

1                   **COMMISSION OF INQUIRY - THE WITNESS HEARINGS**

2                   **ST THERESA'S CATHEDRAL HALL, LAFFAN STREET,**

3                   **HAMILTON, BERMUDA**

4                   **WEDNESDAY, SEPTEMBER 28, 2016**

5  
6  
7                   ALBERTA DYER-TUCKER:   Now that I've got you  
8 settled, I beg your indulgence if you wouldn't mind  
9 standing for the entrance of the Commissioners, please.

10                  SIR ANTHONY EVANS:   This is Second Public  
11 Hearing held by the Commission of Inquiry established by  
12 the Honourable Premier Michael Dunkley on the 24th of  
13 February, 2016.

14                  I will begin by asking counsel -- the  
15 counsel present to identify themselves.  Bear in mind that  
16 you come here under the 1925 Act, certain questions are  
17 entitled to be represented by counsel.  So may I ask counsel  
18 to identify themselves?  Mr. Hargun and Mr. Adamson, of  
19 course, are here as counsel for the Inquiry.

20                  MR. HARGUN:    We are indeed, Mr. Chairman,  
21 and we have also with us Ms. Venous Memari.

22                  VENOUS MEMARI:   Good morning, Mr. Chairman,  
23 and members of the Commission.  I am Venous Memari of  
24 Liberty Law Chambers, Limited.  You will recall that I

1 | appeared before you at the last Hearing, and I have been  
2 | instructed by B.P.S.U. to represent certain of its members,  
3 | namely Dr. Derrick Binns, Mark Telemaque, Cherie Whitter,  
4 | and Anil Chatergoon, Curtis Stovell, Robert Horton,  
5 | Thomasina Hassell, Andrew Morille, Lucia Peniston, Anthony  
6 | Manders, and Randy Rochester.

7 |           Mr. Chairman, you will recall that at the  
8 | last hearing you did indicate that maybe it was not an  
9 | application for leave was required on behalf of these  
10 | members.

11 |           CHAIRMAN: Thank you. I can confirm that on  
12 | the face of it any person who will be -- the Commission has  
13 | asked to be a witness must necessarily be called in the  
14 | provisions of the Act. So thank you very much.

15 |           MS. MEMARI: I'm good.

16 |           CHAIRMAN: In which case, we'll proceed.  
17 | Today's business will consist of the statement by myself on  
18 | behalf of the Commission, and then an opening by Mr. Hargun  
19 | as the counsel to the Inquiry. We anticipate that that  
20 | will take all of today, and any applications which may soon  
21 | to be made will be held tomorrow morning at 10:00. At  
22 | present time we will commence the Hearing witnesses after  
23 | that, namely at 2:00, maybe later tomorrow morning.

24 |           Is there any other preliminary business to

1 cover?

2 NARINDER HARGUN: Not as far as we're  
3 concerned, Mr. Chairman.

4 **OPENING STATEMENT: SIR ANTHONY EVANS**

5 CHAIRMAN: I will begin by saying that  
6 notice of this Hearing was first given in our Opening  
7 Statement at the first Hearing on June the 27<sup>th</sup> of this  
8 year. It was confirmed in our Press Statement on the 12th  
9 of September, 2016 which also advised that the Premier had  
10 provided an extension to the Commission until December  
11 31st, 2016.

12 Let me introduce again the Commission  
13 members, myself as Chairman of the Commission, and my  
14 fellow members who are Mr. John Barritt on my left, Ms.  
15 Fiona Luck on my right, and Mr. Kumi Bradshaw on my far  
16 left. Alberta Dyer-Tucker is the Secretary to the  
17 Commission. In the formal language of the Commissions of  
18 Inquiry Act 1935, she is the Clerk appointed under Section  
19 5.

20 As Chairman, and on behalf of the  
21 Commission, I have appointed Messrs. Narinder Hargun,  
22 Jeffrey Elkinson and Ben Adamson of the firm Conyers Dill &  
23 Pearman as Counsel to the Inquiry.

24 I should emphasize that we are conducting an

1 | impartial, judicial Inquiry pursuant to the 1935 Act and  
2 | that we shall make our proceedings as transparent as we  
3 | properly can.

4 |                   The Commission's website,  
5 | inquirybermuda.com, includes an up-to-date account of our  
6 | activities, and I need only say that this Public Hearing is  
7 | for the purpose of obtaining oral evidence from the  
8 | comparatively small number of witnesses who were concerned  
9 | with, or responsible for the matters that gave rise to the  
10 | concerns expressed in the Report of the Auditor General on  
11 | the Consolidated Fund of the Government of Bermuda for the  
12 | financial years ending 31st March 2010, 2011 and 2012.

13 |                   At the end of each day's hearings, it is our  
14 | intention to post to our website the Witness Statements  
15 | whose evidence has been given that day. It is anticipated  
16 | that additional documents that may be referred to during  
17 | oral evidence will be posted to the website by the end of  
18 | the following day.

19 |                   I'll Terms of Reference are these, and it's  
20 | convenient to set those out here. The following paragraphs  
21 | appear after an introductory paragraph which reads:

22 |                   "Having regard to the Report of the Auditor  
23 | General on the Consolidated Fund of the Government of  
24 | Bermuda for the financial years ending 31st March in 2010,

1 | 2011 and 2012 and with regard to any matters arising under  
2 | Section 3 of the Report to:

3 |                   Scope of Inquiry

4 |                   1.    Inquire into any potential violation of  
5 | law or regulations, including the Civil Service Conditions  
6 | of Employment and Code of Conduct, Financial Instructions,  
7 | and Ministerial Code of Conduct, by any person or entity,  
8 | which the Commission considers significant and determine  
9 | how such violations arose;

10 |                   Under the Heading References to Other  
11 | Agencies

12 |                   2.    Refer any evidence of possible criminal  
13 | activity, which the Commission may identify, to the  
14 | Director of Public Prosecutions and the Police;

15 |                   3.    Refer any evidence of possible  
16 | disciplinary offense, which the Commission may identify, to  
17 | the Head of the Civil Service;

18 |                   4.    Draw to the attention of the Minister  
19 | of Finance any matter, which the Commission may identify,  
20 | appropriate for surcharge under Section 29 of the Public  
21 | Treasury Administration and Payments Act, 1969;

22 |                   5.    Draw to the attention of the Minister  
23 | of Legal Affairs as the Enforcement Authority for Bermuda  
24 | any matter, which the Commission may identify, appropriate

1 | for civil asset recovery under Part IIIA of the Proceeds of  
2 | Crime Act 1997;

3 |                   6. Draw to the attention of the Attorney  
4 | General any matter, which the Commission may identify,  
5 | appropriate for civil proceedings before the courts;

6 |                   Under the heading Recommendations for the  
7 | Future

8 |                   7. Consider the adequacy of the current  
9 | safeguards and the system of financial accountability for  
10 | the Government of Bermuda;

11 |                   8. Make recommendations to prevent and/or  
12 | to reduce the risk of recurrences of any violation  
13 | identified and to mitigate financial, operational and  
14 | reputational risks to the Government of Bermuda;

15 |                   Under the heading Any Other Matter

16 |                   9. Consider any other matter, which the  
17 | Commission considers relevant, to any of the foregoing."

18 |                   It is important to underline the opening  
19 | reference to Section 3 of the Auditor-General's Report for  
20 | two reasons. First, because the Chief Justice has held  
21 | that it governs and limits the scope of the numbered  
22 | paragraphs which follow. It is reported as *Bermuda*  
23 | *Emissions Control Limited v. The Premier and Others*, Civil  
24 | Jurisdiction 2016, number 322. Secondly, because that, in

1 | other words, Section 3, is where the Auditor General said:  
2 | "Many of the observations point to a general failure to  
3 | follow the rules (Financial Instructions) established by  
4 | Government for the safeguarding of public assets."

5 | Her concerns are then described under a  
6 | number of headings which can conveniently be sub-divided  
7 | into two groups; first, what we have called third party  
8 | issues (phone rings) -- whoever that was, would you like to  
9 | apologize?

10 | UNIDENTIFIED: *Indiscernible 10:40.8*

11 | CHAIRMAN: I take it that was an apology.

12 | The Auditor-General's concerns are then  
13 | described under a number of headings which can conveniently  
14 | be sub-divided into two groups; first, what we have called  
15 | third party issues, where third parties were awarded  
16 | government contracts or received public monies; and  
17 | secondly, internal accounting and procedural issues where  
18 | she, the Auditor-General, identified possible failures in  
19 | the handling of and accounting for government funds.

20 | This Witness Hearing will be more concerned  
21 | with the former group than with the latter. The Auditor  
22 | General listed her concerns -- these concerns -- under six  
23 | headings -- these were:

24 | Section 3.1 Failure to comply with

1 Financial Instructions and other rules relating to the  
2 award of government contracts, listing individual contracts  
3 and projects under sub-paragraphs 3.1.1 to 3.1.7 inclusive;

4                   Section 3.2       Millions paid without signed  
5 contracts or agreements;

6                   Section 3.3       Significant contracts not  
7 tendered;

8                   Section 3.4       Duplicate payments;

9                   Section 3.5       Overpayments; and

10                   Section 3.6       Millions paid for  
11 professional services without prior approval.

12                   Before describing how we have approached our  
13 task of inquiring into these matters, culminating in the  
14 oral evidence that we shall hear over the next 10 days or  
15 so, I shall refer to certain legal issues.

16                   First, the legal background; secondly, the  
17 scope of our Inquiry; and thirdly, the purpose of our  
18 Inquiry as it is defined in our Terms of Reference, which  
19 were issued by the Premier on 24th February 2016.

20                   First, the legal background. In Bermuda,  
21 this is provided by the Commissions of Inquiry Act, 1935,  
22 which was amended in 1944, and in subsequent years to 2014.  
23 The corresponding enactment in the United Kingdom was the  
24 Tribunal and Inquiries Act, 1921. Over the years, a number

1 | of high-profile Inquiries were held under that Act, and  
2 | rules and practices were developed for the protection of  
3 | witnesses and interested persons generally, alongside the  
4 | public need for the issues to be thoroughly explored, so  
5 | far as possible. In 2006 there was fresh legislation, the  
6 | Inquiries Act 2005 and the Inquiries Rules Act 2006 which  
7 | gave statutory force to many of these rules; but there has  
8 | been no corresponding enactment or updating of the rules in  
9 | Bermuda. In these circumstances, we have thought it right  
10 | to learn from the British -- and in one case, Irish --  
11 | authorities, and to interpret and apply the Bermuda Act in  
12 | accordance with the principles developed there.

13 |                   Secondly, the width of our Inquiry. We have  
14 | taken the view that it may include government contracts  
15 | that were made before the three-year period because the  
16 | Auditor General was concerned that payments were being made  
17 | under earlier contracts to third parties during the  
18 | relevant period. The Chief Justice held that in principle  
19 | that approach is correct, in his recent judgment in *BECL*  
20 | *Ltd.*

21 |                   A different but related issue has arisen in  
22 | connection with government contracts that have been made or  
23 | negotiated since the three-year period expired. Our view  
24 | was set out in the Statement that I made at our first

1 Public Hearing on 27th June 2016. It seems to us that we  
2 are required to consider current as well as past government  
3 practice, for example with regard to the tendering process  
4 for government contracts because we are asked not only  
5 about the past but also to make recommendations for the  
6 future, which includes taking account of the present.

7           The Commission's remit extends to the  
8 considering the adequacy of current safeguards and the  
9 system of financial accountability for the Government of  
10 Bermuda; that is paragraph 7 of the Terms of Reference.

11 The Commission believes that this mandate includes  
12 obtaining information on the safeguards and processes in  
13 place for dealing with the tendering of the airport  
14 project, which is the largest capital project currently  
15 under negotiation by the Government of Bermuda.

16           The Commission also wishes to advise that  
17 after the Government's press conference and statement  
18 relating to the airport project last Friday, 23rd September  
19 2016, the Government has followed the procedure which the  
20 Commission established for those who wish to make an  
21 objection to any matter which the Commission proposes to  
22 examine as part of its Inquiry. Written objections to the  
23 inclusion of the airport were received yesterday, I should  
24 say Monday, from the Attorney General's Chambers on behalf

1 | of the Government. In accordance with our procedure, the  
2 | Commission has communicated its decision on those  
3 | objections to the Attorney General and now awaits the  
4 | Attorney General's response. Any further application which  
5 | the Attorney General may wish to make will be heard  
6 | tomorrow morning together with any other applications that  
7 | any person wishes to make tomorrow morning, September 29th  
8 | at 10:00 a.m.

9 |                   In this connection, the Commission also  
10 | wishes to state, because the issue has been raised  
11 | publicly, that no undertaking was ever given to the  
12 | Government that we would not inquire into the airport  
13 | project.

14 |                   Thirdly, as regards the purpose of our  
15 | Inquiry, we have to remind ourselves that our task is  
16 | limited to establishing the relevant facts, so far as we  
17 | can. We are not required to make any findings as to  
18 | wrongdoing, whether criminal or in any other sense, and we  
19 | have no power to form or express any view as to whether  
20 | wrongdoing occurred. With regard to criminal liability,  
21 | our Terms of Reference require us to refer "possible  
22 | criminal activity" to the appropriate public official;  
23 | likewise, with regard to possible disciplinary action  
24 | against a public servant, or possible civil liability or

1 | any other financial penalty.

2 |           In summary, we shall try to establish all  
3 | relevant facts and expose them to the public gaze, so far  
4 | as lawful privilege -- private as well as public -- will  
5 | allow. That is something which a police inquiry cannot do.

6 |           What would happen if a witness, who might be  
7 | expected to be able to answer a relevant question, refuses  
8 | to give evidence or to answer the question, or to produce  
9 | specific documents that may contain the answer? To a  
10 | limited extent, that has already occurred, and we are on  
11 | notice that the issue may arise during this Hearing. If  
12 | and when it does arise, we will expect and be grateful for  
13 | legal submissions regarding the course we should adopt.  
14 | The Commission has the same powers as the Supreme Court to  
15 | compel the attendance of witnesses and the production of  
16 | documents (Section 9 of the 1935 Act).

17 |           Witnesses will be entitled to claim  
18 | privileges that are available to them in Court. We may  
19 | need to consider whether a refusal to give evidence or to  
20 | produce documents can be taken into account when deciding,  
21 | as we are required to do, not the issue of guilt but the  
22 | specific question whether it is "possible" that wrongdoing  
23 | occurred. Again, any submissions counsel may wish to make  
24 | on these issues will be welcomed.

1                   So I return to the factual matters with  
2 which the Hearing will be concerned. The oral evidence  
3 will represent the climax of a thorough and detailed  
4 investigation into the matters raised by the Auditor  
5 General which has taken place since the Commission began  
6 its work in April 2016. This has involved a huge amount of  
7 work by individual members of the Commission and by its  
8 counsel, Conyers Dill & Pearman. The process has been as  
9 follows. The Auditor General identified certain contracts  
10 or types of contracts as matters of particular concern,  
11 including government contracts that were awarded without  
12 Cabinet approval even when that was required by the  
13 Government's own Financial Instructions, or without an  
14 appropriate tendering process, or without adequate  
15 explanation as to why the contract award was made.

16                   With limited resources, and in view of time  
17 constraints, and on the advice of counsel, we decided to  
18 concentrate on one aspect, in particular, that is, the  
19 issue of tendering. Were contracts put out to tender, as  
20 required by Financial Instructions? If not, was the  
21 exception permitted by the Financial Instructions or other  
22 rules? If Cabinet approval was required, was it obtained?  
23 If not, why not?

24                   With regard to our limited resources, I

1 | pause here to note that the Commission has had no  
2 | investigators at our disposal, forensic or otherwise. Our  
3 | budget did not provide for this. I should add that we have  
4 | not had access to any police files of any matters, which  
5 | are or have been, under active police investigation,  
6 | although we have been made aware that some of the contracts  
7 | into which we are inquiring are, or have been, the subject  
8 | of those investigations.

9 |                   The Auditor General's Report identified  
10 | various government departments where it appeared that  
11 | Financial Instructions had been, or might have been,  
12 | breached. This made it possible for us to identify the  
13 | senior public servants and the government Ministers who  
14 | were responsible for the contracts in question.

15 |                   Relevant documents were obtained,  
16 | voluntarily in general, but where necessary by issuing  
17 | subpoenas to produce them. Each of the persons identified  
18 | in this way was requested to make a written statement and  
19 | to answer specific questions regarding the contract or  
20 | contracts in question. Each person so asked was offered  
21 | legal advice and assistance from counsel to the Commission  
22 | at no cost to themselves, and with safeguards to protect  
23 | their own interests. In the result, only a small number  
24 | accepted that offer. A few declined to produce any witness

1 statement before the hearing.

2           The result of this preparatory work is that  
3 up to 20 witnesses are likely to be called to give evidence  
4 at the Hearing. These witnesses include those who have  
5 prepared witness statements in advance, and we are thankful  
6 for their cooperation, as well as those who have not done  
7 so. Their evidence inevitably will be more time consuming.  
8 Every effort has been made to arrange dates convenient to  
9 the witnesses concerned.

10           Each witness will be examined, and cross-  
11 examined when appropriate, by counsel to the Commission.  
12 Applications to be represented by counsel, whether as of  
13 right or with leave from the Commission pursuant to Section  
14 12 of the 1935 Act, will be heard by the Commission at the  
15 outset of the Hearing and thereafter as may be convenient.

16           Likewise, the Commission will hear and  
17 consider any applications that may be made for leave to  
18 examine or cross-examine witnesses on behalf of other  
19 interested parties, to the extent permitted by the Rules  
20 published on 8th September 2016.

21           I should place it on record finally that it  
22 appears from the inquiries we have made so far that no  
23 witness is likely to dissent from the Auditor-General's  
24 view that there was a widespread, even systemic, disregard

1 of the requirements of the Financial Instructions during at  
2 least the early part of the period with which we are  
3 concerned.

4                   But we also have reason to believe that from  
5 late 2009 onwards, some steps were taken to discover why  
6 that was so, and to remedy defects in the procedures.  
7 Thus, in 2009/10, the firm of K.P.M.G. was instructed to  
8 conduct a diagnostic review of how six selected capital  
9 projects compared with leading international practices, and  
10 to report on them to the then Minister of Finance. Its  
11 Report contributed to the Good Governance Acts of 2011 and  
12 2012 which followed.

13                   The Future

14                   Financial Instructions are revised from time  
15 to time, including in 2011 and 2013, and we will have to  
16 consider whether the current edition provides a  
17 satisfactory safeguard, in practice as well as on paper,  
18 against any weaknesses that we may find existed during the  
19 earlier period, and which continue to exist.

20                   Now we will proceed to the Opening Statement  
21 from Counsel to the Commission, and we anticipate this will  
22 take the remainder of the day. We will start hearing  
23 evidence from witnesses on Thursday, tomorrow afternoon,  
24 which leaves Thursday morning, tomorrow morning, available

1 | to consider any applications that may be made.

2 |           Mr. Hargun.

3 |           **OPENING STATEMENT - NARINDER HARGUN**

4 |           MR. HARGUN: Chairman, thank you. Mr.  
5 | Chairman, you've already referred to the fact that this  
6 | Inquiry is concerned with the issues and contracts which  
7 | were referred to in Part 3 of the Audit Report of the  
8 | Auditor General in relation to the previous three years.

9 |           Given that the fact that the Commission is  
10 | concerned with the issues which are raised and the very  
11 | contracts which are raised, it is helpful if one was to  
12 | actually look at the terms of that particular section,  
13 | which is Section 3 of the Audit Report.

14 |           You will find that in binder C, and I think  
15 | the mission is to add that part because it is that part  
16 | which informs us the issues which we will have to look at  
17 | and consider whether the factual assertions which I made  
18 | are valid, whether the criticism which I made are valid,  
19 | and what immediate action, if any, should be recommended.

20 |           In relation to that section, we find that,  
21 | as I say, at binder C, if you want to take a look at it,  
22 | and it is at Section 3, starts at page 19. There are a  
23 | number of issues which the Auditor General sets out, and  
24 | there are a number of contracts which the Auditor General

1 sets out by way of examples. There are other contracts  
2 which we will look at given that those contracts relate to  
3 payments made during the period of this particular Report  
4 by the Auditor General.

5 I'll come to it in a moment -- we'll also  
6 look at some contracts which have historical significance,  
7 not for the purposes of looking at any detail of the  
8 issues, but for the purposes of looking at what was the  
9 historical background in which this particular audit report  
10 was prepared.

11 Now as just mentioned, one of the criticisms  
12 which is made by the Auditor General is the failure to  
13 comply with Financial Instructions and related rules. The  
14 Auditor General concludes that many of the capital  
15 development transactions selected for testing during 2010  
16 did not comply with the Financial Instructions in P.F.A.  
17 2000 and P.F.A. 2002.

18 Now, we'll look at it in a moment.  
19 Financial Instructions are instructions given by the  
20 Minister of Finance. They are to some extent policy  
21 instructions. They do now have a statutory basis, and  
22 we'll have a look at the statutory basis. It appears that  
23 P.F.A. 2000 and P.F.A. 2002 are further detailed  
24 instructions primarily concerned with Works and

1 Engineering, even with the supply of goods and supply of  
2 services.

3           One of the issues which we will have a look  
4 at is that within the Government departments, at least  
5 Works and Engineering, which has the primary responsibility  
6 in terms of construction contracts, contracts for  
7 procurement, and contracts for services.

8           Works and Engineering has specialized staff  
9 in terms of engineers, in terms of chief architects, and  
10 other technical officers who have the expertise to  
11 negotiate and to enter into those contracts.

12           One of the issues which you will have to  
13 consider is whether what happened here in terms of  
14 delegation, that is to say rather than Works and  
15 Engineering negotiating and selecting the contracts, that  
16 function was passed onto another ministry, primarily the  
17 Ministry of Tourism and Transport, which as we shall see,  
18 had no particular expertise in relation to those matters.

19           The Auditor General continues -- goes on to  
20 say, we requested supporting documentation for an estimated  
21 35.5 million spent on capital contracts and purchases, and  
22 15 percent, that's 5.2 million, did not have supporting  
23 documentation. So that's the second issue -- no supporting  
24 documentation.

1                   Of the remaining 30.3 million, many failed  
2 to comply with applicable purchasing and approval  
3 standards. The majority lacked the required prior approval  
4 of Cabinet, did not have agreements or contracts, and/or  
5 did not follow the basic tendering procedure.

6                   So the issues for the Tribunal -- for the  
7 Commission would be whether these assertions which are made  
8 by the Auditor General are factually correct; and secondly  
9 whether there is any particular justification which has  
10 been put forward by the relevant witnesses as to why it was  
11 that the Financial Instructions or the other requirements  
12 were not followed in any particular case.

13                   Then the Auditor General gives examples of  
14 -- first, for example, millions spent without prior  
15 approval of Cabinet. The Auditor General refers to  
16 Financial Instruction 8.3.1 -- we'll have a look at that in  
17 a moment. Briefly, that requires that any contract over  
18 \$50,000.00 must be approved by Cabinet before the agreement  
19 or contract can be signed.

20                   There is an interesting legal issue as to  
21 whether any contract without Cabinet approval is a binding  
22 contract. But leaving that aside, clearly as a matter of  
23 internal control, that the Financial Instructions so that  
24 the public money is properly controlled requires that any

1 contract over \$50,000.00 must be considered and approved by  
2 the Cabinet before any technical officer enters into the  
3 contract.

4           You will see that the Auditor says -- the  
5 Auditor General -- that during 2010 approximately 14  
6 million expenditures tested did not have the required by  
7 Cabinet approval. The Auditor General then gives the  
8 particular contracts -- we will have a look at those  
9 contracts in due course -- that the Commercial Courts/  
10 Ministry of Finance renovations, Maintenance and Stores  
11 Building, and there was a particular contract for purchase  
12 of sand and rock, renovations to the Department of Human  
13 Resources, and the Central Laboratory Building project.

14           You will then see that the Auditor General,  
15 in fact, goes into some detail as to how it happened. We  
16 will look at the documents in a moment. But just to see  
17 what the Auditor General says in relation to the Commercial  
18 Courts contract, the contract for the construction of the  
19 Commercial Courts and renovations at the Ministry of  
20 Finance Headquarters was awarded to a company, the  
21 successful bidder, without the prior approval of Cabinet  
22 and related tender process was compromised.

23           When the project was first put out to  
24 tender, the successful bidder's bid was determined to be

1 | invalid because required sections of the Form of Tender was  
2 | not completed. Of the remaining five tenders received, the  
3 | staff of Works and Engineering recommended that the lowest  
4 | bidder be awarded the contract. However, in December 2008,  
5 | the Minister of Works and Engineering instructed technical  
6 | officers to request all bidders to rebid based on a reduced  
7 | scope of work.

8 |                   Just pausing there, one of the issues which  
9 | you will see when you look at the contracts is that as the  
10 | Financial Instructions required ordinarily when tenders  
11 | come back, tenders are opened in accordance with the  
12 | requirements, and the technical officers then consider  
13 | those tenders and make an assessment as to which tenders  
14 | should be accepted, and that is based upon perfectly good  
15 | reasons. It is not necessary that the lowest tender is  
16 | accepted. It may well be that there are other reasons why  
17 | another tender should be accepted.

18 |                   But one issue which you will see is that not  
19 | infrequently the Minister does not accept the  
20 | recommendation of the technical officers. One issue for  
21 | the Commission to consider is whether the Minister should -  
22 | - has a complete discretion in ignoring the recommendations  
23 | made by the technical officers or whether it is a  
24 | discretion, but that discretion is to be exercised

1 sparingly, and if it is exercised, whether reasons should  
2 be given for ignoring the recommendations of the technical  
3 officers.

4                   Here, in relation to the Commercial Courts,  
5 the Permanent Secretary noted the request for rebid, and  
6 that was a request made by the Minister. It should be --  
7 that stays in the context of the Government wishing to  
8 reduce spending given the current economic environment,  
9 P.S. gave instructions to include all bidders, and to allow  
10 them to make corrections to irregularities which may have  
11 disqualified their initial bids.

12                   The successful bidder submitted a request  
13 that revised it from 1.7 million. A review of the second  
14 round of bids was not carried out by Works and Engineering  
15 staff, nor was a recommendation made by them. From the  
16 outset, senior Works and Engineering staff expressed their  
17 concern about the handling of the project.

18                   On January 2nd, 2009 a senior officer noted  
19 this is not how the project should be run. It should be  
20 noted that the review of the recent tender was not carried  
21 out by the Department, nor any recommendation put forward  
22 by the Department of Capital Improvement given to my  
23 knowledge. The decision to award any contracts were  
24 carried out at a higher level. I'm also concerned that

1 additional works are going to be added, and that the final  
2 expenditures will exceed the original tender amount, and  
3 the quality is going to be compromised.

4           The Minister of Finance himself raised  
5 concerns about the following of due process in an email  
6 from financial -- the secretary to the P.S. -- which noted,  
7 please advise whether the award complies with Financial  
8 Instructions to the following respects, 8.2.13. The same  
9 supplier should not be used repeatedly for that good  
10 reason. 8.2.38, unsuccessful suppliers should not be  
11 allowed to resubmit a lower quotation price. 8.3.1,  
12 contracts totaling over \$50,000.00 must be submitted to  
13 Cabinet for approval before acceptance. In addition,  
14 please advise information pertaining to the principals of  
15 the company which has been determined to receive the  
16 contract.

17           We requested copies of Works and  
18 Engineering's response to the Minister of Finance email and  
19 to date have not been provided with one. However, it is  
20 apparent that the awarding of this contract did not meet  
21 critical requirements of Financial Instructions. Then on  
22 January 7th, 2009, the P.S. confirmed that the Minister had  
23 approved the award of the contract to the successful bidder  
24 in the amount of 1.7 million.

1                   Retroactive approval was later obtained from  
2 the Cabinet on February 22, 2009. The final amount paid to  
3 the company subsequent to changes was approximately 1.9  
4 million dollars. So that's one audit example given by the  
5 Auditor General.

6                   The second example given was the Maintenance  
7 and Stores Building. That was a contract in 2010 Cabinet's  
8 prior approval for a 1.6 million contract for the  
9 construction of the Maintenance and Stores Building was not  
10 obtained. When the original bids were received, Works and  
11 Engineering staff recommended the lowest bidder in their  
12 contract award recommendation.

13                   They concluded that the lowest bidder should  
14 have been awarded the contract on the basis of cost and  
15 schedule provided in the submission, the company's clear  
16 understanding of the requirement to undertake the project,  
17 and its collective experience.

18                   I will take the Commissioners to the  
19 relevant documentation in due course. And you will see  
20 that in that case, it wasn't simply a case of the technical  
21 officers recommending that the lowest bidder should be  
22 accepted, other additional reasons were given why that  
23 should be the case.

24                   We also see that the recommendation made by

1 | the technical officers was presented to the Cabinet, but  
2 | rather than the Minister supporting that recommendation to  
3 | the Cabinet, the Minister at the Cabinet level took a  
4 | different position, and the position taken was that he  
5 | wasn't satisfied that the bidder recommended by the  
6 | technical officers could actually complete the project in  
7 | time. There appears to be no reason why that view should  
8 | have been taken because that was a matter which was taken  
9 | into account by the technical officers. As I said, we'll  
10 | have a look at it.

11 |                   The Cabinet did not approve the award of the  
12 | contract at that time. Instead, the Cabinet recommended  
13 | that the consideration of the contract award should be  
14 | carried over to the next meeting to ensure that the  
15 | estimate for the work was updated. We requested  
16 | confirmation of the Cabinet's subsequent approval, but  
17 | neither Works and Engineering nor the Cabinet Office  
18 | provided evidence that the contract was, in fact, returned  
19 | to the Cabinet for approval. So the position is, the  
20 | contract was awarded, but the matter was never returned  
21 | back to the Cabinet for approval.

22 |                   The third matter which the Auditor General  
23 | looked at was the purchase of sand and rock. The P.F.A.  
24 | 2000, that's the detailed requirements for acquisition of

1 goods, requires significant purchases to be approved by the  
2 Cabinet, as well as documented with a contract or  
3 agreement.

4                   In 2010 we examined payment of 1.4 million  
5 for the purchase of sand and rock. The payment was  
6 processed without Cabinet approval, the documented contract  
7 or their indication of receipt of those is (*indiscernible*  
8 *43:39.2 uploaded ?*). We requested, but were not provided,  
9 with Cabinet approval. The failure to obtain Cabinet  
10 approval was corroborated "by correspondence" which Works  
11 and Engineering staff questioned why an agreement was made  
12 prior to Cabinet approval. We will look at that contract  
13 in some detail.

14                   There is another aspect of it in that the  
15 contract was awarded by a technical officer to a company in  
16 which one of his relatives was interested in terms of  
17 having ownership, and it appears that that aspect was never  
18 disclosed to the Permanent Secretary who actually signed  
19 the contract.

20                   The fourth example which the Auditor General  
21 gives is the renovations to the Department of Human  
22 Resources. In 2010 a contract for renovations to the  
23 Department of Human Resources did not receive Cabinet  
24 approval prior to, nor was it put out to tender. Works and

1 Engineering confirmed that the project was not properly  
2 tendered, and noted that they had Civil Service agree to  
3 proceed with the negotiations with a possible contractor.  
4 As such, there was no Cabinet award recommendation document  
5 issued to Cabinet, and no Cabinet approval was obtained for  
6 the award of the contract.

7           The original contract sum of \$257,000.00 was  
8 negotiated with the contractor; however, as a result of  
9 numerous changes made, the amount of \$71,000.00, the final  
10 cost to the public was \$958,000.00. We'll have a look at  
11 that contract and see if there was a justification for  
12 departing from the agreed requirements under the Financial  
13 Instructions, and whether that was justified.

14           The fifth example given is the Central  
15 Laboratory Building project. The original contract sum for  
16 the Central Laboratory Building project was approximately  
17 \$46,000.00. In 2010 the contract did not receive prior  
18 Cabinet approval. Additionally, Works and Engineering  
19 noted that the services were not tendered but were  
20 negotiated with the knowledge of the P.S. Additional  
21 services of \$856,000.00 resulted in the final contract of  
22 the amount of \$902,000.00. Again, we'll have a look at the  
23 underlying documentation to see if there is a justification  
24 for departure from having that particular contract approved

1 | by Cabinet as required by the Financial Instructions.

2 |           And then the Auditor General refers to  
3 | departmental expenditures. He says -- she says there were  
4 | numerous cases, 69 percent of 43 million dollars of  
5 | expenditure greater than one million in 2011, which  
6 | violated the requirement for prior Cabinet approval.

7 |           Then at Table 4, the Commissioners will see  
8 | the departments are set out -- are just identified land,  
9 | buildings, and services for -- in 2011 10 million five  
10 | hundred ninety-six thousand, one hundred thirty-eight.  
11 | Airport operations in 2011, three million forty-seven  
12 | thousand, two hundred and four. Tourism in 2010, one  
13 | million five hundred thousand seven hundred and twenty-  
14 | seven. In 2011, two million seven hundred twenty-six  
15 | thousand, three hundred and three. Transport Control in  
16 | 2011, two million sixty-eight thousand one hundred and six.  
17 | And you see Works and Engineering for 2010, one million  
18 | four hundred ninety-four thousand, three hundred and  
19 | eleven.

20 |           It's those contracts the Auditor General  
21 | said that it is evident that the policies, procedures, and  
22 | rules pertaining to capital expenditures are being violated  
23 | to such an extent as they are perceived as proper.

24 |           Given that the Commission is asked to

1 consider what is the position today in terms of current  
2 practices, and we anticipate that we may also look at the  
3 airport project. Now in that context, the purpose of  
4 looking at the airport project is not to determine the  
5 commercial wisdom of the transaction, or to look at the  
6 commercial bullet points, or to look at any proprietary  
7 documentation, or any confidential documentation of any  
8 sort.

9           The sole purpose of looking at the airport  
10 contractual arrangement is to see what processes were put  
11 in place, and whether those processes complied with the  
12 existing Financial Instructions, and if not, whether there  
13 is a justification for it. Those are issues which we  
14 anticipate are matters which are already in the public  
15 domain. It is not -- we're not concerned here with issues  
16 which are confidential to the parties in terms of their  
17 negotiating posture.

18           So that's the background in terms of what  
19 we'll be looking at, and what we have been looking at, and  
20 what the witnesses deal with because those contracts, those  
21 14 contracts in total, exemplify the issues which arise.

22           But before we look at those issues, can we  
23 just have a look at the internal Government structure which  
24 deals with the issues of how Government enters into

1 | contracts, and how capital expenditure is controlled?

2 |                   At a very high level, one has the Cabinet  
3 | Capital Subcommittee which is composed of senior civil  
4 | servants and the Ministers from Finance and Works and  
5 | Engineering and other ministries. The Capital Subcommittee  
6 | sets --

7 |                   CHAIRMAN: Did you mention somewhere *how*  
8 | the Cabinet works?

9 |                   MR. HARGUN: It's composed of --

10 |                   CHAIRMAN: What is it composed of?

11 |                   MR. HARGUN: The Capital Subcommittee.

12 |                   CHAIRMAN: The Capital *Subcommittee*.

13 |                   MR. HARGUN: This is the body which now  
14 | becomes the law for which there are no consequences. It was  
15 | -- this was one of the reasons why the Commission was  
16 | established.

17 |                   The second issue which the Auditor General  
18 | identified was that millions were paid without signed  
19 | contracts or agreements. That is set out at Section 3.2.  
20 | You will note that the Auditor General says Financial  
21 | Instructions 8.3.4 provides that if a contract is not  
22 | provided by the supplier, a contract agreement must be  
23 | prepared that includes all terms and conditions, and must  
24 | be vetted by the Attorney General prior to signature.

1                   In 2010 the Department of Works and  
2 Engineering did not adhere to Financial Instructions and  
3 related rules. We identified (35 ?) instances where  
4 expenditures were made without contracts or agreements. An  
5 estimated five million, 17 percent of the 30.3 million  
6 expenditures tested in 2010 did not have a contract or  
7 agreement.

8                   So 17 percent of the tested contracts did  
9 not comply with it, and you will see that the departments  
10 which failed to do that, and they're set out -- Civil  
11 Aviation, 2.6 million, Ministry of Works and Engineering,  
12 1.4 million, and so on.

13                   The third issue, a significant issue, is  
14 that significant contracts were not tendered. When we look  
15 at the Financial Instructions, and also the P.F.A.s, one of  
16 the fundamental instructions require that tendering is  
17 required for any contract with a value of goods and  
18 services exceeds \$50,000.00. Financial Instruction 8.31  
19 requires to do that.

20                   You will see that the Auditor General says  
21 despite the requirements of the Financial Instructions, the  
22 2010 audit revealed that 55 percent, that's 16.8 million of  
23 expenditures tested, were not tendered. Expenditures  
24 greater than one million which were not tendered or made by

1 the following departments, and you'll see Education 4.1  
2 million, Tourism, 3.6 million, Civil Aviation, 2.6 million,  
3 Information Technology Office, 2.2 million, Transport  
4 Control, two million, Police, 1.6 million, Correction, 1.1  
5 million, and the Ministry of Works and Engineering, amounts  
6 in excess of one million.

7 In 2011, an estimated 62 million of  
8 expenditures tested, 76 percent were not tendered in  
9 compliance with the Financial Instructions. Then again,  
10 the departments are set out. The main ones being Tourism,  
11 18.1 million, Land, Building and Service, 10.7 million,  
12 Marine Imports, 4.3 million, Airport Operations, 3.8  
13 million, and so on.

14 That is a significant issue which we will  
15 look at when you come to look at the various contracts.  
16 Then the Auditor General also identified an issue of  
17 duplicate payments, and the Auditor General set out the  
18 contracts where money had been paid twice. In particular  
19 the third quarter grant, Works and Engineering payment  
20 certificates, checks issued twice, and payment to Sand 360.  
21 The Auditor General says that the third quarter grant was  
22 recovered, but multiple checks were issued twice. The  
23 amount paid to Sand 360 has not been recovered, and that's  
24 an amount -- a not insignificant amount of \$807,000.00.

1 That was an issue considered by the Auditor General.

2           The next significant issue which the Auditor  
3 General considered was inadequate provision, and that is an  
4 aspect which we will look at in due course. That's at  
5 paragraph 2.9. The Auditor General says that during 2011,  
6 the Office of Tax Commissioner set up a 20 million  
7 provision for valid accounts for taxes which were more than  
8 90 days outstanding. The assumptions underlying the  
9 provisions were not reasonable. Additionally, a well-  
10 founded plan of action for collection was not provided  
11 given the historical and statistical record of collection.

12           The provision was subsequently increased to  
13 31.7 million, and the Auditor General recommends that the  
14 O.T.C. implement a sound methodology for estimating the  
15 provision and that the appropriate level of proper review  
16 was carried out by the A.C.G.

17           The next significant issue which the Auditor  
18 General deals with in Section 3 is that millions were paid  
19 for professional services without prior approval. In that  
20 context, the Auditor General says payments for consultants  
21 during fiscal year 2012 amounted to 33 million dollars or  
22 five percent of the operating expenses of the Consolidated  
23 Fund.

24           Financial Instructions requires accounting

1 officers to obtain written instructions from the Secretary  
2 to the Cabinet for the retention of consultants. Financial  
3 Instruction 10.4.3 further provides that an accounting  
4 officer make surcharge from the Financial Instructions 2.9,  
5 a Cabinet Subcommittee which sets the overall Capital  
6 budgets.

7           Then you have the technical officers in the  
8 various ministries. It's the technical officers who make  
9 the recommendations to the Minister about which tender to  
10 accept. But if the tender process is not adopted, which  
11 particular contracting party the Government should contract  
12 with? It is the technical officers who evaluate the  
13 tenders for the purpose of considering that the Government  
14 is obtaining value from them.

15           Then we have the Minister. It is the  
16 Minister who makes the recommendation to the Cabinet. As I  
17 indicated earlier, there is an issue to what extent the  
18 Minister can, or should differ from the recommendation made  
19 by the technical officers; whether it's open-ended  
20 discretion, or whether it is to be exercised only in  
21 special circumstances.

22           Then we have the Cabinet, which makes the  
23 final decision, particularly in relation to contracts in  
24 excess of \$50,000.00.

1                   Then we have the accounting officer. The  
2 accounting officer is the person consultants are not  
3 retained without prior approval. None of the payments  
4 selected for testing -- that's two million dollars --  
5 pertaining to consultants contained the approval of the  
6 Secretary to the Cabinet, nor were we provided with any  
7 evidence that surcharges had been levied from the relevant  
8 accounting officers for failure to obtain the necessary  
9 approval prior to retaining the consultants.

10                   Those are the main issues identified by the  
11 Auditor General in Section 3 of her Report. You will see  
12 that this is -- this is a report dealing with three years.  
13 The Auditor General has also issued Special Reports --  
14 Special Reports where significant issues have been raised  
15 in relation to a particular project. You have gathered  
16 that the Auditor General issued Special Reports in relation  
17 to the T.C.D. Emissions Facilities -- which we will look at  
18 -- and Heritage Wharf, again that's something which we'll  
19 look at for historical issues, the Dame Lois Building, and  
20 the Port Royal Golf Course.

21                   So broadly speaking, as Mr. Chairman you  
22 identified in your opening, there are two issues. One is  
23 lack of accounting controls and processes, and the second  
24 issue is that the Financial Instructions or rules in

1 | respect to Government procurement were routinely ignored or  
2 | overwritten.

3 |                   It's in that context with those issues in  
4 | mind we will look at the contracts identified by the  
5 | Auditor General -- the five contracts identified, which I  
6 | just looked at. One, the Commercial Courts; secondly the  
7 | Maintenance and Stores Building contract; thirdly the  
8 | purchase of sand and roc;, fourthly the renovations of the  
9 | Department of Human Resources; and lastly, fifthly, Central  
10 | Laboratory Building.

11 |                   We'll also look at, from the same period,  
12 | five additional contracts. We'll do so because they relate  
13 | to payments which were made during the audit period which  
14 | was the subject matter of the Report by the Auditor  
15 | General, mainly for the period 2010, 2011 and 2012. Those  
16 | additional five contracts are the Laboratory at Southside,  
17 | the contract entered into by the Minister of Tourism with  
18 | Global Hue, which was the agency -- strictly speaking, that  
19 | was not the initial contract with Global Hue, it was the  
20 | renewal of that contract within the audit period.

21 |                   Thirdly, we will look at the consultancy  
22 | with an organization called Ambling as to the circumstances  
23 | in which that particular contract was entered into, again  
24 | by the Ministry of Tourism.

1                   Fourthly, we will look at the Bermuda  
2 Emissions contract. This time, not so much the  
3 construction contract, which I'll mention in a moment, but  
4 the operating agreement.

5                   Lastly, we will see if there are any issues  
6 in relation to the security contract, the G.E.T. Security  
7 contract with the Government.

8                   These ten contracts deal with the audit  
9 period, either because they're mentioned in the report  
10 expressly, or payments were made in relation to those  
11 contracts. We will also look at some past contracts, and  
12 that's not so much in detail in the same way as we look at  
13 these ten contracts, but really to see what was the  
14 position, whether there were any criticisms in relation to  
15 those large contracts, and whether any lessons have been  
16 learned in relation to those contracts because if the same  
17 issues continue to arise, again and again, one needs to  
18 understand why it is that that remains the position.

19                   In that context, we will look at the Dame  
20 Lois Building, the Port Royal Golf Course, the Heritage  
21 Wharf, and the Bermuda Emissions construction contract.

22                   Really, the purpose of looking at these  
23 historical contracts, as I said, is really to see whether  
24 the past sheds any light on the present in terms of whether

1 | one can see any culture of non-compliance, and whether any  
2 | lessons have been learned, and whether any procedures have  
3 | been put in place to -- who within the Ministry authorizes  
4 | the payment under the contracts.

5 |                   And finally, you have the Accounting General  
6 | and it is the Accounting General who processes the payments  
7 | after checking the authorization. This machinery, if  
8 | operated properly, ought to ensure that only proper  
9 | payments are made because the accounting officer is there  
10 | to make sure that no authorization is given to make a  
11 | payment of public monies unless the accounting officer is  
12 | satisfied that the Financial Instructions have been  
13 | complied with.

14 |                   It's unsure if the accounting officer  
15 | remains responsible even if he or she has delegated that  
16 | function to another person. If the accounting officer  
17 | authorizes a payment in breach of the Financial  
18 | Instructions, he or she can be surcharged irrespectively.

19 |                   Again, it's somewhat of a gray area. The  
20 | Accounting General is also supposed to verify that all the  
21 | documentation is in place that demonstrates that the  
22 | Financial Instructions are being complied with.

23 |                   So that's the structure and the way the  
24 | Government seeks to ensure that public money is spent in

1 | accordance with proper contracts. It's a combination of  
2 | policy and a combination of administration. The policy is  
3 | set out in the Financial Instructions. These are  
4 | instructions given by the Minister of Finance, and they are  
5 | updated on a regular basis to ensure that public funds are  
6 | only used for proper purposes, and only used for contracts  
7 | which have been authorized by the appropriate governmental  
8 | body.

9 |                   Recently, it's perfectly true that some  
10 | statutory basis has been given to the Financial  
11 | Instructions under the Public Treasury Act, which we'll  
12 | look at. Just as I say, Financial Instructions are largely  
13 | policy established by the Minister of Finance, and they  
14 | change over time. As different circumstances arise,  
15 | different instructions are given. Over a period of time,  
16 | they may find that a particular mode of doing things needs  
17 | to be tightened up if further instruction is given.

18 |                   Can I just show you -- for our purposes  
19 | we're only concerned with the second part of the Financial  
20 | Instructions. You see the Financial Instructions in the  
21 | binder A. This is the general binder A. If you look at  
22 | tab 4 in binder A you will see that these are the Financial  
23 | Instructions issued as of the 31st of December, 2008.

24 |                   If you look at, just at page 15, you will

1 see the accounting officers for the various ministries as  
2 set out. If you look at page 19, paragraph 2.7, it's the  
3 position that while you may delegate, that you remain  
4 responsible if you're the accounting officer. It's really  
5 for our purposes -- Section 8, which is at page 36 -- you  
6 will see the objectives which the Government tries to  
7 achieve in purchasing goods and services, value for money,  
8 fairness, "and tenders will be treated equally," conduct  
9 (our ?) business openly and without restrictive practice,  
10 variety of suppliers are given the opportunity to quote,  
11 compliance with Financial Instructions, ensure there is no  
12 other outstanding Government debt that has not been  
13 repayment resolved before the contract commencement.

14 Then you see that 8.2.1, the provisions  
15 which apply to goods and services up to \$1,000.00. At  
16 8.2.2, contracts between \$1,000.00 to \$5,000.00. 8.2.3.,  
17 in excess of \$5,000.00. And, for our purposes, at page 38,  
18 8.3.1, documentation.

19 Quotations or tenders accepted for the  
20 supply of goods or services in excess of \$50,000.00 must be  
21 documented in a written agreement or contract. Once a  
22 satisfactory contract is formatted, except for minor  
23 amendments, the contract would be used for any other  
24 (*indiscernible 1:11:34.4 transactions ?*). Contracts

1 starting at \$50,000.00, including those looking for  
2 payments, must be submitted to Cabinet for approval before  
3 acceptance.

4 I said that these provisions continue to be  
5 changed over a period of time, and if you look at the next  
6 revision of the Financial Instructions, which is at tab 5,  
7 which is the position as of the 31st of December, 2009, you  
8 will see, if you go to Section 8.3, which is at page 41,  
9 how this particular provision has been amended. 8.3.1 in  
10 2008 has been amended in 2009. Now it requires a tender.

11 A minimum of three recorded written  
12 quotations or tenders, using the invitation to tender or  
13 request for quotations are to be considered before the  
14 acceptance of supply of goods or services in excess of  
15 \$50,000.00.

16 The recommended quotation or tender must be  
17 documented in a written agreement or contract. That's the  
18 position in relation to most of the contracts with which we  
19 are concerned.

20 Just to complete the statutory basis for it,  
21 the Financial Instructions are referred to in the Public  
22 Treasury Act, and that is in A (1) again at Section 3.

23 I'll just read you the appropriate  
24 instructions.

1                   It's Section 1. You will see that  
2 recognition is given to standing orders. Instructions  
3 administered to be obeyed -- that's Section 3. Every  
4 person concerned here are responsible for collection,  
5 receipt, custody, issue or payment of public monies, store,  
6 stamps, investments, securities and negotiable  
7 (*indiscernible 11:14:18*) of an instrument whether the  
8 property of Government or in deposit whether entrusted to  
9 the Government or any public officer in his official  
10 capacity either alone or jointly with any public officer or  
11 any other person shall obey all instructions that may from  
12 time to time be issued by the Minister or by direction of  
13 the Minister in respect to the custody and handling of the  
14 same, and accounting therefore.

15                   You may look up that section because that  
16 section arguably is relevant to the issue of delegation as  
17 to whether the power can be delegated from one ministry to  
18 the other, and whether if it is delegated the technical  
19 officers of the other ministry become responsible. You'll  
20 see that different views are being taken by the -- some of  
21 the civil servants in terms of their Witness Statement, and  
22 the view taken by Mr. (*indiscernible 11:15:22*) who was the  
23 former Attorney General and (*indiscernible 11:15:21*  
24 *Solicitor*) General.

1                   So that's the position.

2                   Just to complete the picture, in relation to  
3 Works and Engineering, you also have the P.F.A.s, which are  
4 again policy guidelines, and that you will find at A (8)  
5 and A (9), just to show you. Look up A (8) and you'll see  
6 that this is specifically Ministry of Works and Engineering  
7 and Housing. That's quite important when one looks at as  
8 to whether, leaving aside the legalities, as to whether you  
9 can achieve delegation from the Ministry of Works and  
10 Engineering to another ministry is a policy issue as to  
11 whether those contracts should be delegated from one  
12 ministry to another.

13                   And that -- one other issue is, Ministry of  
14 Works and Engineering has in place rules and regulations  
15 which deal with the question of entering into contracts of  
16 construction, acquisition of goods, and acquisition of  
17 services. So here you've got detailed rules in relation to  
18 the management procedure for purchasing of goods and  
19 materials. Again, it is updated on a regular basis. This  
20 is updated as of May 2004.

21                   Just to give you the sort of examples, the  
22 detailed material, if you look at paragraph 7.4.3, purchase  
23 of 25,000 for \$250,000.00. Detailed provisions are set out  
24 which the technical officers must follow. The method of

1 procurement shall be by a competitive basis with a minimum  
2 of three or four written (quotes ?), whenever feasible,  
3 using invitation to tender or request for quotation. If  
4 the lowest acceptable bid is not recommended, the  
5 Acquisition and Division Section head must submit a report  
6 to the Permanent Secretary prior to expenditure. If over  
7 \$50,000.00, Cabinet approval must be sought before contract  
8 or purchase order can be assigned, unless Permanent  
9 Secretary endorses otherwise.

10                   And then serious competitive tenders are to  
11 be open, and so on and so forth. Just while you're there,  
12 if you'll look at tab 9, this is called Goods. P.F.A. 2000  
13 is in relation to goods and materials. P.F.A. 2002 is in  
14 relation to management policy and procedure for procurement  
15 of contract services.

16                   The same idea, but this time we're dealing  
17 with services, and you will see, again, detailed  
18 requirements, internal requirements which the technical  
19 officers are to follow.

20                   You'll see -- 6.7 -- how to evaluate  
21 tenders. When assessing an individual tender, the  
22 following shall be taken into account. As I say, the  
23 points are set out.

24                   I make that point because that only applies

1 | in relation to what's a (*indiscernible 11:18:43*). So, Mr.  
2 | Chairman mentioned that some of the issues which are  
3 | identified by the Auditor General actually have been  
4 | identified by other initiatives which the Government has  
5 | taken following some of the Special Reports.

6 |                   In particular, Mr. Chairman referred to the  
7 | K.P.M.G. report. I won't take in you in any detail, but it  
8 | is right that we should look at the summary of that report.  
9 | The K.P.M.G. report you will find at binder B at tab 1.

10 |                   CHAIRMAN: We'll take a 10-minute break at  
11 | a time convenient for you.

12 |                   MR. HARGUN: Certainly. I think after we  
13 | deal with this would be a good time.

14 |                   If I could ask you to have a look at page 3  
15 | of that report, which is the -- headed Executive Summary --  
16 | K.P.M.G. was retained by the Ministry of Finance to conduct  
17 | a diagnostic review of how the development and  
18 | implementation of a small sample of capital projects  
19 | compares with meeting international practices.

20 |                   The ministry is interested in identifying  
21 | the weaknesses in Government's capital projects,  
22 | management, practices, and determining how new practices  
23 | can be adopted to improve the transparency and control of  
24 | expenditures.

1                   They set out the capital projects.    Some  
2 are small, some are large, in particular, they look at the  
3 Cruise Pier at Dockyard, which is large.  Hamilton Police  
4 Station and Magistrates Court, which is again large.

5                   It's the summary of their findings, which is  
6 instructive at this stage.  Compliance with policies and  
7 procedures.  K.P.M.G.'s findings indicate that half of the  
8 projects reviewed did not comply with Government policies  
9 and procedures for capital project development, procurement  
10 or management.  Additionally, the Ministry indicates that  
11 in recent years virtually every significant major capital  
12 project has been over budget.

13                   Failure to comply with government policies  
14 and procedures may have reduced the value for money  
15 achieved in these projects, and they have compromised the  
16 perception of fairness of government procurement processes.  
17 K.P.M.G. recommends that the Ministry develop an  
18 independent --

19                   MR. ADAMSON:    He wants to ask you a  
20 question.

21                   CHAIRMEN:    Before you move on, going to the  
22 previous page, there were six selected contracts --

23                   MR. HARGUN:    Yes.

24                   CHAIRMEN:    -- and there's a statement that

1 | they were selected by the Ministry -- identified by the  
2 | Ministry. Will we have any evidence as to how that  
3 | selection is made?

4 |                   MR. HARGUN:    The selection was made simply  
5 | to give them all sizes. The previous paragraph -- this  
6 | Report presents a preliminary assessment of a sample of six  
7 | capital projects of various sizes identified by the  
8 | Ministries. It's simply a size of the projects. Some are  
9 | very small. For example, the Sea Song residence is a small  
10 | project with less than a million. School painting, small.

11 |                   CHAIRMAN:    Two were less than a million,  
12 | and two were less than --

13 |                   MR. HARGUN:    Yes. I think they are simply  
14 | selected by size.

15 |                   Yes. The relevant Ministers will be giving  
16 | evidence; yes.

17 |                   CHAIRMAN:    I understand.

18 |                   MR. ADAMSON:    The relevant Minister will be  
19 | attending before the Commission.

20 |                   CHAIRMAN:    Oh, I see.

21 |                   MR. HARGUN:    Just to complete this section,  
22 | if I could ask you to look at page 4, that, really, the  
23 | recommendations which are made by -- in the bullet points  
24 | -- essentially define the control supporting the approval

1 requirements that should be applied to small, medium and  
2 large projects: Develop a thorough business plan prior to  
3 tender of large projects; Ensure that adequate  
4 (*indiscernible 11:23:13*) resources are available to project  
5 management; Consider using a central coordinating committee  
6 on large projects to help ensure efficient coordination of  
7 permits and approvals among ministries and departments;  
8 Harmonize existing policies and procedures and ensure that  
9 they are relevant and consistent; Develop additional  
10 controls during the procurement process to help ensure  
11 transparency;. Define Cabinet's role in capital project  
12 approval to help ensure it is consistent with the  
13 (competitors ?) and transparent procurement process.

14 I'll show you after the break that, in fact,  
15 there was also an internal government committee, management  
16 committee, which looked at the same issues to see what  
17 could be recommended.

18 I'll also look at what has already been  
19 implemented in terms of statutory changes because that's  
20 important for the Commission to understand, where we are  
21 already. And the question for the Commission would be as  
22 to whether the architecture in terms of statutory  
23 amendments and other proposals which have been made and  
24 implemented is sufficient.

1                   Secondly, even assuming that the  
2 architecture which is there is sufficient, whether as a  
3 matter of practice it is achieving the result that you  
4 sought to be achieved. I'll come back to that.

5                   CHAIRMAN: Are you in a position yet to say  
6 what submission you're likely to be make after we've looked  
7 at everything? Are you likely to say the architecture is  
8 there but it needs to be better?

9                   MR. HARGUN: That's likely to be the case.  
10 To some extent, it depends upon some of the evidence which  
11 would be given by some of the witnesses, particularly the  
12 Cabinet Secretaries. You'll see that most of the  
13 recommendations made by the K.P.M.G. Advisory Committee and  
14 the internal committee have, in fact, been amended. It has  
15 been adopted and put in place in terms of the Good  
16 Governance Statutes.

17                   The issue really is as to -- twofold. One,  
18 are they actually being utilized as a matter of practice,  
19 and b) are they effective as it was envisioned they would  
20 be? Those are issues which can only be answered after we  
21 have discussed it and canvassed it with the witnesses.

22                   CHAIRMAN: My watch says 11:36, is that  
23 right?

24                   MR. HARGUN: That's -- according to my

1 watch.

2 CHAIRMAN: Well, we'll take 10 minutes so  
3 that makes it 11:46.

4 **(Recess taken.)**

5 **(Recess ended.)**

6 MR. HARGUN: Mr. Chairman, we just looked at  
7 the K.P.M.G. Report. Can I also show you, to complete the  
8 picture, the M.C.S. Report, which you will find at B (2)?  
9 This is the Report prepared by the Management Consultant  
10 Section within the Government. It was prepared for the  
11 Premier and the Cabinet Secretary. If I could ask you to  
12 have a look at the Executive Summary, which you will find  
13 at page 754 internal pagination.

14 You'll see in the second paragraph there, in  
15 recent years Government has faced challenges in maintaining  
16 oversight and control of capital projects. In 2010,  
17 K.P.M.G. Advisory Committee's review of six capital  
18 projects found -- and we just looked at that -- half of  
19 them didn't comply with policies, etcetera. And then it  
20 says, once established, the Office of Project Management  
21 and Procurement will implement clear policy guidelines  
22 based on those practices. A professional group responsible  
23 for purchasing within the Civil Service and Director will  
24 decide the control of all capital projects within the

1 Government.

2                   Then if I could ask you to have a look at  
3 page 758, it is instructive because here is an attempt at  
4 identifying what is the problem. At page 758 the Report  
5 shows the workshop participants identified and agreed upon  
6 the following problems -- issues during the half-day  
7 workshop sessions. These provide the basis for subsequent  
8 recommendations.

9                   One, Ministers have become involved in  
10 operational decisions making for procurement and  
11 contracting in the Bermuda Public Service. In extreme  
12 cases, recommendations for contract (calls ?) made by  
13 technical officers following tendering were changed.

14                   Post-tendering modifications then resulted  
15 in contracts awarded to companies not included in the  
16 original process. This is circumvention of procedures.  
17 Now, when we look at the contracts, it's a view -- it's a  
18 point of view the Commission should keep in mind as  
19 expressed, as I said, within (*indiscernible 11:39:28*) the  
20 government.

21                   Secondly, Permanent Secretaries have not  
22 fulfilled their duty to provide guidance as to the  
23 Minister's role and involvement in operations and decision  
24 making for procurement and contracting with Bermuda Public

1 Service.

2 Thirdly, there are examples of non-  
3 compliance -- non-adherence to the current contracting and  
4 procurement guidelines and reference is made to Section 8  
5 of the Financial Instructions, P.F.A. 2000, and P.F.A.  
6 2002, the Ministerial Code of Conduct.

7 Then fourthly, there is a lack of robust  
8 organization-wide policies and procedures with clear  
9 decision making and approval points for contracting and  
10 procurement in the Bermuda Public Service.

11 Fifthly, there is insufficient resourcing,  
12 planning, and control for projects in the Bermuda Public  
13 Service.

14 Six, that's overleaf, there is a lack of  
15 robust for control and monitoring practices. And finally,  
16 structures such as purchasing and tendering committees that  
17 would provide oversight of capital projects have lapsed and  
18 no longer function. These were the two committees which  
19 actually looked at --

20 CHAIRMAN: Who made that report; who were  
21 the officials?

22 MR. HARGUN: The organization within the  
23 government is Management Consulting Section, and it goes on  
24 -- also you see at page 750, Kevin Johnston and Ianthea Fox

1 of Management Consulting Section. This is -- you get that  
2 from page 750.

3 CHAIRMAN: Do we know, are they still  
4 there, or?

5 MR. HARGUN: We do not know, but we can  
6 certainly find out.

7 CHAIRMAN: (*Indiscernible 11:41:24*)  
8 stringent recommendations?

9 MR. HARGUN: Yes. Some of the  
10 recommendations made, both by the K.P.M.G. Advisory  
11 Committee and the M.C.S. report, mainly that there should  
12 be a central body which is responsible for procurement and  
13 entering into contracts has actually been adopted by  
14 statute.

15 This is something you should keep in mind  
16 because the current position is -- if you look at A, tab 2  
17 that was an attempt at (/following ?) the recommendations  
18 of the K.P.M.G. Advisory in 2011. That's the Good  
19 Governance Act 2011. You will see that at Section 2, which  
20 says that there is to be inserted into the Public Treasury  
21 Administration and Payments Act 1969, an additional Section  
22 32 (b).

23 You will see that that section provides for  
24 the establishment of the Office of Project Management and

1 Procurement. The Office of Project Management and  
2 Procurement is established within the Ministry of Finance  
3 for the following principle purposes: a) to provide  
4 professional, qualified procurement expertise and advice to  
5 Government; b) to ensure that there is no bias in the  
6 awarding of government contracts; c) to identify and apply  
7 performance measures and to ensure the Government obtained  
8 value for money; d) to ensure that the best practices are  
9 adhered to in the oversight of capital projects; e) to  
10 advise of, guide and support the development of and  
11 adherence to procurement regulations, policies and best  
12 practices. Just pausing there, that's very much a summary  
13 of the recommendation of the K.P.M.G. Advisory Report.

14 Then you will see under Subsection 2; the  
15 office shall consist of a public officer known as the  
16 Director of Project Management and Procurement and such  
17 other staff as are required. Let me come to examine one of  
18 the senior civil servants which shall inquire as to what  
19 the status is in relation to the appointment of that  
20 office.

21 Then under Subsection 3, the Director shall  
22 have the following functions: oversight of all government  
23 procurement including contracts and all pre-contract  
24 negotiations such as requests for proposal, invitation to

1 tender, and the obtaining of quotations and estimates; b)  
2 oversight of all capital projects for Government; c)  
3 handling of complaints relating to the awarding of  
4 Government contracts; d) such other function as may be  
5 conferred upon under any other enactment or by the  
6 Minister; and 4) the Director shall issue a Code of  
7 Practice for project management and procurement to be  
8 followed by all public officers concerned with obtaining  
9 goods or services for Government.

10 We will come to examine some of these senior  
11 public servants to find out what is the current status for  
12 that Code of Practice for project management.

13 CHAIRMAN: Does it say anything about  
14 recruiting from outside or does... It says it shall be a  
15 public officer? Does that mean it has to be somebody who  
16 is already a civil servant?

17 MR. HARGUN: It could be from outside, but  
18 presumably that person wants to (become a public officer).

19 CHAIRMAN: So in other words, anybody could  
20 be appointed?

21 MR. HARGUN: Yes. And then -- just a  
22 considering provisions, you can just cast your eye on 32  
23 (c) which gives the Director access to information and at  
24 32 (d) deals with confidentiality. He or she is to produce

1 | an annual report. You will see at -- in Section 33, that's  
2 | Section 3 of the Act -- the Minister of Finance can make  
3 | reservations/regulations and Subsection 2, without  
4 | prejudice to the generality of Subsection 1, the Minister  
5 | shall make reservations/regulations concerning any  
6 | Financial Instructions or directions issued by the Minister  
7 | under Section 3. So the Financial Instructions will become  
8 | regulations eventually and will have statutory basis.

9 | MR. ADAMSON: No regulations have yet been  
10 | passed.

11 | MR. HARGUN: No regulations as yet have  
12 | been passed.

13 | CHAIRMAN: No recommendations?

14 | MR. HARGUN: Regulations. And then you  
15 | will see --

16 | MR BARRITT: In fact, we understand there is  
17 | no Code of Practice yet and there's never been an annual  
18 | report?

19 | MR. HARGUN: Certainly, according to the  
20 | Witness Statement given by the former Premier, Paula Cox,  
21 | she is, I'm sure, aware of whether the Code has been  
22 | published. All indications are that it has not. This is  
23 | the Code of Conduct -- Code of Practice for Project  
24 | Management to be drafted and prepared by the Director.

1                   CHAIRMAN: So this 2011 Act, when did it  
2 come into force?

3                   MR. HARGUN: This has been in force, Mr.  
4 Chairman -- it was passed in 2011. The statute which we  
5 have doesn't show when it became effective.

6                   FIONA LUCK: *(Indiscernible 11:47:43)*

7                   MR. HARGUN: Yes. Thank you. I should  
8 just say in relation to the Code of Practice, this is the  
9 Witness Statement of Anthony Manders, the Financial  
10 Secretary. Draft for the practice has been produced and  
11 has been circulated to key stakeholders for comment. It is  
12 currently being reviewed by the Attorney General's  
13 Chambers, and will then be sent to Cabinet for review and  
14 final approval.

15                  CHAIRMAN: Is there a Director, or rather,  
16 has there been a Director, since 2011?

17                  MR. HARGUN: My understanding is -- and  
18 that -- I'm not sure it comes from any of the Witness  
19 Statements, there is an acting appointment, not a  
20 substantive appointment.

21                  MS. LUCK: *(Indiscernible 11:48:33)*

22                  MR. HARGUN: Yes.

23                  CHAIRMAN: So this may be a symptom of the  
24 disease if there was a disease - which we've got to look

1 into?

2 MR. HARGUN: Yes. Certainly, it's taking  
3 time. You'll see -- just to complete this particular  
4 statute -- there is a criminal offense -- a new criminal  
5 offense created with the new Section 33 (a). A person who  
6 without reasonable excuse fails to comply with any  
7 regulations made in Section 33.2 fails to produce documents  
8 and information or otherwise obstructs the Financial  
9 Secretary or Accountant General, or any member of their  
10 staff in carrying out their functions under Section 3,  
11 fails to produce documents and information or otherwise  
12 obstructs the Director of Project Management and  
13 Procurement or any member of his staff commits an offense.

14 Then it was perceived that this Act needed  
15 -- and ended up -- this is one of the provisions that we  
16 should just note at Section 29 (a) which is at page 6. The  
17 2011 statute was further re-enforced by the provisions of  
18 the 2012 statute, Good Governance Act 2012, which you will  
19 see at tab 3.

20 Section 3 deals with offenses of terminating  
21 contract work or withholding payment from a whistleblower.  
22 That's straightforward. Same in relation to employment at  
23 Section 4. Then there is a new offense. If you look at  
24 Section 5, offense of collusion relating to Government

1 | contracts.

2 |           You'll see that appointed or elected  
3 | official means a member of Parliament, Senator, a person  
4 | who is appointed or elected to any municipality, parish,  
5 | council or any other public authority. Contractor means  
6 | any person bidding for a government contract.

7 |           The substantive provision in Subsection 2,  
8 | an appointed or elected official who attempts to influence  
9 | the awarding of a government contract makes an offense,  
10 | regardless of whether or not he has any interest, whether  
11 | legal, beneficiary, fiduciary, family or otherwise, in any  
12 | other person bidding for the contract.

13 |           In Subsection 4, if any contractor attempts  
14 | to gain an unfair advantage when bidding for a Government  
15 | contract by obtaining from a public officer or from an  
16 | appointment, appointed or elected official information  
17 | which is not available to all persons bidding for that  
18 | contract, the contractor and the public officer or the  
19 | appointed or elected official commit an offense.

20 |           CHAIRMAN: Do you know where it came from?  
21 | Was it recommended by K.P.M.G or from whom?

22 |           MR. HARGUN: It wasn't clear from the  
23 | K.P.M.G. report that that's what was recommended. You  
24 | could certainly find out from the --

1 CHAIRMAN: (*Indiscernible 11:51:55*)

2 MR. HARGUN: Explanatory memorandum. Yes.

3 CHAIRMAN: And this came quite soon after  
4 the report.

5 MR. HARGUN: This was certainly -- it's  
6 clear that the 2011 statute is there for the purpose of  
7 implementing the main recommendations that the K.P.M.G.  
8 Advisory Report and the M.C.S. Report made. The 2012, it's  
9 not clear where it comes from, but one can see why it's  
10 there.

11 What we will do is look at the Explanatory  
12 Memorandum and see where it comes from.

13 It is conceivable, although -- and that is  
14 conjecture -- that it may well have been driven by the  
15 English Bribery Act which, has actually been extended to  
16 Bermuda in the past year, and that has...

17 CHAIRMAN: Domesticated.

18 MR. HARGUN: It is domesticated this year by  
19 the passage of the new legislation in Bermuda. I'm not  
20 sure where this provision came into effect as a result of  
21 the English Bribery Act, but we'll find out.

22 CHAIRMAN: *It strikes me as being very,*  
23 what I would call a very sophisticated provision. One  
24 imagines they came from somewhere.

1                   MR. HARGUN: I'm sure the legislation could  
2 have -- I'm sure the reports and the legislation -- I'm  
3 simply sure that it's not a case where attempts have not  
4 been made to actually update the legislation, and not a  
5 case where there haven't been other investigative bodies  
6 which have looked at this issue. They have made  
7 recommendations. The recommendations to a large part have  
8 been accepted and put into statute. The issue really, in  
9 terms of lessons to be learned from this Commission and  
10 this Inquiry is to some extent the architecture which has  
11 been put in place isn't working.

12                   So, with that in mind --

13                   MR BARRITT: Before you leave that Act, Mr  
14 Hargun, one thing I'd like to know is -- what struck me  
15 about it was the 2012 Amendment Act, was the putting of a  
16 three year time period under which someone could be  
17 prosecuted in respect of an offense under the Act? I've  
18 always been curious to know why three years.

19                   MR. HARGUN: Yes. That is an issue.

20                   MR BARRITT: And that's something I think  
21 we might want to ask from the witnesses.

22                   MR. HARGUN: So, with that in mind, can I  
23 just -- We looked at the issues which were looked upon by  
24 the Auditor General. One specific issue before I start

1 | looking at the contracts, I think we should be aware of,  
2 | and that is the issue of the delegation.

3 |           As I said, this issue arises in this way.  
4 | Ordinarily, an historic view, you would expect the  
5 | Department of Ministry of Works and Engineering to be  
6 | engaged in all civil construction contracts because that is  
7 | the Ministry which is geared towards that particular  
8 | function. As I said, that ministry has a specialization.  
9 | You've seen the (BPSA ") in terms of how the technical  
10 | officers within the ministries are to conduct themselves in  
11 | relation to entering into contracts. They have a Chief  
12 | Architect, an Architectural Division. They have engineers.  
13 | They have dealt with civil contracts over a long history of  
14 | time. They know the contractors. They know how the  
15 | industry works. They know what is required.

16 |           None of the other ministries have that  
17 | specialization. And in particular, the Ministry of  
18 | Transport does not have that specialization. The Ministry  
19 | of Tourism does not have that specialization.

20 |           When we come to look at the contracts you  
21 | will see that in relation to a number of significant --  
22 | large, significant contracts -- they were -- the  
23 | responsibility for tendering those contracts or entering  
24 | into contracts, and administration of those contracts was

1 transferred from the Ministry of Works and Engineering to  
2 either the Ministry of Transport or Ministry of Tourism.

3           Now, there are two issues. One, rather  
4 academic as to whether as a matter of law was that proper  
5 delegation. It may not be the( best ?) issue for the  
6 Commission to expend too much time on. There is a second  
7 issue, leaving aside the narrow legal issue as to what is  
8 the correct position, was it proper delegation or not. The  
9 question the Commission is to consider is whether there was  
10 sensible, commercial or practical reasons why there should  
11 have been delegation. Because -- if the true position is  
12 that the Ministry of Tourism simply didn't have the  
13 specialization -- the expertise -- to manage, conduct and  
14 enter into contracts - civil contracts of this magnitude -  
15 why was it being said that this made sense; that this made  
16 commercial sense or business sense or basic common sense  
17 that these contracts -- these projects -- should be  
18 transferred from Works and Engineering to Tourism.

19           That is a substantive question that the  
20 Commission needs to consider. As I said, there is this  
21 (arid ?) legal debate as to whether you can have delegation  
22 or not. I'm just simply showing you what the debate is.  
23 One doesn't need to spend too much time on it, and you can  
24 look at the debate by looking at one letter which was

1 prepared, a letter of advice given by Mr Saul Froomkin. --

2 CHAIRMAN: I think there is a point there.

3 You have it on the basis also to remain anonymous. It

4 doesn't affect your referring to it at all.

5 MR. HARGUN: Let me refer to legal advice,  
6 given by a lawyer, and that you will find in the Commission  
7 of Inquiry, the Public Binder 3, tab 12, page 105.

8 CHAIRMAN: What page?

9 MR. HARGUN: 105.

10 MR. ADAMSON: I think it was removed from  
11 the binders.

12 MR. HARGUN: Oh, I see. Could I ask you to  
13 look at 3, tab 11? There's a difference -- tab 11. If you  
14 look at page -- unless it's been redacted.

15 MR. ADAMSON: It will be --

16 MR. HARGUN: 105?

17 MR. ADAMSON: No, it's been removed. It's

18 --

19 MR. HARGUN: One moment. Let me -- the  
20 binder I have at page 111 is the advice. It may well be  
21 that that binder has been redacted, and you'll have to find  
22 it at some place.

23 I'll just read you the two paragraphs, which  
24 gives the argument. And this is advice being given as to

1 | whether legally it's possible to have delegation from one  
2 | ministry to another. And the analysis is this:

3 |                   At the outset it appears patently clear to  
4 | me that Public Treasury Administration and Payments Act  
5 | 1969 at Section ( 21/31 ?) requires everyone concerned in  
6 | or responsible for the payment of public monies shall obey  
7 | all instructions that may from time to time be issued by  
8 | the Minister of Finance or by direction of the Ministry of  
9 | Finance in respect to the accounting therefore. These  
10 | instructions commonly known as Financial Instructions  
11 | issued by the Minister of Finance provide as follows: Then  
12 | it recites 12.1.2. The accounting responsibility for  
13 | capital development rests with the Permanent Secretary for  
14 | the Minister of Works and Engineering who is the accounting  
15 | officer for all projects in the capital development  
16 | estimates. The capital development estimates which occur  
17 | in the Consolidated Fund at statute.

18 |                   The Permanent Secretary of Works and  
19 | Engineering is obligated to ensure that proper consultation  
20 | with the applicable accounting officer is maintained  
21 | throughout all phases of the project. That's through the  
22 | Financial Instructions. Accordingly, in my respectful  
23 | opinion, subject only to Financial Instructions being  
24 | amended, in that respect by the Minister of Finance, there

1 | can be no question that the accounting responsibility for  
2 | capital development projects as defined in the Financial  
3 | Instructions rests with the Permanent Secretary for the  
4 | Ministry of Works and Engineering.

5 |           The suggestion that what transpired was a  
6 | delegation of authority for accounting responsibility for  
7 | capital projects related to Transport by way of amended  
8 | note to the capital estimates in the approved estimate of  
9 | revenue and expenditure for 2002/2003 does not stand up to  
10 | critical examination. The appropriation (*after simply*  
11 | *adding a new ?*) statute to provide for funds to be paid out  
12 | of Consolidated Fund in accordance with Section 96 of the  
13 | Bermuda Constitution Order and for no other purpose. To  
14 | suggest somehow that the Explanatory Memorandum to the  
15 | Appropriation Bill 2009 is delegation of authority cannot  
16 | in my view be correct.

17 |           So that, Mr. Chairman, the accountant view  
18 | is understood. What is being said, and you'll see it from  
19 | a number of Witness Statements by some of the civil  
20 | servants is that when -- each year when there is a passage  
21 | of the Appropriation Act, which passes the expenditure for  
22 | a given year -- the revenues -- in relation to capital  
23 | expenditure, there would be capital expenditures set out.  
24 | Next year it will be set out in the name of the Minister.

1 | And they contend by the mere fact that a particular project  
2 | has the name of a particular ministry next to it, that it  
3 | is in effect is being -- the project is being assigned to  
4 | that ministry.

5 |                   The fact that the Legislature then passes  
6 | the statute means that the Legislature are now giving,  
7 | sanctioned the delegation which has already occurred. It's  
8 | that (*argument* ?). As I said, in the end, it may well be  
9 | that the Commission does not have the authority to resolve  
10 | this issue, but what is much more important is the  
11 | interesting legal point as to, can there ever be  
12 | delegation? Secondly, whether delegation has, as a matter  
13 | of law, occurred.

14 |                   A much more interesting point is why would  
15 | you want to delegate a project which are dealing with  
16 | construction of buildings and piers which the Ministry of  
17 | Works and Engineering is suited for and has the expertise,  
18 | and has the personnel, and have done so for many years, to  
19 | another ministry which has no expertise?

20 |                   CHAIRMAN: What is a commercial reason for  
21 | it?

22 |                   MR. HARGUN: What is a sensible commercial  
23 | reason for it? So with that, can we start looking at some  
24 | of the contracts? As I said, there are five contracts

1 mentioned in the Section 3, five which are not mentioned  
2 but relate to it because the payments were made within the  
3 period. But I think what I would like to do is to actually  
4 show the Commission the historical contracts because you  
5 will see what the issues were in relation to the historical  
6 contracts, and then you can see whether the same issues  
7 which relate to the historical contracts have carried on to  
8 the relevant audit period for which the Auditor General  
9 makes her Report.

10 Now can we start with the Bermuda Emissions?

11 CHAIRMAN: Which binder?

12 MR. HARGUN: I'll give it to you in a  
13 minute. Just let me introduce the particular contract.  
14 This is the project, the earliest project, Bermuda  
15 Emissions. In 2001, Bermuda Emissions was chosen to manage  
16 the construction of the project of building emission  
17 buildings in Bermuda. There was no tendering process as to  
18 who should build the particular buildings. The rationale  
19 which was put forward was that tendering wasn't utilized  
20 because there was only one company with specialist  
21 knowledge. The Commission - certainly, the Commission  
22 members who are from Bermuda would know the T.C.D. building  
23 which is a so-called specialist building, and have to take  
24 a view as to whether that is the sort of building which

1 requires specialist knowledge, or whether that is the sort  
2 of building which could have been built by any general  
3 contractor in Bermuda who had the resources to build large  
4 buildings.

5 Can I ask you to have a look at -- Bermuda  
6 Emissions you will find is at tab 9, which is in binder 2,  
7 tab 9?

8 CHAIRMAN: Binder 2?

9 MR. HARGUN: I want to look at the Auditor  
10 General's special report which you will find --

11 CHAIRMAN: ? This is binder 1.

12 MR. HARGUN: Yes, Binder 1.

13 CHAIRMAN: Binder 1.

14 MR. HARGUN: Yes.

15 CHAIRMAN: I had a note that you said 2.

16 MR. ADAMSON: You said binder 2 by mistake.

17 MR. HARGUN: Binder 1 consists of two  
18 binders; yes?

19 MR. ADAMSON: So it's binder 1, tab 9.

20 MR. HARGUN: Binder 1, tab 9. I'll just go  
21 by tabs. Mr. Adamson has given you different sets.

22 If you look at the Report, the Auditor  
23 General's Report, at page 151 internally -- and this was a  
24 Special Report, Mr. Chairman, by the Auditor General.

1 151, internal. Look at the top. Okay, that's the page.

2           During the course of the audit of the 2009  
3 Consolidated Fund, I found serious internal control  
4 deficiencies in the management and oversight of various  
5 capital development projects. One of the projects in  
6 question was the development of the Motor Vehicle Safety  
7 and Emissions Testing Program which had an initial budget  
8 of 5.3 million, and a final cost of 15.23 million.

9           A subsequent audit of the project which  
10 culminated in this Special Report confirmed that the  
11 project lacked the necessary oversight and project  
12 management processes to ensure value for money. The  
13 building you're looking at is the building which was built.

14           Then if I could ask you to look at page 154.  
15 At the third paragraph on that page, the Ministry of Works  
16 and Engineering has a greater degree of accountability  
17 given its responsibility for managing major capital  
18 projects. Financial Instructions recognize the nature of  
19 Works and Engineering operations, and the need for Works  
20 and Engineering to adopt more rigorous and complex  
21 procedures. These extended procurement procedures must be  
22 adhered to for all major capital development projects.

23           Unfortunately, this was not the case in the  
24 development of the Motor Vehicle Safety and Emissions

1 Testing Program, which included the construction of a new  
2 Transport Control Department Administration Building with  
3 testing facilities in Hamilton and two satellite testing  
4 facilities, one in St. George and one in Southampton.

5           The responsibility for the successful  
6 completion of the project was vested in the T.C.D., the  
7 department within the Ministry of Transport instead of  
8 Works and Engineering. T.C.D. then contracted with a  
9 consulting firm, Bermuda Emissions Control Limited, to  
10 manage the project, thereby reducing the level of scrutiny  
11 that may otherwise have been conducted had that project  
12 been managed and overseen by Works and Engineering.

13           So you see what happened here. Because the  
14 contract wasn't being managed by Works and Engineering, it  
15 had been assigned to T.C.D., Ministry of Transport. The  
16 Ministry of Transport had no expertise to deal with it.  
17 The Ministry of Transport, in fact, engaged its consultant,  
18 Bermuda Emissions, to actually enter into a construction  
19 contract to manage the construction project.

20           You will see on the next page --  
21 Furthermore, the audit revealed ministerial interference at  
22 the outset. Such interference undermined Government's  
23 control environment and firmly established the direction  
24 taken by the senior civil servants to move this project

1 forward.

2                   In 2001, two years before, the Cabinet  
3 approved -- two years before Cabinet approved a proposal to  
4 contract the B.E.C.L., the Minister of Transport confirmed  
5 in writing to the B.E.C.L., copied to the Director of  
6 T.C.D., Government's decision to waive the requirement to  
7 advertise for tendering and award any contract for services  
8 dealing with vehicle emissions testing to Bermuda Emissions  
9 Control, Limited.

10                   Now, if you -- keep your hand on that page,  
11 and if you look -- go to page 8 in the same tab, you will  
12 see the letter from the Minister of Transport. This is a  
13 letter of the 17th of August written to Bermuda Emissions  
14 Control for the attention of Mr. Donal Smith. This letter  
15 will confirm that a decision has been made by the  
16 Government to waive the requirement of advertising for  
17 tendering and award any contract for services dealing with  
18 vehicle emissions testing to Bermuda Emissions Control,  
19 Limited.

20                   The Department of Transport Control has not  
21 yet established a Motor Vehicle Emissions Testing Program.  
22 Therefore, specific details as to what services may be  
23 required of your company are not yet available. Numerous  
24 factors will need to be considered in that regard, and I'm

1 | sure your company would wish to contribute to the process.  
2 | We look forward to working with you in implementing a  
3 | meaningful vehicle emissions program in Bermuda.

4 |                   Now at this stage, there is no drawings for  
5 | buildings, nothing of the sort. But it's clear the  
6 | Minister has engaged Bermuda Emissions Control as a  
7 | consultant for purposes of this project. And then if you  
8 | go back to the Auditor's report at page 155, B.E.C.L., this  
9 | is the consultant which they used, subsequently entered  
10 | into a lump sum contract with Correia Construction Limited,  
11 | a company which you will see again in different contracts  
12 | when you look at another historical project, to build three  
13 | facilities, none of which were tendered.

14 |                   It should be noted that C.C.C.L. was related  
15 | by common ownership to B.E.C.L. Now, just to make that  
16 | point, Mr. Chairman, the company which was selected by  
17 | B.E.C.L., which was a consultant, for the purposes of this  
18 | major construction project, was an entity which held 30  
19 | percent shareholding in B.E.C.L.

20 |                   Mr. Correia, who was the principal behind  
21 | Correia Construction, was a Director of Correia  
22 | Construction, the company which was selected as the  
23 | construction company. He was also a Director of B.E.C.L.

24 |                   So, during the construction phase, B.E.C.L.

1 | was also awarded the contract to operate the three  
2 | facilities for an annual fee of 2.4 million. The Motor  
3 | Vehicle Safety and Emissions Testing Program had an initial  
4 | capital expenditure budget of 5.3 million in 2004/2005  
5 | which increased to 8.6 million in 2007/2008 and then to  
6 | 14.25 million in 2008/2009. In the end, the project cost  
7 | taxpayers 15.23 million. In addition, the contractor who  
8 | operated the three facilities has the potential to cost  
9 | Government in the region of 24 million dollars over a ten  
10 | year period.

11 |                   So, Mr. Chairman, the position so far we  
12 | have is this. The contract was delegated from Works and  
13 | Engineering to Tourism and Transport, which had no  
14 | expertise in building buildings of this sort. The Ministry  
15 | of Transport hands the project over to a local company run  
16 | by two individuals -- that's Bermuda Emissions, B.E.C.L.  
17 | B.E.C.L. then contracts with Correia Construction,  
18 | C.C.C.L., to build the buildings. Bermuda Emissions  
19 | manages the contract, the construction contract, on behalf  
20 | of the Bermuda Government.

21 |                   In circumstances where, as I said, the  
22 | contractor, either the principal or the company, actually  
23 | had a 30 percent shareholding in the consultant company.

24 |                   If I can then ask you to have a look at

1 Summary of Findings of the Auditor General in this regard  
2 at page 159. Our findings include the following:  
3 Ministerial directive that compromised civil servants'  
4 ability to comply with Financial Instructions.  
5 Noncompliance with Government's tendering policies and  
6 payment procedure. Contract signed off for construction of  
7 new T.C.D. building before acquiring complete set of  
8 drawings. An inherent conflict of interest between  
9 B.E.C.L., a consultant, and C.C.C.L., the contractor, as  
10 both were 30 percent owned by the same individual. Cabinet  
11 approval not obtained prior to the signing of any of the  
12 contracts relating to either construction or operating of  
13 the testing facilities. Cabinet requests that the  
14 construction of the satellite facility should follow the  
15 open tender process was disregarded by the civil servants.  
16 Insufficient documentation to support increase in capital  
17 budget from 8.6 million to 14.25 million.

18 Just on that point --

19 I was going to refer you to Cabinet  
20 Conclusion 20 056, and if you can't get hold of it --

21 MR. ADAMSON: It's in binder 3.

22 MR. HARGUN: It's in --

23 MR. ADAMSON: It's the same reference, same  
24 page number, binder 3.

1 MR. HARGUN: The point I wanted to show you  
2 was the Cabinet at that stage approved the construction of  
3 two satellite testing sites that the Transport Control  
4 Department --

5 The page reference should be 12. Do you  
6 have that, Mr. Chairman?

7 CHAIRMAN: Yes.

8 MR. HARGUN: It's -- it should be -- it's  
9 the extract from Minutes of Cabinet Meeting Number 20.

10 MS. LUCK: And they accepted it?

11 MR. HARGUN: Yes. They accepted it; yes.  
12 You'll see that there in relation to this issue that the  
13 decision of the Cabinet -- the Cabinet, one, approved the  
14 construction of two satellite testing sites that the  
15 Transport Control Department (*appropriated ?0*, Southampton  
16 and Southside, St David's, following an open tender  
17 process.

18 Now, despite the decision by the Cabinet  
19 that they have to be open tendered in relation to these  
20 construction companies, the position was that there was no  
21 open tender. The contract was just given to Correia  
22 Construction, which as I said, was a 30 percent shareholder  
23 in B.E.C.L.

24 We will examine the technical officers as to

1 | why it was that it wasn't put to open tender.

2 |                   Can I ask you to have a look at -- go back  
3 | to the report at page 168? This is the building  
4 | constructors. The project had four significant capital  
5 | expenditure components, the main facility, the satellite  
6 | testing facility at St. George, the satellite testing  
7 | facility in Southampton, the specialist testing  
8 | (*indiscernible 12:21:51 facility in Hamilton*).

9 |                   Financial Instructions state that the  
10 | accounting responsibility for capital projects development  
11 | rests with the Permanent Secretary for the Ministry of  
12 | Works and Engineering, who is the accounting officer for  
13 | all projects in the capital development estimates with the  
14 | exception of minor works.

15 |                   However, starting with 2002 and 2003 fiscal  
16 | year, the approved estimates, revenue and expenditures  
17 | state that projects of the Ministry of Transport are  
18 | outside the scope of responsibility of the Permanent  
19 | Secretary of Works and Engineering. The rationale for this  
20 | exclusion is not clear, particularly as Works and  
21 | Engineering had the capacity, systems, processes, and  
22 | qualified personnel required to manage capital projects and  
23 | the Ministry of Transport does not.

24 |                   The only reason provided to us by the

1 Financial Secretary for this anomaly was that the  
2 Department of Airport Operations developed a capacity for  
3 capital projects management in order to ensure that the  
4 Government of Bermuda could meet specific requirements and  
5 regulations related to airport standards promulgated by  
6 international civil aviation organizations.

7 The capital project management function was  
8 incorporated into the post of Manager of Maintenance and  
9 Engineering sometime in 2000/2001. With the development of  
10 project management capability within D.E.O., it was logical  
11 to vest control of development and management of airport  
12 infrastructure with the Permanent Secretary of Transport.

13 Now, it's important to understand that  
14 historical issue, Mr. Chairman. Perfectly true, there was  
15 a time in relation to the airport, and particularly the  
16 resurfacing of the airport, the Ministry of Transport did  
17 develop a certain specialization as to how it was to be  
18 done. So to that extent, it had the expertise in relation  
19 to it. For that purpose, it is perfectly true that that  
20 particular contract was delegated to the Ministry of  
21 Transport.

22 That particular specialization came to be  
23 used as the reason for all manner of delegation, including  
24 building of the buildings for T.C.D., building of the pier

1 at Heritage Wharf, for which clearly they had absolutely no  
2 specialization for. The only specialization that they've  
3 ever had is resurfacing the runway at the airport.

4 The report continues, to the best of our  
5 knowledge, however, the Motor Vehicle Safety and Emissions  
6 Testing Program was the sole responsibility of T.C.D., a  
7 totally separate division of the Ministry of Transport, and  
8 no individual from the airport operations were involved.  
9 As discussed later in this report, assigning responsibility  
10 for this capital development project to the Ministry of  
11 Transport significantly diminished government capacity to  
12 manage the project effectively. For example, had P.F.A.  
13 2002 been applied during the procurement phase, the high  
14 level of security would have been employed.

15 In 2003 Cabinet gave its approval to proceed  
16 with the project, and to contract with B.E.C.L. to oversee  
17 its development. Supporting documents indicate that the  
18 buildings were to be funded by B.E.C.L., built by sole  
19 source contractor, C.C.C.L., and then subsequently  
20 purchased by the government, i.e., 'a build then buy  
21 program' arrangement. It should be noted that at the time  
22 of this original approval by Cabinet, the stated cost of  
23 the three buildings, equipment and furnishings was 5.3  
24 million compared to the eventual total cost of 15.23

1 million dollars.

2                   According to a correspondence in 2005  
3 between Works and Engineering and the Accountant General,  
4 it was decided that the build then buy arrangement was not  
5 the most cost-effective way to proceed. It was felt that  
6 because the construction of the building was not tendered,  
7 it would not be known whether a fair price was obtained.

8                   We will then go to the page 171 -- the  
9 desire to openly tender the satellite facility building  
10 construction contract was confirmed in part by Cabinet  
11 approval in May 2005 to move ahead with the construction of  
12 the two satellite sites for an open tender process. I  
13 question why the Permanent Secretary and the Minister of  
14 Tourism and Transport ignored the direction of the Cabinet.  
15 That's an issue which we will explore again with some of  
16 the witnesses.

17                   Can I -- this particular project -- at the  
18 moment we are only concerned with the construction contract  
19 and not the maintenance contract. Can I have you look at  
20 -- given that this was also the subject matter of the  
21 Public Accounts Committee hearings, see what they have to  
22 say in relation to it, and that's at page 183 in the same  
23 binder.

24                   It starts at page 183, but I'm going to ask

1 | you to have a look at 184 starting with subparagraph 4 (e).  
2 | You see there, Mr. Chairman, in August 2001 the then  
3 | Minister of Transport signed a letter declaring that  
4 | B.E.C.L. as the preferred vendor of emission control even  
5 | though one, such reference had not been approved by  
6 | Cabinet, and two, such preference contravened Financial  
7 | Instructions which called for at least three competitive  
8 | bids.

9 |                   At the time, B.E.C.L. was essentially a one-  
10 | man company with no resources to construct a major  
11 | structure in Hamilton and two satellite facilities.  
12 | Neither did it appear that B.E.C.L. had the financial  
13 | resources to provide the working capital required that such  
14 | an enterprise demanded. The Committee found no evidence  
15 | that such issues were viewed as critical by Government. We  
16 | were then informed that Correia Construction Company, Ltd.  
17 | took a shareholding in B.E.C.L. in February 2003 as a  
18 | result of the former paying off unspecified expenses  
19 | incurred by B.E.C.L.

20 |                   I ask you to then go to page 186 at  
21 | paragraph 6 (c) -- Financial Instructions prescribe that  
22 | all capital development projects with the exception of  
23 | minor works must be the responsibility of Works and  
24 | Engineering who employ engineers just for such purposes.

1 This did not happen in this case. The Financial Secretary  
2 had attempted to explain why oversight of this project was  
3 not handled by Works and Engineering. He cites the passing  
4 of responsibility to M.O.T. when specialized expertise was  
5 required to resurface the airport runways sometime in  
6 2000/2001.

7 Your Committee requests the site of the  
8 documents authorizing this change. No such documents could  
9 be found. Certainly, a budget or footnote stating project  
10 of Ministry of Transport are also outside the scope of  
11 responsibility of the Permanent Secretary of Works and  
12 Engineering is not proper authority. In fact, the Auditor  
13 General has reached a legal -- has received a legal opinion  
14 stating that the responsibility of oversight of Works and  
15 Engineering cannot be legally transferred without an  
16 amendment to the Financial Instructions.

17 The transfer of supervisory authority to  
18 Transport, notwithstanding the absence of an authorizing  
19 document, was intended to be a one off for the runway  
20 resurfacing project, and not permanent. However, no one in  
21 the Ministry of Finance appeared to be cognizant of the  
22 potential conflicts of interest that might arise from an  
23 operating government department also having supervisory  
24 authority over its own capital project. Finance appears

1 | to have simply allowed the Ministry of Transport to proceed  
2 | as if this was normal, and then the Ministry of Transport  
3 | operated outside the Financial Instructions.

4 |           In addition to the appearance of a  
5 | government within a government, there was a conflict of  
6 | interest between B.E.C.L. and C.C.C.L., the former being  
7 | the contracting firm, the latter being the actual  
8 | construction company but having a shareholding in B.E.C.L.  
9 | Significantly, B.E.C.L. was a one man company, and for its  
10 | operations on the T.C.D. project, B.E.C.L. used C.C.C.L.'s  
11 | accountant to produce its accounts. How could B.E.C.L.  
12 | control or supervise the activities of C.C.C.L. under those  
13 | circumstances? Clearly, it could not.

14 |           The contractor, B.E.C.L., which was  
15 | controlled by the subcontractor, C.C.C.L., was in no  
16 | position to refuse change orders. They were simply rubber  
17 | stamped. Thus, C.C.C.L. had no risk of having change  
18 | orders refused. Change orders were being sent to B.E.C.L.  
19 | for approval, but B.E.C.L. was essentially fulfilling the  
20 | figurehead role for C.C.C.L., the ultimate contractor.

21 |           So there were no effective checks and  
22 | balances, although the Director of T.C.D. was required to  
23 | sign off on all payments.

24 |           The retaining of Entech -- let's note that

1 particular entity -- Entech -- because that entity will  
2 also figure in the next project which you will see which  
3 was handled by the Ministry of Tourism.

4                   The retaining of Entech, the architectural  
5 consulting firm, did not remedy the problem because Entech  
6 was retained by B.E.C.L. instead of the project  
7 (*indiscernible 12:32:18 on behalf of the Bermuda*  
8 *Government*).

9                   So statutorily, B.E.C.L. was doing what  
10 Works and Engineering was supposed to be doing. For  
11 example, an engineer submitted an application for a million  
12 dollar change order and B.E.C.L. approved it the next day.  
13 It was highly unusual and unlikely that the proper due  
14 diligence was carried out. So, Mr. Chairman, you see what  
15 has happened here is in effect the ministry which is there  
16 for the purposes of monitoring substantial construction  
17 projects on behalf of the Government of Bermuda was  
18 basically sidelined.

19                   It was sidelined, and the project was  
20 assigned to a Ministry which had no expertise. It had no  
21 expertise. It provided the contract management to a  
22 consultant, which at the time was a two-person band. That  
23 consultant then engaged as the contractors without any form  
24 of tendering, a construction company which was either

1 | directly or through its principal a 30 percent shareholder  
2 | in the consultant itself.

3 |           The principal of the construction company  
4 | was a Director of the construction company and a Director  
5 | of the consultant, the consultant who had given the  
6 | contract to the construction company.

7 |           The change orders, as you can see, for this  
8 | particular project went from five million to 15 million  
9 | dollars. The change orders were approved by the  
10 | consultant, and you'll see one situation where the request  
11 | for a change order for one million dollars was approved the  
12 | next day.

13 |           The Commission can see -- may take the view  
14 | -- that in those circumstances effectively any form of  
15 | supervision, monitor, getting value for money was  
16 | completely bypassed. It was bypassed because the structure  
17 | which is supposed to be followed, i.e., all major  
18 | construction work should be done by the Ministry of Works  
19 | and Engineering through their technical officers, through  
20 | proper tendering processes were all bypassed.

21 |           This particular issue, what happened in  
22 | relation to this particular project in effect repeats  
23 | itself a number of times.

24 |           CHAIRMAN: Could I just surmise? You've

1 | got there the government, the contractor, B.E.C.L., and the  
2 | nominal subcontractor, Correia, and no other company  
3 | involved?

4 | MR. HARGUN: Correct.

5 | CHAIRMAN: *Indiscernible #2 58:56.9.*

6 | MR. HARGUN: Well, the -- of course, who  
7 | still has no --

8 | CHAIRMAN: We'll come to individuals in a  
9 | moment but...

10 | MR. HARGUN: The B.E.C.L. has no  
11 | architectural experience either. It has never built a  
12 | building.

13 | CHAIRMAN: Then Entech came in.

14 | MR. HARGUN: Entech are Architectural  
15 | Consultants, they were engaged by B.E.C.L.

16 | CHAIRMAN: Do you know who they were?

17 | MR. HARGUN: I will show you their  
18 | letterhead when we look at the next project.

19 | CHAIRMAN: Were they a bonafide  
20 | architectural firm?

21 | MR. HARGUN: They are qualified.

22 | CHAIRMAN: Who were the individuals. You  
23 | had Correia you mentioned his name.

24 | MR. HARGUN: Dennis Correia -- Mr. Dennis

1 Correia is the principal. He was a Director of Correia  
2 Construction. He was also a Director of B.E.C.L., either  
3 directly or through Correia Construction for 30 percent of  
4 the shares of B.E.C.L.

5 CHAIRMAN: And was anybody, any other  
6 individual, involved in B.E.C.L.?

7 MR. HARGUN: The principal of B.E.C.L. was  
8 Mr. Donal D-O-N-A-L Smith.

9 : And the other one was Mr. Madeiros

10 CHAIRMAN: And then we have the Government,  
11 the Minister was Dr. Brown.

12 MR. HARGUN: The Minister was Dr. Brown.

13 CHAIRMAN: This story has covered 2001, I  
14 think, through 2007 or something like that.

15 MR. HARGUN: Yes. I believe that is the  
16 case. Certainly --

17 MS. LUCK: Was the letter signed in 2001?

18 MR. HARGUN: The letter I showed you was  
19 signed in --

20 CHAIRMAN: 2001.

21 MR. HARGUN: -- 2001, and that was signed by  
22 the Minister.

23 CHAIRMAN: The Minister of Finance.

24 MR. HARGUN: Yes.

1 CHAIRMAN: Has he remained the Minister of  
2 Transport throughout?

3 MR. HARGUN: Yes. The Ministry of Transport  
4 was sort of merged with the Ministry of Tourism, so the  
5 Minister of Tourism and the Minister of Transport  
6 (*indiscernible 12:37:40*)

7 CHAIRMAN: Right through to 2007?

8 MR. HARGUN: Yes.

9 CHAIRMAN: *Looking at this about the*  
10 *company you've got basically four* individuals, Dennis  
11 Correia, Mr Smith, Mr Madeiros and Dr Brown.

12 MR. HARGUN: Yes.

13 CHAIRMAN: Any other individuals involved  
14 in this story as far as you can see?

15 MR. HARGUN: Mr. Telemaque, who you will be  
16 seeing in due course, was the Permanent Secretary of  
17 Tourism and Permanent Secretary of Transport. We will be  
18 asking him questions in relation to the tender.

19 CHAIRMAN: And what would his dates be?  
20 (*indiscernible 12:38:37 The Permanent Secretary is the*  
21 *Ministry of Transport?*)

22 MR. HARGUN: Transport.

23 CHAIRMAN: And do you have the dates?

24 MR. HARGUN: My understanding is

1 throughout, but we will confirm that.

2 CHAIRMAN: So this is -- I'm asking this  
3 question, this is a demonstration of how one can start with  
4 the Auditor General *indiscernible 12:39:05 look at the*  
5 *contract and you can find out who were the individuals who*  
6 *were dealing with that contract.*

7 MR. HARGUN. Certainly. Yes. Yes. It seems  
8 we just -- the same characters appear. Let's have a look  
9 at Heritage Wharf, which is again historical.

10 MR BARRITT: Mr. Hargun, before we do that,  
11 leaving this particular contract, one thing I would like to  
12 observe, this is a contract that began in 2004/2005  
13 thereabouts and doesn't become the subject of any scrutiny  
14 it appears except by the Office of the Auditor General  
15 until a Report of October, 2010, which is subsequently  
16 commented on by the Public Accounts Committee at the House  
17 of Assembly, an oversight Committee, in 2011. Thereby  
18 hangs the story as well, I think.

19 MR. HARGUN: Well, yes. Yes. I mean, I was  
20 primarily showing you this for historical purposes. The  
21 B.E.C.L. comes in two parts. What we just looked at is the  
22 construction contract. The construction contract is merely  
23 for historical purposes. We will also look at the  
24 maintenance contract. The maintenance contract does come

1 | within the terms of the Audit Report because payments were  
2 | being made during that time.

3 |                   MR BARRITT:    I'm speaking more to the issue  
4 | of oversight --

5 |                   MR. HARGUN:    Yes.

6 |                   MR BARRITT:    -- the current system we have  
7 | and whether it needs improvement.  If this is how we get on  
8 | top of projects, it looks largely historical if we look  
9 | back now in terms of oversight.

10 |                  MR. HARGUN:    Yes.  Specifically, there is  
11 | an issue as to how quickly one should be actually looking  
12 | at these projects.

13 |                   Can we just have a look at -- since the same  
14 | characters appear in the Heritage Wharf?  Now again, this  
15 | was, Mr. Chairman, a very substantial civil engineering  
16 | project.  The building of the second pier in Dockyard and  
17 | the terminal building -- it cost -- it originally was  
18 | estimated to cost anything like 25 million, but you'll see  
19 | that more than double the amount was actually spent on that  
20 | particular project.

21 |                   Again, one would think that that would have  
22 | been a classic case where the responsibility for tendering,  
23 | selection of the contractor, overseeing the project, making  
24 | sure that only proper amounts were being paid would be the

1 responsibility of the Ministry which has the specialization  
2 and the expertise to do the job.

3                   That would ordinarily be Works and  
4 Engineering. But again -- and you have to ask the reason  
5 why -- the responsibility for this very substantial  
6 infrastructure project was given to the Ministry of  
7 Tourism. Again, it is a fact that despite the fact that  
8 this was a very substantial project for Bermuda, there was  
9 no tendering process. So having been given the project, so  
10 what does the Ministry do given that it doesn't have any  
11 expertise to oversee and manage the construction of the  
12 second pier?

13                   CHAIRMAN: the Ministry of Transport?

14                   MR. HARGUN: The Ministry of Tourism.

15                   COMMISSIONER: The Ministry of Tourism.

16                   MR. HARGUN: And if you look at -- if you  
17 go to tab 12, you will see a letter from Mr. Telemaque, tab  
18 12, page 1. The letter was written to the same company,  
19 Entech, Limited. And you see, Mr. Chairman, a letter to  
20 Entech Limited dated the 23rd of November -- it says that I  
21 enclose herewith a draft schematic design and cost  
22 estimates of the above-captioned.

23                   In this regard, the Minister of Tourism and  
24 Transport invites you to quote for the following: The

1 provision of project management services, the sort of  
2 services ordinarily which would have been done by Works and  
3 Engineering, and the Minister of Tourism is going out to  
4 get them. Certification of design, the development of  
5 construction tender, pre-qualifying suitable contractors,  
6 site inspections, the provision of sign-off services of  
7 various construction services. And then it says, the  
8 outlying passenger terminal design would be the subject of  
9 a separate tender process with an architectural firm.

10           So, what is happening here is Government has  
11 given this contract to Tourism. Tourism doesn't have the  
12 expertise, so Tourism is going out to a local architect  
13 saying, can you give us a quotation as to whether you're  
14 prepared to provide us these services, and how much. You  
15 will see that he comes back -- Entech -- and if you say who  
16 were Entech you will see, Mr. Chairman, at page 3 the  
17 principals of Entech; they are listed on their letterhead.

18           But, as I said, this was the same firm which  
19 was hired by B.E.C.L. in the emissions testing program. He  
20 said, thank you for inviting Entech, Limited to submit a  
21 fee proposal for the exciting project. Our fee estimate  
22 has been determined following very careful consideration of  
23 the information provided to us dated 23rd of November, and  
24 then it deals with the sort of thing that they would be

1 | doing. You'll see in Part Number 3, pre-qualifying  
2 | suitable contractors. He says this will be a very  
3 | important aspect of the project ensuring that only  
4 | appropriately qualified and resource contractors are  
5 | invited to tender who will provide the client with the best  
6 | opportunity of realizing satisfactory project conclusion.

7 |           Then if you go to the final paragraph on  
8 | that page, he says, as the prime consultant and project  
9 | manager, Entech Limited would have a hugely important role.  
10 | The current cost estimate provider minus the terminal  
11 | building, but inclusive of the bridge, amount to  
12 | approximately 31 million.

13 |           While this is a relatively large project in  
14 | size, it is also comparatively straightforward from a civil  
15 | engineering point of view. In fact, it relates closely to  
16 | the marine works which we have already designed and  
17 | reviewed at the (*indiscernible 12:47:15*) Our understanding  
18 | is that the design and construction schedule for the  
19 | proposed project is extremely tight. We highly recommend  
20 | that a suitably qualified and experienced local consultant  
21 | and contractor be used for this project. Apart from the  
22 | requisite local knowledge, the construction issues and  
23 | protocols, they are also available on a daily basis to  
24 | provide immediate response required for a fast-track

1 project. If the need be, additional resources and  
2 manpower can be augmented from overseas sources on an as-  
3 needed basis.

4 And he says, if you look the next paragraph,  
5 he says, our fee estimate is one million ninety-five  
6 thousand dollars.

7 It is right that they did actually also go  
8 out to another architectural firm to provide similar  
9 services, and you will see that at page 7. This is  
10 Woodbourne Associates. They were asked to provide the same  
11 services, and they said they could do it for one million  
12 eight thousand dollars, which is as it happens, slightly  
13 less than Entech.

14 The appointment of Entech as consultants was  
15 approved by the Cabinet as consultants. I can give you the  
16 reference, that was conclusion 1079 on the 9th of January,  
17 2007, and simply as consultants -- the Cabinet meeting held  
18 on the 9th of January, 2007.

19 So, their consultancy has been approved, so  
20 Entech goes out selecting suitable contractors. The sort  
21 of thing they're looking at, you will see, is -- before I  
22 show you the document - what they do is they invite three  
23 local construction firms, Correia Construction, that's the  
24 same construction as Correia Construction in the last

1 project, Lawrence Marine Limited, and Bermuda Salvage  
2 Limited, to essentially come in and have a meeting with  
3 them. I'll show you the sort of information they asked,  
4 but they basically have meetings with the three contractors  
5 to see who is the most -- more suitable one. On that  
6 basis, they select -- on the basis of three interviews,  
7 they select Correia Construction.

8                   In circumstances where the other two  
9 contractors are saying this is a very substantial project,  
10 we're not sure you should be doing it this way, and they  
11 are saying that for purposes of getting value for the  
12 Government of Bermuda, you should be asking for a tender.  
13 People invited to the interview, other than Correia  
14 Construction, that is Bermuda Salvage and Lawrence Marine,  
15 are saying that the best way to deal with it is for you to  
16 invite us to put forward a form of tender, and then you can  
17 decide who should be the person who should be accepted as  
18 the bidder.

19                   But that's not how it was done. The way it  
20 was done by Entech was, as I said, informal interviews, one  
21 with Mr. Correia, the other two with the others, and then  
22 Correia Construction was selected.

23                   Let me show you what happened. If you look  
24 at -- I'll come back to the -- if you look at --

1 MR. ADAMSON: It's page 18.

2 MR. HARGUN: I'll show you the  
3 recommendation by Entech first, and then I'll show you the  
4 other material. If you go to page 11, this is a letter  
5 from Entech of the 31st of January, 2007. This is a letter  
6 written to Mr. Telemaque. Now just pausing here, Mr.  
7 Telemaque, of course, *now the client*, the Minister of  
8 Tourism has hired Entech. This is an odd situation that an  
9 architectural firm is advising the Ministry how they should  
10 go around selecting in circumstances where there is already  
11 a Ministry in existence with which does very little other  
12 than actually go around selecting contractors.

13 He says, thank you for your letter of the  
14 29th of January instructing us to proceed in the spirit of  
15 optimizing accountability to us. We have now completed our  
16 contractor interviews and are now in a position to  
17 recommend in our opinion a suitable local marine  
18 contractor. Marine Salvage Limited, Correia Construction  
19 Limited, and Lawrence Marine Limited were invited for  
20 interview Monday, 29th, Tuesday 30th of January, 2007, at  
21 our offices. They were each informed about the expected  
22 extent of the project. It is important and their  
23 requirement of meeting the April 22, 2009, deadline.

24 A brief overview of the proposed design was

1 explained, as was the budget cost and the initial bill of  
2 quantities. In order to provide a level playing field,  
3 they were then asked the same ten questions. They were:  
4 what total staff -- what is your total staff? What  
5 equipment do you have? What experience do you have? What  
6 capacity do you have to do a 35 million dollar project?  
7 What ability, desire to work as the design progresses?  
8 What willingness to go if it goes different ways? Schedule  
9 2009 deadlines. Ordering materials. Sourcing materials.  
10 Design, build, holistic team approach.

11                   So it was a general discussion about the  
12 construction project, and on the basis of those  
13 discussions, this is the conclusion of selection of a major  
14 contractor to do a major civil engineering project. It  
15 was very evident to us based on their respective responses  
16 available on request, and subsequent to paragraph 5 of our  
17 25th of January, 2007 letter to you that Correia  
18 Construction Limited was the only local marine contractor  
19 with an adequate track history, capacity, and capability of  
20 doing the proposed works in the required time-frame.

21                   Lawrence Marine Construction Limited's  
22 61 full-time staff would likely have to bring in another  
23 barge and five (*indiscernible 12:54:54*) crew to augment its  
24 operations to meet time deadlines. It was clear with only

1 five full-time staff that Bermuda Salvage Limited, and  
2 Lawrence Marine would have to subcontract out to work to  
3 overseas contractors. Again, we have to emphasize our  
4 opinion that far too much time would be lost on this  
5 project if we had to wait for overseas contractors to  
6 tender and mobilize.

7 Just pausing there, Mr. Chairman, it is not  
8 unusual in Bermuda for local contractors to actually have  
9 arrangements with foreign contractors to do substantial  
10 projects. The Legislative Building was one such project.

11 We have no hesitation in recommending  
12 Correia Construction Limited for this project and suggest  
13 that they be selected as the preferred contractor.

14 So that's how it was done. And then, can I  
15 just show you the letter from Crisson Construction who also  
16 asked to bid -- asked to -- not bid, but --

17 MR. ADAMSON: Attend the meeting.

18 MR. HARGUN: -- attend the meeting. If I  
19 could ask you then to look at page 14. This is a letter to  
20 Mr. Reed at Entech Limited from Charles Crisson of the 31st  
21 of January, 2007. He says, Dear Mr. Reed, please find  
22 attached the information requested yesterday outlining our  
23 company. We find it very unfortunate that we were only  
24 given this short period of notice to be interviewed and

1 | qualify a job of this magnitude, especially after just  
2 | returning to the island the night before. Therefore, it is  
3 | very brief, and we have not had a chance to elaborate on  
4 | our overseas experience ability. We are of the opinion  
5 | that the job should go to competitive bidding, even if the  
6 | bidding process was short and within 10 percent of the  
7 | negotiated price. This would allow you to come up with a  
8 | preferred contractor. This would at least give the  
9 | taxpayer a fair deal by saving millions of dollars.

10 |           One point to note, Mr. Chairman, so far is  
11 | that in those interviews nobody has been asked how much  
12 | will you do it for. It's all about what's your  
13 | arrangement, how many working people have you got to do it,  
14 | what's your structure. Nobody has been asked how much  
15 | would you do it for.

16 |           Here's Mr. Crisson who is saying before you  
17 | select the preferred contractor, you might actually want to  
18 | ask for a bid because you might want to consider the lowest  
19 | bidder as a potential preferred contractor.

20 |           Likewise, if you look at the letter from  
21 | Lawrence Marine, which you will find at page 18, this is  
22 | from William Lawrence, again written to Mr. Reed at Entech,  
23 | Limited on the 30th of January. He says, Dear Sirs, thank  
24 | you for meeting with me at your offices on Monday. As per

1 | your request, I am providing a company profile for your  
2 | review. The brief overview of the project that you  
3 | provided was very interesting and intriguing to me. I  
4 | would like to confirm my desire to be involved in the  
5 | construction, and that would undoubtedly become a major  
6 | feature in revitalizing our Tourism product.

7 |                   Having had the time to reflect on the  
8 | project since our discussion at your offices, some  
9 | observations have come to mind. While the idea of being  
10 | involved in a negotiated rate contract from the start was  
11 | very interesting, I personally believe that the best  
12 | possible value for the Government and the Bermuda public  
13 | would be achieved through the traditional competitive  
14 | tender process. Would not a competitive tender on the  
15 | main aspects of the project be prudent, he asks. This  
16 | could then be used as a basis for the negotiated contract  
17 | with the most competitive respondent. Or alternatively, as  
18 | the project is a substantial size, could it not be in two  
19 | or three distinct projects -- contracts. I would make the  
20 | comment to you that in this age of fiscal accountability,  
21 | any action that would show the most responsibility in  
22 | managing government funds would be the most acceptable to  
23 | the ordinary taxpayer.

24 |                   So out of the three people who were asked to

1 | come to the tender interview, two of them suggest that  
2 | perhaps you'd like to consider how much it will cost.  
3 | Perhaps you'd like to actually consider a tender process,  
4 | and then take a view as to who it should be. But that was  
5 | not adopted. The contractor for this exceptionally large  
6 | contract was selected on the basis of an interview without  
7 | any indication from that contractor as to what it might  
8 | ultimately cost.

9 |                   CHAIRMAN: We have reached the stage where  
10 | the Government's consultant actually asked to think about  
11 | spending too much public money, and the advice is ignored?

12 |                   MR. HARGUN: Mr. Chairman makes a good  
13 | point. What effectively happens, because the Ministry of  
14 | Tourism doesn't have the expertise to manage projects of  
15 | this sort, the entire conception, tendering, management,  
16 | the view, overview, payments is bypassed. So the  
17 | Government in effect, in the end, ceases to have any  
18 | control over these projects.

19 |                   || It's one-o'clock.

20 |                   CHAIRMAN: Yes, well, we'll break now until  
21 | five past two.

22 |                   MR. HARGUN: Certainly.

23 | **(Recess taken.)**

24 | **(Recess ended.)**

1                   CHAIRMAN: Mr Hargun, looking to tomorrow  
2 there may or may not be applications or applications  
3 tomorrow morning, we better leave the morning free just in  
4 case. I think you're scheduled to have two witnesses  
5 tomorrow afternoon.

6                   MR. HARGUN: We are.

7                   CHAIRMAN: Do you think it's realistic to  
8 get through those two in the afternoon.

9                   MR. HARGUN: Certainly; I think so.

10                  CHAIRMAN: Because I was going to say, *if*  
11 you don't finish this afternoon rather than rush to finish  
12 we'll break off this afternoon and you can finish tomorrow  
13 morning.

14                  MR. HARGUN: That would be perfect,

15                  CHAIRMAN: And then you would be fixed for  
16 2-0-clock.

17                  MR. HARGUN: Yes. At the moment I don't  
18 see any difficulty finishing those two witnesses tomorrow  
19 afternoon.

20                  Before I start, Mr. Chairman, it's been  
21 pointed out to me by Ms. Memari on behalf of the civil  
22 servants she represents that the - obviously, these  
23 proceedings have been reported by the Royal Gazette, which,  
24 of course, they're entitled to do. But it is from blogs

1 | where people are --

2 |                   VENOUS MEMARI: Commenting.

3 |                   MR. HARGUN:    -- commenting on what is  
4 | happening, and requests have been made, in which we  
5 | certainly don't disagree with that given that this is a  
6 | Judicial Inquiry, and while no restriction on reporting  
7 | whatsoever. But perhaps it should not be commented upon  
8 | whilst it is continued. Perhaps you'd like to consider  
9 | that.

10 |                   CHAIRMAN: How do we do that?

11 |                   MR. HARGUN: The commenting --

12 |                   MR BARRITT: The Gazette does have a  
13 | practice of not allowing comments on qualified judicial  
14 | matters.

15 |                   MR. HARGUN: It certainly would not be an  
16 | order. It would be -- at most if the Commission considered  
17 | it appropriate, more in terms of an indication or a  
18 | request.

19 |                   CHAIRMAN: In other words, please think of  
20 |                   us as a court.

21 |                   MR. HARGUN: Yes. Obviously a report, but  
22 | it's the ability for the public to comment on it as it goes  
23 | along.

24 |                   CHAIRMAN: I certainly agree. We will say

1 | that certainly and if you can get a message to the Editor  
2 | saying that since it's the practice not to have blogs in  
3 | respect to court hearing, we'd be very grateful if you'd do  
4 | the same for us.

5 | MR. HARGUN: Certainly.

6 | CHAIRMAN: Thank you.

7 | MR. HARGUN: In that case, can I complete  
8 | the section on the Dockyard project? There are two reports  
9 | I want to refer to quickly. One is the construction report  
10 | prepared by a company called Trent Construction Consulting  
11 | on behalf of the Auditor General. That you will find, Mr.  
12 | Chairman, at tab 12, page 83. The relevant section I want  
13 | to draw to your attention is at page 88.

14 | CHAIRMAN: Project Consultant.

15 | MR. HARGUN: Project consultant. You see  
16 | that they say -- forgive me --

17 | MS. LUCK: The Auditor General requested  
18 | this report to be prepared?

19 | MR. HARGUN: Yes. If you look at the  
20 | beginning of the document, which is at page 83, it's a  
21 | report prepared by Trent Construction provided for the  
22 | Auditor General. Given that it's a specialist report, the  
23 | Auditor General herself asked for it.

24 | At page 88 they say Entech were again the

1 | company responsible for the day-to-day project and  
2 | management of the site. We understand from the meeting  
3 | with Correia that full-time personnel were on-site to  
4 | monitor and check the works as they progressed.

5 |                   Can I just say one word in relation to  
6 | Entech -- I've mentioned Entech a number of times.  
7 | Clearly, the point I was hoping to make was that it's the  
8 | outside architectural management firms which are being  
9 | utilized. I should not be seen to be suggesting anything  
10 | improper on the part of Entech at all. They're a perfectly  
11 | respectable architectural management firm in Bermuda. The  
12 | only point I was making was that the work is being  
13 | outsourced to an outside party, and the (*indiscernible #3*  
14 | *02:09:45*)

15 |                   Then they go on to say; Entech were also  
16 | responsible for payment certificates, and for assessing and  
17 | recommending the additional cost and variations that  
18 | occurred on the site. As we have previously noted,  
19 | Entech's specialty is not the field of estimating or  
20 | surveying, and we're not aware of any house or external  
21 | party being involved with the project in order to verify  
22 | costs.

23 |                   That's quite an important point - (house  
24 | party ?) being nobody on the part of the Government

1 involved in relation to the issue of cost verification.  
2 On a project of this value and scope, working with a  
3 competent contractor who employs quantity surveyors it  
4 would have been much more prudent to employ similar  
5 quantity surveyors to protect the government's interests.

6 Our concerns in respect to the additional  
7 costs were highlighted in our main report, but we reconfirm  
8 these aspects below:

9 1. On what basis was the original schedule  
10 of rates accepted? Who verified, and on what grounds were  
11 the values accepted as realistic?

12 2. Revised contract price which increased  
13 the project value initially from 38.9 million to 47.8  
14 million, there does not appear to be sufficient detail in  
15 the Correia documentation to adequately accept all of the  
16 values claimed. We see no evidence that the value was  
17 checked in any way. Again, if this was checked, who  
18 verified, and on what grounds were the values accepted as  
19 realistic.

20 3. As highlighted in our original report,  
21 there are many of the variations which occurred and had  
22 been accepted without evidence of any verification, simply  
23 acceptance.

24 And then, if you go to the final paragraph

1 on that page -- As we have repeatedly commented, Correia  
2 were placed in a very strong contractual position and had  
3 the necessary resources in order to make the most of the  
4 contractual situation. In the given circumstances of the  
5 site with so many changes and additions, re-measurement  
6 would have been the most reasonable and accurate method of  
7 obtaining a realistic figure of the project as a whole, and  
8 would have provided a better way to control costs.

9 This would, however, require the client's  
10 representatives, Entech, to have also carried out re-  
11 measurement, and have the proper knowledge of costing in  
12 order to effectively monitor and manage costs, and it is as  
13 we see it, no evidence of re-measurement or records that  
14 were some site queries of the quantities submitted in  
15 payment application or querying of additional work  
16 submissions.

17 Then, if you look at page 1290, you see the  
18 project overview. You see that the original T.A.F., total  
19 cost wise to figure, was 35 million. The revised T.A.F.  
20 was 45 million. The revised T.A.F. in 2010/2011 was 60  
21 million. So that nearly doubled the original figure.  
22 Then, if you look at -- One of the issues you will see  
23 under Key Dates and Approval Parties, under Final Design  
24 you will see that it is said that the design was developed

1 concurrently with construction, an issue which goes to  
2 planning of the project.

3                   If you look at -- on the next page, 1291,  
4 Tender Opening, there was no tender opening for  
5 contractors. The evaluation was based primarily on  
6 interviews as we saw.

7                   CHAIRMAN: To be careful not to jump to  
8 conclusions, but it doesn't follow if they had been  
9 (*indiscernible 02:13:39*) at tendering that the costs would  
10 not have escalated

11                   MR. HARGUN: Not at all.

12                   CHAIRMAN: So, how do we deal with that?

13                   MR. HARGUN: No. The only thing about  
14 tendering is that tendering certainly gives you a realistic  
15 -- One way of finding the value for money is to invite  
16 tenders. And all things being equal, the lowest tender  
17 would provide you with the most value. It's just a  
18 measurable -- I should not be understood as saying that you  
19 cannot contract other than by tendering. There are  
20 certainly circumstances where you can.

21                   CHAIRMAN: I think perhaps I was looking at  
22 it the other way round as well. They should have had  
23 tenders on the face of it, certainly. The cost escalating  
24 was nearly double. If that wasn't the result of the lack

1 | of tenders or was it the result of it?

2 |           MR. HARGUN:    You will see -- there are a  
3 | number of causes which actually do -- a number of reasons  
4 | which explain the escalation of the price.  One was the  
5 | speed by which it is required.  Second, that originally a  
6 | particular method of construction was envisioned, but  
7 | subsequently a different method was employed which required  
8 | additional drawings, and it resulted in delays.  It  
9 | resulted in additional costs, and as to why there were  
10 | delays, there were still workmen on the site.  You'll see  
11 | all those reasons why it cost.

12 |           It's --Tthe reason why these costs incurred  
13 | the way they did wasn't necessarily related to the tenders.  
14 | There were other issues with this particular project.

15 |           CHAIRMAN:    Could one say that if there had  
16 | been a tendering process, the contractors would have looked  
17 | at it carefully and then maybe come up with a revised  
18 | method.

19 |           MR. HARGUN:    The contractor would have  
20 | looked at the project on the basis that it could be  
21 | actually executed in the way the owner was hoping to have  
22 | it executed; certainly.

23 |           You'll see on page 1293, under the bullet  
24 | points, it says that Bidders were not required to submit a

1 price quote or any other financial information.

2 MR BRADSHAW: Mr. Hargun, I have a question  
3 I want to discuss with Sir Anthony, are you suggesting that  
4 perhaps if an external party -- project manager of this  
5 particular project (*indiscernible 2:16:19*) then the public  
6 purse could have been better protected? We've read, I  
7 think, some letters which clearly talked about... that  
8 somebody had mentioned submitting the project in two  
9 different (parts ?)

10 MR. HARGUN: Yes. One of the bidders; yes.  
11 One of the parties which were invited for the interviews;  
12 yes.

13 Not necessarily. It doesn't necessarily  
14 follow that if the internal -- if the work had been  
15 performed by Works and Engineering would necessarily have  
16 resulted in those figures. But what it does mean is that  
17 by employing this particular methodology, by assigning the  
18 contract to Ministry of Tourism, and by necessity having to  
19 have an outside project manager, the internal controls  
20 which exist within Government in relation to tendering, in  
21 relation to Financial Instructions, in relation to the  
22 payments being made by parties who have a legal obligation  
23 to check that all the Financial Instructions have been  
24 complied with, all that was put on one side that would not

1 | be complied with.

2 |                   MR BARRITT:     But there was a suggestion in  
3 | that consulting report that the people who were retained to  
4 | do on-site supervision, were outside their field of  
5 | expertise.

6 |                   MR. HARGUN:     Certainly.   The Trent Report  
7 | does suggest that you needed more by way of management.  
8 | For example, you needed quantity surveyors; you needed to  
9 | reassess the value of the -- remeasure the entire project.  
10 | They do make suggestions as to what additional work should  
11 | have been done if you did employ an outside management  
12 | consultant; yes.

13 |                   So can I then show you -- just the final  
14 | point in this Report by Trent, at page 1295?  Perhaps the  
15 | point I'm seeking to make from these reports -- compliance  
16 | with policies and procedures - procurement policies.

17 |                   Documented procurement policies were not  
18 | followed for the project for the hiring of project managers  
19 | and the contractor.  Policies state that any project  
20 | greater than \$50,000.00 must be publicly advertised, but in  
21 | both cases, bids were selected from a small group of  
22 | vendors identified by either M.T.T. or Entech.

23 |                   In addition, when hiring contractors, the  
24 | selection criteria did not include price, but only

1 quantitative factors. Documented policies state that the  
2 price cost must be received and considered in the  
3 evaluation process. Therefore, in this case, the policy  
4 was not followed. Selecting bidders without considering  
5 price would likely not lead to the best value for money.

6 And that's the same point made in the next  
7 paragraph, Value for Money. Selecting a contractor without  
8 asking for a bid price would not allow price competition to  
9 occur. Therefore, value for money may have been  
10 diminished. And that's the point, the substance of the  
11 point made by the Trent Report.

12 Then, there is a Special Report by the  
13 Auditor General which you will see at page 96. You will  
14 see at page 104, at paragraph 2.5, the Auditor General says  
15 that the Ministry of Works and Engineering had a mandate to  
16 carry out capital development projects, and the accounting  
17 responsibility for all such projects was vested in the  
18 Permanent Secretary. In order to carry out its mission,  
19 Works and Engineering had developed Government structure,  
20 accountability relationships, and rules and procedures for  
21 managing major capital projects. This project did not  
22 leverage the expertise of Works and Engineering.

23 Instead, the ultimate responsibility for the  
24 project was delegated to the Ministry, and then they deal

1 with the legal point that they are not satisfied that it  
2 legally could be done, but that's a separate point.

3           Then, could I ask you to have a look at the  
4 findings of the Auditor General. If you go to page 107 at  
5 paragraph 3.3, the Auditor General finds, Government did  
6 not follow approved policies and procedures of tendering.  
7 Cabinet did not approve the construction contract.  
8 Government did not critically assess the priority and  
9 affordability of its major capital projects. Government  
10 did not conduct a comprehensive financial assessment of the  
11 project before awarding the contract to the preferred  
12 contractor.

13           Appropriate planning and design was not  
14 conducted before construction began, resulting in  
15 significant cost overruns. The Ministry did not protect  
16 the financial interest of the Government when it accepted  
17 the preferred contractor as its own guarantor and failed to  
18 perform financial due diligence. Appropriate oversight of  
19 the construction or costs was not performed by the  
20 Ministry. And their conclusion is that the government did  
21 not use the accepted practices in planning and managing the  
22 spending of public money to build Heritage Wharf and its  
23 related infrastructure. Inadequacies in the management of  
24 the project did not protect the Government's interests or

1 provide the Government with the ability to measure whether  
2 value for money was achieved in many areas.

3           There are detailed issues in relation to the  
4 project management contract set out at page 110, and that's  
5 under paragraph 4.1.1. The first paragraph refers to the  
6 -- Any contract in excess of \$50,000.00 being submitted for  
7 Cabinet approval and the requirement for tenders. The next  
8 paragraph says, Government determined that a project  
9 manager was needed to manage the construction of the pier,  
10 terminal, and ground transportation areas. Specifically,  
11 the project manager's responsibilities included certifying  
12 the preliminary design to include a registered engineer's  
13 stamp, overseeing the permission process through the  
14 Department of Planning, developing construction tender to  
15 include detailed design, pre-qualifying suitable  
16 contractors to conduct the construction work, performing  
17 site inspections during construction, and providing sign-  
18 off services for various construction work.

19           In direct violation of the Financial  
20 Instructions, the project management contract was not  
21 publicly tendered. Instead, three companies were invited  
22 to submit bids for the project management contract. Two of  
23 these companies submitted bids of 1.1 million and one  
24 million respectively. The third declined to bid. That's

1 | the management contract. And Cabinet selected the hiring  
2 | on the basis of bid analysis and the company's recent  
3 | experience in design and review work at Dockyard.

4 |                   Then a section in relation to the issue of  
5 | costs -- I'll ask you to have a look at page 115. Cost not  
6 | verified. The project incurred 20.8 million in additional  
7 | costs relating to increased ground transportation area, in  
8 | situ instead of precast concrete. That was a change of  
9 | method of construction which led to considerable delay.

10 | Dolphin mitigation. Pile overdrive, terminal buildings and  
11 | *indiscernible 02:24:40 cluster work ?*). Changes initiated  
12 | throughout the project have been blamed for the additional  
13 | costs.

14 |                   Senior officials told us that costs were  
15 | verified by the project manager. However, given the  
16 | Ministry's lack of experience in the management of capital  
17 | projects, it would have been expected that some level of  
18 | independent oversight would have been undertaken to protect  
19 | the Government's interests. We found no evidence that the  
20 | Ministry performed due diligence on the amount submitted.

21 |                   So it's the same point which I made earlier  
22 | in relation to the disadvantages of moving significant  
23 | civil engineering project from the Ministry of Works and  
24 | Engineering to Tourism.

1                   That is all I desire to say in relation to  
2 this project. Perhaps the next project to touch upon from  
3 a historical perspective is the Port Royal Golf Remediation  
4 project. That you will find at tab 11.

5                   Just by way of background, Mr. Chairman, the  
6 --

7                   CHAIRMAN: Before you get to Port, has the  
8 Public Accounts Committee considered that? The Auditor  
9 General recommended it?

10                  MR. HARGUN: Yes. I'm certain -- I would  
11 not be surprised if there was some difference in it, but  
12 it's not within the documenting material which we have. We  
13 will double check that.

14                  CHAIRMAN: On to Port Royal?

15                  MR. HARGUN: Yes. Port Royal. There are  
16 certain golf courses in Bermuda which are essentially owned  
17 by Government. In relation to those golf courses, over a  
18 period of time, the Government takes on the remedial action  
19 in terms of improvements, in terms of major overhauls,  
20 construction of the buildings, and so on and so forth.

21                         Port Royal is one such golf course.  
22 Historically, that responsibility for the remediation work,  
23 the construction work, rested as a matter of statute with  
24 Works and Engineering. You will see that there was a

1 statutory change by amending the Act so that the  
2 responsibility for the remediation work to the golf courses  
3 and the construction work was moved from Works and  
4 Engineering to Tourism.

5           You will see that essentially the same  
6 issues which we looked upon both in relation to the T.C.D.  
7 project, and in relation to the Heritage Wharf resurface in  
8 relation to Port Royal. The easiest way to look upon it is  
9 to look at the Special Report of the Auditor General which  
10 was prepared -- presented in October 2014. That you will  
11 find at tab 11, page 70.

12           The Report starts at page 70. The relevant  
13 part I want to show you first is page 75. In the second  
14 paragraph, you'll see that between 2007 and 2011 the  
15 Government of Bermuda approved 24.5 million refurbishment  
16 of the golf course known as the Port Royal Golf Course  
17 Improvement Capital Development Project.

18           Then you will see at page 77, Role of the  
19 Government at paragraph 2.3. The Government owns the land  
20 on which the golf course sits, as well as the buildings  
21 erected thereon, and the related furniture and equipment.  
22 The 1998 Act designated the Minister of Works and  
23 Engineering as the Minister responsible for Port Royal Golf  
24 Course. In 2006, the Act was amended, and the

1 responsibility for Port Royal Golf Course was transferred  
2 to the Minister of Tourism and Transport.

3           On the next page, 78, in 2009 the wording of  
4 the Act was amended to change the Minister charged with  
5 responsibility for Tourism and Transport to the Minister  
6 charged with the responsibility for golf courses. From  
7 2006 to 2010 the Minister in charge of the golf courses was  
8 the Minister of Tourism and Transport. So for all intents  
9 and purposes, it is not the Minister of Public Works or  
10 Works and Engineering, but it is the Minister of Tourism  
11 who has the responsibility to (oppose/propose ?), manage,  
12 fund, and contract for the remediation projects and the  
13 construction projects in relation to golf courses -- and  
14 responsibility for the project.

15           Government can effectively -- efficiently  
16 and effectively deliver programs and services by  
17 concentrating and leveraging expertise across ministries  
18 and departments. The Ministry of Works and Engineering had  
19 a mandate to carry out capital development projects and the  
20 accounting responsibility for all such projects was vested  
21 in its Permanent Secretary.

22           In order to carry out its mission, Works and  
23 Engineering had developed governing structures,  
24 accountability relationships, and rules and procedures for

1 | managing major capital projects. This project did not  
2 | leverage the expertise of Works and Engineering. Instead,  
3 | the ultimate responsibility for the project was delegated  
4 | to the Cabinet office and the Ministry of Tourism and  
5 | Transport, and the Board of Trustees were given the  
6 | responsibility for managing the project. Neither the  
7 | Cabinet Office, the Ministry of Tourism and Transport, nor  
8 | the Board of Trustees had demonstrated the capacity,  
9 | systems processes and qualified personnel for the oversight  
10 | or management project of this magnitude.

11 |           Additionally, Financial Instructions did not  
12 | permit the delegation of the management of capital  
13 | development projects to any entity other than Works and  
14 | Engineering. The Public Treasury Administration and  
15 | Payment Act 1969, in fact, provided that every person  
16 | concerned in or responsible for the payment of public  
17 | monies shall obey all instructions issued by the Minister  
18 | of Finance. That's the same legal point that there can be  
19 | no effective delegation.

20 |           Then you will see on the next page, 79, the  
21 | third paragraph under Funding for the Project, in November  
22 | 2007 the Government approved a 13.6 million expanded  
23 | capital redevelopment project for Port Royal Golf Course.

24 |           Then you will see that -- Summary of the

1 Findings at page 84, the Board of Trustees did not follow  
2 processes to control the expenditure of public money. Just  
3 to -- by way of clarification, the golf course is run by,  
4 on a day-to-day basis, by a management committee, in  
5 effect, and they are the Trustees. So it's referred to as  
6 the Board of Trustees. Ordinarily, they would make,  
7 whenever they require any funding to carry out any work,  
8 they make a request to the relevant Minister. Historically  
9 that used to be the Minister of Public Works, and now to  
10 the Minister of Tourism under the new Legislative  
11 structure.

12                   After the money has been given, historically  
13 it's always been the Trustees who would manage that money  
14 and carry out the project. It has never been -- it does  
15 not appear that it was envisioned that the Trustees would  
16 be asked to carry out projects on behalf of the Government  
17 for sums in the range of 13 to 15 million dollars.

18                   So, going back to the Summary of Findings,  
19 the Board of Trustees did not adequately monitor the  
20 project, the Government did not adequately monitor the  
21 project, the Government did not correctly account for the  
22 project, the Government did not follow its processes to  
23 approve all project costs.

24                   You will see in the Conclusion at the next

1 | page, at page 85, we cannot conclude that the Board of  
2 | Trustees used all of the funds it received for the project  
3 | for the intended purpose. Further, we cannot conclude  
4 | whether it has fully accounted for the money it received  
5 | because the Board of Trustees has not provided accurate  
6 | financial reporting, including financial statements audited  
7 | for reliability, completeness, and accuracy.

8 |           The recommendation made by the Auditor  
9 | General is that we recommend that the Board of Trustees  
10 | comply with Legislation and Financial Instructions when  
11 | undertaking major capital development projects. We further  
12 | recommend that the Board of Trustees prepare reliable,  
13 | complete, and accurate financial information, and provide  
14 | such information for audit on a timely basis.

15 |           You will see the Key Findings at page 87.  
16 | The Board of Trustees. The Board of Trustees is  
17 | responsible for managing the operation of the golf course,  
18 | however, based on our findings, the Board of Trustees did  
19 | not demonstrate the requisite expertise and capacity to  
20 | appropriately manage this major capital project, nor did it  
21 | maintain essential accounting records.

22 |           Then the Noncompliance with Financial  
23 | Instructions and Related Rules. I ask you to look at page  
24 | 89, paragraph 4.2.2. You will see that the Act requires

1 | the Board of Trustees to follow Financial Instructions. We  
2 | examined the following sections of Financial Instructions  
3 | that we considered to be significant in addressing the  
4 | major risks of management of this project and that relate  
5 | to business conduct, value for money, purchase of goods and  
6 | services expenditure, capital expenditure, and in addition,  
7 | Works and Engineering had adopted more rigorous and complex  
8 | guidance for procurement of goods and services. They refer  
9 | to the P.F.A. 2000 and the P.F.A. 2002, and they say that  
10 | they did not comply with them.

11 |           Can I show you how and why this is -- that  
12 | is so, and that is set out at page 90. There were at least  
13 | three instances where the interest of the Board of Trustees  
14 | members were or appeared to be in conflict with the  
15 | interest of the Board. On two occasions, major contracts  
16 | were awarded to companies in which the Board of Trustees  
17 | members appeared to have had personal interests. In  
18 | another instance, it appeared that a Board of Trustees  
19 | member received a commission from a company which was  
20 | awarded a contract by the Board of Trustees.

21 |           Just keep your hand there and go backward to  
22 | page 61. You will see the composition of the Board of  
23 | Trustees at the relevant time. For present purposes, we  
24 | can just look at the top half of the Board of Trustees. The

1 Chairman was a Mr. Wendall Brown. The Deputy Chairman and  
2 Chairman of the House and Links Committee was Mr. Zane  
3 DeSilva, who was a member of Parliament. The Chairman was  
4 Bob Wilson. The Trustee was Mr. Allen Richardson and  
5 another name you wish to note, Mr. (Delano ?) Bulford was  
6 also a Trustee.

7           If you go back to the concerns expressed by  
8 the Auditor General -- I ask you to go back to page 90, the  
9 second paragraph. In the first instance, the contract for  
10 equipment rental was not formally put out to tender  
11 following established procedures. Instead, contractors  
12 were invited to bid, and only one company submitted a bid.  
13 The company was awarded a 1.6 million contract and was paid  
14 1.7 million. The subsequent contract for 1.2 million was  
15 awarded to the same company without bid tenders. The  
16 contract was based on the lowest quoted rate for equipment  
17 rental. The company received a further .6 million for  
18 other services for which no bid appears to have been  
19 received.

20           In total, approximately 3.5 million was paid  
21 to the company. The Board of Trustees member, who was also  
22 an elected member of Parliament, had an ownership interest  
23 in the company since other bids were not requested. We do  
24 not know if the subsequent services were provided at a

1 reasonable cost. So that is one concern, and in common  
2 parallels, it would be put on the basis of that there  
3 appeared to be a conflict of interest between the Trustees  
4 and the contractor who was selected to provide this  
5 particular service.

6           The second instance is -- in the second  
7 instance, the contract was awarded to a contractor to  
8 provide goods and services based on a guaranteed supply and  
9 uniformity of quality, color, or product basis. The  
10 contractor subsequently subcontracted the supply of  
11 materials to another company in which a Board of Trustees  
12 member was a Director. The contractor received 1.3 million  
13 for the services provided to the project. The amount paid  
14 to the subcontractor was not provided.

15           So, again, what appears to be a conflict of  
16 interest through a medium of a contract and a subcontract.

17           The third instance -- in the third instance  
18 the Board of Trustees authorized and paid \$10,000.00 in  
19 excess of the invoice price to a company which was awarded  
20 a contract for goods. The Board of Trustees Minutes  
21 indicate that this payment was to enable the company to pay  
22 a finder's fee of \$10,000.00 to a Board of Trustees member.  
23 It's not clear what relationship, if any, the Board of  
24 Trustees member had with the company to earn such a

1 | payment. By any standards, then to conclude that this is  
2 | inappropriate behavior by a Board member who had a  
3 | fiduciary relationship to avoid the appearance of actual or  
4 | perceived conflict of interest.

5 |           Additionally, without a fair and transparent  
6 | process to award contracts, it is not possible to know if  
7 | the spending decisions were appropriate. So, the burden of  
8 | the concern expressed by the Auditor General is not so much  
9 | was there value for money, but it is an appearance of  
10 | conflict in relation to these three instances. As long as  
11 | you've got an appearance of conflicts, and there isn't an  
12 | open system, it is impossible to know whether there was  
13 | value for money.

14 |           CHAIRMAN: How did these examples of the  
15 | conflict of interest within the Trustees, how do they relate  
16 | to our Inquiry?

17 |           MR. HARGUN: Well, it goes to how public  
18 | monies should be spent -- how they should be controlled.  
19 | As the Auditor General continues to make the point in every  
20 | Special Report, that the Government does have at least in a  
21 | theoretical framework, a well-constructed architecture of  
22 | controlling public money.

23 |           CHAIRMAN: Which financial instruction was  
24 | ignored here?

1                   MR. HARGUN: Well, it would be -- the  
2 payments would have to be made by the accounting officer  
3 who would check that these payments were appropriate, who  
4 would check, for example, that you cannot make payment  
5 necessarily for finder's fees. Who would not select a  
6 contractor for 3.5 million dollars' worth of construction  
7 work without a tender or some other means of finding out  
8 that that was the lowest price or some other means of  
9 finding out that the Government was obtaining value for  
10 money?

11                   What the Commission should see is that going  
12 back to the same point again, by ignoring the structure  
13 which is set up in the Works and Engineering in terms of  
14 the accounting officer, in terms of the bid procedure, in  
15 terms of the Financial Instructions, in terms of the P.F.A.  
16 2000 and 2002, we ended up here in a situation where 13.5  
17 million dollars of taxpayer money, public money, was being  
18 controlled and spent by the Board of Trustees of the golf  
19 course.

20                   CHAIRMAN: And that was the result of the  
21 statutory change in 2006?

22                   MR. HARGUN: That was -- well, two reasons.  
23 There was -- it's perfectly true that under the Legislation  
24 dealing with golf courses certain monies which are given to

1 | the golf course Trustees are spent by the Trustees. But it  
2 | can never be suggested that that would be the case in  
3 | relation to major projects where the Government is spending  
4 | 13, 14, 15 million dollars. If there had been no change in  
5 | legislation whereby the responsibility for these major  
6 | projects had changed in relation to golf courses from Works  
7 | and Engineering to the Ministry of Tourism, the Works and  
8 | Engineering did have in place systems which would have  
9 | controlled this expenditure.

10 |                   I'll show you why -- where it breaks down.  
11 | For example, it's a small example, but it's a telling  
12 | example -- this is in relation to the \$10,000.00 finder's  
13 | fee which was paid to a certain Mr. Bulford who was the  
14 | Trustee. Go to the -- If you look at the Minutes of the  
15 | Trustees which you will find --

16 |                   I understand that you may not have them in  
17 | your -- I don't know whether you have it or not. If you'll  
18 | look up your page 11 -- 121 -- They've been removed from  
19 | the public binders.

20 |                   Can I just read how the issue was dealt with  
21 | in relation to the issue of the finder's fee?

22 |                   CHAIRMAN: And you're reading what?

23 |                   MS. LUCK: The Minutes.

24 |                   MR. HARGUN: The Minutes.

1                   Yes. This is the -- in October this would  
2 be February 20, 2008, Minutes. Maintenance Shed. Mr.  
3 Lemoigne asked the Board to make a decision on the  
4 maintenance shed as the building will need to be available  
5 for July/August. Mr. DeSilva confirmed that his engineer,  
6 Mr. Dave Woodward, has looked at the Miracle Steel Shed,  
7 and he is happy to move ahead with a proposal from Mr.  
8 Bulford as long as it meets with the requirement for high  
9 winds.

10                   Mr. Lemoigne noted that a finder's fee of  
11 \$10,000.00 was submitted by Mr. Bulford for the Board's  
12 knowledge. Mr. Bulford, as the agent for Miracle Steel,  
13 confirmed the quality of the product and noted that a  
14 similar building at Well Bottom that he can take Mr.  
15 Lemoigne to view. Mr. Lemoigne noted that he had looked at  
16 the shed made by Canadian (?) Steel, and he was not happy  
17 with the amount of corrosion as the building had only been  
18 erected for three years. And so it goes on.

19                   Then in May 2007, the Trustees note that the  
20 Chairman asked Mr. Bulford to temporarily excuse himself  
21 from the meeting. The Chairman informed the Trustees that  
22 an issue has arisen with regard to Mr. Bulford's  
23 commission, payment for the purchase of the maintenance  
24 shed. He stated that the Board is aware Mr. Bulford

1 | represents the vendor in selling the sheds, and as such is  
2 | entitled to receive commission for any shed sold.

3 |           He noted that the problem that has arisen is  
4 | that the vendor has provided an invoice for the shed which  
5 | does not include Mr. Bulford's commission for payment. Mr.  
6 | Bulford has submitted a separate invoice to the Board for  
7 | the commission. Therefore, when the accountant audited,  
8 | the concern is that there will be a check written to a  
9 | Trustee for commission. He suggested -- that is Mr.  
10 | DeSilva -- Mr. DeSilva suggested that Mr. Bulford go back  
11 | to the vendor and request it reissue the invoice for an  
12 | amount which included his commission so the Board can issue  
13 | one payment to the vendor, with Mr. Bulford to receive his  
14 | commission payment directly from the vendor.

15 |           Mr. DeSilva confirmed that it is normal for  
16 | the vendor to issue one invoice which includes the  
17 | commission and they are then responsible to distribute  
18 | their representative's commission. The Board discussed in  
19 | detail and agreed to advise Mr. Bulford to liaise with Mr.  
20 | Pitt and request a revised invoice from the vendor.

21 |           Now this is Government expenditure.

22 |           MS. LUCK: I apologize, may I be excused  
23 | for one minute, please? Thank you.

24 |           MR. HARGUN: This is spending of public

1 money. The meeting aside, whether the payment of  
2 \$10,000.00 to Mr. Bulford as a finder's fee is appropriate  
3 or not, and whether there is a conflict of interest, what  
4 is being suggested is that because there are two invoices,  
5 one from the steel manufacturer, and one directly from Mr.  
6 Bulford because his \$10,000.00 wasn't included in the  
7 invoice from the steel manufacturer. And because of the  
8 concern that this would be frowned upon by the Auditor  
9 General, what is being suggested and accepted on behalf of  
10 people who are spending public money is that they should go  
11 back to the steel contractor and ask the steel contractor  
12 to provide a further invoice which includes the \$10,000.00  
13 but which doesn't name the Trustee.

14 Well, that I would suggest is not the sort  
15 of oversight which should be taken by a body which is  
16 concerned with --

17 CHAIRMAN: Well, it's straight forward  
18 fraud, isn't it. The so-called commission is being paid to  
19 Mr B on the basis he was an agent for the vendor. He  
20 wasn't. The vendor didn't know anything about it. The  
21 buyer was agreeing to pay a commission and dress it up as  
22 if it had come from the vendor.

23 MR. HARGUN: And the additional point that  
24 what is being suggested here is that his name should not be

1 | seen on an invoice that he is being paid \$10,000.00. And  
2 | so --

3 | CHAIRMAN: I think (*Indiscernible 02:51:18*  
4 | *forward on* ) The Auditor General I suppose.

5 | MR. HARGUN: Well, it's an inappropriate  
6 | payment because it's drawn on the Consolidated Fund. So  
7 | the conclusion of looking at this particular project is  
8 | it's in many ways similar to the Bermuda Emissions and very  
9 | similar to the position which was found at Port Royal.

10 | Procurement and remediation project is moved  
11 | from Works and Engineering, given to Tourism. The project  
12 | is not managed by Tourism. Instead, it's handled between  
13 | the Board of Trustees. The Government department which is  
14 | now responsible for it, Tourism, has no expertise  
15 | effectively to manage it. There is a complete  
16 | noncompliance with the Financial Instructions. There is,  
17 | on the face of it, a degree of self-dealing on the part of  
18 | the Trustees at the golf course. For our purposes, for the  
19 | purposes of the Commission, that this was -- this  
20 | represented a failure of any and of all supervision by the  
21 | Government department in relation to the expenditure of  
22 | public monies.

23 | The last project -- historical project --  
24 | that I want to have a look at -- and I'll do that very

1 | quickly, is the Magistrate's Court Building.

2 | MR. ADAMSON: *whispering.*

3 | MR. HARGUN: Mr. Adamson points out that  
4 | it's not entirely historical because payments were made in  
5 | relation to that building during the period of the audit.

6 | That you will find in tab 3. No, I guess  
7 | that's wrong. It would be tab 10. Now the issue to look  
8 | at in relation to this one is the issue which comes up  
9 | again when you look at subsequent contracts. Here, there  
10 | was a proper preparation of the drawings, the tender, the  
11 | requirements. It was put to tender, bids were received,  
12 | bids were analyzed, recommendations were made by the  
13 | technical officers. But the Minister did not want to  
14 | accept the recommendation by the technical officers.

15 | If you look at page 27 of the Tender  
16 | Evaluation, you see that on the 27th of October, 2007 --  
17 | you will see the number of contractors who have submitted  
18 | bids. That's D & J Construction, B.C.M., Apex, Landmark  
19 | Construction in joint venture with Lisgar Construction  
20 | Company, and then Bermuda Building Services. On page 28,  
21 | you will see the comparison of the bids in relation to  
22 | Landmark and Apex. The Landmark is at 72 million. Apex is  
23 | at 73 million.

24 | Then the analysis of the Landmark Lisgar

1 Construction, Limited bid. The technical officers said the  
2 joint venture was incorporated as a company in Bermuda  
3 under the name of Landmark Lisgar on the 16th of August,  
4 2007. They say who are the principals behind it. They say  
5 this project would be the first project in Bermuda for the  
6 new company. However, Landmark Construction Limited has  
7 carried out work for Government in the past. Recent  
8 projects included the new Hamilton Bus Terminal and the  
9 Sessions House parking area. Landmark Construction,  
10 Limited is in good standing with the Department of Social  
11 Insurance and the Tax Commissioner's Office.

12 On the next page, they analyze further. In  
13 the second paragraph, they say, however, a detailed cost  
14 breakdown by elements of the original bid form which was a  
15 required submission was not completed. This was submitted  
16 with the word "included" in each line, and the words "see  
17 Form of Tender" in the total line. The allowance amount  
18 which was part of the breakdown form were noted as a  
19 separate document labeled "Bid Form - Appendix B1 -  
20 Schedule of Allowances."

21 And then if you go down, the third paragraph  
22 from the bottom, the technical officers say the bid as  
23 received was considered incomplete and conditional because  
24 of the additional qualifying statements, assumptions or

1 | comments. The bid can, therefore, deemed to be  
2 | nonresponsive.

3 |                   On 12th of October, 2007 after the formal  
4 | closing date, Mr. Bryan McLeod, Managing Director of  
5 | Landmark Lisgar, wrote to the Permanent Secretary of  
6 | Ministry of Works and Engineering to submit further  
7 | information and make certain corrections to their bid. And  
8 | it goes on.

9 |                   Then there is analysis of the Apex  
10 | Construction Management bid. You will see they say in the  
11 | second line -- second paragraph -- the principal of the  
12 | firm is Mr. Gilbert Lopes. Apex has carried out several  
13 | large commercial residential projects. Recent projects  
14 | include mixed-use retail and residential complexes at  
15 | Dundonald Street. And then they say Apex Construction  
16 | Management is a totally Bermudian owned company, has not  
17 | been awarded a contract by the Government in the past.  
18 | Another company owned by Mr. Lopes, G.F. Construction, has,  
19 | however, carried out work for Government at Southside. The  
20 | company is currently the developer of the Loughlands  
21 | project. Based on the information provided, and similar  
22 | size projects successfully executed, Apex has most recent  
23 | knowledge for carrying out the project of this scope in  
24 | Bermuda. It goes on in great detail.

1                   Their recommendation is based on -- and this  
2 is paragraph 6 -- based on the bid information received on  
3 the 14th of September, analyzed for cost and evaluated for  
4 correctness, completeness, condition of qualifying  
5 statements, and further discussions with our consultants,  
6 it is recommended that the construction management contract  
7 where the construction manager is also the constructor of  
8 the project for the new Magistrate's Court/Hamilton Police  
9 Station project be awarded to Apex Construction Limited for  
10 a management fee of Bermuda dollars, six million six  
11 hundred fifteen thousand dollars, and a guaranteed maximum  
12 sum of 69.1 million dollars.

13                   Then there is an invitation to the Cabinet.  
14 The Cabinet is invited to authorize the Ministry of Works  
15 and Engineering to award the contract for construction in  
16 those terms to Apex. You will see that.

17                   Now, a clear recommendation by the technical  
18 officers as to why it is that they say the contract should  
19 be awarded to the -- to Apex. But you will see that that  
20 recommendation doesn't sit well with the Minister at the  
21 time, and if you look at the witness binder, I ask you to  
22 have a look at the Witness Statement of Mr. Binns which in  
23 my binder is at tab 2.

24                   If you go to paragraph 23 of Mr. Binns'

1 Witness Statement, you can see how the matter progressed.  
2 At paragraph 23, I recall that the day before the meeting  
3 of the Cabinet on 23rd of October, the Minister and I  
4 discussed his wish for L.L.C. -- that's Landmark Lisgar --  
5 the other company which was not chosen by the technical  
6 officers as a successful bidder -- that L.L.C. to be  
7 awarded the contract.

8 He indicated that the recommendation for  
9 Apex as it was written could not proceed. So the Minister  
10 is saying the recommendation, the document which you just  
11 saw, which had been prepared, should not proceed further.

12 I advised him that it would not be wise to  
13 put the Cabinet in the position to select a recommendation  
14 other than that given by technical officers without a clear  
15 rationale for doing so. The Minister agreed and suggested  
16 that we should not submit a Contract Award Recommendation  
17 but instead submit a Cabinet paper that presented a  
18 balanced report based on the total cost submitted by each  
19 contractor and invite the Cabinet to decide which company  
20 they preferred.

21 So let me just step back. So the Minister  
22 says, fine, and in that case what we should do is we should  
23 not tell the Cabinet what is the recommendation by the  
24 technical officers. What we should do is we should prepare

1 a paper which says these are the points in favor of this  
2 contractor and these are the points against him, and these  
3 are the points in favor of the other contractor, and these  
4 are against him, and make no recommendation, and let the  
5 Cabinet decide.

6 Mr. Binns says that -- again at paragraph 23  
7 -- I advised the Minister that this might not reflect well  
8 on him with his colleagues as they would expect him to  
9 bring a recommendation to them. He said that he understood  
10 this but preferred to invite them to select. On the same  
11 day, I consulted with the then Cabinet Secretary regarding  
12 the Minister's wish to invite the Cabinet to consider both  
13 contractors and to decide which contractor they preferred.

14 He advised that it would not be wise for the  
15 Minister to come forward without a recommendation and I  
16 relayed this information to the Minister. The Minister  
17 maintained his position.

18 On 26th of October, 2007 the Cabinet paper  
19 presented to the Cabinet on 23rd of October was sent back  
20 to the Ministry with a request that the Minister return  
21 with a clear recommendation and the rationale for that  
22 recommendation.

23 So you see what happens. What happens is  
24 that the Minister says I do not want Apex to go forward; I

1 | want the other company. Mr. Binns says that can't be done  
2 | in light of the technical officers' recommendation. He  
3 | suggests that we just compare the contractors -- these are  
4 | the points in favor, these are the points against, you  
5 | select.

6 |           The Minister is advised that that may not be  
7 | wise because the Cabinet is looking for a recommendation.  
8 | Nonetheless, such a paper is submitted. And there is the  
9 | paper I just referenced. That was the paper which was  
10 | submitted to the Cabinet on the 23rd of October. The  
11 | Cabinet sent it back on the basis that it should be -- The  
12 | Minister should come back with a recommendation.

13 |           Subsequently, the Minister made a  
14 | presentation to the Cabinet, and that is on the 30th of  
15 | October, 2007. The Minister then advised the Cabinet, and  
16 | you should note this is at the Cabinet Minutes for the  
17 | meeting on the 30th of October, 2007, Meeting Number 41  
18 | where the Minister stated that --

19 |           MR. ADAMSON: The page reference is 1037.

20 |           MR. HARGUN: The page reference is 1037.

21 | Yes, 1037. And you will see that in the middle of the  
22 | paragraph the Minister stated that both bidders had  
23 | submitted bids that were comparable to the Ministry  
24 | estimate, differing from each -- from either -- by only

1 approximately 1.4 percent. He stated that while Apex  
2 Construction Management had undertaken major projects in  
3 Bermuda, Landmark Lisgar Construction Company brought the  
4 experience of their Canadian partner, Lisgar Construction  
5 Company. He noted that based on the total bid both  
6 companies were evenly balanced. He stated that he was  
7 satisfied that Landmark Lisgar offered the best option for  
8 the Government, and recommended them as successful bidder.

9           You will see at 1038 that the Government  
10 approved that recommendation by the Minister. You will  
11 also see the views of the technical officers in relation to  
12 that at 1039. You will see an email from Lawrence Brady  
13 who was the Chief Architect to Dr. Binns. Dr. Binns was  
14 the P.S., Permanent Secretary. He says the anticipated  
15 construction time is 30 months, etcetera. Under the  
16 heading of Contractual Discussion with Landmark Lisgar --  
17 For clarification and the record, I would like to reaffirm  
18 that the analysis carried out on the three submissions  
19 received on September 14, 2007, by the technical officers  
20 in the department came to a different conclusion to that  
21 decision to enter into a contractual decision with Landmark  
22 Lisgar.

23           Then you will see the email from the  
24 Permanent Secretary, Mr. Binns, to the architect, Lawrence

1 | Brady. He says thank you for the information. I'm keenly  
2 | aware of the outcome of the analysis by the technical  
3 | officers. However, I am aware that the Minister completed  
4 | his own analysis and came to a different position, which he  
5 | then recommended to his colleagues, and obtained their  
6 | approval for the same.

7 |                 So the position there was that the Minister  
8 | carried his own analysis. It's not clear on what grounds,  
9 | but he came to a different conclusion from the technical  
10 | officers. This case -- this particular contract is as  
11 | clear as any where the Minister disagrees with the clear  
12 | recommendation of the technical officers.

13 |                 One of the issues for the Commission to see  
14 | is whether that is a complete freedom of action, or whether  
15 | in circumstances where there are good reasons for doing so.

16 |                 CHAIRMAN: Is there any record of the  
17 | Minister's analysis?

18 |                 MR. HARGUN: The documentation does not  
19 | disclose that analysis.

20 |                 There was a Report by the Auditor General in  
21 | relation to this issue. I'll very briefly take you to it.  
22 | You will see that at page 71 -- is the relevant part I want  
23 | to show you. The report actually starts at page 64-- at  
24 | 1071. You recall that the Minister represented to the

1 Cabinet that his view was that the small Bermuda company  
2 with the overseas partners could effectively do the  
3 project.

4                   This is the Auditor's Report at 1071, under  
5 the paragraph Contract Changes. As stated about the  
6 contract with the construction manager, Landmark Lisgar was  
7 signed in December 2007. By late summer of 2008, however,  
8 work was behind schedule. The relations with the Canadian  
9 and Bermuda partners in Landmark Lisgar had deteriorated,  
10 and eventually, the Canadian partner departed or was pushed  
11 out. This left Landmark, a small company with no  
12 experience with a construction project of this size as the  
13 sole contractor.

14                   On October 23rd, 2008, Landmark Lisgar  
15 Construction Company changed its name to L.L.C. Bermuda.  
16 The new contract provided for L.L.C. to receive an advance  
17 payment of \$600,000.00. As explained to me, this advance  
18 payment of \$600,000.00 was used to assist L.L.C. in  
19 maintaining positive cash flow so that it could continue  
20 seamlessly with the construction of the Magistrate's Court,  
21 Hamilton project, and Hamilton Police Station Building.  
22 The making of this advance was considered by Works and  
23 Engineering to be absolutely necessary for these purposes.

24                   Then, the next paragraph, the new contract

1 | does not require L.L.C. to provide a performance bond, a  
2 | requirement not necessarily carved in stone, but  
3 | alternatively, risk-reducing options such as redemptions  
4 | would require a financially strong, viable company. We saw  
5 | no evidence that the Ministry undertook an investigation  
6 | and analysis to ensure that L.L.C. had the financial  
7 | resources to support this contract.

8 |                   On the last paragraph on that page, what  
9 | concerns me most as Auditor are the failure of the new  
10 | contract to require L.L.C. to provide invoices with every  
11 | progress payment submission. So, in effect, after the  
12 | departure of the Canadian company a new contract was  
13 | entered into. That's not really the focus of what showing  
14 | you this contract at this stage.

15 |                   So those are the historical contracts, and  
16 | you see the issues which arise in relation to it. With  
17 | that background, we can move on to the contracts which are  
18 | in the Audit Report.

19 |                   The first one we want to look at is the  
20 | Commercial Courts/The Ministry of Finance Renovations.  
21 | That you will find at tab 1 of your binder.

22 |                   Now this was a case where there was a proper  
23 | tender. There was a bid evaluation. The technical  
24 | officers recommended a particular bidder. The Minister

1 then intervened, and the Minister asked that the entire  
2 process be repeated because he felt that the cost attached  
3 for the budget was excessive. The requirements for the  
4 project as he saw it were lowered, and those bidders who  
5 hadn't even complied with the previous instructions to put  
6 forward a proper bid, all of those bidders were re-invited.

7           You'll see how the contract was awarded.  
8 Can we have a look at -- the best way to deal with it is to  
9 look at the relevant documents. If you look at tab 1,  
10 you'll see at page 9 the original analysis of the bids.  
11 That's the contract award recommendation. This is on the  
12 15th of October, 2008. You'll see at paragraph 2, Tender  
13 Procedure, the project was advertised, then addenda were  
14 issued, a tender opening was public. Then the companies  
15 rejected responded to the tender as set out. You'll see  
16 the names, one through seven. One incomplete bid was  
17 received. That's quite an important point because the  
18 company which submitted the original incomplete bid was  
19 eventually the successful bidder.

20           One incomplete bid was received from Bermuda  
21 Drywall and Ceilings, and did not include in the price the  
22 five addenda, and did not complete all sections of the Form  
23 of Tender. Neither previous projects information nor  
24 schedule of values were provided. Therefore, the bid is

1 | invalid.

2 |                   If you look at paragraph 4, Tender  
3 | Evaluation, the lowest bidder is DeCosta Construction. The  
4 | second lowest bidder is within five percent. The closeness  
5 | of the bid is a good indicator that the bidders understand  
6 | the same scope of work. And then you see financial checks.  
7 | Then you see the principals behind them. And then you will  
8 | see the recommendations. We would recommend awarding the  
9 | contract to DeCosta Construction.

10 |                   So on the face of it, it's a straightforward  
11 | issue, and you will see that the -- somebody wants to know  
12 | why the Bermuda Drywall & Ceilings, the bidder who was  
13 | disqualified, was disqualified. If you look at page 14,  
14 | this is the email from Mr. Horton who is now the Permanent  
15 | Secretary at Works and Engineering. This is in 2008. He  
16 | sends an email to Lawrence Brady who was then, and still  
17 | is, Chief Architect. He says, please do not forget to  
18 | provide me by tomorrow the additional expanded reasons to  
19 | support the decision to disqualify Bermuda Drywall &  
20 | Ceilings as bidders on the Ministry of Finance Commercial  
21 | Courts construction project.

22 |                   And then the Chief Architect replies to  
23 | that, and you find the reply at page 13. He says,  
24 | incomplete bid submission from Bermuda Drywall & Ceilings,

1 details as follows, and he sets them out. He says, one,  
2 only pages 1 to 5 of the 8 pages that comprise the Form of  
3 Tender were returned. It is clearly indicated at the top  
4 of each page that all sheets form part of the tender. Five  
5 addenda were issued during the bid process. The addenda  
6 revised the scope of work. These changes to the scope of  
7 work have financial implications. Bermuda Drywall &  
8 Ceiling did not allow for these addenda in their price.

9           The Form of Tender request -- he says,  
10 Bermuda Drywall's submission was missing the principals of  
11 the firm, all risk insurance policy, worker's compensation  
12 policy, and insurance policy, and also missing was previous  
13 projects information, and pages 7 and 8 comprised of the  
14 supplemental instructions, this was not submitted.

15           So these were the reasons, and it appears  
16 from the documentations that Mr. Burgess, who was the  
17 Minister at the time, took on very much a hands-on approach  
18 in relation to this particular project. You will see that  
19 if you look at the email from Lucy Chung in the Works and  
20 Engineering Department -- Sorry, from the Jonathan Castro  
21 to Lucy Chung, at page 17.

22           You see he says, Lucy, Minister Burgess with  
23 an unknown person came in this morning about 8:35 asking  
24 for you. I have told them that you are not in yet. And

1 | then he asked where you sat. When I showed him your desk,  
2 | he said that he was taking the plans for what I believe to  
3 | be the Magistrate's Court/Hamilton Police Station.  
4 | However, he may have meant Ministry of Finance and the  
5 | Commercial Courts as these were the plans that he took with  
6 | him.

7 |                   Looking at what his guest had in his hands,  
8 | I noticed the logo of S.H.Y. Architecture. Minister  
9 | Burgess then introduced himself as Mr. Burgess, the  
10 | Minister, on his way out. The unknown gentleman I would  
11 | describe as a Caucasian man slightly taller than Mr.  
12 | Burgess with grayish, silver-white hair. I did not  
13 | introduce myself.

14 |                   So, what is happening is that the Minister  
15 | has gotten himself involved in this project, even though  
16 | there is a recommendation for a particular bidder. The  
17 | Minister is consulting another architectural firm to find  
18 | out whether the project can be done apparently at a lower  
19 | cost. And you see that if you look at the email --

20 |                   CHAIRMAN: Just a moment, what is the other  
21 | architectural firm?

22 |                   MS. LUCK: This is S.H.Y.

23 |                   MR. HARGUN: S.H.Y.

24 |                   CHAIRMAN: Oh, I see; okay.

1 MR. HARGUN: You also see that, Mr.  
2 Chairman, if you look at page 24, there is an email from  
3 Lucy Chung in the department to the Permanent Secretary  
4 Horton. P.S. Horton, for the avoidance of doubt, please  
5 note that we are on hold on this project pending further  
6 instructions from you. You stated that the Minister is  
7 consulting with another architectural firm with  
8 expectations that they can assist in completing the project  
9 more cheaply. You see that, and then it goes on.

10 The same point -- on the next page at the  
11 bottom of the next page, 25, an email from the Permanent  
12 Secretary Horton to Lucy Chung. I should be grateful if  
13 you could please provide me with a copy of the  
14 specifications for the Commercial Courts/Ministry of  
15 Finance job. As he told us last week, the Minister wishes  
16 to share these with another architectural firm in the  
17 expectation that the job can be completed more cheaply.

18 If you then look at the email at page 27,  
19 this is an email from Lucy Chung to the Minister and the  
20 Permanent Secretary, and it records the key points of a  
21 meeting held on the 17th of December. One, the Minister  
22 instructed the architects department to ask all bidders to  
23 rebid the project based on reduced scope of work. The  
24 architects are to issue a text description of the reduced

1 scope of work. Three, the Minister wants the prices in by  
2 Tuesday, December 23rd. Now bearing in mind today that the  
3 date of the email is December 17th. He wants the prices in  
4 by December 23rd, and as part of those submissions, the  
5 bidders must be prepared to start work on the 2nd of  
6 January. That's in about two weeks' time.

7 Five, The Minister instructed the architects  
8 department to immediately seek pricing from the various  
9 carpet suppliers. One key element will be the lead time.

10 Six, the Minister wishes that finances are  
11 supposed to be ready by end of January. Lucy Chung noted  
12 that this does not seem realistic.

13 Nine, the Permanent Secretary gave  
14 instructions to include all bidders and to allow bidders to  
15 make corrections to irregularities that may have  
16 disqualified their bid.

17 Now, one of the issues which the Commission  
18 should consider is the relationship between the technical  
19 officers and the Minister in relation to projects. It is  
20 an open question, and it requires considerate evaluation.  
21 There are statements in places that the Minister is not  
22 expected to interfere in contracts, and it is said that  
23 that is contrary to Financial Instructions.

24 The Financial Instructions actually don't

1 deal in reality when you look at it, as to what is the  
2 proper relationship between a Minister and the technical  
3 officers. It is perfectly true; the starting point must  
4 be that in relation to evaluation of the bids and the like,  
5 it would be for the technical officers to do that.

6 Policy issues relating to any department are  
7 clearly the purview of the Ministers. How much to spend,  
8 not to spend -- those are policy issues for the Ministers.  
9 But the real issue is in the administration of that policy,  
10 and in the implementation of that policy, when it goes down  
11 to the detail of a particular project, how much  
12 intervention is desirable -- or to put it another way, does  
13 there come a stage when intervention by the Minister  
14 becomes undesirable because all that is happening is  
15 implementation of the policy of the decision made by the  
16 Minister and/or the Cabinet?

17 Is it really the Minister's function to take  
18 away the drawings and give them to another architect firms,  
19 and say can you come up with a lower price? Or is that not  
20 the function of the technical officers? That is an issue  
21 because you will simply see it from the emails that the  
22 technical officers take the view that that is not  
23 necessarily the way construction contracts should be dealt  
24 with.

1 I say that -- if you look at the email  
2 exchanges at page 30, this is an email from -- right at the  
3 bottom -- from -- the full email from Lawrence Brady to  
4 Lucy Chung. Lawrence Brady is the Chief Architect. Lucy  
5 Chung is another architect within the department. Lucy, I  
6 can tell from the observation in the report, this is not  
7 how projects are or should be run. There should be no  
8 *(indiscernible 03:26:24 )of the recent* tender was not  
9 carried out by this department, nor any recommendation was  
10 put forward by this department, or Cabinet approval given  
11 to my knowledge. The decision to award any contract was  
12 carried out at a higher level. And the higher level means  
13 the Minister.

14 I am concerned that additional works are  
15 going to be added, and the final expenditure is going to  
16 exceed the original tender amount, and that the quality is  
17 going to be compromised. So just to stand back and make  
18 the point, everybody was asked to rebid a second time  
19 around in relation to the reduced requirements, including  
20 the bidder who was disqualified because they didn't comply  
21 with the bid requirements. The second time around the  
22 recommendation was not made by technical officers. The  
23 decision was made by a higher up as to who should receive  
24 the contract.

1                   You also see the middle email on the same  
2 page, this is page 30, from R.K.H. -- R.K.H. is Mr. Horton,  
3 the Permanent Secretary -- to Lawrence, the Chief  
4 Architect. He says, you are right, and the contract should  
5 not be run this way. The award of this (standard ?) to  
6 Bermuda Drywalling has not yet been approved by Cabinet.  
7 It is the Minister's expectation that it will be approved  
8 retroactively.

9                   Then, again, an email from the Chief  
10 Architect to Lucy -- I, of course, share your concerns  
11 about what you aptly described as a highly irregular way of  
12 running a project. I am also gravely concerned with the  
13 apparent lack of coordination and construction drawings.

14                   CHAIRMAN: Is there no example for  
15 retroactive approval?

16                   MR. ADAMSON: There are.

17                   MR. HARGUN: There are. It does happen, the  
18 retroactive approval.

19                   CHAIRMAN: Because then, if I remember, the  
20 instruction was that contracts would not be signed until  
21 they had government approval.

22                   MR. HARGUN: Yes.

23                   CHAIRMAN: So in a sense, it's almost by  
24 definition you couldn't have retroactive approval?

1 MR. HARGUN: Yes.

2 CHAIRMAN: You're just saying, Well, we  
3 don't mind in this case.

4 MR. HARGUN: As a matter of fact, I should  
5 say it does happen, but I see the point. The way rules and  
6 regulations are drafted, nothing is supposed to happen  
7 until the Cabinet has considered the contract --  
8 substantial contracts. Substantial contract is any  
9 contract in excess of \$50,000.00, and has said yes. That  
10 is your authority to sign the contract.

11 Secondly, a contract which is signed by  
12 Cabinet authority, as far as the internal rules of the  
13 Government are concerned, is unauthorized. Perfectly true  
14 as far as the third party is concerned. If the contract  
15 has been signed on behalf of the Government by the person  
16 who has (ostensible ?) authority, would be binding on the  
17 Government, but we're looking at not necessarily  
18 Government's relationship with third parties. We're  
19 looking at Government's relations internally.

20 Internally certainly, until there has been a  
21 recommendation to the Cabinet, papers have been prepared,  
22 papers have been considered by the Cabinet Ministers, a  
23 meeting has taken place, and it has been approved, there is  
24 no decision.

1 MR BARRITT: I wonder, Mr. Hargun, this  
2 issue, as you say seems to run through a lot of the  
3 contracts, both historical and the ones within our purview  
4 under Section three; and it's one that has caught my eye  
5 and interest and it's this. What is a public -- a civil  
6 servant -- to do in those circumstances where there is this  
7 conflict between -- I say conflict, but apparent conflict -  
8 - between the Minister and the civil servant?

9 One of the things that I've looked at is the  
10 Ministerial Code of Conduct such that existed in 2002. It  
11 seems to suggest -- it's advice to Ministers, of course,  
12 that in 12.1 Ministers have a duty to give fair  
13 consideration and (due rate ?) to inform them impartial  
14 advice from civil servants in reaching policy decision, so  
15 that's in respect to policy.

16 But then it does go on in 12.2 to talk about  
17 Heads of Department Service Accounting Officers, and it  
18 seems to set up a system whereby if you think that there's  
19 going to be a -- You have personal responsibility for the  
20 propriety and regularity of public finances for which you  
21 are responsible -- for which he's responsible. This is  
22 talking to the Ministers, of course, for maintaining public  
23 accounts. It seems to suggest that accounting officers  
24 have a particular responsibility to see that appropriate

1 | advice is given, and if there is, it's not being followed,  
2 | then they are to... If advice is overruled the matter should  
3 | be brought to the attention of the Auditor General, I  
4 | notice; and then if the Minister decides nonetheless to  
5 | proceed, the accounting officer should request written  
6 | instruction to take the action in question, and send the  
7 | relevant documentation to the Auditor General. And a  
8 | similar procedure applies with respect to the Public  
9 | Accounts Committee.

10 |           And I guess as we go forward, you'll be keen  
11 | to say, see whether this has ever been invoked by anybody  
12 | in dealing with these particular instances.

13 |           MR. HARGUN: Those are difficult issues in  
14 | practice. My understanding of the legal position, or what  
15 | ought to happen as a matter of strict reading of the rules  
16 | is that in relation to Financial Instructions, a public  
17 | officer is to comply and abide by Financial Instructions  
18 | all the time. And that doesn't mean that even if he is  
19 | directed by the Minister; if the public officer is  
20 | satisfied that the instruction which is given does not  
21 | comply with the standard of instructions -- the Financial  
22 | Instructions -- then he should not carry them out.

23 |           CHAIRMAN: Should not carry them out?

24 |           MR. HARGUN: Should not carry them out.

1 The reason is because he, under the relevant legislation,  
2 he would be open to surcharge if he gave directions -- he  
3 gave directions in breach of the Financial Instructions.  
4 And that comes from Section 3 of the Public Treasury Act.

5 Now that's the theoretical basis, and, of  
6 course, you can imagine as a matter of practical politics,  
7 when a civil servant is being asked or directed by a  
8 Minister to carry out the particular function, it is not  
9 easy to simply say I will not do so because of the  
10 particular rule.

11 But that is how the system of Government is  
12 supposed to work that the public servant -- the public  
13 officer -- it's the Permanent Secretary's responsibility to  
14 say, this instruction by you does not comply with the  
15 standing orders, Financial Instructions, and therefore, I  
16 am unable to carry out.

17 CHAIRMAN: Is there any record of a  
18 surcharge being imposed on anybody for anything?

19 MR. HARGUN: I am not aware of a situation  
20 where there is.

21 CHAIRMAN: It must be disciplinary or  
22 deterrent, rather than compensatory.

23 MR. HARGUN: Well, I think... It's part and  
24 parcel of their employment contract that they're to comply

1 with all the rules and regulations, including the Financial  
2 Instructions.

3 CHAIRMAN: It can only be a sanction. It's  
4 never imposed. It would be interesting to know.

5 MR. HARGUN: But this is -- The issue about  
6 how far a Minister should actually interfere in what are  
7 essentially day-to-day working of the Ministry, and which  
8 get to select in relation to a particular project, that is  
9 a real practical issue as to how far the Minister should  
10 go.

11 It sometimes said that the Ministerial Code  
12 says that the Minister should not interfere, but actually  
13 if one looks at the Ministerial Code, it's not altogether  
14 clear where one gets that from.

15 MR BARRITT: I agree with that.

16 MR. HARGUN: You will also see, for  
17 example, in the K.P.M.G. Advisory Report there is a passage  
18 -- I'll show you at some stage -- where it is said that the  
19 Minister should not interfere in contracts. And the  
20 authority given in the K.P.M.G. Advisory Report is the  
21 Financial Instructions. We looked up the Financial  
22 Instructions in the 2008 version all the way to 2012. It's  
23 difficult to actually look at any particular provision and  
24 say, this provision is the authority for that proposition.

1                   So all these assumed rules, assumed  
2 conventions, are probably that conventions which do not  
3 find their authority in any written materials, and that's  
4 something we are considering.

5                   CHAIRMAN: Well, we'll take about a ten-  
6 minute break. It's just after quarter to.

7 **(Recess taken.)**

8 **(Recess ended.)**

9                   MR. HARGUN: Just to complete this  
10 particular project, can I just ask you to have a look at  
11 tab 1, page 32. This is an email from Mr. Horton to  
12 Lawrence Brady, the Chief Architect. You see Contractor  
13 Award Recommendation. Lawrence, I'm writing to confirm  
14 that Honorable Derrick Burgess, J.P., Minister of Works and  
15 Engineering, has approved the award of the contract for the  
16 construction for the entire second floor of the Government  
17 Administration Building in order to accommodate the  
18 construction of the new Commercial Courts and the  
19 renovation and expansion of the Minister of Finance  
20 Headquarters to Bermuda Drywall & Ceilings Limited in the  
21 amount of 1.696 million dollars.

22                   So, here is the Permanent Secretary  
23 announcing the decision of the Minister. And then you will  
24 see on the 8th of January, the following day, the Permanent

1 Secretary Horton writes to Bermuda Drywall & Ceiling saying  
2 that he is pleased to inform them that the submitted tender  
3 had been accepted.

4                   There is a curious document which follows  
5 that, and that is the contract award recommendation at page  
6 34, and that document was produced four days after the  
7 letter to Bermuda Drywall & Ceiling saying congratulations,  
8 you've been selected, had been sent. That is a Contract  
9 Award Recommendation. You'll see at paragraph 3 that it  
10 referred to the initial tender procedure, and that was the  
11 previous procedure. You'll see at paragraph 5 the initial  
12 tender evaluation that the lowest bidder was DeCosta  
13 Construction. Value Engineering *indiscernible (03:48:20)*  
14 that DeCosta Construction in the event that Value  
15 Engineering exercised. They refer to the bid tender  
16 procedure at paragraph 7.

17                   CHAIRMAN: Is this the document we saw  
18 earlier which said that Bermuda had dropped out?

19                   MR. HARGUN: No.

20                   CHAIRMAN: This is a different document.

21                   MR. ADAMSON: The original -- this is the  
22 retender.

23                   MR. HARGUN: This was the retender. This is  
24 Retender.

1 CHAIRMAN: The retender, but this quotes  
2 DeCosta as the (*indiscernible 03:48:50*)

3 MR. HARGUN: Yes, it does.

4 CHAIRMAN: And where is Bermuda on the  
5 retender?

6 MR. HARGUN: Bermuda is lowest to the  
7 highest.

8 CHAIRMAN: I'm not quite following you  
9 because...

10 MR. HARGUN: If you look at --

11 MS. LUCK: Remember, the first time they  
12 were eliminated. And this is the outcome.

13 CHAIRMAN: I see. So they are repeating  
14 the first tender.

15 MR. HARGUN: And then if you look at the  
16 initial tender evaluation, the retender procedure -- do you  
17 see that in paragraph 7? The retender -- the retender  
18 response is at paragraph 8. And then you see the values.

19 MR BARRITT: Yes.

20 MR. HARGUN: The 1.696 for Drywall.  
21 DeCosta is 1.725, \$28,000.00 difference.

22 Contract Award. The Minister effectively  
23 awarded the contract to Bermuda Drywall & Ceiling and gave  
24 them the authority to start on site at such and such.

1                   Retender Evaluation -- these are technical  
2 officers. Bermuda Drywall & Ceilings delivered the lowest  
3 price, and it would appear that the contract was awarded to  
4 them by the Minister on this basis. The difference between  
5 the lowest price and the next lowest price was \$28,000.00.  
6 It represents a difference of 1.7 percent. Bermuda Drywall  
7 & Ceilings rebid did not include the five addenda. Nor  
8 were all sections of Form of Tender completed as required.  
9 This is even in relation to the retender.

10                   The technical officers then say, as  
11 instructed by the Minister, the department went back to  
12 Bermuda Drywall & Ceilings to ask if the addenda were  
13 included, and to fill in the company information sheet.  
14 This was eventually confirmed and provided.

15                   The requirement of the bid was to provide a  
16 list of relevant past experience. Bermuda Drywall &  
17 Ceilings noted two past projects, the St. George's Police  
18 Station and the Police Commercial Crime Department. It is  
19 worthwhile pointing out that the new work supplied and  
20 installed for the Police Commercial Crime Department was of  
21 mediocre quality. There are still deficiencies to be  
22 corrected over six months after the client has moved into  
23 the space.

24                   So, look at the Conclusion and

1 Recommendation of the technical officers at paragraph 30.  
2 The Minister of Works and Engineering, having considered  
3 the quality of work of past projects, bidding deficiencies  
4 and the actual prices, is of the opinion that DeCosta  
5 Construction was best satisfactorily provide the services  
6 required.

7                   It's somewhat odd, given that the Minister  
8 has already selected Bermuda Drywall. It's somewhat odd  
9 given that the Permanent Secretary has already sent the  
10 letter on the 8th of January saying, congratulations, you  
11 have been selected. The technical officers carry out an  
12 evaluation and come to the conclusion that in their view  
13 the person -- the entity best placed to do the work is  
14 DeCosta Construction.

15                   CHAIRMAN: Do we know what this document  
16 was. Was it just written for the file or was it sent to  
17 somebody?

18                   MR. HARGUN: It was possibly used for the  
19 purposes of Cabinet consideration because --

20                   CHAIRMAN: Well, I hope not. In which case  
21 the Cabinet behaved very oddly.

22                   MR. ADAMSON: They do. It's at page  
23 40.

24                   MR. HARGUN: Page 40. If you look --

1 MR. ADAMSON: It would be in the small  
2 binder.

3 MR. HARGUN: In the small binder.

4 This is to some extent reading into the  
5 document. If you look at the second paragraph, in  
6 introducing the contract recommendation, seeking  
7 retroactive approval, we think that the document you're  
8 looking at is that document -- Contract Award  
9 Recommendation ,because it is more of a document.

10 The Minister informed his colleagues that  
11 the scope of work had been reduced. The Minister notes  
12 that the commercial project involved the construction of  
13 two new courtrooms. The Minister advised following an  
14 initial tender he directed that every effort be made to  
15 achieve a lower bid for the most responsible bidder,  
16 DeCosta Construction consequently.

17 The Minister noted that the revised bids  
18 were received from Bermuda Drywall, DeCosta, and A.J.W.,  
19 and the prices are set out. The Minister recommended that  
20 the contract be awarded to Bermuda Drywall for that amount.

21 It's not clear, I have to admit, not clear  
22 whether this document, the Contract Award Recommendation of  
23 the 12th of January is the document which was placed before  
24 them. I do note that in the second paragraph it does say,

1 | in introducing this contract recommendation. The document  
2 | you're looking at is contract recommendation, albeit to a  
3 | different bidder.

4 | CHAIRMAN: There's nothing in the Cabinet  
5 | Minutes, is there, about the contract recommendation being  
6 | (awarded to DeCosta ?)

7 | MS. LUCK: No.

8 | CHAIRMAN: So, it's rather odd.

9 | MR. HARGUN: Yes. Yes. Even though the  
10 | Minister had said that he was going to recommend a  
11 | particular bidder, the technical officers' recommendation  
12 | even those carried out three days afterwards was for a  
13 | different bidder.

14 | CHAIRMAN: And my guess would be - I like  
15 | the phrase, (*indiscernible 03:55:21*) awarded. We've  
16 | already done that. I would guess... It might have been made  
17 | for a (*indiscernible*), I would think, as a gesture...

18 | MR. HARGUN: Possibly.

19 | So can we then move onto the next contract,  
20 | which is at tab 2? This is the Maintenance and Stores.  
21 | You can look at the story, but just looking at the  
22 | documents, and you'll see the Contract Award  
23 | Recommendation. In paragraph 3 you see who the respondents  
24 | were to the tender. In particular, note that there was

1 DeCosta Construction and G.E.M. Development.

2           If you go to page 3, you will see the form  
3 of time indicates the duration of the construction for the  
4 work which is given. Again, the entities to note are the  
5 lowest is G.E.M. Development, and then Central Construction  
6 at 26 weeks.

7           Then if you look at the cost evaluation, the  
8 lowest cost is G.E.M. Development at 1.4 million, Central  
9 Construction at 1.6. Then if you look under the Company  
10 Principals at paragraph 6, for Central Construction are Mr.  
11 Victor Walters, John (Moon ?), and Paul King. For G.E.M.,  
12 George Morton, Sr. and George Morton, Jr.

13           Then their financial checks. Then  
14 Conclusion and Recommendation. You'll see that G.E.M.  
15 Construction submitted the lowest price, along with the  
16 most expeditious schedule for the (D.E.D. ?) Maintenance  
17 and Stores Building. The tender submission and Form of  
18 Tender showed a clear understanding of the requirements to  
19 undertake the project. In addition, the company and its  
20 partners had the collective experience to complete the  
21 work. It is, therefore, recommended the contract be  
22 awarded to G.E.M. Construction for the value tendered sum  
23 of 1.494 million.

24           Now, on the face of it you'd think that's a

1 perfectly good reason for awarding the contract to G.E.M.;  
2 the lowest bid, good quality, good timing, a lot of good  
3 reasons. Then this document which is the Contract Award  
4 Recommendation was prepared. If you look at the document  
5 at page 5, this would be in your short binder -- this is  
6 Cabinet Minutes. The Minister is introducing this  
7 recommendation, and you'll see that Maintenance and Stores  
8 Building. He refers to the size. He then refers to the  
9 bids. You'll see G.E.M. Development at 1.494 million.

10           The Minister noted that the tender prices  
11 were significantly above the estimate presented by the  
12 technical officers in the Ministry. He reported that  
13 G.E.M. Construction, Limited had submitted the lowest price  
14 for the construction of the building. However, they have  
15 performed poorly on previous projects, and these were  
16 concerns that required project deadlines would not be --  
17 there were concerns that the required project deadline  
18 would not be met.

19           Central Developmen Limited had submitted  
20 their second bid of tender, and their tender submission  
21 showed a clear understanding of the requirements to  
22 undertake the project. He, therefore, recommended that the  
23 contract be awarded to Central Construction Company, the  
24 principals of which are Victor Walters, and John Moon, and

1 Paul King. Then the there were expressed concerns that the  
2 estimates varied so much, and the Cabinet agreed that the  
3 consideration of this contract award should be carried over  
4 to the next meeting to ensure that the estimate for the  
5 work was updated.

6 Now, it is slightly odd from the sense that  
7 if you look at the recommendations from the technical  
8 officers, it is a clear recommendation based on the lowest  
9 price, and as they put it, most expeditious schedule. They  
10 say that G.E.M. had a clear understanding of what was  
11 required to complete the project, and they had the  
12 collective experience to complete the work. There is no  
13 suggestion in the technical officers' assessment that there  
14 is any prospect that G.E.M. had performed poorly on  
15 previous projects or that G.E.M. may not be able to achieve  
16 the project within the deadlines. Indeed, if one looks at  
17 the Conclusions and Recommendations, under Rationale, the  
18 reasons are to the contrary.

19 So it's not quite clear why this happened  
20 the way it was. You'll see that was one of the issues  
21 which was picked up by the Auditor General. If you look at  
22 page 7, the Auditor General says that when the original  
23 bids were -- you'll see in the following paragraph -- when  
24 the original bids were received, Works and Engineering

1 staff recommended lowest bidder G.E.M. in their Contract  
2 Award Recommendation. They concluded that the lowest  
3 bidder should have the award of the contract on the basis  
4 of cost, schedule provided, the company's clear  
5 understanding of the requirements to undertake the project,  
6 and collective experience.

7                   However, when the contract was presented to  
8 Cabinet, the Minister of Works and Engineering expressed  
9 concern about the lowest bidder's ability to achieve the  
10 deadline. No evidence to support these assertions was  
11 documented in the Cabinet conclusions. The Cabinet did not  
12 approve the award of the contract at the time. Instead,  
13 Cabinet recommended a consideration of the contract award  
14 be carried over to the next meeting to ensure that the  
15 estimate for the award was updated.

16                   We have requested confirmation of the  
17 Cabinet's subsequent approval, however, neither Works and  
18 Engineering nor Cabinet Office provided evidence that the  
19 contract was, in fact, returned to Cabinet for approval.  
20 And the contract was awarded to Central.

21                   COMMISSIONER: It was?

22                   MR. HARGUN. Yes. Central Contracting.

23                   MR BARRITT: There's one thing here that  
24 puzzles me too is that (panels in the paragraph ?), the

1 | last one before the Cabinet conclusion. The Cabinet  
2 | Secretary reported that it was likely that the estimate was  
3 | about five or six years old and that the numbers might not  
4 | have been reviewed to account for 2007 prices. Are you  
5 | suggesting that the... I looked for the date that the  
6 | Contract Award Recommendation is five/six years old.

7 | MR. HARGUN: Well, the Contract Award  
8 | Recommendation is --

9 | CHAIRMAN: The reference to estimate to this  
10 | figure of 1.2. It wasn't the tender amount.

11 | VOICE: Pretender estimate.

12 | MR. HARGUN: Yes, pretender estimate. This  
13 | was a point -- if it was 1.2 million, why are they bidding  
14 | 4.7 million.

15 | CHAIRMAN: The document you've just shown  
16 | us, which is page... Let me find it. The document we had  
17 | which showed the - over the page - the document which  
18 | looked like a working paper...

19 | MR. HARGUN: Page 8. 7 and 8. 7 and 8; yes.

20 | CHAIRMAN: Then at the top of the page 8,  
21 | when the contract was presented to Cabinet, the Minister of  
22 | Works and Engineering voiced concerns, and, in fact, in the  
23 | Cabinet Minutes...

24 | MR. HARGUN: He raised a different concern.

1                   CHAIRMAN: So the Cabinet Minutes doesn't  
2 have the Minister of Works and Engineering.

3                   MR. HARGUN: He does. If you look at page 5  
4 -- Page 5 in the Cabinet Minutes, you'll see the final  
5 paragraph. He says the Minister noted the prices,  
6 etcetera, but in the middle of the page, you see, However -  
7 - this is the Minister speaking -- they have performed  
8 poorly on previously projects, and there was concern that  
9 the required project deadline would not be achieved.

10                  CHAIRMAN: Got you.

11                  MR. HARGUN: So it is an oddity where the  
12 situation -- clear recommendation by the technical  
13 officers, the Minister goes to the Cabinet and says that,  
14 in his view the project might not be performed on time and  
15 may be of poor quality, which appears to be contrary to  
16 what the technical officers appear to have said. The  
17 contract -- the presentation was withdrawn from the Cabinet  
18 and never goes back, but the contract is awarded to the  
19 bidder recommended by the Minister.

20                  MR BARRITT: Interesting conundrum, because  
21 should the Minister have gone to the technical officers and  
22 had that battle out there, interfere that way, or does it  
23 save his comments for when you go to the Cabinet table?

24                  MR. HARGUN: Well, we saw the last

1 | situation where the Minister did not agree with the  
2 | recommendation of the technical officers. He did say,  
3 | rather than presenting no recommendation we should simply  
4 | present the fee evaluation on all the bidders -- the two  
5 | bidders -- and let the Cabinet decide. Of course, the  
6 | Cabinet did not like that. The Cabinet does not want to  
7 | decide technical issues. They want to be presented with a  
8 | recommendation, which they can accept or reject.

9 | MR BARRITT: Or does he talk to the  
10 | technical officers through the Permanent Secretary?

11 | MR. HARGUN: Yes. But, I mean, that's  
12 | another issue. It's another issue. And what is the role  
13 | of the Minister --

14 | MR BARRITT: But it's a live one for us.

15 | MR. HARGUN: -- in circumstances where in  
16 | relation to technical issues. In relation to  
17 | administration of policy, all the technical officers are  
18 | doing is implementing Government policy to build the  
19 | building. They go out, seek bids, bids are received, they  
20 | recommend Mr. X for the following five reasons.

21 | In what circumstance does a Minister say, I  
22 | don't want Mr. X, I want Mr. Y? That's what's happening  
23 | here.

24 | CHAIRMAN : That's got two possibilities

1 | in here. One is, the Minister might say I want Mr X rather  
2 | than Mr Y. The other might be that he says, well, looking  
3 | at these bids, Mr Y is maybe higher but on the other hand I  
4 | think perhaps there are reasons to (go against it ?).

5 |           MR. HARGUN: Well, perfectly understood. But in  
6 | this case, as I said, there are two criteria to put forth.  
7 | One, they may not be able to complete, appears to the  
8 | contrary to the express rationale by the technical  
9 | officers. Secondly, a lack of quality. Again, while it's  
10 | not addressed in express terms, implicitly seems to be  
11 | contrary to what the technical officers said.

12 |           I'm not sure I want to say anything more by  
13 | way of introduction in relation to this project. The next  
14 | one is the purchase of sand --

15 |           CHAIRMAN: Can you go on?

16 |           MR. HARGUN: Entirely a matter for you --  
17 | I'm good to go as long as long as you want me to, but  
18 | obviously --

19 |           CHAIRMAN: Until 5:00. It might be a nasty  
20 | shock for you!

21 |           MR. HARGUN: No, no, no. I'm perfectly up  
22 | to carry it.

23 |           COMMISSIONER: I think we might compromise  
24 | and bring it forward if you can go on to half past four or

1 | just over.

2 |                   MR. HARGUN:    Absolutely.

3 |                   So, the next one is the stone and the sand  
4 | issue.  Now, this was a large purchase of aggregate by the  
5 | Ministry of Works.  However, there is no formal contract in  
6 | relation to the purchase or the payment of money, and there  
7 | was no Cabinet approval.

8 |                   It appears that one of the reasons why there  
9 | was no Cabinet approval was, apparently, the matter was  
10 | urgent.  The matter was urgent because there were only two  
11 | month's supply of aggregate on the Island, and Cabinet  
12 | approval would require preparation and takes time.  In  
13 | those circumstances, if the matter is urgent or one of  
14 | emergency, contracts can be entered into without Cabinet  
15 | approval.

16 |                   One of the issues which does arise, however,  
17 | is why was it that a particular contract was selected -- a  
18 | particular bidder was selected as opposed to another.  If  
19 | you go to page 43 -- this is tab 3, page 43 -- you'll see  
20 | the prices, the unit costs - (\$51.50/\$51.15 ?) for Harmony  
21 | Holdings, \$46.00 for East End Asphalt, \$47.00 for D.M.  
22 | Rogers Transport.

23 |                   Now East End Asphalt is a Bermuda company  
24 | which had been supplying aggregate to the Bermuda

1 Government for the last 15 years. They said that they have  
2 supplied over 60,000 tons of aggregate and sand to the  
3 Bermuda Government.

4 Harmony Holdings had never supplied any  
5 material to the Government at all at the relevant time.  
6 But the point to note at this stage is that they were the  
7 highest bidder at \$51.00. The lowest was East End Asphalt,  
8 and in the middle was D.M. Rogers.

9 The other point to note is that you will see  
10 from the letter at page 1 --

11 CHAIRMAN: What page?

12 MR. HARGUN: At page 1 of tab 3. The  
13 quotation which is put forward by Harmony Holdings Company  
14 Limited is on April the 24th, and the contract appears to  
15 be awarded on May 7th. If you look at page 2, there is a  
16 purchase order given by Shawne Tuzo, who is a logistical  
17 coordinator.

18 If you look at the same binder at page 68,  
19 you will see in the middle of that page the -- this is in  
20 relation to Harmony Holding, Limited, the company which is  
21 the bidder -- and you will see that the subscribers for the  
22 company are Westport Trust Company Limited as Trustees for  
23 the Harmony Trust. For present purposes, please note that  
24 the Certificate of Incorporation was on the 8th of May,

1 | 2009, which is one day after they were given -- awarded the  
2 | contract.

3 |                   The other point to note is that the Harmony  
4 | Trust, which owned the company -- Westport Trust Company  
5 | Limited on behalf of Harmony Trust -- you will see that at  
6 | page 64 -- if you look at the Harmony Trust (*indiscernible*  
7 | *04:14:33*) paper from 2009 -- so just before the company was  
8 | incorporated -- and for present purposes the only  
9 | significant fact to note is at page 67, which sets out the  
10 | specified class -- specified class being the beneficiary of  
11 | the Harmony Trust -- and you will see that they are Eugene  
12 | Ball and Walter Greene -- In other words, in effect,  
13 | without doing a chancery analysis, the shareholders of  
14 | Harmony Holdings were Eugene Ball and Walter Greene. That  
15 | goes to why go through this exercise of a trust in between.

16 |                   The rationale for why, in the end, the  
17 | contract was awarded to Harmony Holdings, the highest  
18 | bidder, is set out in the Witness Statement of Mr. Victor  
19 | Ball, which is at tab 17 of the witness statements. He  
20 | says in paragraph 1 that he was the purchasing officer for  
21 | the Ministry of Public Works from 2004 to 2011, and in  
22 | paragraph 3, he says, I would purchase directly from  
23 | suppliers, and we carried out testing from the various  
24 | quarries before deciding on a particular bid inquiry, which

1 | was D.M. Rogers. Then he said, next sentence, while this  
2 | has been a success, it did lead to complaints, and concerns  
3 | were raised about possible lay off at East End Asphalt.

4 |                   Government policy was to use wherever  
5 | possible the middle local supplier, and accordingly, I  
6 | decided next time the Government asked ( me to bid ?) we  
7 | would invite East End Asphalt to quote for the business.  
8 | You'll see that he said in paragraph 5, this was an  
9 | emergency since it takes two months to import aggregate,  
10 | and that's why it did not approve -- Cabinet approval --  
11 | but at paragraph 6, we obtained the approval of the  
12 | Permanent Secretary and the Minister to make an emergency  
13 | purchase of aggregate. This meant we would not need  
14 | Cabinet approval and we would not need to follow the Form  
15 | of Tender process set out in 744.

16 |                   In paragraph 8, he says, my father had, I  
17 | believe, spoken at his church to some people who worked at  
18 | East End Asphalt, and they had told him about the  
19 | Government contract. He asked me if his company could bid  
20 | on it, and I told him that I could see no reason why it  
21 | could not. I said that Shawne Tuzo could explain the  
22 | process.

23 |                   In 9, Shawne Tuzo ran the process in terms  
24 | of collection, the quotations, and putting together a

1 spreadsheet of the options. East End Asphalt's price was  
2 lower than the price of importing directly. I remember  
3 taking Tuzo -- talking to Tuzo about this -- and we could  
4 not understand how the price could be so low. I was  
5 concerned about this. I felt that there was a good chance  
6 East End Asphalt could carry on to delivery of such a low  
7 price. I suspected that they would after we had signed the  
8 six-month (*indiscernible 04:18:29*). In any event, I  
9 thought it was too high a risk to take. I also was  
10 concerned that the delivery date was outside the stipulated  
11 delivery date.

12 I cannot now remember the difference in the  
13 proposed date and the stipulated one, but it was a factor.  
14 I was also concerned that their price was so much lower  
15 that the prices that they had been charging in the past  
16 that this showed that it is possible that they had been  
17 overcharging.

18 Harmony Holdings' quote, on the other hand,  
19 was approximately 10 percent of the cost of bringing in the  
20 aggregate indirectly. Given the policy consideration used  
21 in developing local suppliers, and involving Bermuda  
22 businesses, my recommendation was to award the contract to  
23 Harmony Holdings. I knew that my father was a shareholder  
24 in Harmony Holdings. I felt able to make a professional

1 decision, and that my decision was entirely professional  
2 and correct based on the information I had at the time.

3           The ultimate decision was the Permanent  
4 Secretary's. I did not inform the P.S. that my father was  
5 involved in Harmony Holdings. I did not want this to  
6 influence him, and so on and so forth.

7           Obviously, we will look at this contract  
8 after we have had the opportunity to examine some of the  
9 witnesses in relation to this issue, but that's the  
10 background to it as to why Cabinet approval was not sought,  
11 and why it was awarded to Harmony Holdings.

12           It's perhaps better that I address this  
13 further after I've had an opportunity to hear the oral  
14 evidence.

15           The first contract is -- relates to the H.R.  
16 Department, and that is at tab 4. The point here is that  
17 there is no tendering of the contract. I am not sure how  
18 much we want to say at this stage other than to show you  
19 what was said by the Auditor General. If I can ask you to  
20 have a look at the report, specifically, it starts at page  
21 40 in tab 4. You'll see at page 40; they set out the  
22 P.F.A.s in relation to goods and services in excess of  
23 \$5,000.00, P.F.A. 2002 in relation to services. Then what  
24 did we find? In 2010, a contract for renovations to the

1 Department of Human Resources did not receive Cabinet prior  
2 approval, nor was it put out to tender.

3 Works and Engineering confirmed that the  
4 project was not properly tendered, and noted that the head  
5 of Civil Service agreed to proceed with negotiations --  
6 with negotiating a cost with a contractor, Greymane  
7 Contracting. As such, there was no Cabinet award  
8 recommendation document issued to Cabinet, and no Cabinet  
9 approval was obtained for the award of this contract.

10 The original contract sum of \$257,000.00 was  
11 negotiated with the contractor, however, as a result of  
12 numerous change orders in the amount of (\$700,000.00 ?),  
13 the final cost to the public was \$958,000.00.

14 The observations by the Auditor General are  
15 on page (32/42 ?). Greymane Contracting was paid  
16 \$957,000.00 for renovations related to the Department of  
17 Human Resources. The original contract sum was for  
18 \$256,000.00, with change orders amounted to \$700,000.00.  
19 Works and Engineering confirmed the project was not  
20 properly tendered and noted that the head of Civil Service  
21 agreed to proceed with negotiating a price with the  
22 contractor.

23 There was also no Cabinet award  
24 recommendation document issued to Cabinet. As such, there

1 | was no Cabinet approval for the award of the contract.  
2 | Furthermore, the contract did not meet the criteria to be  
3 | considered under Section 6.1 for exceptional circumstances.

4 |           There are a number of witnesses who deal  
5 | with this particular contract, and the issues are raised,  
6 | as I said they are, and I think further submissions are  
7 | best made after we have listened to those witnesses.

8 |           So that is the H.R. There are four other  
9 | contracts which I need to deal with, and I will probably  
10 | deal with them tomorrow. They should not take that long,  
11 | and they deal with the Forensic Lab Marsh Folly project,  
12 | the Central Lab -- those two are going to be short --  
13 | Global Hue, the third one, and Ambling is the fourth.

14 |           There is no reason why I should not be able  
15 | to complete all four either within the hour or the hour and  
16 | a half. So if that's convenient --

17 |           CHAIRMAN: I'd like to note what the four  
18 | are.

19 |           MR. HARGUN: Certainly. They are -- if you  
20 | look at the index --

21 |           CHAIRMAN: Just tell me the names.

22 |           MR. HARGUN: They are tabs 5, 6, 7 and 8,  
23 | and they are Forensic Lab, Central Lab, Global Hue --  
24 | Global Hue is the agency advertising contract -- Ambling --

1 | Ambling is the consulting contract. Those are with the  
2 | Ministry of Tourism.

3 |                   CHAIRMAN: And that completes the list?

4 |                   MR. HARGUN: That completes the list.

5 |                   CHAIRMAN: Well, thank you very much indeed  
6 | Mr. Hargun.

7 |                   We will meet at 1000 tomorrow. We will hear  
8 | the applications and then the rest of your opening and  
9 | start the evidence at 2:00, or will you arrange for one of  
10 | the witnesses to be here?

11 |                   MR. ADAMSON: We're trying --

12 |                   MR. HARGUN: We're trying, but we're working  
13 | on the basis that it's likely to be 2:00.

14 |                   CHAIRMAN: Well, thank you very much  
15 | indeed.

16 |

17 |                   **END OF PROCEEDINGS, SEPTEMBER 28, 2016**

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1 R E P O R T E R ' S C E R T I F I C A T E

2

3

4 I, Scott A. Huseby, Court Reporter,  
5 do hereby certify that this transcript  
6 is a true and accurate record of the  
7 electronically recorded proceedings,  
8 transcribed under my direction  
9 this 10th day of October, 2016.

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14 SCOTT A. HUSEBY

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