

Commission of Inquiry Opening Statement, 27th June, 2016

This is the First Public Hearing held by the Commission of Inquiry established by the Hon. Premier Michael Dunkley on 24 February 2016.

Notice of the Hearing was given by the First Procedural Statement published on 13 June 2016 and I welcome all present who have responded to it.

Let me introduce myself as chairman of the Commission and my fellow members who are Mr. John Barritt, Ms. Fiona Luck and Mr. Kumi Bradshaw. Alberta Dyer-Tucker is the Secretary to the Commission. (In the formal language of the Commissions of Inquiry Act 1935, she is the Clerk appointed under section 5.) Jane Brett is her alternate and both are here today.

As chairman and on behalf of the Commission I have appointed Messrs. Narinder Hargun and Jeffrey Elkinson of the firm Conyers Dill & Pearman as Counsel to the Inquiry.

The Commission has established a website www.inquirybermuda.com Throughout our proceedings, we will endeavor to update the website every working day where new information is available and we shall expect all interested persons to keep themselves informed by consulting the website on the same daily basis.

Terms of Reference

Our Terms of Reference – I need not read them *verbatim* - are grounded in the Report of the Auditor General on the Consolidated Fund of the Government of Bermuda for the Financial Years that ended on 31st March in 2010, 2011 and 2012 respectively, specifically with regard to any matters arising under Section 3 of the Report. Section 3 therefore is fundamental to our Inquiry. As it is published on our website, I need not quote it here. It lists the observations and recommendations made by the Auditor General in the light of the audits, limited to “those matters arising from the audits which are significant enough to warrant the attention of the House of Assembly”, and it adds the grave warning “Many of the observations point to a general failure to follow the rules (Financial Instructions) established by Government for the safeguarding of public assets”.

We are appointed, of course, by the Hon. Premier with the Terms of Reference I have referred to above. We are not acting as or on behalf of the House of Assembly as was envisaged by the Auditor General in that passage from her Report. I should emphasize that we are conducting an impartial, independent judicial Inquiry pursuant to the 1935 Act and that we shall make our proceedings as transparent as we properly can.

Our starting point, therefore, is the Auditor General's observation that there appeared to have been, during the relevant period, a general failure to follow Financial Instructions, which were described as the rules established by the Government for the safeguarding of public assets. The Financial Instructions have been revised from time to time and we must be careful to identify the rules that were in force during the relevant period of three financial years ending on 31 March 2012, and during any relevant earlier period. It will also be necessary for us to take note of amendments that have been made to the Financial Instructions since 31 March 2012 because our Terms of Reference include making recommendations for the future -

*"7. Consider the adequacy of **current** safeguards and the system of financial accountability for the Government of Bermuda"*

"8. Make recommendations to prevent and or to reduce the risk of recurrences of any violation identified and to mitigate financial operational and reputational risks to the Government of Bermuda"

The introduction to Section 3 of the Report also notes that the Permanent Secretary of Public Works is the Accounting Officer for all capital development projects except – and the exception may be important – “except those delegated by the Minister of Finance to another Ministry”. Such delegation appears to have occurred – did in fact occur – in relation to several of the projects that are relevant to our Inquiry, and we must take that into account as we seek to identify the relevant Accounting Officer in each case and, more generally, the senior personnel who bore Ministerial or other responsibility for each project.

Section 3 of the Report also noted that the Ministry of Works and Engineering was also required to follow its own internal Management Policies and Procedures set out in PFA 2000 (“Purchasing of Goods & Materials”) and PFA 2002 (“Procurement of Contract Services”).

Before proceeding further to identify the issues we must inquire into, I should refer to the “Scope of Inquiry” as defined in our Terms of Reference, paragraph 1 supplemented by paragraph 9. These read –

“Scope of Inquiry

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

“Any other matter”

9. Consider any other matter which the Commission considers relevant to any of the foregoing”

I should also note that paragraphs 2-5 inclusive of the Terms of Reference under the heading “References to other Agencies” require us to refer “any evidence of possible criminal activity” to the Director of Public Prosecutions and to the Police, and of “possible disciplinary offences “ to the Head of the Civil Service (paragraph 3) and to draw to the attention of the Ministers of Finance and of Legal Affairs, respectively, any matters that may be appropriate for surcharge or for civil asset recovery (paragraphs 4 and 5).

Issues for the Inquiry

Having regard to the Terms of Reference, the Commission should stress that it is clear that we are not required to resolve specific issues, whether of criminal or other liability, but rather to inquire into the conduct of governmental affairs during the period in question, and where relevant either before or after that period, in relation to matters that are referred to in Section 3; and

where we consider it appropriate, to refer “any potential violation of law or regulations” to the appropriate agency.

In short,

- was the Auditor General correct?
- if so how did that occur and why was the situation allowed to continue?
- what can be done to prevent it happening in the future?

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

The first group consists of transactions which involved third parties outside the government whether as contracting parties or as recipients of payments made by the Government, or as both. These headings are –

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

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

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

- 3.6 Supplementary Appropriation Bills not tabled.
- 3.7 Inadequate procedures over bank reconciliations

- 3.8 Completeness and accuracy of accounting for Employee Benefits.
- 3.9 Inadequate provisioning.
- 3.10 Inadequate procedures over amounts receivable from or payable to other Government agencies.
- 3.11 Lack of ministerial authorization for inter-fund transfers.
- 3.13 Bank limit exceeded by \$24 million.
- 3.14 Inappropriate application of or lack of accounting policies.
- 3.15 Presentation issues.
- 3.16 Overspending of Supplementary Estimate limits.
- 3.17 Information Technology (IT) .

These may be referred to as 'Internal accounting/procedural issues'

Internal accounting /procedural issues

The Inquiry will look into the internal accounting/procedural issues and in particular on whether the alleged deficiencies have now been redressed and, if not, why not.

This will involve scrutinizing the mechanics of government and it is an important aspect of the inquiry. These are important issues and the inquiry will wish to scrutinize what the departments have done in response to the criticisms leveled in the Report. We want to be assured that Government has learned and moved on from any past mistakes about its own internal processes.

Third Party issues

Much of the Commission's time will be devoted to Third Party Issues. This is an area of obvious public concern.

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

The essential first stage, therefore, is to identify the contracts and projects where the Auditor General's Report suggests that relevant Financial Instructions were not complied with in this respect. Some of these, for example in sub-sections 3.1.1 to 3.1.7, are referred to by name. Others, for example in paragraph 3.3, are defined only by reference to the Government Departments concerned and on the basis of samples which the Report describes. These may include a large number of contracts, not all and perhaps not many of which are directly relevant to our Inquiry. We therefore have to proceed, initially at least, on a selective basis.

In making our selections, we will consider and be guided by the evidence provided by those involved in the transactions, as well as the size of the contract, and also the way in which Financial Instructions have said to have been breached.

Individual members of the Commission, and our Counsel, after thorough perusal of the Auditor General's files, have already identified a number of contracts and projects on which we can focus at the outset. That has been done with the considerable assistance of the former and present Auditor General and of her Office, and we have notified potential witnesses accordingly. This is an on-going and indeed urgent process and we shall be greatly assisted if interested persons and potential witnesses can inform us as soon as possible whether they will challenge either the validity of the sampling process used by the Auditor General in sub-sections 3.2, 3.3 and 3.12, or the accuracy of the figures shown in Tables 5-10 of her Report. That is in addition, of course, to providing us, where they can, with further information about contracts and projects falling within the Report.

Paragraph 9 of our Terms of Reference includes "any other matter which the Commission considers relevant to any of the foregoing". Our present, provisional view is that we will be assisted by considering certain Government contracts that were awarded before, or after, the period of Financial Years 2010-2012 where either payments made during those years represented Government outgoings under earlier contracts or the Government's practice during Financial Years 2010 to 2012 may have emerged before the period began and may have continued after it ended. For those reasons, we propose to inquire into contracts where questions may arise with respect to the award of the contract and tendering process in respect of -

- (1) the TCD Emissions Centre,
- (2) the Port Royal Golf Course,
- (3) the Dame Lois Browne Evans Building,
- (4) Heritage Wharf, and
- (5) the current Airport Development.

In considering the tendering processes, the Commission will likely consider the following particular questions in relation to each contract:

- (1) Was the contract properly tendered in accordance with the Financial Instructions;
- (2) Were there any links between the successful bidder and the Government or individual members of the Government or Civil Service such as to cause concern and warrant further investigation?

While the focus will at least initially be on the tendering process, the scope of the Inquiry may extend beyond the tendering process in some cases. The Commission may for example also consider how certain contracts were administered. Some of the projects involved large cost overruns. The Commission may, in the course of its inquiry, consider how such overruns arose.

Generally

Throughout its Inquiry, the Commission will have in mind what lessons can be learned from the alleged shortcomings that the Auditor General has identified. Our principal aim will be to discover why Financial Instructions were not followed and to what extent the situation has been remedied; and to make practical recommendations for the future.

Witnesses

I will now say a few words about witnesses. The Commission appreciates the difficulty and pressure many people will feel about giving evidence to the Inquiry. The Commission takes these matters seriously. The Commission has many powers, such as the power to compel people to give evidence. We also have the power in exceptional cases to preserve the confidentiality and the privacy of individual witnesses who request it.

I strongly urge any person who may be able to assist us to come forward, whether in person or by posting information on our website.

Today's First Public Hearing

I have outlined above what the Commission presently sees as the scope of its Inquiry, going forward. Next, counsel for the Commission will set out our provisional timetable leading to a Witness Hearing that will take place on Wednesday 28 September 2016 and scheduled to continue until Tuesday 11 October 2016 and longer, if necessary.

The second purpose of today's hearing is to enable us to hear any Applications that may be made by interested parties, whether for the right to appear or be represented at the Inquiry, or by arising out of what I have said and what Counsel for the Inquiry will say, or regarding any other relevant matter.