

In the matter of the Commission of Inquiry appointed pursuant to section 1A of the Commission of Inquiry Act 1935 dated 24 February 2016

Second Witness Statement of Anthony Manders

1. I am Anthony Manders, _____, I am currently the Financial Secretary. I make this witness statement in response to the Witness Summons dated 20 September 2016 pursuant to section 9 of the Commission of Inquiry Act 2016.

Airport Project

- (i) What request was made? Is there a record of your request(s) and if there is, may we please have a copy or copies as appropriate?
2. When the Ministry was engaging with the UK Government on the Entrustment for the Airport Project the Ministry made the formal request to the Accountant General on the applicability of Financial Instruction to the project, and if necessary, to seek a waiver of Financial Instructions.
3. An e-mail from the Minister of Finance to the Governor which explained the justification for requesting the waiver was forwarded to the Accountant General for his consideration. The e-mail is included on pages 1 - 5 of my Annex II.
5. The question of the applicability of Financial Instructions arose because the proposed procedure for the airport project as it related to the partnership between the Bermuda Government and the Canadian Government (represented by the Canadian Commercial Corporation or "CCC", the crown agency of the Government of Canada) does not require CCC to provide services to the Bermuda Government in respect of which remuneration is required. There is no remuneration payable to CCC by the Government in exchange for any service. The agreement between CCC and the Bermuda Government (Letter of Agreement or "LOA" at pages 14 – 20 of my Annex II) was that "...a protocol to facilitate and expedite the further discussion..." related to the project was established. The transactions contemplated under the LOA are not compensatory payments for the procurement of either goods or services. The proposed procedure will result in various CCC Airport public-private partnerships "P3" project agreements that will require the Bermuda Government to assume various expenditure liabilities to support the Airport P3, but none of those expenditures accrue to either CCC or its subcontractors as a "fee for service". As a result, because no remuneration accrued to CCC, it was not clear whether the provisions of Financial Instructions relating to competitive tendering between prospective "suppliers" of goods and services applied to the proposed arrangement. Notwithstanding the inherent and peculiar nature of the CCC P3 transactions, the Ministry of Finance, out of an abundance of caution asked the Accountant General for his permission to proceed with the Government's "incremental" process with CCC, without any requirement of a competitive tendering process. That permission was granted by the Accountant General in 2014 on Page 4 of Annex II. The Accountant General's permission

was provided on the condition that, when available, further information can be provided on CCC's fees, even at a high level, to enable an evaluation of value for money for "the services". That further information has been provided, but with the proviso and clarification that only Aecon pays for contractual services that CCC renders to Aecon as its prime contractor, as no services are ultimately provided to the Bermuda Government by CCC.

(ii) Does the above represent the entirety of your communication with the Accountant General on this matter, and if not, what other communication has there been? May we please have copies of such records if there are any?

6. Various replies and documentation were provided to the Accountant General with regard to this matter over the preceding period ending March 16th 2016 which are included in my Annex II pages, 6 - 123. I have endeavoured to provide all of the communication on this matter I was able to obtain.

(iii) What documentation was provided to the Accountant General for review and may we please have copies?

7. Various documents was provided to the Accountant General for review. These are included in my Annex II, including memoranda, agreements and email correspondence.

(iv) Was there any documentation which was requested by the Accountant General but not provided?

8. All documentation which was requested by the Accountant General was provided.

9. Under the circumstances, the Ministry acknowledges the points raised by the Accountant General throughout the process and note the following two points:

- Even though Bermuda has the right to conduct its own due diligence concerning the quality of the CCC Team membership qualification and CCC's selection methodology, the Bermuda Government does not engage any contractors. The only agreement that Bermuda enters into is with CCC, the prime contractor. CCC takes on the risk to build the Airport, on time, on spec and on Budget.
- Technically, even though Aecon brought the opportunity to the attention of the CCC, the CCC had full procurement discretion as to whether or not it would agree to assume the risks (i.e., the prime contractor guarantee) of being Aecon's Prime Contractor. Had the CCC refused, it would only have meant that Aecon would have pitched their direct role as the Airport P3 partner directly and without the benefits of the CCC Prime Contractor Guarantee. No aspect of that introduction by Aecon to the CCC changes that procurement due diligence by CCC. Had Aecon not passed the onerous vendor selection process at CCC, then it is the view of Government that CCC would have simply withdrawn. If CCC had withdrawn from the project the Government would have sought an alternative procurement strategy.

(v) What role, if any, will the Office of the Project Management and Procurement fulfill in relation to this project?

10. At this time the Office of Project Management and Procurement are to the best of their ability fulfilling their role in relation to the project in accordance with the Public Treasury

Act 1969. However I have been advised by the Acting Director of the Office of Project Management and Procurement that there are steps required for the office to properly fulfill its statutory obligations under the Public Treasury Act 1969 (Act) in relation to the Airport terminal redevelopment project namely:

- a. Cabinet authorizes the Acting Director of OPMP to issue a Code of Practice for Project Management and Procurement (Code); and
- b. Regulations that contain the Code are made under section 33 (2)(b) of the Act, or under discrete procurement legislation.

Project Background – sole procurement

11. The above being said, the Ministry believes it would be of some assistance to the Commissioners to be provided with some back ground information about the Government's rationale for this project, the resultant transaction and sole source procurement in general.
12. In an effort to ensure that much needed infrastructure improvements did not over-burden the taxpayer or jeopardize Government's debt position, it was incumbent on the Government of Bermuda to explore alternative means of procuring and funding the required capital expenditure to facilitate the redevelopment.
13. The Government explored one such alternative which involved contracting with the Canadian Commercial Corporation (CCC) within the Government of Canada.
14. On June 4th 2014 a Government delegation including the Minister of Finance, Financial Secretary, Attorney General and General Manager of the Bermuda airport met with the Director of Business Development and Sales of the CCC. The primary purpose of the meeting was to explore the use of a Government to Government approach to redevelop the airport.
15. Some of the benefits to using a Government to Government approach to redevelop the airport were as follows:
 - Enables earliest development of the new terminal and associated works supported by an expert delivery team;
 - Customized solution is developed in collaboration with Bermuda;
 - Expedites project procurement; early start, early finish;
 - Guarantees that contracts will be performed per the terms and conditions mutually agreed upon;
 - Due diligence conducted to satisfy CCC of the Canadian's supplier's technical, financial and managerial capability to deliver on the contract;
 - Concession approach requires no outlay for the airport authority and no new debt;
 - Enhanced Bilateral Relationship;

- Total transparency, adhering to international best practices;
- Respect and adherence to socially responsible business practices;

16. Based on the above benefits, the Bermuda Government was confident that the Government-to-Government approach of contracting with the CCC was the appropriate model to be used for the redevelopment of the airport as this approach would provide the Government with a timely, efficient and trustworthy alternative.
17. On July 29th 2014 Cabinet approved the Minister of Finance entering into a Memorandum of Understanding with the CCC (pages 9 – 13 of my Annex II), in order to continue dialogue, and ultimately, facilitate an exclusive negotiation on a Government-to-Government basis in relation to the redevelopment of the airport.
18. Following further due diligence the Minister of Finance sought and obtained Cabinet approval on November 18th, 2014 to sign the LOA with the CCC.
19. On November 24th 2014 the Minister of Finance signed the Memorandum of Understanding (“MOU”) and the LOA with the CCC.
20. The Minister of Finance provided the rationale for using this approach in a Ministerial Statement dated November 21st 2014 [pages 1 – 7 of my Annex III].
21. The Government did carefully consider various competitive tendering procurement options for the project. However after fully assessing these options they were not considered viable.
22. Generally, all common law jurisdictions allow governments and public sector entities to sole source procure goods and/or services as an exception to the preferred procurement process of competitive tendering. Those exceptional circumstances include the following:
 - where time is of the essence (known as the “pressing circumstances” grounds or where a competitive solicitation is not “time practical” or time-effective); needed economic stimulation during a recession is a reasonable, and not uncommon, ground to expedite commercial transactions;
 - where, for any reason, it is not in the public interest to issue a competitive bid; it is used where it is in the public interest to expedite a procurement to deliver a highly required good or service, such as the demands of our broader “international transportation” business and tourism economy demands to upgrade or renew a national airport;
 - where the professional services are so specialized or unique that only one service source is capable of performing the contract to the quality level required.
23. The highly unique nature of the CCC’s proposal, combined with the urgent need for expedited procurement for the purpose of both national economic stimulation and to quickly upgrade Bermuda’s airport for international business and tourism enhancement, and, the best interests of Bermuda in having such vital and expensive infrastructure built entirely with foreign capital at a time of onerous fiscal restraint were, taken together, extremely compelling and legally recognized grounds for sole source procurement – any one of which on their own could be used to justify a sole source procurement.
24. In any sole source procurement transaction, there are many excellent ways to ensure “value for money” (“VFM”), to secure market standard commercial terms and conditions,

and to ensure continued governance oversight of the performance of the service provider – including a P3 transaction for airport redevelopment and its long term operation.

25. Various of those VFM and “market normalization” strategies are embedded in the sole source procurement for this airport project which include in summary:

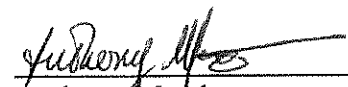
- Securing the advice, guidance and direct negotiation of highly specialized and experienced financial and legal advisors to ensure the inclusion of commercially normative and customary “values”, commercial protections, risk management, performance governance, remedial, dispute resolution, and financial terms and conditions;
- Take a highly developmental, incremental and graduated approach to contract and business case formulation, based on the contract process milestones of an MOU, LOA and then Airport Development Agreement before (and as preparation for) the formulation of the definitive project agreements that are now being structured and negotiated toward commercial close;
- Structuring the capital cost to be entirely pushed to the private sector;
- Structure the project without transferring any infrastructure (land, buildings or fixtures) to the private sector;
- Ensure continuous improvement, capital maintenance and refurbishment out of Airport proceeds;
- Ensuring “windfall sharing” and protection against excessive private sector profits;
- Entrenching the CCC’s guarantee of “on time, on spec and on budget” protection;
- Tightly defining the financial obligations and risks of the Government, with associated controlled potential risks, liabilities and cost exposures;
- Ensure that a public sector contract performance governance (oversight) structure is entrenched;
- Post completion value assessments and verification testing and studies, both qualitative and quantitative;
- Retaining an independent VFM review, assessment and possible opinion.

26. Also in the course of discussions between the Government and the Foreign & Commonwealth Office of the United Kingdom (“FCO”), questions were raised by the FCO concerning whether or not the Government had followed general rules of public expenditure best practices. Those inquiries led to a joint retainer by the Government and Deloitte Ltd. (“Deloitte”) to compare the CCC P3 partner selection process to the UK Government’s (HM Treasury) non-mandatory guidance on recommended practices for the evaluation of Public Section spending proposals (“**Green Book**”).

27. The purpose of this engagement was to evaluate the business case, VFM and affordability of the existing proposal and to provide a high-level cost effectiveness opinion for the proposal being put forward.

28. The Government is confident that the Deloitte Report will add substantial value to the project, both by improving VFM for the Government of Bermuda, and by further reducing risk.

29. The Government requested, and secured, an Entrustment Letter dated July 17, 2015 from the Director of Overseas Territories in the FCO, which delegated authority to the Government to proceed to negotiate and enter into an Airport P3 redevelopment contract with CCC. ~~With regard to the legitimacy of the Government's process to select a P3 partner,~~ the Entrustment requested the Government to prepare the various recommended Green Book case reports that Deloitte had identified. The Government voluntarily agreed to prepare such reports, in part, to strengthen and better explain its P3 partner selection process.
30. Finally Cabinet approved the establishment of a governance structure for the Airport Redevelopment Project to provide the appropriate oversight of the project and to conduct the due diligence necessary to recommending final approval of the Commercial Agreement to the Cabinet.
31. The governance structure has been developed in line with leading practice for similar P3 projects. The project is of national importance and the scale and complexity of the transaction require that an appropriate level of attention, direction and decision making is dedicated in order to reach financial close within the agreed timelines. Therefore, the governance structure establishes a Project Board, chaired by the Minister of Finance with representation from other key ministries, with responsibility for oversight and decision making in regard to the Project in order to ensure that timelines will be met. The Project Board is responsible for guiding the negotiations and reviewing the final draft of the Project Agreement in order to make a recommendation to the Cabinet on approval of the terms.
32. A Government Advisory Team ("GAT") has also been established and is led by the Project Co-directors: the Financial Secretary and the General Manager of the Airport with support from our external project advisors. The GAT reports to the Project Board on adherence with major milestones and provide analysis and recommendations on commercial and financial terms as well as design. The GAT Co-directors are supported in negotiation of commercial, financial and technical terms by our advisors as may be required.
33. I believe that the facts stated in this witness statement are true to the best of my knowledge and belief.


Anthony Manders

10/10/2016.
Date