

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

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**Witness Statement of Derrick Binns**

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1. I am Derrick Binns and I am currently the Cabinet Secretary for the Government of Bermuda. I make this witness statement in response to the request of the Commission of Inquiry duly appointed by the Premier on 24 February 2016 to inquire into the findings of the Auditor General's report on the Consolidated Fund for the Financial Years 2010, 2011 and 2012.
2. I was appointed Permanent Secretary for the Ministry of Works and Engineering twice. First, between March 2003 and 27 April 2004 and again from 8 March 2006 to 20 December 2007, I was hence the senior public officer for the Ministry and as such the Accounting Officer for the Ministry. As Permanent Secretary, I also served as policy adviser to the Minister.

Processing of Payments

3. I have been asked to comment generally on the Auditor General's concerns or criticisms contained in her report on the Consolidated Fund for the financial years 2010 through 2012 that large expenditures by Works and Engineering had not been approved by Cabinet, were paid where there were no signed contracts or agreement and where any such contracts or agreement had not been tendered. Further, I have been asked to comment on my understanding of the process followed by those persons in the Ministry for which I was responsible at the time.
4. It is important to note that I was not the Permanent Secretary for the Ministry of Works and Engineering during the reporting period for the Auditor General, thus I am unable to comment on any processes within this Ministry during 2010, 2011 or 2012.
5. I cannot comment on the specific processes followed by those persons in the Accountant General's Department during the fiscal years of 2010, 2011 and 2012 as I was not in that Department.

6. With respect to my responsibilities regarding expenditures from the Ministry of Works and Engineering, I understood I was to ensure that Financial Instructions were understood and followed by staff within my Ministry and I was guided by Financial Instructions, the Conditions of Employment and Code of Conduct of the Public Service and the Ministerial Code of Conduct 2002.
7. The process that I recall we followed with regard to the award of Government contracts was that first, a Request for Proposals would be issued. The bids submitted would be analyzed, with a recommendation provided to the Minister for consideration. The Minister would take a Contract Award Recommendation to his Cabinet Colleagues, who would then make a decision on the award of the contract.
8. For the sake of clarity, the distinction between a Cabinet Paper or Cabinet Memorandum and a Contract Award Recommendation is that a Cabinet Paper or Cabinet Memorandum is the Minister's paper containing information for his Cabinet Colleagues to consider. It can contain technical details for processes followed, information gained and technical recommendations made. The Contract Award Recommendation on the other hand is produced by technical officers and contains an analysis of the tender process, concluding with a recommendation for the award of the contract. Often the document was annexed to the Minister's Cabinet Memorandum.
9. The process that I recall we followed with regard to the processing of payments to contractors from public monies would include the Quantity Surveyor certifying that the works covered by the invoice had indeed been completed, the project architect confirming that all was in order for payment, and the Permanent Secretary satisfying himself that the payment could be made based on the certifications of the technical officers and then authorizing the payment.

#### Heritage Wharf

#### The Auditor's findings

10. When I commenced work as Permanent Secretary for the Ministry of Works and Engineering on 8 March 2006, I had a general awareness that the Heritage Wharf project was a significant Government initiative, that it was being managed by the Ministry of Tourism and Transport and that it was urgent in that it had to be completed before April

of 2009 for the arrival of the first larger cruise ship. I was not formally briefed on this project by my staff upon commencement of my duties as Permanent Secretary because it was not a Works and Engineering project. This is evidenced by the Chronology of Key Decisions and Events set out by the Auditor General at the end of her Special Report on the Royal Naval Dockyard Cruise Ship Pier – Heritage Wharf [pages 12-116 to 12-117 of my witness bundle] and various other documents included in the bundle [p. 12-45].

11. I had no involvement in and no direct knowledge of the decision to “delegate” this capital project to the Ministry of Tourism and Transport as it was in train prior to my taking up my responsibilities at the Ministry of Works and Engineering.
12. By way of explanation, when persons are appointed as Permanent Secretaries, they are briefed in writing and verbally by all Heads of the Departments under the particular Ministry. The briefs and discussions (similar to those which would be prepared for a new Minister) provide an overview of each of their responsibilities and usually includes summaries and status reports on all ongoing projects and any particular unresolved burning or “hot button” items relating to these projects. It was not then and is not now the responsibility or obligation of an incoming Permanent Secretary to check the work of their predecessors. It is the expectation that all colleagues perform their duties responsibly and professionally. This project was not part of my brief when I was appointed as Permanent Secretary.
13. Regarding the explanatory note at page 12-61 of my witness bundle, I can say that explanatory notes in the approved capital account estimates are included in the budget book which accompanies the annual Appropriation Acts. The budget book and all its contents are the responsibility of the sitting Minister of Finance. Having considered the question regarding notes for 2007/2008 and page 12-61 of my witness bundle, I can only infer that these notes demonstrated the objectives of then Ministers of Finance.
14. With regard to the advice from Mr. Saul Froomkin on the legalities of explanatory notes *vis á vis* legislation [pages 12-57 to 12-60 of my witness bundle], I only became aware of this information upon receipt of my witness bundle in connection with this Commission of Inquiry and note that it is dated 8 February 2010, well after the period of time during which I was responsible for projects in the Ministry of Works and Engineering and the completion of the wharf.

(i) The rationale for delegating this capital project to MOTT

15. I have no direct knowledge of the process engaged by the Ministry of Tourism and Transport in the identification or securing of Correia Construction as the contractor to build the wharf, although now that I have read the Auditors' Special Report and other documents in my witness bundle related to this project, I have become familiar with this project.
16. I should add, for the sake of completeness, that the first time I became directly involved in this project was when the then Cabinet Secretary and Permanent Secretary for the Ministry of Tourism and Transport, Mr. Marc Telemaque telephoned me on a Friday evening asking whether I could sign a contract engaging the Bermuda Government with Correia Construction Company Limited. He informed me that he had been advised by our Attorney General's Chambers that I, as Permanent Secretary for the then Ministry of Works and Engineering should sign it.
17. My role at this stage was simply that of a service provider to a sister Ministry; to provide expertise in finalizing a highly technical contract. I did not see any need to go behind the information provided to me by the then Cabinet Secretary given that this was a Ministry of Tourism and Transport project. I agreed that Works and Engineering would review the contract and subsequently execute it. I proceeded to find the necessary technical officers within my Ministry to review the draft contract and provide their expertise to ensure the proper information was included and that the Government of Bermuda was protected.
18. Several changes to the contract were made by the technical officers and subsequently it was vetted by the Attorney General's Chambers. Once the contract was finalized, I signed it [page 12-27 to 12-28 of my witness bundle refers]. Once the work started, the technical officers within the Ministry of Works and Engineering attempted to do what they would ordinarily do in keeping with our responsibilities under Financial Instructions (section 12.1.2); that is, obtain data in order to ensure expenditure was in accordance with the contract, thereby maintaining accounting responsibility for this capital project.
19. As an example, the technical officers attempted to obtain data in order to measure performance against the contract, but soon learned that Entech had been appointed as

project managers and had the responsibility to perform the functions that the Ministry of Works and Engineering would normally provide. Had the technical officers continued to manage the progress of the project (as set out above), confusion, particularly among contractors, would have resulted. Therefore we withdrew, leaving the full responsibility for the project and its management with Entech as per their agreement with the Ministry of Tourism and Transport [page 12-29 of my witness bundle].

- (ii) Whether the Minister of Finance had given a direction, pursuant to section 3(1) of the Public Treasury (Administration and Payments) Act 1969, that W&E should delegate the capital project to MOTT?

20. I have no knowledge of whether the Minister of Finance had given direction that W&E delegate the capital project to MOTT. Moreover, as indicated in paragraph 13 above, it was a reasonable assumption by the public officers during the relevant period that that the delegation of this project to MOTT was in accordance with the stated position of the then Minister of Finance [page 12-61 of my witness bundle refers].

## 2. The Dame Lois Brown Evans Building Project

21. Generally, the Commission is correct in its understanding that the contract to construct the Dame Lois Brown-Evans building was awarded to Landmark Lisgar Construction Limited (“Landmark Lisgar”) and that technical specialists within the Ministry of Works and Engineering had recommended that the contract be awarded to Apex Construction. Indeed, it was Minister Dennis Lister (“the Minister”) who advised his Cabinet colleagues that he was satisfied that Landmark Lisgar offered the best option for the Government and he recommended them as the successful bidder. The Minister’s recommendation was approved by his Cabinet colleagues [page 10-37 of my witness bundle refers].

- (i) Please explain the circumstances in which the Ministry decided not to follow the technical specialists’ recommendation and instead recommend the selection of LLC?

22. To the best of my recollection, the extracts from the minutes of the meeting of the Cabinet on 23 October 2007 [pages 10-34 to 10-36 of my witness bundle] set out the

history of the pre-qualification process through to the final recommendations of the technical officers within the Ministry of Works and Engineering.

23. I recall that the day before the meeting of the Cabinet on 23 of October, the Minister and I discussed his wish for LLC to be awarded the contract. He indicated that the recommendation for Apex as it was written could not proceed. I advised him that it would not be wise to put Cabinet in a position to select a recommendation other than that given by the technical officers without a clear rationale for doing so. The Minister agreed, and suggested that we should not submit a Contract Award Recommendation, but instead submit a Cabinet Paper that presented a balanced report, based on the total cost submitted by each contractor, and invite the Cabinet to decide which company they preferred. I advised the Minister that this might not reflect well on him with his colleagues as they would expect him to bring a recommendation to them. He said that he understood this but preferred to invite them to select.
24. On this same day, I consulted the then Cabinet Secretary regarding the Minister's wish to invite the Cabinet to consider both contractors and to decide which contractor they preferred. He advised that it would not be wise for the Minister to come forward without a recommendation. I relayed this information to the Minister. The Minister maintained his position.
25. On 26 October 2007 the Cabinet Paper presented to the Cabinet on 23 October was sent back to the Ministry with a request that the Minister return with a clear recommendation and rationale for that recommendation [pages 10-34 to 10-36 of my witness bundle refers and pages 2 - 4 of my Annex I]. I advised the Minister that his best course of action was to submit a Contract Award Recommendation that presented the results of the objective evaluation. I further indicated that the objective assessment must reveal that Apex would be the recommended firm, because Landmark Lisgar had not submitted sufficient detail to support their total bid and had attached a number of assumptions and qualifiers to their total bid. I therefore advised the Minister that there was a risk associated with the Landmark Lisgar bid because we could not be certain that the total bid price submitted addressed all the issues that we had asked them to identify. Consequently, the Landmark Lisgar bid could not be considered complete. In contrast, the bid by Apex was complete and provided substantiation for the total bid presented. In addition, the bid by Apex did

not have the same degree of assumptions and qualifiers as that of the Landmark Lisgar bid. As a result, the Apex bid had to be considered superior and less risky.

26. I advised the Minister that if he did not recommend Apex, he could be challenged as to why he recommended the riskier of the two bids. I further advised him that allegations might then be made that he had an interest in seeing the riskier bid awarded the contract. I reminded the Minister that the entire file would be available to the Auditor General who might legitimately ask these questions and he must therefore be prepared to answer them. The Minister indicated to me that he was still leaning towards Landmark Lisgar and that we would talk more about it the following week.
27. On 29 October 2007, the Minister indicated to me that a revised Cabinet Paper was due the following day. I reiterated my advice that his best course of action would be to submit a Contract Award Recommendation in support of Apex. I further indicated that I had prepared a Contract Award Recommendation to this end, but was awaiting a few clarifying comments from the Architect's section. The Minister indicated that he would be making a recommendation for Landmark Lisgar.
28. The following day, the Minister informed me that he had decided to recommend Landmark Lisgar and indicated changes he wished to have made to the Cabinet Paper. He indicated that he would proceed via a Cabinet Paper rather than a Contract Award Recommendation. I was satisfied that I had provided the Minister with sound and impartial advice, that he had taken my advice into consideration, and that he had made a decision, which is the prerogative of a Government Minister. I then assisted the Minister to give effect to his decision by amending the Cabinet Paper in accordance with his directions. Having reviewed the documents in my witness bundle, I can see that the Minister indicated to his colleagues that his recommendation was Landmark Lisgar and that this recommendation was approved by his colleagues [page 10-38 of my witness bundle refers].
29. Shortly thereafter, upon the advice of the Attorney General's Chambers, the Ministry of Works and Engineering sought legal advice from Conyers Dill and Pearman on the content for a letter of intent and a contract. I have been able to find emails which set out some of the communication between senior technical staff within the Ministry and Conyers Dill and Pearman [pages 11 – 15 of my Annex I].

30. Consequently, a letter of intent was issued to Landmark Lisgar on the evening of Monday 19 November 2007. The Minister advised the Cabinet on Tuesday 20 November 2007 that the letter had been issued. It is my understanding that one of the Minister's colleagues produced a copy of that letter and that after discussions on the content, the majority of Cabinet members were not satisfied with the content because, whilst the letter was appropriately legal, it did not include a notice to proceed instructing Landmark Lisgar to commence breaking ground. Additionally, it is my understanding that the Cabinet were not satisfied with the 19 November letter of intent because it implied that if contractual negotiations did not conclude successfully, then the contract may not be awarded to them. It was my understanding that the Cabinet wanted to have the Construction Manager begin as quickly as possible and to recognize that the decision to award the contract to them had been made.
31. It is my further recollection and understanding that the Cabinet then requested that the letter of intent which had already been issued to Landmark Lisgar be amended and reissued. The Minister's colleagues suggested amendments to the wording of the letter. However, I was concerned about whether the letter, if reissued as suggested, would put the Government at risk because the suggested wording, in my view, enabled the contractor to commence work without a contract having been executed. I was concerned that this weakened the Government's negotiating position because the Construction Manager now knew that the Government would be awarding them the contract even though all contractual matters had not been finalized.
32. I advised the Minister of these express concerns and he directed me to reissue the letter of intent as amended. I raised these same concerns with the then Secretary to the Cabinet who suggested alternate wording which, in his view would both satisfy the Cabinet and ameliorate my concerns.
33. Accordingly, I re-amended the letter of intent dated 20 November 2007 and I presented the letter to the Construction Manager on 21 November 2007 [page 5 of my Annex I].
34. I have been able to find copies of a very limited number of email communication between Paul Smith and then members of my staff which indicate that during the early part of December 2007, we were still receiving advice on the content of the contract to be executed between the Bermuda Government and Landmark Lisgar [pages 6 – 15 of my



Annex I]. They also appear to indicate an intention to have the contract signed on 5 December 2007, however at this stage I cannot recollect whether I signed the contract or if it was signed by my successor as I left the Ministry of Works and Engineering on 20 December 2007.

35. Whilst I have made every attempt to obtain documentation in addition to that supplied to me by the Commission in my Witness Bundle, those which I attach to my Witness Statement are all that I have been able to procure.

36. I believe that the facts stated in this witness statement are true to the best of my knowledge and belief.



**Derrick Binns**



**Date**