office, without Cabinet approval and contrary to recommendation of the technical officers of the Department, and not to the lowest bidder. Contrary to FI 8.2.3 (7), there was no documentation, such as a Cabinet conclusion, for the decision not to accept the lowest bid (although the files appear to be incomplete). PS Binns failed to notify the Accountant General (ACG) that no Cabinet approval was obtained for this contract and therefore there was a breach of Financial Instructions associated with this project, as required by FI 2.14 As successor PS, Mr. Horton (who was responsible for authorising payments as Accounting Officer) failed to notify the Accountant General of breaches of Financial Instructions associated with this project, as required by FI 2.14
C - Purchase of Sand and Rock (3.1.4)	<ul style="list-style-type: none"> A Purchase Order is considered an agreement under PFA 2000 and therefore the Commission does not concur with the Auditor General's finding of no contract or agreement. However the Commission cautions for a purchase of this magnitude a proper contract would safeguard the Government to a greater degree. Notwithstanding that this was treated as an emergency, given the size of the contract (\$1.4 Million), the Commission considers that Cabinet approval ought to have been sought, pursuant to Financial Instruction 8.3.1. A clear conflict of interest existed for Purchasing Officer Ball, with no disclosure of identity of principals to Permanent Secretary – in breach of Financial Instruction 3.3 and with reference to Civil Service Conditions of Employment and Code of Conduct 7.2.3
D - Renovations- Department of Human Resources (3.1.5)	<ul style="list-style-type: none"> The Commission accepts that there was confusion as to the responsibility between PS Horton and Head of the Civil Service, Major Kenneth Dill. We do criticise the fact that two senior Civil Servants (Dill and Horton) allowed this situation to arise, with the result that Financial Instructions, particularly the requirement for Cabinet approval, were ignored. The Commission also noted that there appears to have been no Ministerial involvement in this case.
E - Central Laboratory Building Project and Southside Laboratory Contract (3.1.6)	<ul style="list-style-type: none"> Notwithstanding the urgency, which initially propelled the Marsh Folly project forward, Cabinet approval could still have been sought, as it should have been, a point which PS Horton acknowledged was a regretful oversight on his part. The tender process was defective for Central Lab Southside. Only one bidder, the successful bidder, was told about the reduced bid requirements, giving that bidder an unfair advantage.

Contract	Findings
	<ul style="list-style-type: none"> • Ministerial interference by Minister Burgess in the drafting of the Contract Award Recommendation to Cabinet for Central Labs Southside, and acceptance of this course of action by the PS. This forgoing criticism of the PS remains valid in the Commission's view, notwithstanding any reservations PS Horton may have expressed to the Minister at the time. • Apparent non-disclosure by Minister Burgess to the Cabinet of the concerns and recommendations of the technical officers on the Central Lab Southside award contrary to P.F.A. 2002, clause 6.7.3 • An absence of clear guidelines on what a PS ought to do in circumstances where he disagrees with the course of action a Minister proposes to take, short of resigning. It is clear in this case that PS Horton had misgivings at the interference in the bidding process by the Minister. A PS placed in this position is in a difficult position. However, the FI are clear that Accounting Officers, like any other civil servant, must inform the ACG of any breaches of the FI. In the Commission's view, this includes a failure to adhere to PFA 2002. No notification was ever made to the ACG by PS Horton or any other civil servant. • Justification by Minister Burgess, that this project was a case of contractor empowerment is accepted by the Commission. However, the Commission notes that appropriate procedure should still have been followed and documented accordingly.
<p>F - Global Hue: 3.1.7 - Departmental Expenditures; 3.3 - Significant Contracts Not Tendered</p>	<ul style="list-style-type: none"> • The Contract was not tendered, in violation of FI 8.2.3. The Commission agrees with the Auditor General's findings that this was a new contract not a renewal. However it was treated as a renewal by the Minister and Permanent Secretary. The Commission learned that the second contract was not renewed at the expiration of the second two-year term. • The Premier as Minister for Tourism recommended the contract to Cabinet as a straightforward renewal with no evident concern shown over the serious criticisms raised in the Auditor General's report. There is no evidence that the criticisms of Global Hue were brought to the notice of Cabinet when the 2009 Agreement was approved. • This new contract was agreed after the 2008 financial crash and the Commission believes that environment would have been conducive for a competitive tender among advertising agencies, likely enhancing value for money. • The Commission understands that the Director of Tourism reports to the PS of the Ministry of T&T. The PS appeared to provide no oversight of the Director of Tourism who in turn failed to ensure requisite tender information was obtained or a waiver of the tender requirement. The PS failed to notify the Accountant General of this breach of Financial Instructions. • Payments were made by the Accountant General's department on the basis of sign off by the Accounting Officer without evidence of tendering or a request for a waiver.
<p>G – Ambling: 3.3 Significant Contracts Not Tendered</p>	<ul style="list-style-type: none"> • The contracts agreed with Ambling in 2008 and in 2010 were not tendered. • It appears that the Premier negotiated the contract directly with Ambling with no input from the Cabinet Secretary or Permanent Secretary. • Substantial sums were paid to Ambling but there are no coherent records of any services they performed.

Contract	Findings
	<ul style="list-style-type: none"> • This is another contract that should sensibly reside in the Ministry of W&E but was moved by the Premier to T&T (others included Bermuda Emissions construction, Heritage Wharf, and Port Royal). • The PS said multiple agreements were put in place with Ambling but only one Cabinet approval appeared to have been sought. • The Financial Controller was unable to recall any services that had been provided under the contract(s) and the Commission was unable to locate any reports or work product. • The Commission understands that the Director of Tourism reports to the PS of the Ministry of T&T. The PS appeared to provide no oversight of the Director of Tourism who in turn failed to ensure requisite tender information was obtained or a waiver of the tender requirement. The PS failed to notify the Accountant General of this breach of Financial Instructions. • Payments were made by the Accountant General's department on the basis of sign off by the Accounting Officer without evidence of tendering or a request for a waiver.
<p>H - Motor Vehicle Safety and Emissions Testing Programme: 3.3 Significant Contracts Not Tendered; Auditor General Special Report</p>	<ul style="list-style-type: none"> • Assurances (2001 and 2003) and contracts were provided (2005 to 2009) to BECL without an appropriate tender process. • The selection of BECL was the personal choice of the Minister of Transport and Tourism (Brown) • The delegation of this project from Works and Engineering to Transport and Tourism was unclear and inappropriately documented contrary to Financial Instructions 2.7 and 12.1.2. • The PS failed in his oversight of the Department of Transport whereby the Director of Transport failed to ensure requisite tender information was obtained per the 2005 Cabinet decision, or a waiver of the tender requirement. The PS failed to notify the Accountant General of this breach of Financial Instructions. • Accountant General Joyce Hayward, as the Principal Accounting Officer for Government, failed to comply with Financial Instructions. Specifically, she (i) failed to implement and/or permitted the Ministry to circumvent Cabinet requirement (2005) of open tender process, and (ii) approved payments without sight of requisite approvals.
<p>I - Magistrates Court and Hamilton Police Station (Dame Lois Browne Evans Building): Auditor General Special Report</p>	<p>Contract #1</p> <ul style="list-style-type: none"> • Minister Lister's non-disclosure to Cabinet of the technical officers' recommendation ran counter to the requirements of clause 6.7.3 of P.F.A. 2002, which requires that this recommendation be submitted to Cabinet for approval. • An absence of practical guidelines on what a PS (in this case PS Binns) ought to do in circumstances where he has misgivings about with the course of action a Minister proposes to take. The current guidance offers civil servants a simple choice – carry out the instructions or resign. The ultimate decision rests with Cabinet but Cabinet must be properly informed. Cabinet was not fully informed in this case. The Commission notes that the FI expressly requires that the Technical Officer's recommendations be submitted to Cabinet for approval. If a Minister fails, or refuses to submit the TO's recommendations, the appropriate step is for the PS, as Accounting Officer, to inform the ACG of a breach of the FI pursuant to paragraph 2.14. This was not done in this case. Indeed, it appears that paragraph 2.14 is rarely if ever invoked.

Contract	Findings
	<p>Contract # 2</p> <ul style="list-style-type: none"> • The second contract was not submitted by Minister Burgess and PS Horton for approval by Cabinet, nor were principals disclosed as required. • It was clear that Mr. Burgess' consultant Mr. Julian Hall was aware in October 2008 of Burgess and Hollinsid's involvement. The Commission cannot accept that Minister Burgess did not know of their involvement. • The level of compensation for providing collateral by Messrs.' Burgess and Hollinsid appears on its face to be excessive. Commission estimates suggest that if the project lasted for approximately 30 months with a \$6 million profit, they would have received \$300,000 and \$180,000 respectively in salaries and \$1.32M and \$1.2M in profit margin respectively, in return for provision of collateral (home equity) valued at approximately \$1.6M but no actual cash outlay.
<p>J - Port Royal Golf Course Improvements Capital Development Project: 3.1.7 Departmental Expenditures; Auditor General Special Report</p>	<ul style="list-style-type: none"> • The delegation of responsibility for this major capital expenditure was unclear, unsatisfactory, and inappropriately documented. • No documented financial procedures were adopted and followed by Port Royal Golf Course Trustees contrary to the 'Introduction' section of Financial Instructions. • Inappropriate level of financial oversight of a QUANGO by the Department of T&T, contrary to FI 2.7 'Delegation of accounting officers' responsibility' • Poor assumption of responsibility when a handover occurs and a PS assumes responsibility for a new Ministry.
<p>K - Royal Naval Dockyard Cruise Ship Pier Heritage Wharf: Auditor General Special Report</p>	<ul style="list-style-type: none"> • The delegation of this project from Works and Engineering to Transport and Tourism was unclear and inappropriately documented contrary to Financial Instructions 2.7 and 12.1.2. • The final terms of the construction contract were not submitted for approval to Cabinet, as required by FI 8.3.1, by the Premier, although Cabinet did apparently approve the selection of the vendor. The contract did not allow the right to audit nor did it require a performance bond. • Selecting a contractor without a bid price did not allow price competition to prevail. • Expertise that resided in the Ministry of W&E, which could have added value, was bypassed. • This was another example where the handover between a new PS and the predecessor appeared inadequate. • The Accountant General was not notified of the breach of Financial Instructions with respect to Cabinet approval required by FI 2.14. • Payments were made by the Accountant General's department without evidence of Cabinet approval of the contract.
<p>L - L. F. Wade Airport Development Project: Terms of Reference – Paragraph 7 (Current Safeguards)</p>	<ul style="list-style-type: none"> • The Commission commends ACG Stovell for his response to the Government's request for a waiver, first made in September 2014. • FS Manders failed to make clear that the waiver he sought for CCC would extend to approval of the whole project including the selection of Aecon as contractor. The Commission further notes regarding the difference in perspective regarding the waiver between the FS Manders and ACG Stovell that it is for the ACG to determine in any event on what basis a waiver should be issued • There appears to be no express provision or provisions in Financial Instructions that address proposed public private partnerships. • The Office of Project Management and Procurement played a more limited role than might have been expected, if it had been fully staffed and resourced at the time.

Section 5 (2): Accounting/Procedural Issues

Findings and recommendations in respect to those other Section 3 matters which the Commission reviewed, and which we have previously described as “Accounting/Procedural Issues”, are found in that section of our Report and in view of those findings we have not found it necessary to bring them forward in this section.

The Commission wishes however to sound this note of caution with respect to accounting/procedural issues. It was suggested to us that matters have improved since the Auditor General completed her review (and we find that they have and indicate that is so where appropriate) and the fact that the Auditor General has since been issuing unqualified opinions in respect of the Consolidated Fund has been offered as evidence of this.

It has to be pointed out that, as far as the Auditor General is concerned, qualifications in prior years were based on the fact that her office found serious deficiencies in internal control over the management of various capital development projects. In this regard, the Commission notes that there has been little or no capital development to speak of since that reporting date.

Part 2: Referrals (Terms of Reference paragraphs 2 – 6)

To the Director of Public Prosecutions and the Police (paragraph 2)

Paragraph 2 of the Terms of Reference reads –

“References to other agencies

2. Refer any evidence of possible criminal activity, which the Commission may identify, to the Director of Public Prosecutions (DPP) and the Police;”

As stated above in Section 2, we have approached this part of our task with great care and discretion. We have interpreted paragraph 2 as follows:

Interpretation

“Evidence of possible criminal activity” must be distinguished from the standard of proof required by the criminal law in other circumstances, including –

“evidence which establishes guilt”: this is the standard of proof “beyond doubt” which is the burden that the prosecution must discharge in order to obtain a conviction after a criminal trial;

“evidence which justifies criminal proceedings”: the prosecuting authority must be satisfied that there is evidence

on which a jury could properly convict the defendant; and “evidence which justifies a police arrest”: in brief, an arrest may be made on the basis of reasonable submission.

We interpret paragraph 2 of the Terms of Reference (TOR) as meaning that a reference is only justified when there is evidence which we accept of facts which establish “possible criminal activity” with the emphasis on “possible”. We have applied this as an objective test, meaning that there is evidence which justifies referral to the DPP/Police for further investigation of possible criminal offences.

We are not concerned with any question of innocence or guilt nor do we say that any individual might or should be committed for trial or arrested whilst further investigations are carried out. Those are matters for the DPP and the Police, not for us.

“Possible criminal activity” does not expressly require us to identify the individuals who were involved in the activity in question but we have taken the view that if the evidence before us does identify any individual(s) who were involved in it, we must say so. But we emphasise that naming an individual does not imply any finding of guilt. To read this Report in that way would be to misunderstand it.

Nor do we seek to influence the scope of whatever inquiries the DPP and the Police may undertake. That too is entirely a matter for them, whether or not we have referred any matter or individual to them. Conversely, our decisions and this Report do not limit the scope of their inquiries.

Privilege

Two witnesses have asserted their legal right to refuse to answer questions on the ground commonly known as the right to avoid self-incrimination, and more colloquially as ‘pleading the Fifth’. Leading counsel, Mr. Jerome Lynch QC, who appeared on their behalf, submitted that –

“The privilege against compulsory self-incrimination is part of the common law of human rights” (ref. Cross and Tapper on Evidence para.30).

The Commission recognised that each witness had the right to claim the privilege, on the basis that –

“First.....the fact that you have claimed legal privilege against self-incrimination is not evidence against you of guilt of any criminal offence....

Secondly, the Commission is required by its Terms of Reference to refer to the Director of Public Prosecutions and to the Police [“any evidence of possible criminal activity” which it may identify]; and

[Thirdly], the Commission therefore will determine those issues by reference to such other evidence as it has received relating to [them]...Or, as lawyers sometimes put it, without the benefit of hearing any evidence from you about [them].” (Transcript 29 November 2016 page 29).

NOTE: It might be said that the claim for privilege against self-incrimination is a voluntary admission of “possible” criminal activity; but we do not regard it as such. We consider that there must be other, independent evidence to that effect, which we accept, before we can make that finding.

In the result, therefore, the question for the Commission under TOR paragraph 2 is unaffected by the witnesses’ privilege claim: it remains, is there evidence from other sources, which we accept, disclosing “possible criminal activity” by that person? But there is one practical difference – we have no evidence from that person which might have influenced our decision whether or not to accept other relevant evidence.

Pending Police Inquiries

In his submissions on behalf of the two witnesses who claimed privilege, Mr. Lynch QC placed much emphasis on the fact that a police investigation into some at least of the same matters has been pending during our Inquiry. The Commissioner of Police confirmed that that was the situation when we communicated with him in May 2016. We took the view that our Inquiry is distinct from whatever police investigation is taking place, and that we should not take any formal steps to discover what evidence they have obtained (although Mr. Lynch submitted that we should have done so). Our object has been to obtain evidence from primary sources, and theirs by definition must be second-hand.

We did not accept Mr. Lynch’s submission that his clients were somehow prejudiced by the fact that a parallel police investigation to some extent has overlapped our Inquiry. Among his complaints was the fact that his clients had not been approached by the police investigators or invited to make statements to them. He did not identify any evidence that might be specifically requested from the police, and in the event the submission was overtaken by their decisions to claim privilege and not to give oral evidence.

“Evidence of Possible Criminal Activity”

We have identified in Section 6: Part 1- Violations, what we find were ‘violations of law or regulations’ by reference to relevant contracts, and in Section 5(1): Evidence we have set out the names of the persons who were involved as Ministers or civil servants at relevant times.

The contracts were as follows –

- (1) Four contracts (contracts (A) (B) (D) and (E)) were placed by the Ministry of Works and Engineering (W&E) at different dates between November 2007 and April 2010.

We do not find evidence of “possible criminal activity” in relation to any of these four contracts, by any of the Ministers and civil servants involved.

- (2) The Magistrates Court and Hamilton Police Station (Dame Lois Browne Evans Building-DLBE) contract (I) was first awarded in November 2007 when Mr. Dennis Lister JP MP was the Minister and Dr. Derrick Binns the Permanent Secretary.

We find no evidence of ‘possible criminal activity’ in relation to that contract. In November/December 2008, however, the contracting company was re-constituted and renamed LLC Ltd., and a new contract was entered into. The Minister at this time was Mr. Derrick Burgess JP MP and the Permanent Secretary Mr. Robert Horton.

The new contractual arrangement involved two new principals of the contracting firm, LLC Ltd., one being a friend or acquaintance of the Minister and the other a half-brother of the then Premier Dr. Brown. They guaranteed repayment of bank advances made for the benefit of the Government through second mortgages on their homes. This did not require any immediate outlay on their part and their existing first mortgages were also in favour of the bank. Each stood to receive a substantial financial benefit from ‘wages’ paid during the currency of the contract and from major shares of the contractor’s profit on completion. None of this was disclosed to Cabinet by the Minister or by the Premier, nor was Cabinet approval sought.

There was written evidence that a consultant representing the Minister and Ministry was present at relevant meetings with the bank. Minister Burgess has denied that he knew the identities of the new principals and the guarantors when he authorised the contract with LLC Ltd. but we cannot accept this. His evidence implies that the consultant failed to tell him and that he, the Minister, was in total dereliction of his Ministerial duties by failing to concern himself with who they were.

The Minister therefore authorised the new contract when, as we find, he knew that a friend or acquaintance of his and a half-brother of the Premier had been introduced as principals and that they would receive substantial financial benefits from successful completion of the project, without obtaining Cabinet approval or otherwise reporting their involvement.

In the case of the Minister, we also take account of the manner in which he reacted when he was questioned about this matter. He evaded questions and refused to answer them. He was offensive to counsel and to members of the Commission. He made it clear that he was unwilling to give frank and truthful answers on this topic. His reaction and demeanour was significantly different from when he was asked about other matters.

We have received no evidence suggesting that the then Premier was unaware either of the need for a new contract for this 'flagship' project or of the fact that two private individuals had become involved as principals and guarantors. We would find, on the evidence available to us, that he knew about them and who they were.

Both the Minister and the Premier failed to notify Cabinet and failed to ensure that Cabinet approval was obtained.

The Commission understands that there is an extant police investigation with regard to the DLBE Building project. The Commission believes that this should continue with respect to the second contract which would include the involvement of the Minister. We do not make that finding with regard to Permanent Secretaries Dr. Binns or Mr. Robert Horton. The Commission is unable to agree, on the evidence before it, whether it should refer the then Premier for investigation in respect of this contract.

- (3) The contracts entered into by the Ministry of Tourism and Transport between 2001 and 2010 (contracts (F)(G)(H)(J) and (K)) had a number of common features. Three of them (Motor Vehicle Safety and Emissions Testing Programme, Royal Naval Dockyard Cruise Pier- Heritage Wharf and Port Royal Golf Course Improvements Capital Development Project) were or included construction contracts which ought to have been negotiated and supervised by W&E which housed relevant government expertise. Financial Instructions (FI) which required this were ignored. Authority to enter into construction contracts and to supervise them on behalf of the Government was given to a private company (BECL and Heritage Wharf) and to a QUANGO (Port Royal) which lacked necessary expertise to safeguard the Government's interests. At least three of the contractors (BECL, Global Hue (in 2009) and Ambling) were selected by the Minister personally without a competitive tender process.

The Commission understands that these matters are the subject of extant police investigations and believes they should continue including the involvement of the Minister/former Premier.

We do not make that finding with regard to the Permanent Secretaries, Major Marc Telemaque and Ms. Cherie-lynn Whitter, nor any other civil servant.

- (4) The Purchase of Sand and Rock contract (contract (C)) entered into by W&E in April 2009 was authorised by the Permanent Secretary, Mr. Robert Horton, on the recommendation of Mr. Vic Ball, who did not reveal to him a serious conflict of interest regarding the selection of the contractor, Harmony Holdings Ltd., a recently-formed company 50% owned by his father.

We consider that this matter should be investigated by the police and the DPP, but we do not make that finding as regards Mr. Robert Horton.

- (5) There is no evidence of possible criminal activity in relation to the L. F. Wade Airport Development Project (Contract (L)).

To the Head of the Civil Service (paragraph 3)

Under paragraph 3 of our Terms of Reference, we are required to refer "any evidence of possible disciplinary offences", which we may identify, to the Head of the Civil Service. Under this head, we have considered what criticisms, if any, might be made of civil servants who were involved in Contracts (A) to (L) (above), and also whether we would consider it appropriate to commence disciplinary proceedings against any of them now, in 2017.

Answering the second question first, we do not consider that disciplinary proceedings would be appropriate, essentially for two reasons. First, because of the lapse of time; and secondly, because throughout the relevant period in connection with the matters we reviewed, there was a widespread disregard of proper procedures which was tolerated at all levels within the Civil Service and permitted, even sometimes apparently encouraged, by Ministers in charge of relevant Departments. There is even evidence of deliberate attempts to circumvent FI, for example in BECL (Contract (H)) where the Accountant General was persuaded to accept something less than the Cabinet's requirement of an 'open tender process'.

We have been reminded that the contracts we have inquired into represent only a small proportion of the many hundreds or even thousands of contracts negotiated and entered into by Government departments during the period in question, and we have been cautioned against finding that there was a general malaise throughout the Government service. But if that is correct, the question arises, why were the contracts we have examined, which include the largest and most high-profile projects undertaken by the Government during those years, not handled as they should have been?

Returning to the first question (above), we have identified breaches of FI and other regulations which in our view could be identified

as “possible disciplinary offences” within our Terms of Reference, paragraph 3.

These are set out in **Section 6: Part (1) - Violations** where individual civil servants and relevant contracts are named.

All the civil servants we have named occupied senior posts, and we make the following further observation. Those who were concerned with these contracts at the level of Permanent Secretary (or senior, as Secretary to the Cabinet) at the very least permitted them to be handled as they were and failed to report non-compliance with the FI to the Accountant General as the FIs required them to do (FI 2.14). Apart from any formal steps they might have taken as individuals, by virtue of their senior positions and responsibilities, we heard no evidence that they acted or sought to act collectively in order to ensure full compliance in all cases, large and small. If and when Ministers disregarded their advice or that of their Departments, we would have expected them, first, to place their doubts or dissent on record (as they occasionally did) and secondly, to consult their colleagues regarding the situation they found themselves in. This seems not to have occurred.

We were reminded that the Conditions of Employment and the Code of Conduct do not provide guidance for any civil servant who is conscious of the need to dissent from a proposed course of action, short of the nuclear option of retirement given by paragraph 7.0.9. We recommend (below) that the Code should be redrafted to give clear and full guidance to any civil servant who finds himself in that position.

We also record that, in our view, it is not sufficient for senior civil servants to excuse themselves on the ground that ‘they advise, but Ministers decide’. The dilemma arises when a Minister disregards their advice and decides on a course of action that breaches Financial Instructions. We saw examples of letters from Permanent Secretaries which implied dissent or their coded disapproval of a proposed course of action. They should be able to record their dissent, in our view, and if necessary “blow the whistle” without putting their jobs at risk.

Surcharge (paragraph 4)

Paragraph 4 reads –

“Draw to the attention of the Minister of Finance any matter, which the Commission may identify, appropriate for surcharge, under section 29 of the Public Treasury (Administration and Payments) Act 1969;...”

We were doubtful whether any of our criticisms of civil servants are in respect of matters “appropriate for surcharge” because of their nature (e.g. failure to obtain Cabinet approval, failure to report regular breaches of FIs, etc.), and we set out to discover

whether, and if so, how often and in respect of what disciplinary offences, this procedure has been used during the past decade. It appears to have been rare and generally regarded as appropriate to specific defaults involving liquidated sums of money. This confirmed our initial view that we should not identify any matters to the Minister of Finance under this head, and we do not do so.

Moreover, we consider that it would be inappropriate to recommend surcharge proceedings in respect of the matters we have enquired into, so many years after the events in question, and at a time when some of those who were involved have left or retired from the Civil Service.

We do recommend, however, that the scope of surcharge proceedings and the circumstances in which they may be invoked should be clarified and publicised more widely than they appear to be at present.

Civil Asset Recovery (paragraph 5)

Paragraph 5 reads –

“Draw to the attention of the Minister of Legal Affairs (as the Enforcement Authority for Bermuda) any matter, which the Commission may identify, appropriate for civil asset recovery under Part IIIA of the Proceeds of Crime Act 1997;...”

We have been conscious throughout that we should not make or appear to make any finding of guilt or innocence, particularly in relation to “possible criminal activities” (Terms of Reference, paragraph 2). Therefore, we take no action under this head, notwithstanding that the burden of proof for civil asset recovery may be lower than the criminal standard.

Whether or not action should be taken will be a matter for consideration by the Minister at an appropriate time.

Civil Proceedings Before the Courts (paragraph 6)

Paragraph 6 reads –

“Draw to the attention of the Attorney-General any matter, which the Commission may identify, appropriate for civil proceedings before the courts;...”

We have concluded that we could not do this without finding, or implying, that we considered that the civil burden of proof can be discharged, or that a prima facie case for liability exists, in respect any matter which we might identify under this head. For the same reason as under Paragraph 5 (above), therefore, we take no action under this head.

7: Current Safeguards

Whether or not action should be taken will be a matter for consideration by the Attorney General at an appropriate time.

We should note, first, that we have taken “*Current Safeguards*” as referring to the present (2017), rather than specifically to the period 2009/2012 covered by the Auditor General’s Report. That is an important distinction because significant steps have been taken to address some of the issues which the Auditor General highlighted in her Report.

The Commission understands that these steps were taken to improve governance and believes on the evidence before it, that they have added to the checks and balances necessary to make Government more accountable and transparent.

Secondly, we can identify the date when these processes began with reasonable accuracy. Early in 2010 the Ministry of Finance retained KPMG Advisory Ltd., internationally recognised financial consultants, to undertake a diagnostic review of a small sample of capital projects with a view to “*identifying the weaknesses in Government’s capital project management practices and determining how leading practices can be adopted to improve the transparency and control of expenditures.*” KPMG reported to the Minister of Finance during 2010.

Meanwhile, the Internal Audit Act 2010 had been passed, leading to the establishment of an Internal Audit Department within the Ministry of Finance. It was designed, to paraphrase from the preamble, to provide for an independent and objective assessment of stewardship, performance and cost of government policies, programmes and operations. The office was also intended to provide reasonable assurance that persons entrusted with public funds are carrying out their duties effectively, efficiently and in accordance with the law (which, in the Commission’s view can and should include Financial Instructions).

Former Secretary to the Cabinet Donald Scott told the Commission that it was his experience that the work of the Department of Internal Audit had led to “*significant improvements*” in public administration. The Commission also had sight of two internal audit reports and was impressed with the candour with which issues were tackled and the recommendations that were made as a result.

The KPMG Report

Six projects were chosen, two of which also figure in the Commission’s review: Royal Naval Dockyard Cruise Ship Pier - Heritage Wharf and Magistrates Court and Hamilton Police Station (Dame Lois Browne Evans Building).

A brief summary of the KPMG Report is worth highlighting here, given its relevance to matters on which the Commission has focused and about which we heard evidence: -

- Half of the projects reviewed did not comply with Government policies and procedures for capital project development, procurement or management; and that,
- Failure to comply with Government policies and procedures may have reduced the value of money achieved in these projects, and may have compromised the perception of fairness of the Government’s procurement processes.

This, it was noted in the KPMG Report, was in addition to the fact the Ministry of Finance had reported that “*in recent years, virtually every significant major capital project has been over budget*”.

It was these findings that led to KPMG’s recommendation that “*the Ministry develop an independent oversight authority to help manage capital projects and ensure compliance with Government policies and procedures.*”

Management Consulting Section

The KPMG review was followed by a study by the Management Consulting Section of the Bermuda Government (MCS) to identify and establish an organisational structure for the Office of Project Management and Procurement (OPMP). The study included workshops with senior members of the Civil Service.

The Commission thinks it instructive to highlight some of the findings which were listed in the MCS report dated February 2011: -

- “*Ministers have become involved in operational decision making for procurement and contracting in the Bermuda Public Service. In extreme cases recommendations for*

contract awards, made by technical officers following tendering, were changed. Post tender modifications then resulted in contracts awarded to companies not included in the original bid process. This is circumvention of procedures.”

- “Permanent Secretaries have not fulfilled their duty to provide guidance as to the Minister’s role and involvement in operations and decision making for procurement and contracting within the Bermuda Public Service.”
- “There are examples of non-adherence to the current contracting and procurement guidelines (Financial Instructions Section 8, PFA 2000, PFA 2002 and the Ministerial Code of Conduct) by public servants and Government officials at all levels.”

Those observations bear a striking similarity to what the Commission learned in evidence and on which we now report.

The Good Governance Acts 2011/2012

There followed a raft of good governance measures which were enacted in 2011 and 2012. The major piece of legislation was the Good Governance Act 2011.

It sought to address a number of the issues and problems which feature in the Auditor General’s Report for the three years under review by the Commission. The former Premier, the Hon. Ms. Paula Cox who continued to hold the portfolio of Minister of Finance after she became Premier in November 2010, told us that the 2011 Act was intended to:-

- Enhance oversight and control by: -
 - a. establishing the OPMP and setting out the functions of the Director;
 - b. requiring all public authorities, particularly QUANGOS (Quasi-autonomous non-governmental organisations), to comply with Financial Instructions and a Code of Practice for Procurement; and
 - c. amending the Internal Audit Act to include a clause which provides that the Director of Internal Audit’s power to obtain documents overrides other statutory provisions or rules of privilege that would otherwise prevent the disclosure of documents or information.
- Ensure best practice and transparency by: -
 - a. introducing regulations defining Financial Instructions and a Code of Practice for Procurement ; and,
 - b. providing for an annual report on procurement to be laid before the Legislature.

- Demonstrate zero tolerance for non-compliance by creating offences for: -
 - a. non-compliance with any part of the Public Treasury (Administration and Payments) Act (“the Act”) and its associated regulations, including Financial Instructions;
 - b. any public officer involved in the awarding of contracts who does not disclose a conflict of interest, whether legal, fiduciary, beneficial, family or otherwise;
 - c. willfully destroying or concealing documents as well as increasing the penalties for such offences – offences that were also introduced in the Internal Audit Act as well as the Audit Act; and
 - d. increasing the penalties for certain offences in both the Internal Audit Act and the Audit Act.
- Protect those who expose wrongdoing by the inclusion of whistleblower protection in the Employment Act.

[Ms. Paula Cox Witness statement dated 22 August 2016]

The offence of collusion in the award of Government contracts was added through the Good Governance Act 2012.

The Office of Project Management and Procurement

The OPMP is currently headed by an Acting Director. It was widely acknowledged before us that it is still not fully staffed. There have been no annual reports to the Legislature since its establishment and a Code of Practice for Procurement has still to be adopted; although the Commission is aware that a draft of the Code has been published, the sixteenth we understand, for the purposes of further review and comment.

While initially established within the Ministry of Finance, responsibility for the OPMP was transferred in March 2014 to the Cabinet Office. The reason or reasons for this was not made clear to the Commission.

Nonetheless, there is evidence that the OPMP has been operational. According to Financial Secretary (FS) Anthony Manders, the office is currently meeting the goal of reviewing all Government contracts before they go to Cabinet. “[T]hat’s happening now”, he testified, “even though they’re not fully staffed. I think they’re adding value to the process now, and I’m sure ... pretty sure ... [there has been] significant improvements in procurement all across Government”. [Transcript 11 October 2016, p.170]

By way of example, the Commission was informed by Mr. Manders that the OPMP was consulted at an early stage with

respect to the proposed L.F. Wade Airport Development Project. Mr. Manders explained:

"[T]hey have had a few Directors. The first, the interim Director, did ask questions about, you know, what level of due diligence we do. So they have been providing a level of oversight and, when the current Acting Director came in, he's invited in on all of the calls that the Government advisory team have weekly. So he is providing ... some level of oversight that's required under the Public Treasury Act but ... he [has] said that that would be strengthened with the Code of Practice being brought into force." [Transcript, 11 October 2016, p.155]

Consultation with the OPMP on the L.F. Wade Airport Development Project was also confirmed by Accountant General (ACG) Curtis Stovell who said that he had relied on FS Manders who had told him the OPMP was consulted and that the office had no objections. The Commission also had sight of evidence that the office was included on email exchanges between the ACG and the FS at various stages and at various times with respect to the Airport Development Project: see Section 5 (1) L. – L.F. Wade Airport Development Project.

While there is as yet no formal machinery that governs consultations, ACG Stovell said that it was his practice to always consult with the OPMP, particularly in cases where waivers were requested to depart from Financial Instructions and he mentioned specifically where multiple quotes are required for a purchase of \$100,000 or greater.

Secretary to the Cabinet Dr. Derrick Binns confirmed as well that the "extra layer" of oversight that was intended to be provided by the OPMP appears to be working. Dr. Binns testified that it was now his practice when reviewing Cabinet Memoranda to make sure that before they go to Cabinet for decision they confirm, where appropriate, that the OPMP has been consulted.

"[I]t has ensured that the necessary rigour is applied to the Cabinet when they are making a decision that all of the necessary procedures have been followed in the making of a recommendation", said Dr. Binns.

However, the Commission also learned that the views of the OPMP do not necessarily prevail at the Cabinet table.

As an example, the OPMP was consulted with respect to remedial works on the Swing Bridge in St. George's, and the decision to retain a professional engineering consultancy firm. The relevant Cabinet Minute [22 December 2015] noted that the OPMP had "questioned the process used by the Ministry to come to its conclusion". The Contract Award Recommendation was shared with the Cabinet in a Memorandum which related that following

an open tender process there had only been one bidder. No written detail is provided on the position of the OPMP save and except that having been consulted the office "did not feel able to support the recommendation".

The only note in the Cabinet Minute is that: "after questions raised by OPMP of engineers, had been answered, recommendations were made by the Ministry of Public Works' engineers to follow, in order for OPMP to satisfy OPMP's concerns (sic). The Minister noted that the Permanent Secretary was ensuring that the recommendations were followed."

With respect to proposed upgrades of the King's Wharf, the Commission noted that the views of the OPMP were sought and obtained in respect of a tender for work on a \$851,725 contract. The Cabinet Memorandum in support [24 February 2015] reported the OPMP had been consulted and had no objection to the recommendation.

However, the Minute of a subsequent Cabinet decision on 10 November 2015 to authorise the expenditure of up to \$15 million on upgrades the wharf, as well as the Memorandum in support, do not record that the OPMP was ever consulted on these proposed works.

In each case, the Commission notes that the projects were nonetheless under the supervision of the Ministry of Public Works.

Other Improvements

Finally, as the Commission has noted elsewhere in its Report, there have been other improvements, two of which are worth noting again in this section:

- The introduction of a new computer system, brought in subsequent to the three-year period under review, which provides a built-in system of checks to better ensure all authorisations and documentation are in place before payments can be processed.
- The development of an "enhanced" Financial Instructions Training Programme drawn up by the Cabinet Office in collaboration with the Ministry of Finance with the stated key aims of restoring "a culture of compliance" within the Civil Service which, it is hoped, will lead to adherence to Financial Instructions in all matters.

Limitation Period

We were surprised to note that all offences under the 2011/2012 Acts are subject to prosecution within a three year time limit (Section 33c). The Commission heard of no reason why a longer time limit should not apply. One suggestion, that the period of three years falls within the usual term of any Government (five years maximum), on its face makes little sense. We would reject any contention that the usual period should be reduced for that or any other political reason.

The Current Position

The two most important features of the 2011/2012 legislation, in the Commission's view, were undoubtedly the power to give Financial Instructions statutory force (2011 Act, section 33.3) and the establishment of the OPMP. We must express our considerable disappointment, perhaps our surprise, that neither of these has been fully implemented, even now in 2017. Whether the reason is a slow-moving bureaucracy, or a lack of political will, or a perceived lack of resources, or a combination of all three, it is not for us to say.

Regarding the OPMP, the fact is that it is not yet fully staffed, nor has a permanent Director been appointed (because, we understand, the current Acting Director is not yet fully qualified for the post). We have not been made aware of the reasons why the FI continue to have only the uncertain status to which we have referred throughout our Report.

Current Problems

We will also mention four matters where in our view the present situation is far from satisfactory, and where we shall make recommendations (Section 8) for improvement that we consider important.

Financial Instructions

Ministers decide, civil servants can only advise and carry out their decisions. This, or words to the effect, was a constant refrain before the Commission. It was a view that was urged upon us by a number of senior civil servants with respect to a number of decisions or contracts that were entered contrary to Financial Instructions and/or established practice.

The Commission's view is that Financial Instructions are a key component of safeguards to ensure that public funds are properly

spent. It is the job of the Civil Service to make sure that they are followed so as to meet that goal.

There are two provisions which underscore this role, to which reference has already been made in this report, but which we repeat here to underline the point.

Financial Instructions 2.12 Departure from Financial Instructions (FI): *"Permission to depart from FI must be sought from the Accountant General in writing with the reason and the mitigating controls. Departure from these instructions without the written permission of the Accountant General is not permitted."*

Financial Instruction 2.14 Notification of Breach of Financial Instructions: *"Government employees must immediately notify the Accountant General of any breaches of the FI. Notification is required even if the breach does not result in financial loss to the Government."*

However, the evidence before the Commission was that these two provisions were rarely exercised, if at all, in cases where they could have been and should have been.

But the Cabinet is supreme, the Commission was also told, and by extension so are the Ministers of Cabinet. Civil servants must therefore comply with their instructions, or so the argument goes.

While the Commission accepts and recognises the right of the Cabinet to adopt policies and make decisions, we also believe that the Civil Service is there to make sure procedures, for example Financial Instructions, are followed, and where decisions are made not to follow or deviate from those procedures that the reasons are documented.

The Commission is therefore recommending changes to Financial Instructions, the Ministerial Code of Conduct and Civil Service Code of Conduct and Conditions of Employment to both require and provide for documentation in the appropriate circumstances.

The Auditor General might therefore reasonably expect to find upon audit, evidence of why Financial Instructions were not followed, in a Cabinet Memorandum and/or minute of a Cabinet meeting as well as on the relevant Ministry file; and/or, as is the current requirement, evidence of a waiver having been issued by the Accountant General.

It will also be available for production before the Public Accounts Committee, the parliamentary body charged on behalf of the Legislature with the responsibility of ensuring that there is accountability for decisions of the Cabinet.

The Legal Status of FI

Power exists for the Minister of Finance to give FI full statutory force so that breaches (without reasonable excuse) would become criminal offences and could be prosecuted accordingly, but this power has not yet been exercised. We consider that it should be. At present, FI have legal backing only under the 1969 Act and violations can be sanctioned only on disciplinary offences, or as giving rise to a surcharge. That sanction has proved insufficient, which no doubt is part of the reason why some senior civil servants have regarded FI as guidelines only, as we have noted in Section 4. We may add that statutory enforcement could possibly be selective, recognising that not necessarily all breaches should be regarded as criminal offences.

Accounting Officers and the Role of the Accountant General

The Accountant General (ACG) is responsible for the processing of payments, with Accounting Officers having primary responsibility to ensure that such payments are in accordance with FI. While the ACG would be expected to monitor and review such payments to ensure they were properly in accordance with FI, the Commission heard evidence from both the present and former ACG to the effect that the ACG Department relies primarily on the Accounting Officers. The ACG does not and did not manually verify or 'double check' the supporting documentation.

(Note: the Commission heard that a new computer system, brought in subsequent to the period under review in the Auditor General's Report, has been introduced which provides a built-in system of checks to better ensure all authorisations and documentation is in place before payments can be and are processed.)

In addition to the processing of payments, the ACG has oversight responsibilities under FI, and to which reference has already been made, but which most notably include that:

- (a) Government employees must notify the ACG of any breaches of FI (Clause 2.14);
- (b) The ACG and the ACG alone, has the power to waive compliance with FI (Clause 2.12);
- (c) All questions of interpretation of the FI are for the ACG alone (Clause 2.6).

The Commission would have expected this oversight responsibility to be a major component of the ACG's function, however during the relevant period it appeared from both the Auditor General's Report and the evidence before the Commission, that the ACG (and her department) took no initiative with regard to such issues.

The reason for this, at least in part, as far as the Commission was able to ascertain, was that there appears to have been some confusion over the precise remit of the ACG as well as the status of FI.

Another issue of interpretation which arose in evidence related to the overlap between the FI and the procurement procedures at the Ministry of Works & Engineering (W&E). The FI, clause 8.2, states that, while all departments must follow the FI, W&E 'adopt more rigorous and complex procedures', namely the PFA procedures. The question which arose was this: if W&E fail to follow the PFA, is this a breach of FI which needs to be reported to the ACG? Put a different way, does the ACG's duties of oversight extend to monitoring compliance of the PFA by W&E?

There are important differences between the PFA and the FI in relation to procurement. The FI have been amended over time, but the FI typically only required three quotations and for the contract to be formally approved by Cabinet. The PFA on the other hand required a public tendering process, followed by a formal review by the Technical Officers (TO) and for the TO's recommendations to be forwarded to Cabinet for approval.

In relation to the W&E contracts under review, the Commission found that the TO's recommendations were not always submitted to Cabinet. Instead, the Minister gave his own analysis, often through a Cabinet Memorandum and this would form the basis for Cabinet's decision. It could be argued that such a process was not in breach of the FI, even if it was not compliant with the PFA. This appears to have been the view of the civil servants concerned. On occasion, the civil servants advised the Ministers that such behaviours were ill-advised, but they never informed the ACG. They did not appear to believe that this was required.

Given that the FI themselves refer to W&E 'adopt[ing] the more rigorous and complex procedures of the PFA', the Commission's view is that the ACG's remit does extend to W&E's compliance with the PFA.

It is however clear from the evidence heard by the Commission that civil servants appear to have taken a different view. The Commission found that, in relations to the W&E contracts it has reviewed, the PFA was frequently breached. Yet none of the civil servants, senior or junior, ever informed the ACG or appeared to have considered that this might be required. It is difficult to avoid the conclusion that, in relation to W&E procurement, the ACG had no oversight whatsoever. Yet the civil servants did not see the need to inform her of breaches of the PFA. Equally, the ACG who had primary responsibility for overseeing the functioning of the FI allowed a situation to continue whereby Government contracts were being awarded and processed without scrutiny or oversight by the ACG's department.

The fact that such a state of affairs continued throughout this period exercised the Commission. The Commission would have expected the ACG, as a matter of leadership, to have taken on a larger role. The Auditor General had issued a number of special reports, most notably the Bermuda Emissions Control Ltd. Special Report, pointing to non-compliance and Ministerial interference. The Commission believes that the ACG could have and should have inserted her department as a watchdog of the public purse.

This was not done. Instead a system was allowed to continue whereby civil servants felt, if Ministers wished to influence the procurement process that their only role was to carry out the Ministers' wishes, even if that meant non-compliance with the FI and the PFA. As explained above, in the Commission's view, civil servants could have and should have alerted the ACG and the ACG in turn should have been compiling a catalogue of breaches or issuing formal waivers. Instead the system of oversight seems not to have been employed, as it should have been.

On further observation: The Financial Secretary (PS in the Ministry of Finance) has oversight of the ACG and the ACG department. Overall Ministerial responsibility rests with the Minister of Finance.

Mr. Scott was Financial Secretary (FS) from 2000 until November 2010 when he became Secretary to the Cabinet [and Head of the Civil Service]. Ms. Paul Cox JP was Minister of Finance from January 2004 until December 2012 (she continued to hold this office after she was appointed Premier in November 2010).

Both Ms. Cox and Mr. Scott gave evidence before us. It seems to us that neither of them can avoid some share of the overall responsibility for two matters about which we have made separate findings. First, when the audit period began (1 April 2009) the ACG, as discussed above, seems not have been concerned to verify that payments were duly authorised, relying entirely on the Accounting Officers within individual Ministries to carry out those checks. Secondly, contracts for major construction projects were permitted to be awarded to and supervised by the Ministry of Tourism and Transport rather than remain with and/or under supervision by the Ministry of W&E, without formal delegation of any kind.

The Accountant General (ACG) is the head of a department established by statute, Public Treasury (Administration and Payments) Act 1969, with statutorily prescribed duties.

Section 4 sets out the position clearly:

" (1) The Consolidated Fund shall be administered by the Government Department called the Accountant-General's Department.

(2) The Department shall, subject to the general direction and control of the Minister, be under the supervision of a public officer who shall be known as the Accountant-General; and the Accountant-General shall have the powers and discharge the duties conferred or imposed upon the Accountant-General by or under this Act or any other provision of law."

Some of those duties under the 1969 Act include: -

- *A "general supervision in respect of the arrangements under which payments out of or into public funds are made by or to Government Departments"*

And *"subject to any general or special directions given by the Minister of Finance"*, the ACG may issue instructions to Government Departments with respect to

- *The method by which payments are made into or out of Government Departments;*
- *The payment of public funds into the Consolidated Fund by Departments; and*
- *The accounting for public funds by Government Departments.*

This underscores the role the ACG is required to fulfil and its importance as the office responsible for ensuring proper administration and application of Financial Instructions throughout Government, as onerous as that might sound.

It requires a more robust and comprehensive approach than the one the Commission saw for the three-year period under review. The one current instance which we did review, the Airport Redevelopment Project, showed how effective the office can be, and should be.

The Commission also learned that there are still instances where the current ACG considers that his office is still without sufficient resources to undertake some of the work his Department should be doing: Section 5 Evidence (2) Accounting/Procedural Issues, 3.4 Duplicate Payments and 3.12 Millions paid for preferential services without prior approval.

If oversight is going to be effective, it needs to be contemporaneous, and resources should be made available as need. Reviews, and special audits and commissions of inquiry have far less value when the horse has long since left the stable.

There is also the vexatious issue of who is responsible outside the ACG department and in the various Ministries for oversight of spending.

FI have this to say on the matter [Clause 1.4]

“An Accounting Officer is the officer of a department/ministry whom the Minister of Finance regards as responsible for the custody and control of funds voted by the Legislature and the collection of revenue due to that department/ministry.”

FI list 97 such persons with Government [Clause 1.6].

But there is the option to delegate financial signing authority to “Authorised Officers” [Clause 9.3]. The responsibilities of Authorised Officers are then spelled out in Clause 9.4:

“Authorised Officers must certify the validity and correctness of every payment to be made by the Accountant General.

“It is the Authorised Officer’s responsibility to:

- (1) ensure payment is made in accordance with FI,*
- (2) carefully review supporting documentation prior to approval for payment,*
- (3) ensure that appropriate documentation is attached for all payments prior to submission to the Accountant General for payment as documented in FI Section 9.5,*
- (4) ensure submission of provided approved routes/access in E1 for authorised personnel to ACG Tech and that personnel are adequately trained on the payments process,*
- (5) exercise care and implement proper controls to prevent duplicate payments by ensuring that invoices have not been previously presented for payment.”*

However, clause 2.7 also makes clear that: “Accounting Officers may delegate departmental financial accounting functions, but they will not be relieved of accountability and responsibility by such delegation.”

That is a critically important proviso. The Commission notes that this has been a feature of FI for the three-year period we have had under review.

Our impression is that clause 2.7 has not been adhered to and part of the problem may be that there can be too many or multiple accounting officers.

Delegation

Before December 2009, FI expressly provided that the accounting responsibility for all major capital development projects rested with the Permanent Secretary of the Ministry of W&E. At that time FI 12.1.12 read –

“The accounting responsibility for capital development rests with the Permanent Secretary for the Ministry of W&E who is the Accounting Officer for all projects in the Capital Development Estimates, with the exception of Minor Works. For Minor Works, the accounting responsibility remains with the applicable Accounting Officer.”

The Commission has already noted that there were, and are, good practical reasons for this requirement. All capital development projects call for considerable specialist expertise, including with regard to conducting tenders, negotiating with contractors, drafting construction contracts, supervising the work of contractors and, vitally important for the protection of the public purse, measuring work done and authorising payment only for what has been completed in conformity with the contract. Within the Government, that expertise exists solely within the Ministry of W&E.

However, it appears that during the years 2006-2009 this requirement was disregarded in relation to three substantial projects that were undertaken by another Ministry, the Ministry of Tourism and Transport (T&T). These were Motor Vehicle Safety and Emissions Testing Programme BECL (Contract (H)), Royal Naval Dockyard Cruise Pier-Heritage Wharf (Contract (K)), and Port Royal Golf Course Improvements Capital Development Project (Contract (J)). The result in each case was that the specialist role that FI specified would be performed by the Government Ministry that had relevant expertise was undertaken by the Ministry of T&T, or was contracted out to non-government bodies with no direct responsibility for safeguarding public funds.

In the case of Heritage Wharf, this resulted in an almost ludicrous situation where the PS of T&T asked the PS of W&E to assist in drafting the construction contract for a highly technical marine engineering project with an estimated cost of \$39m. The then PS of W&E, Dr. Binns, described this process in his evidence to us as employing W&E as a “service provider” for T&T, even though FI expressly provided that the function should be performed by W&E itself, not by T&T.

We were impressed by a letter dated 13 April 2007 which Dr. Binns wrote to the PS of T&T, Major Marc Telemaque after this episode [Public Binder 1, Tab 12, p.28] in which he set out the risks that T&T was running by embarking on this project without relevant expertise. In the event, the warning was justified and ‘unforeseen’ difficulties were encountered resulting in seriously increased costs. (But we also note that this apparent breach of FI was not reported to the Accountant General as it ought to have been under FI 2.14).

In December 2009, however, FI 12.1.2 was amended to permit “the respective Permanent Secretary of any other Ministry within the Bermuda Government, outside the Ministry of W&E, which

has been granted special permission from the Cabinet Office to engage in capital development” to become the Accounting Officer in such circumstances. Even so, the Ministry of W&E was not excluded altogether; the FI as amended “obligated [the PS of W&E] to ensure that proper consultation with the applicable Accounting Officer is maintained throughout all phases of the project.”

FI 12.1.2 was further amended in March 2011 so that the power given to the Cabinet Office in December 2009 was transferred to the Minister of Finance. That subsequent change may explain why much of the evidence we heard on this issue proceeded on the basis that the Ministry of Finance (MOF) had that power, even before 2009. It was contended, unconvincingly in our view, that MOF permission was impliedly given when capital development projects undertaken by the Ministry of T&T were included in the Explanatory Notes to annual Estimates of Revenue and Expenditure, or were discussed at meetings of the Cabinet Capital Expenditure Committee. The simple fact, on the evidence we have heard, is that the clear requirement of FI 12.1.2 in its original form was ignored in relation to the three T&T projects we have inquired into.

The above we believe demonstrates an urgent need to ensure the terms of FI 12.1.2 are fully recognised and enforced.

Codes of Conduct

We have referred in Section 4 (Governance) to the different Codes of Conduct relating to Ministers and Civil Servants and to the fact that, properly and understandably, these are amended from time to time. We have noted in particular that former versions of the Ministerial Code contained useful guidance for civil servants, who found themselves in disagreement with a course of action proposed by their Minister, which was not also found in the Civil Service Code, and which recently was removed from the Ministerial Code itself.

This demonstrates, at the very least, a failure to provide clear guidance to civil servants who may find themselves in that situation which as we have learned has arisen not infrequently in the past. Equally important in our view, is the need to make it clear to civil servants, as well as Ministers, that FI should not be disregarded and when they are, there is an express obligation to report the breach to the Accountant General in the interests of good governance. So far as individual civil servants are concerned, we consider questionable that the Code should provide only for the ‘nuclear option’ of retirement when objections are disregarded or dismissed. We are left in no doubt, but that the Codes of Conduct need urgent review both in themselves and with a view to making them fully conform with each other.

“Whistleblowers”

The Good Governance Act 2011 contains protection for “whistleblowing” employees including civil servants but not limited to them. We believe that special consideration should be given to the situation a civil servant finds him or herself in when FI apparently are ignored by his or her seniors. There is a general public interest in seeing that FI are complied with; and it should be possible, in our view, for junior civil servants to speak up if disregard for FI were to become, in the Auditor General’s words, “the norm”, without putting their careers at risk. Quite apart from provisions for “whistle blowing”, the Commission finds that there ought to be clear provisions included in a redrafted Civil Service Code of Conduct on the steps they should take.

8: Recommendations

A key part of the Commission's mandate is to *"make recommendations to prevent and/or to reduce the risk of any recurrences of any violation identified and to mitigate financial, operational and reputational risks to the Government of Bermuda."* [Terms of Reference, paragraph 8]

The Commission's recommendations have been strengthened thanks to communication with key persons interested including: i) the Auditor General and staff ii) senior Civil Servants and iii) the former Chairman of the Public Accounts Committee ('PAC'). We are grateful to all parties for sharing their perspectives.

The Commission is acutely aware that we have been looking into matters that date back a number of years. Hindsight can be helpful and it is easier to have clarity of vision looking back, but what is required is oversight that is current and contemporaneous.

A system that provides for oversight when contracts are entered into and monies are spent will be far more effective than one that looks back after the fact, long after monies have been spent, records no longer exist and/or are unavailable for review, and the persons responsible have either left Government or the Civil Service.

These challenges were most apparent to the Commission in its review of the Auditor General's Report, and to this end, we identified ten key areas in which we have made recommendations, to:

- Ensure that Ministers and Senior Civil Servants have More Effective Relationships
- Improve Transparency and Strengthen Safeguards against Conflicts of Interest
- Improve the Effectiveness of Financial Instructions
- Clarify Accounting Officer Responsibility
- Strengthen the Offices Responsible for Safeguarding the Public Purse
- Enhance Parliamentary Oversight of Government Spending
- Hold Civil Servants Responsible with Regard to 'Ownership' of Responses to Auditor General Reports
- Increase Transparency and Make Government's Financial Reporting More Timely
- Urgently Review Personnel and Processes in the Civil Service
- Hold Quangos More Responsible

Ensure that Ministers and Senior Civil Servants Have More Effective Relationships

Many of the cases the Commission has examined appear rooted in difficulties with navigating the relationship between Ministers and senior civil servants, particularly Permanent Secretaries. These senior civil servants bear direct responsibility for making sure that rules are followed, while at the same time ensuring that Ministerial mandates are carried out. We recognise that this role can at times be difficult; senior civil servants should be neither needlessly obstructionist nor compliant to the point of complicity.

The Commission heard evidence that where a Permanent Secretary has concerns about the propriety and regularity of a course of action that a Minister is intent on pursuing, they should first advise the Minister of their concerns. Should the Minister ignore the Permanent Secretary's concerns, the options available for recourse are i) enlisting assistance from the Secretary to the Cabinet in brokering a solution or ii) requiring written Ministerial instruction which could then be disclosed to the Auditor General and/or PAC as a means of protecting themselves from criticism and possible surcharge.

We feel that the following recommendations will further assist in enabling an effective relationship between senior civil servants and Ministers:

- Provide for sanctions for non-compliance with the Ministerial Code.
- Re-insert paragraphs 12.2 and 12.3 from the Ministerial Code of Conduct 2002 or adopt the 2012 revisions drafted by the previous Government²¹⁸ in the current document. These provisions enable contentious instructions to be put before the Auditor General and by extension the Public Accounts Committee and hence in the public domain.
 - The Commission recommends a public re-launch of the Ministerial Code of Conduct by each new Administration that is also signed by the relevant Premier as a public manifestation of a commitment to proper conduct by his/her Ministers.
 - Financial Instructions and the Civil Service Code of Conduct and Conditions of Employment should also be reviewed to ensure that appropriate language, reflective of these paragraphs is present.
- Train new Ministers on their responsibilities, with particular

attention to their relationship with the Permanent Secretary as Accounting Officer. Ideally, all Ministers and Permanent Secretaries should undergo periodic re-training.

- Ministers should have no role in the movement or placement of Permanent Secretaries. A potential location for codifying this is in the 'Public Service Regulations'
- Provide Ministers with an 'aide-de-camp', perhaps a promising younger civil servant who can, where necessary, transfer with Ministers if and when they change Ministries. In addition to helping maintain clear channels of communication with the Permanent Secretary, this will serve as an opportunity to widen the experience of civil servants who may in the future find themselves taking on the role of Permanent Secretary.
- Require that Ministers provide full disclosure to Cabinet of Technical Officer recommendations, even if they choose to recommend an alternative course of action.
- Where decisions are taken by Cabinet or Ministers that are contrary to or deviate from the recommendations of Technical Officers, these decisions must be documented and signed by the relevant Permanent Secretary and Minister.

Improve Transparency and Strengthen Safeguards against Conflicts of Interest

Transparency, disclosure of interests and appropriate management of potential conflicts of interest should be mandatory for all individuals who are able to influence the public purse. The Commission notes that recommendations in this area have been highlighted by past and current members of both the Government and the Opposition.

- Mandate full transparency and openness in Political Campaign Finance, requiring all political donors and political donations to be reported and open to public scrutiny.
- Members of Parliament and Senators should be required by law to provide information on any potential benefit (financial or non-financial) which might reasonably influence their actions. As and when appropriate, this should be documented in a publicly available Register of Interests.
- Introduce penalties for failure to disclose or attempts to conceal interests.
- Increase the limitation period, from three years, in clause 33C of the Good Governance Act. Appropriate modifications should also be reflected in section 20 of the Audit Act 1990 (offences), Section 22 of the Internal Audit Act 2010 (offences), and Section 33C of the Public Treasury (Administration and Payments) Act 1969.
- Introduce restrictions preventing government officials

from profiting from insider information, connections or Ministerial activities after leaving office.

Improve the Effectiveness of Financial Instructions

The Commission heard evidence from senior civil servants that Financial Instructions have room for improvement and are not always "fit for purpose". Recommendations to improve the effectiveness of Financial Instructions include:

- Give Financial Instructions the force of law by making them regulation. This will provide clarity that Financial Instructions are not just general guidelines, but statutory protocols that must be followed.
- Apply surcharge or other disciplinary actions when appropriate and on a more timely basis. The Commission notes that despite multiple infractions over the years, there is a limited record of disciplinary and/or any other action being taken.
- Review and where appropriate, update minimum dollar thresholds; for example, with regard to tender requirements.
- Provide clarity on the relationship between the Cabinet and Financial Instructions. Where the Cabinet's mandate supersedes the requirements of Financial instructions, identify what actions must be taken by the Secretary to the Cabinet and the appropriate Permanent Secretary.
- Review and further develop specific procedures for large capital projects and projects involving public private partnerships. These larger projects tend to be for significant financial sums and warrant appropriate attention to 'value for money' etc. These procedures should ensure that the Office of Project Management and Procurement (OPMP) provides independent appropriate oversight.
- Make Financial Instructions more user-friendly for non-financial managers in the Civil Service; perhaps clearly delineate the portions of the regulations which are relevant for civil servants who are not Accounting Officers.
- Develop a framework that sets out what steps should be taken in determining whether or not a waiver should be granted by the Accountant General.

Clarify Accounting Officer Responsibility

The lack of clarity around responsibility for project expenditures was an issue that became apparent to the Commission on a number of occasions during the Public Hearings.

- Reconsider whether it is advisable to have multiple Accounting Officers in Ministries. The Commission

understands that oftentimes Heads of Department are designated as Accounting Officers. This can dilute the accountability and authority of the Permanent Secretary as Accounting Officer.

- Ensure that an effective transition process is used when Permanent Secretaries and other Accounting Officers are on-boarded, retire and/or change Ministry or Department. A standard procedure may need to be developed in this regard.
- Regularly train and test Accounting Officers around their responsibilities to protect the public purse, per Financial Instructions and other relevant regulations.
- Clarify the delegation process and requirements for delegation. Add delegation protocols to Financial Instructions, including details on requirement of appropriate documentation, oversight and chain of responsibility.

Strengthen the Offices Responsible for Safeguarding the Public Purse

- Provide appropriate levels of funding and other resources. Both PAC and the Auditor General complained of having insufficient funding and human resources to provide the appropriate level of oversight.
- Provide subpoena powers to the Auditor General (subject to appropriate safeguards), which will extend to Government Ministries, Departments, quasi-autonomous non-governmental organisations ('Quangos') and third party contractors.
- Review the independence of the Auditor General to ensure it has the power, for example, to establish its own leases, to seek independent legal advice, to control its own disbursements, and to operate an independent payroll system etc.
- Strengthen the capacity and status of the OPMP. Finalise its Code of Practice (the Commission understands the draft Code of Practice has gone through at least 16 revisions) and ensure that the Office is funded and has sufficient qualified personnel.
- Develop a working relationship between PAC and OPMP so that current projects are subject to scrutiny in a more timely manner.

Enhance Parliamentary Oversight of Government Spending

- Increase PAC focus on current Government spending. PAC should initiate reviews on its own (as entitled under the Official Standing Orders of the House of Assembly) and expand current practice beyond reviewing and

examining reports which may be long concluded. People should know that they can be called to account for the expenditure of funds at or about the time decisions are made. In this regard, PAC must be given the necessary budget and resources to get on with the job. The Commission is conscious of this need, having undertaken some of the work that should and would fall within the remit of PAC.

- Enable greater transparency by making PAC conclusions, transcripts, etc. more easily accessible for public scrutiny.
- Neutralise political partisanship as a factor in stymying PAC's efforts.
 - The Commission has learned that at times, politically affiliated PAC members have formed a bloc and through their absence at committee meetings, deprived PAC of the attendance numbers required for quorum. This can be addressed via the addition of one or two politically independent Senators or other politically unaffiliated persons to the committee.
 - Change the practice of appointing the Chair of PAC, to the Opposition spokesperson for Finance, and replace with the appointment of an independent legislator or unaffiliated member.
- Review and make amendments as appropriate to the Parliament Act 1957 to require meetings on a regular and timely basis and strengthen the investigatory scope and powers of PAC.
- The Commission also endorses the recommendation of the SAGE Commission that parliamentary accountability be enhanced by the formation of three Joint Select Committees, charging them with the responsibility of monitoring the work of the various Government Ministries between them on an on-going basis.

Hold Civil Servants Responsible with Regard to 'Ownership' of Responses to Auditor General Reports

- Clearly identify which civil servant in a Ministry or Department 'owns responsibility' for addressing issues identified by the Office of the Auditor General.
- Mandate that the responsible civil servant report to PAC and the Minister within an appropriate period of time, on what actions have been taken to address the Auditor General's exit points; the Commission suggests that this be no more than 6 months. The relevant Minister should follow up with a further report to the Cabinet on his Ministry's status for all outstanding audit issues. There should be a note made in individual civil servants' annual reviews for non-compliance with this follow up process and sanctions considered for consistent tardiness and non completion.

- The Commission noted a few instances where inaccurate information was contained in the Auditor General's reports. Where such inaccuracies are identified, protocols that provide recourse to challenge and/or have audit reports corrected should be made available to Accounting Officers.

Increase Transparency and Make Government's Financial Reporting More Timely

The Commission has strong concerns about the lack of timeliness with regard to Government's financial reporting and the negative impact this has on financial planning and budgeting. The Commission is also well aware of and heard, during its Hearings, about concern regarding the level of Government debt. As we approach fiscal year 2017, it is disappointing that the most recent fiscal year for which there is an audit report is 2012.

- Increase resources available to the Office of the Auditor General and Accountant General so that the annual audit report is completed within 9 months of the fiscal year end (as required by law).
- Broadly communicate details around Government debt, including the amounts, the weighted cost of debt and the due dates associated with each obligation to the public.

Urgently Review Personnel and Processes in the Civil Service

The Commission considers the Civil Service to be one of the most important institutions in Bermuda; with some 5,000 employees, it is certainly its most populous.

- Enact (as appropriate) SAGE Commission recommendations to improve accountability throughout, but particularly at senior levels of the Civil Service.
- Conduct a frank, independent assessment of whether all current leaders of the Civil Service have appropriate skill sets, perspective and motivation to effect needed change. If not, ascertain whether this can be improved with training.
- Review and where appropriate, make improvements to the broader Civil Service appraisal process.
- Maintain / further develop the relationship with external parties to take advantage of training opportunities and further improve general practice.
- Examine whether the Head of the Civil Service and Secretary to the Cabinet roles should be separated.
- Enforce the available disciplinary measures and sanctions, on a timely basis, where appropriate for senior civil servants who fail their regulatory responsibility.
- Fix tenure for Permanent Secretaries (perhaps 5 to 7 years)

in a particular Ministry, to institutionalise knowledge, while reducing the chance of stagnation and lead to sharing of best practices.

Hold QUANGOs More Responsible

- Enforce the requirement that QUANGOs follow Financial Instructions or develop their own set of financial procedures, approved by the relevant Accounting Officer and / or Accountant General as appropriate. These financial instructions should be on deposit with both the relevant Ministry and the Accountant General's Department.
- Take action where QUANGOs are non-compliant. This may include appointing civil servants to be ex-officio members of QUANGO boards and/or assigning Accounting Officer responsibility to a civil servant in the Department or Ministry responsible for funding and oversight of the QUANGO.
- Where QUANGO boards continue to be non-compliant, take appropriate action including dismissal.

We would like to note and express thanks for the work of others who have preceded us in making similar efforts to assist and provide recommendations intended to strengthen our country and the Civil Service which is responsible for so much that is key to our way of life, not least of which is managing risk and protecting the public purse.

We take particular note of efforts resulting in reports including but not limited to:

- Various Special Reports from the Office of the Auditor General
- The Report of the SAGE (Spending and Government Efficiency) Commission – presented in October 2013
- A Review of the Civil Service in Bermuda, provided by the National School of Government in February 2011 – presented in February 2011
- The Diagnostic Review of Selected Capital Projects, provided by KPMG – presented to the Ministry of Finance in 2011
- The Management Consulting Section Report to the Ministry of Finance, 2010

The Commission notes that credible progress has been made since the start of the period under review, as evidenced by the Good Governance Act 2011 and 2012 amendments, Public Access to Information legislation, the establishment of the Office of Project Management and Procurement and more.

But more can and should be done.

9: Acknowledgments

The Commission could not have completed its task without the assistance of many.

For their support, professionalism and service, we are grateful.

Ministers and Civil Servants:

past and present, who appeared as witnesses or who assisted in any way to retrieve documents and support the Commission

Office of the Auditor General:

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St. Theresa's Cathedral for St. Theresa's Hall

Venue set up:

Select Sites, Mrs. Starla and Mr. Chris Williams and staff

Security:

Bermuda Security Agency, Mr. Allan Looby and staff

Transcription Services:

MG Reporting and Transcription (Bermuda), Mrs. Margaret Gazzard; Doris Goodman Recording and Transcription Services, Mrs. Doris Goodman

Electronics:

Electronic Services, Mr. Tony Best and staff

Video Streaming:

Bernews, Mr. Dennis Martins

Service Providers:

ProServe, Mr. Glendal Phillips and staff Stokers, Mr. Loderick Holder

Office Supplies:

A.F. Smith, Ms. Jackie Raynor; TOPS Ltd, Ms. Kristina Denkins; Bermuda Waterworks, Ms. Karlene Kelly

Appendices

1. Commission of Inquiry Gazette Notice and Terms of Reference

GN265/2016

ISSUE OF COMMISSION OF INQUIRY

COMMISSIONS OF INQUIRY ACT 1935

SECTION 1A

NOTICE is hereby given that, in exercise of the powers conferred on him by section 1A of the Commissions of Inquiry Act 1935, on 24th February 2016, the Premier has been pleased to appoint a Commission of Inquiry in the following terms:

“IN EXERCISE of the powers conferred on me by section 1A of the Commissions of Inquiry Act 1935, I, MICHAEL H DUNKLEY, Premier of Bermuda, do hereby appoint

SIR ANTHONY HOWELL MEURIG EVANS (Chairman)

HON JOHN BARRITT

FIONA ELIZABETH LUCK

KUMI DUANE BAMIDELE BRADSHAW

(hereinafter, "the Commission")

to inquire into the following matters, which are, in my opinion, for the public welfare:

Having regard to the Report of the Auditor General on the Consolidated Fund of the Government of Bermuda for the Financial Years ending 31 March in 2010, 2011, and 2012, and with regard to any matters arising under Section 3 of the Report to -

Scope of Inquiry

1. Inquire into any potential violation of law or regulations, including the Civil Service Conditions of Employment and Code of Conduct, Financial Instructions, and Ministerial Code of Conduct, by any person or entity, which the Commission considers significant and determine how such violations arose;

References to other agencies

2. Refer any evidence of possible criminal activity, which the Commission may identify, to the Director of Public Prosecutions and the Police;
3. Refer any evidence of possible disciplinary offences, which the Commission may identify, to the Head of the Civil Service;
4. Draw to the attention of the Minister of Finance any matter, which the Commission may identify, appropriate for surcharge under section 29 of the Public Treasury (Administration and Payments) Act 1969;
5. Draw to the attention of the Minister of Legal Affairs (as the Enforcement Authority for Bermuda) any matter, which the Commission may identify, appropriate for civil asset recovery under Part IIIA of the Proceeds of Crime Act 1997;
6. Draw to the attention of the Attorney-General any matter, which the Commission may identify, appropriate for civil proceedings before the courts;

Recommendations for the future

7. Consider the adequacy of current safeguards and the system of financial accountability for the Government of Bermuda;
8. Make recommendations to prevent and/or to reduce the risk of recurrences of any violation identified and to mitigate financial, operational and reputational risks to the Government of Bermuda;

Any other matter

9. Consider any other matter which the Commission considers relevant to any of the foregoing.

AND I DIRECT that the inquiry shall commence as soon as is practicable from the date of this appointment and shall be conducted in Hamilton, Bermuda or any other location(s) which the Commission may consider necessary or appropriate in furtherance of the inquiry, and at such times as they may deem appropriate.

AND I FURTHER DIRECT that the Commission shall submit findings and recommendations to the Premier within twenty weeks of the date of appointment or such longer period as the Premier may from time to time direct.

AND I FURTHER DIRECT that, without prejudice to the powers granted to the Commission under the Commissions of Inquiry Act 1935, the Commission shall conduct such parts of the inquiry that it may deem appropriate *in camera*.

AND I FURTHER DIRECT that the Commission shall exercise all such powers as may be necessary for the purposes of this inquiry and as may lawfully be exercised by the said Commission."

Dated this 12th day of April 2016


Acting Secretary to the Cabinet

This Notice will be published	
on	Friday
	April 15 th , 2016
by the	R-G

2. Section 3 of the Report of the Auditor General



Report of the Auditor General
on the
Consolidated Fund of the
Government of Bermuda
for the Financial Years
March 31, 2010, March 31, 2011 and March 31, 2012

December 2014

3. AUDIT OBSERVATIONS & RECOMMENDATIONS

At the conclusion of the Consolidated Fund audit, we document our observations and provide recommendations to address issues identified. We discuss these matters with the Accountant General indicating any points which should be brought to the attention of specific departments. Although we expect our recommendations to be implemented, our primary concern is that the Accountant General and departments select the best course of action to address the issues identified on a timely basis.

Included in this section are those matters arising from the audit which are significant enough to warrant the attention of the House of Assembly. Many of the observations point to a general failure to follow the rules (Financial Instructions) established by Government for the safeguarding of public assets.

Financial Instructions are rules that govern the custody, handling and accounting of public money including the management of capital development projects. Financial Instructions and related rules are designed to ensure that public money is managed effectively for the intended purpose.

These instructions specify that the Permanent Secretary of Public Works is the Accounting Officer for all capital development projects except those delegated by the Minister of Finance to another Ministry. W&E is required to follow Financial Instructions as well as its own internal Management Policies and Procedures set out in P.F.A 2000 “Purchasing of Goods & Materials” and P.F.A 2002 “Procurement of Contract Services”.

3.1 Failure to comply with Financial Instructions and related rules

Many of the capital development transactions selected for testing during 2010 did not comply with Financial Instructions, P.F.A 2000 or P.F.A 2002.

We requested supporting documentation for an estimated \$35.5 million spent on capital contracts and purchases and 15% (\$5.2 million) did not have supporting documentation. Of the remaining \$30.3 million, many failed to comply with the applicable purchasing and approval standards. The majority lacked the required prior approval of Cabinet, did not have agreements or contracts and/or did not follow the basic tendering procedure.

3. AUDIT OBSERVATIONS & RECOMMENDATIONS

3.1.1 Millions spent without the prior approval of Cabinet

Cabinet is tasked with the responsibility of making major policy decisions on behalf of the people of Bermuda. In order for Cabinet ministers to make well informed decisions in the interest of the public, Cabinet must be provided with accurate, objective information and high quality advice. Financial Instruction 8.3.1 supports this principle by requiring all contracts “over \$50,000 (including those with multiple payments) to be approved by Cabinet before the agreement or contract is signed”.

During 2010, approximately \$14 million of expenditures tested did not have the required prior Cabinet approval. Examples of expenditures greater than \$500,000 without prior Cabinet approval include:

Table 3: 2010 Contracts not approved by Cabinet

NATURE OF CONTRACT	VALUE
	\$
Commercial courts/Ministry of Finance renovations	1,863,386
Maintenance and stores building	1,600,000
Purchase of sand and rock	1,421,400
Renovations - Department of Human Resources	957,726
Central Laboratory Building project	902,000

3.1.2 Commercial courts/Ministry of Finance renovations

A contract for the construction of the Commercial courts and renovation of the Ministry of Finance Headquarters was awarded to a company (“the successful bidder”) without the prior approval of Cabinet and the related tender process was compromised.

When the project was first put out to tender, the successful bidder’s bid was determined to be invalid because required sections of the Form of Tender were not completed. Of the remaining 5 tenders received, staff in W&E recommended that the lowest bidder be awarded the contract.

3. AUDIT OBSERVATIONS & RECOMMENDATIONS

However, in December 2008, the Minister of W&E instructed technical officers to request all bidders to re-bid based on a reduced scope of work. The Permanent Secretary (PS) noted that the request for the re-bid should be phrased in the context of Government wishing to reduce spending given the current economic environment. The PS gave instructions to include all bidders and to allow them to make corrections to irregularities which may have disqualified their initial bids.

The successful bidder submitted a revised bid of \$1.7 million. A review of this second round of bids was not carried out by W&E staff nor was a recommendation made by them.

From the onset, senior W&E staff expressed their concerns about the handling of the project. On January 2, 2009, a senior officer noted "...this is not how projects should be run. It should be noted that a review of the recent Tender was not carried out by this Department nor any recommendation put forward by this Department or Cabinet approval given to my knowledge. The decisions to award any contracts were carried out at a higher level. I am also concerned that "additional works" are going to be added and that the final expenditure is going to exceed the original Tender amount and that the quality is going to be compromised."

The Ministry of Finance itself raised concerns about following due process in an email from the Financial Secretary to the PS which noted "...please advise whether the award complies with Financial Instructions in the following respects: 8.2.1(3) the same supplier should not be used repeatedly without good reason, 8.2.3(8) unsuccessful suppliers should not be allowed to resubmit a lower quotation price, 8.3.1 contracts totalling over \$50,000 must be submitted to Cabinet for approval before acceptance. In addition, please provide information pertaining to the principal(s) of the company which has been determined to receive the contract."

We requested a copy of W&E's response to the Ministry of Finance's email and to date have not been provided with one. However, it is apparent that the awarding of this contract did not meet critical requirements of Financial Instructions.

On January 7, 2009, the PS confirmed that the Minister had approved the award of the contract to the successful bidder in the amount of \$1.7 million. Retroactive approval was later obtained from Cabinet on February 10, 2009. The final amount paid to the company subsequent to change orders was approximately \$1.9 million.

3. AUDIT OBSERVATIONS & RECOMMENDATIONS

3.1.3 Maintenance and stores building

In 2010, Cabinet's prior approval for a \$1.6 million contract for the construction of a Maintenance and stores building was not obtained.

When the original bids were received, W&E staff recommended the lowest bidder in their Contract Award Recommendation. They concluded that the lowest bidder should have been awarded the contract on the basis of cost, schedules provided in its submission, the company's clear understanding of the requirements to undertake the project and its collective experience.

However, when the contract was presented to Cabinet, the Minister of W&E voiced concerns about the lowest bidder's ability to achieve the deadline. No evidence to support these assertions was documented in the Cabinet Conclusion.

Cabinet did not approve the award of contract at that time. Instead, Cabinet recommended that consideration of the contract award should be carried over to the next meeting to ensure that the estimate for the works was updated.

We requested confirmation of Cabinet's subsequent approval. However, neither W&E nor the Cabinet Office provided evidence that this contract was in fact returned to Cabinet for approval.

3.1.4 Purchase of sand and rock

P.F.A. 2000 requires significant purchases to be approved by Cabinet as well as documented in a contract or agreement. In 2010, we examined payments of \$1.4 million for the purchase of sand and rock. The payments were processed without prior Cabinet approval, a documented contract, or verification of receipt of goods such as a bill of lading.

We requested but were not provided with Cabinet approval. The failure to obtain Cabinet approval was corroborated by correspondence in which W&E staff questioned why an agreement was made prior to Cabinet approval.

These payments were also not supported by a contract or agreement as required by P.F.A. 2000. We requested but were not provided with a contract nor agreement. Instead, we were presented with a Government purchase order and invoices from the vendor as supporting documentation for the payments.

3. AUDIT OBSERVATIONS & RECOMMENDATIONS

Further, we requested evidence that the quantity of sand and rock was received and verified. We would have expected to see the appropriate sign-off on bills of lading showing actual cargo received but W&E was unable to provide such evidence. These documents were later provided when W&E obtained them directly from the vendor.

A review of this documentation provided by the vendor indicated that payments for the sand and rock were processed prior to the receipt of goods in contravention of Financial Instructions.

3.1.5 Renovations - Department of Human Resources

In 2010, a contract for renovations to the Department of Human Resources did not receive Cabinet's prior approval nor was it put out to tender.

W&E confirmed that the project was not properly tendered and noted that the Head of the Civil Service agreed to proceed with negotiating a cost with a contractor. As such, there was no Cabinet Award Recommendation document issued to Cabinet and no Cabinet approval was obtained for the award of this contract. The original contract sum of \$257,000 was negotiated with the contractor. However, as a result of numerous change orders in the amount of \$701,000, the final cost to the public was \$958,000.

3.1.6 Central Laboratory Building project

The original contract sum for the Central Laboratory Building project was approximately \$46,000. In 2010, the contract did not receive prior Cabinet approval. Additionally, W&E noted that the services were not tendered but were negotiated with the knowledge of the PS. Additional services of \$856,000 resulted in a final contract amount of \$902,000.

3.1.7 Departmental expenditures

There were numerous cases (69% or \$43 million of expenditures greater than \$1 million in 2011) which violated the requirement for prior Cabinet approval. In both 2010 and 2011, expenditures tested for the following departments did not have prior Cabinet approval.

3. AUDIT OBSERVATIONS & RECOMMENDATIONS

Table 4: Departmental expenditures not approved by Cabinet

DEPARTMENT	2010	2011
	\$	\$
Lands, Buildings & Survey		10,596,138
Airport Operations		3,047,204
Civil Aviation	2,622,747	2,757,425
Tourism	1,500,727	2,726,303
Transport Control		2,068,106
Information Technology Office		2,019,150
Telecommunications		2,015,314
Education	3,890,235	1,828,218
Health Insurance		1,639,728
Finance HQ		1,399,966
Transport HQ		1,373,000
Corrections	1,108,338	1,363,273
Operations & Engineering	1,394,113	1,177,203
Accountant-General		1,027,889
Police	1,889,161	
Works & Engineering	1,494,311	

It is evident that the policies, procedures and rules pertaining to capital expenditures are being violated to such an extent that it has now become the norm for which there are no consequences.

Compliance with the required procedures for the procurement of goods and services reduces the risk of non-performance, fraud and misappropriation. Persons with signing authority should be held accountable for breaches of compliance of the relevant Financial Instructions and rules.

We recommended that W&E should comply with Financial Instructions, P.F.A 2000 and P.F.A 2002 and the Accountant-General should take steps to reinforce compliance with Financial Instructions and related rules across Government. Where appropriate, the existing penalties for not complying with these policies, procedures and rules should be enforced.

3.2 Millions paid without signed contracts or agreements

Financial Instruction 8.3.4 provides that “if a contract is not provided by the supplier, a contract/agreement must be prepared that includes all terms and conditions... and must be vetted by the Attorney General prior to signing”.

3. AUDIT OBSERVATIONS & RECOMMENDATIONS

In 2010, the Department of Works & Engineering did not adhere to Financial Instructions and related rules. We identified instances where expenditures were made without contracts or agreements. An estimated \$5 million (17%) of the \$30.3 million expenditures tested in 2010 did not have a contract or agreement. Expenditures greater than \$300,000 made on behalf of the following departments did not have signed contracts or agreements:

Table 5: Expenditures made without signed contracts

DEPARTMENT	2010
	\$
Civil Aviation	2,622,747
Ministry of Works & Engineering	1,494,311
Police	1,330,718
Corrections	1,108,338
Operations & Engineering	1,019,113
Lands, Buildings & Surveys	941,453
Information Technology Office	612,027
Accountant General	300,000

We recommended that payments should not be processed unless there has been substantial compliance with Financial Instructions and related rules. To facilitate this process, we provided suggestions for revising the payment authorization signoff stamp or requiring a checklist to be prepared to include key Financial Instructions and P.F.A. requirements. We also recommended training for persons with signing authority as well as holding responsible persons accountable for any breach of compliance of Financial Instructions and related rules.

3.3 Significant contracts not tendered

Tendering is required for any contract where the value of goods and services exceeds \$50,000.

Financial Instruction 8.3.1 requires Ministries and Department to obtain quotations from suppliers of goods and services. The minimum number of quotations to be obtained and the rigour of the evaluation and awarding process depend on the size of the purchase or contract as well as the potential cost/benefit of administering the tendering process.

3. AUDIT OBSERVATIONS & RECOMMENDATIONS

Despite the requirements of Financial Instructions, the 2010 audit revealed that 55% (\$16.8 million) of expenditures tested were not tendered. Expenditures greater than \$1 million which were not tendered relate to the following departments:

Table 6: 2010 Contracts not tendered

DEPARTMENT	2010
	\$
Education	4,189,474
Tourism	3,634,805
Civil Aviation	2,622,747
Information Technology Office	2,258,772
Transport Control	2,081,170
Police	1,643,562
Corrections	1,108,338
Ministry of Works & Engineering	1,033,807

In 2011, an estimated \$62 million of expenditures tested (76%) were not tendered in compliance with Financial Instructions, P.F.A. 2000 and P.F.A. 2002. Expenditures greater than \$1 million which were not tendered relate to the following departments:

Table 7: 2011 Contracts not tendered

DEPARTMENT	2011
	\$
Tourism	18,116,485
Lands, Buildings & Surveys	10,749,109
Marine & Ports	4,346,651
Airport Operations	3,830,087
Civil Aviation	2,791,425
Public Transportation	2,262,459
Transport Control	2,081,694
Telecommunications	2,049,993
Education	1,995,165
Health Insurance	1,639,728
Finance HQ	1,563,106
Financial Assistance	1,492,250
Corrections	1,418,625
Operations & Engineering	1,267,642

3. AUDIT OBSERVATIONS & RECOMMENDATIONS

We recommended that the Accountant-General take steps to ensure that Financial Instructions and related rules are followed across Government. Contracts should not be entered into and payment certificates should not be processed unless all relevant procurement policies have been followed. Where appropriate, the existing consequences for not complying with Financial Instructions should be enforced.

3.4 Duplicate Payments

An underlying premise of Financial Instructions is that payments for the same goods and services will not be made twice. Financial Instruction 9.4 requires authorized officers to “exercise care and implement proper controls to prevent duplicate payments by ensuring that invoices have not been previously presented for payment.” Included in duplicate payments were the following:

Table 8: Duplicate Payments

	2010	2011	2012
	\$	\$	\$
3 rd Quarter grant	5,175,551		
Works & Engineering Payment Certificate	1,179,253		
Cheque issued twice	59,041		
Miscellaneous items		571,421	
Payment to Sandys 360			807,000
	6,413,845	571,421	807,000

The 3rd quarter grant was recovered but not the cheque which was issued twice. The amount paid to Sandys 360 has not been recovered. Explanations for the other duplications have not been provided. We recommended that the Accountant General investigate the circumstances giving rise to these duplications, implement more robust controls and procedures to prevent duplication of payments and take all steps necessary (including legal action) to recover any amounts overpaid.

3.5 Overpayments

A basic element of an effective internal control system is verification of the correctness of payments. Financial Instruction 9.4 is explicit that “it is the authorised officer’s responsibility to “ensure payment is made in accordance with Financial Instructions and to carefully review supporting documentation prior to approval for payment”.

3. AUDIT OBSERVATIONS & RECOMMENDATIONS

The Department of Airport Operations (DAO) overpaid \$256,336 to a project contractor in 2009. This amount remained outstanding at March 31, 2010. When the retention of \$759,721 was subsequently released to the project contractor, this overpayment of \$256,336 along with outstanding Payroll Tax of \$321,277 was not deducted from the retention. This resulted in a loss of Government revenue of \$577,613.

In addition, the retention was paid to the wrong person. Payment was made to the project manager instead of the project contractor. DAO was advised of this error by the project manager who then transferred the funds to the project contractor.

We recommended that more robust controls and procedures should be implemented to prevent duplication of payments. We recommended that DAO should properly monitor retention amounts and take the necessary legal and other steps to recover any amounts overpaid.

3.6 **Supplementary Appropriation Bills not tabled**

Section 96(4) of the Bermuda Constitution Order 1968 requires a Supplementary Appropriation Bill to be introduced into the House of Assembly as soon as practicable after the year end of the financial year in which the Supplementary Estimates became necessary.

During 2010, Supplementary Appropriation Bills were not introduced in the House of Assembly for estimates relating to March 31, 2001 and subsequent years. In 2011, these Supplementary Estimates were tabled and approved.

We recommended that all required Supplementary Estimates be updated and related Supplementary Appropriation Bills introduced into the House of Assembly in accordance with the Bermuda Constitution Order 1968.

3.7 **Inadequate procedures over bank reconciliations**

In recent years, we reported significant issues related to the bank reconciliation process. These issues have not been resolved. Current year deficiencies include:

- Lack of support for reconciling items;
- Duplicate payments;
- Stale dated cheques not cancelled;
- Unsupported transactions;
- Unrecorded foreign exchange transactions;

3. AUDIT OBSERVATIONS & RECOMMENDATIONS

- Deposits & wire transactions improperly or not recorded in the GL;
- Disbursements not recorded; and
- Deposits not made on a timely basis.

Given the risks inherent in the reconciliation process, it is imperative that the Accountant General exercise a greater degree of control over the reconciliation function. We recommended that the ACG perform procedures required under Financial Instructions and develop a robust control environment. In the case of stale-dated cheques for which there were no clear guidelines, we recommended that Financial Instructions should be amended to explicitly address this matter.

3.8 **Completeness and accuracy of accounting for Employee Benefits**

Testing of the completeness and accuracy of the liability relating to the Public Service Superannuation and the Government Employees Health Insurance Funds revealed the following:

- During 2011, terminated, retired and temporary employees as well as summer students were erroneously included in the actuarial valuation. This resulted in a \$2.5 million miscalculation of the accrued benefit obligation for PSSF and \$10.5 million for GEHI;
- An inappropriate method of loss calculation was used which required a \$21.5 million valuation adjustment; and
- Incorrect Cost of Living Adjustments were included in the actuarial valuation resulting in a \$15 million overstatement.

We recommended that the ACG implement a more robust system to improve the completeness and accuracy of information provided to the actuary.

3.9 **Inadequate provisioning**

During 2011, the Office of the Tax Commissioner (“OTC”) set up a \$20 million provision for doubtful accounts for taxes which were more than 90 days outstanding. The assumptions underlying this provision were not reasonable. Additionally, a well-founded plan of action for collection was not provided given the historical and statistical record of collection. The provision was subsequently increased to \$31.7 million.

3. AUDIT OBSERVATIONS & RECOMMENDATIONS

We recommended that the OTC implement a sound methodology for estimating the provision and that the appropriate level of review be carried out by the ACG.

3.10 **Inadequate procedures over amounts receivable from or payable to other Government agencies**

Our testing of receivable balances continues to indicate weak accounting procedures which include:

- Grants of \$700,000 and expenses of \$612,000 of the Confiscated Assets Fund were not appropriately reflected in the accounts and
- Amounts due to/from the Bermuda Hospitals Board were not reconciled on a timely basis resulting in \$9.4 million (2011) in unbilled claims not being properly reflected.

We recommended timely and accurate reconciliation of balances due to or from other Government agencies.

3.11 **Lack of ministerial authorization for inter-fund transfers**

Inter-fund transfers in the following amounts were not authorized for transfer by the Minister of Finance.

Table 9: Interfund transfers

	2010	2011
	\$	\$
Unauthorized transfers	11 million	12 million

We recommended explicit written authorization of inter-fund transfers by the Minister.

3. AUDIT OBSERVATIONS & RECOMMENDATIONS

3.12 Millions paid for professional services without prior approval

Payments for consultants during fiscal 2012 amounted to \$33 million or 5% of the operating expenses of the Consolidated Fund. Financial Instruction 10 requires Accounting Officers to obtain the written approval of the Secretary to the Cabinet for the retention of consultants. Financial Instruction 10.4.3 further provides that an Accounting Officer may be surcharged under Financial Instruction 2.9 if consultants are retained without prior approval.

None of the payments selected for testing (\$2 million) pertaining to consultants contained the approval of the Secretary to the Cabinet nor were we provided with any evidence that surcharges had been levied on the relevant Accounting Officers for failure to obtain the necessary approvals prior to retaining the consultants.

We recommended the establishment of robust controls, heightened scrutiny, the establishment of an oversight committee for the retention of consultants and the application of surcharges.

3.13 Bank limit exceeded by \$24 million

During fiscal 2012, the Temporary Loans Act 1973 limited the borrowing from any bank by way of overdraft to 10% of annual budget estimates of expenditure approved by the House of Assembly.

As at March 31, 2012, Government was not in compliance with Section 2 of the Temporary Loans Act 1973 as the bank overdraft of \$121 million exceeded the legislated limit by \$24 million.

We recommended enhanced monitoring, controls and procedures to ensure compliance with the Temporary Loans Act 1973.

3.14 Inappropriate application of or lack of accounting policies

Accounting policies are principles or rules selected by Government which apply to the underlying transactions in the financial statements. The selection of appropriate accounting policies results in fair and accurate presentation.

3. AUDIT OBSERVATIONS & RECOMMENDATIONS

Appropriate accounting policies were selected but misapplied in the following instances:

- Betterments were not added to related capital assets as required by accounting standards. Instead, they were separately capitalized resulting in inaccurate amortization charges; and
- Customs duty was capitalized resulting in an overstatement of the cost of capital assets and inventory.

Formal policies have not been established to address:

- the capitalization of computer software resulting in \$7.6 million being incorrectly recorded;
- the treatment of interest costs on capital projects;
- the transfer of capital assets to quangos; and
- the impairment of capital assets. As a result, the Assets under Construction balance included several items which no longer contribute to Government's ability to provide goods and services.

Given the need for consistent application of accounting policies, we recommended that:

- Betterments should be recorded and calculated in a manner that is consistent with the accounting policy and recommendations contained in the CPA Canada's Public Sector Accounting Standard PS 3510;
- A policy should be developed and applied consistently for the treatment of Customs duty; and
- Formal policies should be developed based on Canadian Public Sector Accounting Standards. These policies should be documented in Financial Instructions and communicated to all department and ministry comptrollers.

3.15 Presentation issues

We highlighted concerns about the timeliness and accuracy of financial information being presented for audit in previous years. This period was no exception. Among the notable matters which impacted the delivery of the audit were:

- Multiple revisions to the financial statements were required as a result of hundreds of adjusting journal entries (2012 – 269, 2011 - 193, 2010 - 84);

3. AUDIT OBSERVATIONS & RECOMMENDATIONS

- Expenses were not reported by function; and
- Interdepartmental transactions were not eliminated.

The ACG needs to improve its financial reporting process by evaluating present procedures relating to timeliness and accuracy. We recommended that procedures be enhanced to improve the year-end financial processes and the review of financial statements.

3.16 Overspending of Supplementary estimate limits

Spending limits are imposed by the House of Assembly during the annual budget debate. Financial Instruction 5.5 states that “the approval of the Legislature must be obtained before committing to an over-expenditure. ... Except for a catastrophic event (e.g. spending required on an emergency basis in the event of a hurricane) approval of the Legislature must always be obtained in writing before making any commitment to overspend.”

For the year ended March 31 2010, the limits imposed by the House of Assembly were exceeded in the following areas:

- \$35.8 million was overspent on current expenditures by twenty-four departments without prior legislative approval. Fifteen of the departments which overspent in the current year also overspent in the previous fiscal year.
- Nine capital development projects exceeded the Total Authorized Figure (TAF) approved in the budget by \$400,000.
- Approximately \$9.4 million was overspent on capital projects by various Departments without prior Ministerial approvals as the required virements (transfers between estimates within a department) were only approved after the year-end. A virement is a transfer of a specific budget amount from one or more approved estimates to another within the department’s total budget.

Table 10: Overspending of limits

Overspending of:	2010	2011	2012
	\$ millions	\$ millions	\$ millions
Current expenditures	35.8	45.7	34.4
Capital projects	9.4	7.85	10.87
Total authorized figure	0.4	0.88	8.4

3. AUDIT OBSERVATIONS & RECOMMENDATIONS

The Ministry of Finance has in the past agreed to enforce Supplementary Estimate procedures. This includes requiring formal explanations from departments that overspent, and applying sanctions or penalties for non-compliance as provided for in Financial Instructions. Since that time, however, each fiscal year has seen incidents of overspending with no supplementary estimates or sanctions applied. We continue to support the recommendation of procedures being enforced.

3.17 Information Technology (IT) deficiencies

The Government depends on information processed through its IT system to perform critical functions. We have in the past years identified IT control deficiencies, many of which have not been resolved. Deficiencies in the current years include

- Weaknesses in access rights/privileges;
- Lack of password policies;
- Formal change management and problem/incident management procedures were not in place;
- Disaster recovery plans and Business Continuity Plans were not finalized and updated;
- One open-ended contract resulted in significant modification costs as well as undue reliance on one individual;
- Weaknesses in the Virtual Private Network;
- Security Policy not implemented;
- Operations and emergency procedures not documented;
- A Risk Assessment and Risk Assessment Plan have not been prepared; and
- Lack of a policy on disposal of IT devices.

Given the risks to the delivery of services as well as protection of the accuracy, confidentiality and integrity of information collected, it is critical that these deficiencies are rectified. We recommended enhanced procedures to improve the management of IT security.

3. Commission of Inquiry Rules

Commission of Inquiry

Box 20

The Swan Building

26 Victoria Street

Hamilton HM 12

294-0415 or 294-0416

commission@inquirybermuda.com

COMMISSION OF INQUIRY

RULES

PART I

Evidence

1. (1) The commission panel will send a written request for a written statement to any person from whom the inquiry panel proposes to take evidence.
- (2) The commission panel may make a written request for further evidence, being either a written statement or oral evidence.
- (3) Any request for a written statement will include a description of the matters or issues to be covered in the statement.

Oral evidence

2. (1) Subject to paragraphs (2) to (4), where a witness is giving oral evidence at an inquiry hearing, only counsel to the inquiry and the commission panel may ask questions of that witness.
- (2) Where a witness has been questioned orally in the course of an inquiry hearing pursuant to paragraph (1), the chairman may direct that the witness's legal representative may ask the witness questions.
- (3) Where
 - (a) a witness has been questioned orally in the course of an inquiry hearing; and
 - (b) that witness's evidence relates to the evidence of another witness, the legal representative of the witness to whom the evidence relates may apply to the chairman for permission to question the witness who has given oral evidence.

- (4) When making an application under paragraph (3), the legal representative must state
 - (a) the issues in respect of which a witness is to be questioned; and
 - (b) whether the questioning will raise new issues or, if not, why the questioning should be permitted.

Opening and closing statements

3.
 - (1) Only counsel to the inquiry may make an opening statement to the commission panel at the commencement of the first of any oral hearings.
 - (2) Subject to paragraph 3, only counsel to the inquiry may make a closing statement to the commission panel at the conclusion of any oral hearings.
 - (3) A witness or a witness's legal representative may make a closing statement to the commission panel with the permission of the chairman.
 - (4) The commission panel may impose time restrictions on the length of any closing statements referred to in paragraph (3).

Disclosure of evidence

4.
 - (1) In this rule-

‘restricted evidence’ means any evidence (whether given orally or in writing) which is in the possession of the commission panel, or any member of the commission panel, and which is the subject of an order made pursuant to paragraph (2).
 - (2) The commission panel may, whether on the application of any witness or any other person or of its own motion, order the restriction of publication of any evidence or any class of evidence before the commission panel.
 - (3) When an order is made pursuant to paragraph (2), the chairman may nonetheless order the disclosure of the restricted evidence to a witness on a confidential basis where the chairman considers it necessary or reasonable to do so.

Public Access

5. Subject to any orders in respect of restricted evidence, the chairman will take such steps as he considers reasonable to secure that members of the public (including reporters) are able –
- (a) to attend the inquiry;
 - (b) to obtain or to view a record of evidence and documents, given produced or provided to the inquiry or commission panel.

Warning letters

6. (1) The commission panel may send a warning letter to any person-
- (a) it considers may be, or who has been, subject to criticism in the inquiry proceedings; or
 - (b) about whom criticism may be inferred from evidence that has been given during the inquiry proceedings; or
 - (c) who may be subject to criticism in the report, or any interim report.
- (2) The commission panel must not include any explicit or significant criticism of a person in the report, or in any interim report, unless-
- (a) the chairman has sent that person a warning letter; and
 - (b) the person has been given a reasonable opportunity to respond to the warning letter.

Records management

7. Subject to the legal rights of any person-
- (a) during the course of the inquiry, the chairman will have regard to the need to ensure that the record of the inquiry is comprehensive and well-ordered; and
 - (b) at the end of the inquiry, the chairman will transfer custody of the inquiry record to an appropriate public record office, as the Premier directs.

Powers of Subpoena

8. (1) In this rule –
- “a preliminary or non-public sitting” shall mean a hearing attended by one or more commissioners who may attend in person or by means of telephone, electronic or other communications facilities.
- (2) The commission panel may issue a subpoena for the production of evidence or the answering of questions at a preliminary or non-public sitting.
- (3) Documents or responses received at a preliminary or non-public sitting shall form part of the record of inquiry to be considered by the full commission panel.
- (4) A claim by a person that –
- (a) he is unable to comply with the subpoena, or
- (b) it is unreasonable in all the circumstances to require him to comply with such a subpoena,
- shall be submitted in writing to the commission panel and will be determined by the chairman who may revoke or vary the subpoena on that ground.
- (5) In deciding whether to revoke or vary a subpoena on the ground mentioned in paragraph (4) the chairman will consider the public interest in the information in question being obtained by the inquiry, having regard to the likely importance of the information.
- (6) Claims under paragraph (4) should be submitted in writing to the commission panel as soon as possible and in any event prior to any return date of the subpoena.

PART II

Times of Sitting

9. The hours, times and location of the Commission’s public sittings will be as directed by the commission panel and published from time to time.

4. Commission of Inquiry Rulings



Attorney-General's Chambers

BY HAND & EMAIL (ben.adamson@conyersdill.com)

26 September 2016

Conyers Dill & Pearman Ltd
Clarendon House
2 Church Street
Hamilton HM 11

Attention: Mr. Ben Adamson

Dear Mr. Adamson,

Re: Commission of Inquiry – LF Wade Airport Re-development

This will acknowledge receipt of a copy of your correspondence to Liberty Law dated 20 September 2016, along with copies of summonses to witnesses Mr. Anthony Manders and Mr. Curtis Stovell. Those individuals are, respectively, the Financial Secretary of the Government of Bermuda and the Accountant General. They are required to provide documentation and information relating to the LF Wade Airport Re Development Project (“the Project”).

In accordance with Rule 4 of the Commission’s Rules, the Attorney General objects, on the following grounds, to the disclosure and use of any documentation or information relating to the Project that is not already in the public domain:

1. The Project is not within the Commission’s Terms of Reference.

The inquiry into the Project is apparently made in reliance on paragraphs 7 and 9 of the Terms of Reference: “7. Consider the adequacy of current safeguards and the system of financial accountability for the Government of Bermuda;” “9. Consider any other matter which the Commission considers relevant to any of the foregoing.”

In *BECL v. Commissioners and AG* [2016] SC (Bda) 82 Civ (7 September 2016) at paragraph 37, the Chief Justice was of the view that:

“This mandate is primarily anchored to the Financial Years 2010, 2011 and 2012 and the matters addressed in Section 3 of the Auditor-General’s Report. This finding may (not must) have implications for the range of documents falling outside this time period which can properly be sought.”

A footnote to that sentence states that this finding may have implications for the Commission’s ‘evinced intention’ of inquiring into the Project. We say, respectfully, that the Project is outside the remit of the Commission. Section 3 of the Auditor’s Report identifies certain systemic failures of accountability, but only in relation to the years of the Auditor’s Report. Insofar as the Commission



26 September 2016
 Letter – AG to CD&P
 Re. Commission of Inquiry – LF Wade Re Development

seeks to inquire into the Project, it is constrained by the limits of the Terms of Reference and to documents that are in the public domain.

Paragraph 9 of the Terms of Reference is also limited in its scope. The language in that paragraph, “any other matter ... relevant to ... the foregoing,” cannot be interpreted to expand the inquiry beyond the Auditor’s Report. Any request relating to the Project or question put to a witness that relates to the Project need not be answered by a witness because such questions or requests are not relevant. As the Chief Justice noted in the BECL decision:

“A basic rule of evidence is that witnesses are required to answer only relevant questions. It must be possible to easily determine what is or is not relevant by reference to well-defined terms of reference” (at para. 16).

In addition to our objection to the Commission’s receipt and use of any Project documents, we object to the disclosure of the Project documents by witnesses who may be in a position to provide them. Such witnesses may feel they are not in a position to object to the disclosure themselves because there may be penal consequences attached to a failure to comply with a Summons or request. As employer and interested party, Government makes the objection to the disclosure.

2. The documents relating to the Project are protected by public interest immunity.

Public Interest Immunity or “PII” may be claimed where the disclosure of confidential information would cause real or substantial harm to the public interest. In this particular case, the public interest would be engaged by the premature disclosure of information which would harm the Government of Bermuda’s commercial position in relation to entities with which it is engaged in active negotiations. PII arises under the common law, and has been expressly preserved in the context of judicial proceedings involving the Crown by section 19 of the Crown Proceedings Act 1966 and by the Rule 24/15 of the Rules of the Supreme Court of Bermuda 1985 (“RSC”). Witnesses before the Commission have the same rights and privileges they would have when appearing before the courts in legal proceedings. In particular, the right includes immunity against the release of any information which would be injurious to the public benefit.

Section 19 of the Crown Proceedings Act 1966 addresses the rules of discovery of evidence in proceedings in which the Crown is a party. The proviso to subsection (1) thereof makes very clear this provision does not authorise or require the disclosure of any document or to answer any question if the disclosure of such document or the answering of such question would be against the public interest.

Rule 24/15, RSC similarly states that rules governing disclosure in court proceedings are without prejudice to any rule of law which authorises or requires the withholding of any document on the ground that the disclosure of it would be injurious to the public interest.

In addition to any prejudice to Government’s interests caused by disclosure, Government has a contractual obligation not to disclose proprietary information that it has received in the course of negotiations. The disclosure would be injurious to the commercial interest of third parties. The non-



26 September 2016
Letter – AG to CD&P
Re. Commission of Inquiry – LF Wade Re Development

disclosure would cease to be effective at Financial close, but would continue in effect should Government decide not to proceed with the Project.

We request that the Commission keep confidential any documents and information about the Project it may receive that are not already in the public domain. If the Commission is unable to accede to this request for confidentiality, we ask that the Commission grant a stay of any proposed public disclosure by it to allow the Attorney General an opportunity to petition the Supreme Court on the issue.

Should you have any questions or concerns, please do not hesitate to contact me at 295-5151 ext 4427.

Yours faithfully,

A handwritten signature in blue ink, appearing to read "G. Howard", with a long horizontal flourish extending to the right.

Gregory Howard
Crown Counsel
for the Attorney-General

Commission of Inquiry
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27th September 2016

By Email

TO: Attorney General
Attorney General's Chambers
Global House
43 Church Street
Hamilton

Attn: The Honourable Trevor Moniz, JP, MP

Dear Attorney General,

Counsel to the Commission have forwarded to me your letter dated 26 September 2016 setting out in accordance with Rule 4 of the Rules of the Commission your grounds for objecting to the disclosure of any documentation or information relating to the LF Wade Airport Redevelopment ("the Airport Project") that is not already in the public domain.

What follows is my ruling as Chairman as required by Rule 4, made after full consultation with my fellow Commissioners.

Your first objection is that the Airport Project is "not within the Commission's Terms of Reference", citing the recent judgment of the Chief Justice in *Bermuda Emissions Control Ltd. vs. the Premier and others* (Civil Jurisdiction 2016: No. 322) where he held that the Commission's "mandate is primarily anchored to the financial years 2010, 2011 and 2012 and the matters addressed in Section 3 of the Auditor General's Report". You also refer to a footnote added by the Chief Justice in which he referred to possible

implications of that remark for the Commission's "evinced intention of investigating the current Airport Project".

There was of course no issue before the Chief Justice as to the Airport Project, or relating to it, and the footnote may have been prompted by some reference made by counsel in the course of their submissions. I am unclear what that reference may have been, but I doubt whether it included what I had previously communicated (in my Opening Statement at the first Public Hearing of 27 June 2016) as the Commission's reason for identifying the Airport Project as a proper subject of its Inquiry. The Commission is required not merely to investigate the three-year period addressed by Section 3 of the Auditor General's Report but also to "consider the adequacy of current safeguards etc." and to "make recommendations to prevent and / or reduce the risk of recurrences of any violation identified" as having occurred during 2010/12 under Articles 7 and 8. The Airport Project we believe is the largest and possibly the only major government capital project that is under negotiation at the present time. We are concerned primarily with possible violations of the correct tendering process for government contracts during the three-year period, but we also have to consider "current safeguards" against violations that we find occurred and to make recommendations for the future. We do not believe that the Chief Justice had this further issue in mind when he added the footnote to his judgment, and we would respectfully agree with him that we are not required to "investigate the current Airport Project" in the same way as if it had been concluded in 2010/12. We seek evidence only as to the tendering process, and I enclose for your convenience the questions that we asked of relevant witnesses on 25 July 2016 and 1 August 2016, and most recently again in our Summonses of 26 September 2016 (attached) after raising the issue with Heads of Department on 28 June 2016.

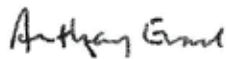
For those reasons, I must rule against your objection that the questions asked about the Airport Project fall outside the Terms of Reference of the Commission.

You contend secondly that "the documents relating to the Airport Project are protected by public interest immunity", but you do not identify the documents or classes of documents to which that privilege against disclosure might extend. We are currently of the view that no privilege can be claimed for any of the documents which have been requested, limited as they are to the tendering process, which in any event I understand has been the subject of much public debate. If that is incorrect, please identify the

documents or classes of document which you contend are entitled to the privilege. In this connection, I note that the Acting Attorney General (at the press conference he held on Friday 23 September) gave examples of what he contended are privileged documents, which he described as 'contract documents, subject to negotiation'. We do not require and so far as we are aware we have not sought any documents of that kind.

The Commission therefore must maintain its requests for information and documents contained in the Summonses (subpoenas) issued on 20th September 2016. The Commissioners will hear any further submissions or applications you may wish to make at the commencement of the second day of the Public Hearing, that is on 29 September 2016, at St. Theresa's Church Hall, Laffan Street, Hamilton at 10 am. Meanwhile, the times and places for appearance under the summonses can remain adjourned for further agreement between the witnesses concerned and the Commission.

Yours sincerely,



SIR ANTHONY H.M. EVANS
CHAIRMAN, COMMISSION OF INQUIRY

Cc: Gregory Howard, Attorney General
Narinder Hargun, Conyers Dill and Pearman
Jeffrey Elkinson, Conyers Dill and Pearman
Ben Adamson, Conyers Dill and Pearman

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29th September 2016

COMMISSION RULING

The Commission having heard Mr. Lynch's Counsel Submission on behalf of Dr. Brown, one, rejects his application to set aside the Subpoena directing Dr. Brown to appear as a witness before the Commission, and two, adjourns the date for Dr. Brown to appear as a witness until Monday 28th November, 2016 at 10:00 a.m. Within the terms of the Subpoena, the hearing is adjourned to that date for the purpose of hearing his evidence.

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6th October 2016

COMMISSION RULING

On 9th September 2016 the Commission issued a Summons requiring Mr. Dennis Lister to appear before the Commission on 28th September 2016 “or such other time and date as the matter may be adjourned to.”

The Summons was served on Mr. Lister personally on 12th September, 2016.

On 26th September, 2016 Mr. Lister was informed by letter that it was not necessary for him to appear on Wednesday 28th September but asking him to appear yesterday, Wednesday, 5th October at 2 p.m.

He has not acknowledged that letter nor a reminder that was sent to him on Monday 3rd October, 2016.

He did not appear yesterday, Wednesday, 5th October, 2016 and we have not heard from him.

For the avoidance of any doubt, the Commission rules that for the purposes of the Witness Summons issued and served on Mr. Dennis Lister the hearing of his evidence is adjourned until next Monday, 10th October, 2016 and he is required to attend the hearing pursuant to the Summons on that date at 10:00 a.m. The Summons has been signed pursuant to section 11 of the Commissions of Inquiry Act, 1935. A copy of this Ruling will be served on Mr. Lister.

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11th October 2016

COMMISSION RULING

A summons was issued by the Commission on 7th October addressed to BECL and marked "FAO Mr. Delroy Duncan Trocan Management Limited". The Summons required the Company to attend here this morning and to produce four categories of company records that are described in it. The production was required here at 10 o'clock this morning. Mr. Johnston of Counsel and Mrs Johnston have appeared for the Company. Mr. Delroy Duncan has appeared in person. I'll say no more until the end of this Ruling about Mr. Delroy Duncan personal position.

On behalf of the Company Mr Johnston objected to the validity of the Summons under Rule 8 of the Commission's Rules of Procedures. That Rule requires the objection to be made in writing to the Chairman who will determine whether or not to revoke or vary the subpoena on the ground put forward. In fact the objection was not made in writing and that was on the ground that we were told that the Summons was not seen by Mr. Duncan or on behalf of the Company until yesterday afternoon. In those circumstances Mr. Johnston has made the objection orally today and it was agreed, expressly agreed by him & by Counsel for the Commission that all four members of the Commission being present the Ruling should be made by them as a body.

I should give something of the background. The Summons in question is in fact the third which has been issued requiring production of the documents specified in it. The first was addressed to Mr. Donal Smith a Director of the Company who responded to it that the documents were company documents not his personally. For that reason a second summons was issued addressed to the Company BECL and to Trocan who we understand are its company administrators. The third summons is addressed to BECL alone although as stated above it is marked for the attention of Mr. Duncan of Trocan. Following the second summons BECL began proceedings

before the Supreme Court challenging the validity of the appointment of the Commission & on individual grounds the validity of the Summons. That Summons was issued on 29th August. It was heard by the Chief Justice on 2nd September and he gave his ruling on 7th September. There was a further hearing before him on 6th October which appears to have proceeded on the basis that the only significant remaining issue that's to say remaining before him was whether the summons could properly require production of documents to fewer than all four of the Commissioners. In August when the second summons was issued only two Commissioners of four were present in the jurisdiction. In that context the Chief Justice observed I would respectfully add understandably – that that objection might be overcome if a fresh subpoena were issued requiring attendance before all four Commissioners who are at present sitting here in Bermuda. That is how the third summons came to be issued and returnable today.

The Counsel, Mr Johnston objects on two grounds. First he says that the new summons is invalid because the first summons – the previous summons one should say strictly the second summons, has not been formally discharged and he says secondly that the new summons fails to give necessary information about the documents and why they are required. The first objection raises the question whether the Chief Justice simply overlooked the possible difficulty when he made the suggestion that he did. For our part, we would not hold that the third summons was invalid on that ground. However we are troubled by practical difficulty to which I will come to below. As for the second objection that is whether the new summons fails to give necessary information about the documents and why they are required we dismiss that objection. There is ample support both in the summons and as given in the affidavit sworn previously by one of the Commissioners to support their requirement that is made.

So I return to the practical difficulty which is this. According to the judgment of the Chief Justice. According to paragraph four of the judgment of the Chief Justice he said this. He referred to a previous ex parte hearing before Mr. Justice Hellman on 30th August 2016 and the Chief Justice observed that Mr Justice Hellman “very properly adjourned the matter for an ex parte on notice Hearing as an obviously

controversial stay was sought. In lieu of an interim injunction or stay to hold the writ he ordered BECL to deliver the documents sought forthwith to the Court to be held under Seal until the determination of the injunction application or until further Order of the Court. The Chief Justice's order affirmed that form of Order made by Mr. Justice Hellman. That Order was clearly made on the basis that what was called "documents sought" would be and were at the time of the Chief Justice's judgment being held by the Court under Seal. And that was subject to any further Order by the Court. We do not consider that it would be appropriate for the Commission to attempt or to appear to bypass that Order by requiring that the Company to make further hard copies of documents which may be held electronically by Trocan or by Mr Duncan on its behalf. Therefore whilst we consider that the first objection should be dismissed we feel unable to compel production of the documents without leave from the Court as Mr. Justice Hellman's Order requires. Matter is further complicated because we are told that "the documents" meaning physical copies of documents which are stored electronically with Trocan or maybe elsewhere, are held by Mr. Woloniecki of Counsel pursuant to an agreement made between Counsel in the course of the former proceedings. Its not necessary for us to resolve that issue today. It will be a matter for the Court. And so in conclusion we reject the Claims made under Rule 8 Sub Rule 4 of the Commission's Rules. We order production of the documents specified in what I have called the new or the third summons subject to obtaining leave from the Court pursuant to the Order of Mr. Justice Hellman. We further direct that the application to the Court be made forthwith. We appreciate the difficulties caused by the pending hurricane. The Commission meaning all four members will be able to receive the documents at 2 p.m. on Friday 14th October, that's 2 p.m. this week and requires the parties to use their best endeavour to obtain the Court's Ruling before that time.

If there are any further submissions on the practical aspects of what I have just said we will of course hear them now.

Finally with regard to Mr. Delroy Duncan all we propose to say is that the summons in question and the Order we have made was issued against the Company not against Trocan or against him personally. If as we understand he has a role as

Director of the Company he may be indirectly involved but we say no more than that.

Commission of Inquiry

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commission@inquirybermuda.comNovember 29th 2016**Commission's Ruling**

The Commission is concerned to enquire into, among other matters, the award by the Government of Bermuda to BECL, that's the company the Bermuda Emissions Control Limited, of contracts for the construction of vehicle emission testing stations in 2003 and 2006, and for services associated therewith, and for the operation of those facilities against payment of an annual fee.

The Commission has sought to obtain certain financial records of BECL, which it considers may be relevant to its inquiry, and it has issued a subpoena addressed to Mr. Delroy Duncan, who has held them in his capacity as a director of Trocan Limited, itself, a director of BECL.

Mr. Duncan has informed the Commission of Inquiry this morning that BECL, through Mr. Donal Smith, has instructed him not to release the documents to the Commission, and that he, Mr. Duncan, has no authority to do so. Mr. Smith, who is present at this hearing, has confirmed that that is correct. I have informed Mr. Smith that by withholding this evidence, he will compel the Commission to determine issues relating to BECL without reference to any relevant evidence that may be contained in the financial records of BECL, or which the Commission might have obtained if it had had access to them. Because Mr. Smith has persisted in his refusal to authorise Mr. Duncan to release the documents, or to release them himself, it has to be quite clear to Mr. Smith, and others, that that consequence will follow.

The Commission has decided to release Mr. Duncan from the subpoena, and to make no further order in relation to it.

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November 29th 2016

Commission's Ruling

The Commission issued, and served on Dr. Brown, a subpoena requiring his attendance to appear as a witness before the Commission at its September hearing. On the 29th of September, the second day of that hearing, Mr. Lynch, Queen's Counsel, applied on behalf of Dr. Brown to discharge the subpoena, and the Commission varied the date for Dr. Brown's appearance until tomorrow, the 30th of November, at 10:00 a.m.

This morning, Mr. Lynch, Queen's Counsel, has applied for the subpoena to be discharged on the ground that Dr. Brown, if he does appear as a witness, will assert his legal right to claim privilege against self-incrimination as regards all of the seven matters which the Commission seeks to question him about. Mr. Lynch has also indicated that Dr. Brown will swear an affidavit asserting his right to claim privilege in regard to all those issues.

As the Commission has made clear throughout its proceedings, all witnesses who appear before it are entitled to exercise their full legal rights, including, in the case of Dr. Brown and one other witness, the right to claim privilege against self-incrimination, sometimes popularly known as "Pleading the Fifth."

The first question is whether Dr. Brown has the legal right to claim the privilege, and the Commission accepts that he does. The second issue is whether it is necessary for him to attend as a witness in order to assert his right in response to each and every question that he will be asked. On this issue, the Commission is prepared to accept Dr. Brown's claim for privilege in affidavit form, but it will not discharge the subpoena for him to give oral evidence until the affidavit is sworn in terms which are acceptable to the Commission.

The application, therefore, is adjourned until tomorrow morning, the 30th of November, at 10:00 a.m., and the time for Dr. Brown to appear under the subpoena is varied until 12:00 noon tomorrow, the 30th of November, 2016.

5. Public Hearings Transcript Index

Day	Date	Page	Content
1	28 September 2016	17	Counsel Opening
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3	30 September 2016	1 2	[Mr. A. Manders -stood over] Major Marc Telemaque
4	3 October 2016	4 95	Ms. Cherie-lynn Whitter Mr. Robert Horton
5	4 October 2016	5 74 105 125 138	Ms. Thomasina Hassell Mr. Anil Chattergoon Mr. Andrew Morille Major Kenneth Dill Senator Vic Ball JP
6	5 October 2016	1 5 60 108 117	Airport Discussion Mr. Lawrence Brady Mr. Edmund Lee Matvey Mr. Bryan McLeod Mr. Donald Scott JP
7	6 October 2016	4 14 158	Ruling - The Hon. Dennis Lister JP MP The Hon. Derrick Burgess JP MP The Hon. Paula Cox JP
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10	11 October 2016	1 90 134	Announcements etc Ruling - BECL Ruling- Mr. Allan De Silva Mr. Lawrence Brady Mr. Anthony Manders
11	28 November 2016	5 16 19	Mr. Donal Smith Submission- Mr. Eugene Johnstone Mrs. Joyce Hayward
12	29 November 2016	5 16	Submission- Mr. Delroy Duncan Applications- Mr. Jerome Lynch QC
13	30 November 2016	4 99	Closing Statement -Mr. Lynch QC Closing Statement-Mr. Narindar Hargun
14	1 December 2016	4 131	Closing Statement-Chairman

6. Commission of Inquiry Budget/Finances

COI Financial Summary (Prepared February 27, 2017)	Commission Budget		Estimated Total
	Actual Expenditure (as of Feb. 27, 2017)	Estimated costs and payables outstanding	
<i>Commission Direct Expenses</i>			
Chairman's Airfare	32,672	3,800	36,472
Chairman's Accommodation	25,311	5,100	30,411
Chairman Fees & Other	36,887	8,500	45,387
Commissioner Fees (FL, JB, KB)	165,000	15,000	180,000
Total Commission Direct Expenses	259,870	32,400	292,270
<i>Professional Services</i>			
Legal Fees	541,549	72,000	613,549
Marketing / Communications	12,110	4,500	16,610
Clerk to the Commission (Consultant) / Other	22,750	28,000	50,750
Total Professional Services	576,409	104,500	680,909
<i>Misc. / Administrative Expenses</i>			
Food & Water	2,508	200	2,708
Office Supplies	3,351	0	3,351
Printing	2,641	750	3,391
Process Servers / Couriers / Other	3,942	100	4,042
Other	0	10,000	10,000
Total Misc. / Administrative Expenses	12,442	11,050	23,492
<i>Hearing Related Expenses</i>			
Audio / Transcription	37,650	0	37,650
Facility Rental	16,800	0	16,800
Hearing Security & Other	17,000	0	17,000
Total Hearing Related Expenses	71,450	0	71,450
Total Expenses	920,171	147,950	1,068,121

7. References/Footnotes

Section 3: Our approach

- 1 Public Inquiries Beer p.171.
- 2 Procedural Statement, 29 September 2016
- 3 Procedural Statement, 13 June 2016
- 4 Appendix 3
- 5 Royal Gazette, 23 September 2016
- 6 Appendix 4

Section 4: Governance

- 7 We believe that P.F.A is the abbreviation for Programme Finance and Administration

Section 5: Evidence

A: Commercial Courts and Ministry of Finance Renovations

- 8 Public Binder 1, Tab 1, p.9
- 9 Public Binder 1, Tab 1, p.12
- 10 Public Binder 1, Tab 1, p.13
- 11 Public Binder 1, Tab 1, p.15
- 12 Public Binder 1, Tab 1, p.17
- 13 Public Binder 1, Tab 1, p.17
- 14 Transcript, 3 October 2016, p.108
- 15 Transcript, 6 October 2016 p.135
- 16 Public Binder 1, Tab 1, p.19
- 17 Public Binder 1, Tab 1, p.20
- 18 Public Binder 1, Tab 1, p.20
- 19 Public Binder 1, Tab 1, p.20
- 20 Public Binder 1, Tab 1, p. 27
- 21 Transcript, 3 October 2016, p.110
- 22 Transcript, 3 October 2016, p.106
- 23 Transcript, 3 October 2016, pp.105 – 106
- 24 Horton witness statement, para. 35
- 25 Public Binder 1, Tab 1, p.29
- 26 Public Binder 1, Tab 1, pp.30 – 31
- 27 Public Binder 1, Tab 1, p.30
- 28 Horton Witness Statement, para. 38
- 29 Public Binder 1, Tab 1, p.32
- 30 Public Binder 1, Tab 1, p.33

B: Maintenance and Stores Building

- 31 Public Binder 1, Tab 2, p.1
- 32 Hassell witness statement, p.17
- 33 Transcript, 10 October 2016, p.63
- 34 Letter of 22 November 2016 from Mr. D. Lister to Commission of Inquiry
- 35 Horton witness statement, para. 45

C: Purchase of Sand and Rock

- 36 Public Binder A, Tab 8
- 37 Public Binder A, Tab 5
- 38 Transcript, 4 October 2016, p.142
- 39 Public Binder 1, Tab 3, p.3
- 40 Ball witness statement
- 41 Affidavit - Mr. Nick Faries
- 42 Public Binder A, Tab 4, Financial Instructions 2008
- 43 Public Binder A, Tab 8, PFA 2000 p.29, para. 5
- 44 Public Binder A, Tab 12, Civil Service Code of Conduct, p.35
- 45 Morille witness statement
- 46 Public Binder 1, Tab 3, A&S 1 /3
- 47 Public Binder 1, Tab 3, A&S 1-45

D: Renovations - Department of Human Resources

- 48 Horton witness statement, para. 26
- 49 Horton witness statement, para. 30
- 50 Horton witness statement, para. 32
- 51 Horton witness statement, para. 28
- 52 Transcript, 3 October 2016, p.99
- 53 Dill witness statement, paras. 5 – 9
- 54 Public Binder 1, Tab 4, pp.11 – 12
- 55 Transcript, 4 October 2016, p.126
- 56 Public Binder 1, Tab 4, p.11
- 57 Transcript, 4 October 2016, p.133
- 58 Transcript, 4 October 2016, p.135
- 59 Public Binder 1, Tab 4, p.20
- 60 Burgess witness statement 1, para. 18

E: Central Laboratory Project

- 61 Brady witness statement, p.92
- 62 Horton witness statement, para.60
- 63 Horton witness statement, para. 4
- 64 Morille witness statement, para.29
- 65 Burgess witness statement, para.27
- 66 Vernon Burgess witness statement, para. 9
- 67 Public Binder 1, Tab 6, p.3
- 68 Transcript, 3 October 2016, p.147
- 69 Transcript, 3 October 2016, pp.152-153
- 70 Transcript, 6 October 2016, pp.146-148
- 71 Public Binder, Tab 6 – CL 31-10
- 72 Transcript, 3 October 2016, pp.161 – 163

F: Global Hue

- 73 Public Binder A, Tab 10, PFA 2002
- 74 Public Binder A, Tab 4, Financial Instruction 2008
- 75 Appendix 3, Report of the Auditor General 2010, 2011 and 2012, p.26
- 76 Auditor General Special Report February 2009, p.3
- 77 Auditor General Special Report February 2009, p.15
- 78 Transcript, 30 September 2016, p.125

79 Public Binder Tab 5, p.2
 80 Transcript, 30 September 2016, p.111

G.: Ambling

81 Public Binder A, Tab 10, PFA 2002
 82 Public Binder A, Tab 4, Financial Instructions 2008
 83 Public Binder 1, Tab 8, p.17
 84 Public Binder 1, Tab 8, p.17
 85 Transcript, 6 October 2016, p.175
 86 Public Binder 1, Tab 8, p.7
 87 Transcript, 29 September 2016, p.85
 88 Public Binder 1, Tab 8, p.17
 89 Transcript, 4 October 2016, p.93
 90 Transcript, 30 September 2016, p.111

H: Motor Vehicle Safety and Emissions Testing Programme

91 Public Binder 1, Tab 9, pp.35 - 47
 92 Public Binder 1, Tab 9, p.8
 93 Per BECL website www.bermuda emissions.com
 94 Public Binder 1, Tab 9, pp.9-10
 95 Public Binder 1, Tab 9, pp.14, 15
 96 Public Binder 1, Tab 9, pp.16, 17
 97 Public Binder 1, Tab 9, pp.23 - 25
 98 Public Binder 1, Tab 9, p.28
 99 Public Binder 1, Tab 9, p.26
 100 Public Binder 1, Tab 9, pp.136 - 138
 101 Auditor General's Special Report, p.5
 102 SAGE Commission Report, p.110
 103 Website -Chief Justice Ruling, 20 December 2016
 104 Judicial Review – BECL vs. Premier et al., para. 30
 105 Judicial Review – BECL vs. Premier et al., para. 34
 106 Public Binder 1, Tab 9, p.162
 107 Public Binder 1, Tab 9, p.128
 108 Transcript, 28 November 2016, p.55
 109 Letter of 23 February 2017 in response to Horton Maxwell letter
 110 Public Binder 1, Tab 9, p.24
 111 Transcript, 28 November 2016, p.57
 112 Public Binder 1, Tab 9, p.129
 113 Transcript, 28 November 2016, p.59
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 116 Transcript, 28 November 2016, p.61
 117 Public Binder 1, Tab 9, p.120
 118 Transcript, 28 November 2016, p.64
 119 Transcript, 28 November 2016, p.66
 120 Public Binder 1, Tab 9, pp.14-15
 121 Transcript, 28 November 2016, p.74
 122 Transcript, 28 November 2016, pp.74 - 75
 123 Transcript, 28 November 2016, p.74
 124 Transcript, 28 November 2016, p.42
 125 Transcript, 28 November 2016, p.26

126 Transcript, 28 November 2016, p.42
 127 Transcript, 30 September 2016, p.13
 128 Transcript, 30 September 2016, p.14
 129 Public Binder 1, Tab 9, pp.183 – 191
 130 Transcript, 30 September 2016, p.16
 131 Transcript, 30 September 2016, p.29
 132 Transcript, 30 September 2016, p.30
 133 Transcript, 30 September 2016, pp.47, 48

I: Magistrates Court and Hamilton Police Station (Dame Lois Browne Evans Building)

134 Public Binder Tab 9
 135 Public Binder Tab 4
 136 Appendix 2 Terms of Reference
 137 Special Report of the Auditor General, February 2009
 138 Public Binder 1, Tab 10 pp.10-27
 139 Transcript, 29 September 2016, p.153.
 140 Transcript, 29 September 2016, p.153
 141 Public Binder A, Tab 12, para. 7.0.9.
 142 Binns witness statement, para. 26
 143 Transcript, 10 October 2016, p.40
 144 Transcript, 29 September 2016, p.157
 145 Transcript, 10 October 2016, pp.52-53
 146 Transcript, 10 October 2016, pp.22, 25
 147 Transcript, 10 October 2016, pp.24-25
 148 Transcript, 6 October 2016, p.25
 149 Transcript, 6 October 2016, p.38
 150 Transcript, 6 October 2016, p.49
 151 Transcript, 5 October 2016, p.73
 152 Transcript, 6 October 2016, p.62
 153 Burgess Second witness statement
 154 Transcript, 1 December 2016, p.7

J: Port Royal Golf Course Improvements Capital Development Project

155 Commission Opening Statement, 27 June 2016
 156 Website -Auditor General's Special Report
 157 Public Binder, Tab 11, pp.11-84
 158 Department Head Works and Engineering letter, Randy Rochester
 159 Public Binder, Tab 11, p.117
 160 Scott witness statement, p.7
 161 Scott witness statement p.7
 162 Cox witness statement, para. 2
 163 Burgess witness statement, para. 11
 164 Horton witness statement, para. 14
 165 Public Binder 1, Tab 11, pp.33 et seq.
 166 Transcript, 3 October 2016, p.15
 167 Transcript, 3 October 2016, p.13
 168 Transcript, 3 October 2016, pp.28-29
 169 Transcript, 7 October 2016, pp.68-69

K: Royal Naval Dockyard Cruise Pier - Heritage Wharf

- 170 Auditor General Special Report, March 2015
- 171 Public Binder A, Tab 10, PFA 2002
- 172 Public Binder A, Tab 4
- 173 Website - Opening Statement
- 174 Public Binder 1, Tab 12, p.28
- 175 Transcript, 30 September 2016, p.59
- 176 Public Binder 1, Tab 12, pp.12-64
- 177 Transcript, 28 September 2016, p.102
- 178 Transcript, 30 September 2016, p.63
- 179 Transcript, 29 September 2016, p.96
- 180 Binns witness statement, p. 4
- 181 Binns witness statement, p. 3
- 182 Public Binder 1, Tab 12, p.28
- 183 Public Binder 1, Tab 12, p.27
- 184 Transcript, 29 September 2016
- 185 Transcript, 6 October 2016, p.164
- 186 Website - KPMG Report

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- 213 Transcript, 11 October 2016, p.161
- 214 Manders Witness Statement 2, Annex 2, p.36
- 215 Transcript, 11 October 2016, p.161
- 216 Civil Airports Act 1949, clause 5(1)
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Section 8: Recommendations

- 218 Section 4, subsection 5 of this Report – Codes of Conduct

