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COMMISSION OF INQUIRY - THE WITNESS HEARINGS
ST. THERESA'S CATHEDRAL HALL
LAFFAN STREET, HAMILTON, BERMUDA
MONDAY, OCTOBER 10, 2016

AUDIO RECORDED TRANSCRIPTION
October 10, 2016
Day 9

Reported by: Scott Huseby

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A P P E A R A N C E S

COMMISSION MEMBERS:

- Sir Anthony Evans, CHAIRMAN
- Ms. Fiona Luck, COMMISSIONER
- The Honorable John Barritt, J.P., COMMISSIONER
- Mr. Kumi Bradshaw, COMMISSIONER

COMMISSION LAWYERS/COMMISSION'S COUNSEL:

- Mr. Narinder Hargun, CONYERS DILL & PEARMAN
- Mr. Ben Adamson, CONYERS DILL & PEARMAN

PUBLIC SERVICE LAWYER:

- Ms. Venous Memari, LIBERTY LAW CHAMBERS LIMITED

CLERK TO THE COMMISSION:

- Ms. Alberta Dyer-Tucker
- Jane Brett

RECORDER:

- Rolf Martin

Also Present:

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Examination of DENNIS LISTER

Page 5

1 MR. HARGUN: Good morning, Mr. Chairman.
2 Mr. Chairman, this morning we have as our next witness,
3 former Minister Lister.

4 CHAIRMAN EVANS: Thank you.

5 (Inaudible discussion.)

6 THE WITNESS: Dennis Patrick Lister. I do
7 solemnly and sincerely affirm that the evidence I shall
8 give shall be the truth, the whole truth and nothing but
9 the truth.

10 CHAIRMAN EVANS: Please sit down, Mr. Lister.

11 Mr. Lister, I want to begin by mentioning the
12 fact that in the previous correspondence, you did raise the
13 question of legal representation and ask whether the
14 Commission could bear the cost of that for you.
15 Unfortunately we couldn't.

16 You're not represented formally today. I wanted
17 to begin by saying that if at any stage you feel that you
18 would like some legal advice or to raise any issue, raise
19 it with me and with Mr. Hargun's help, we'll see where we
20 get.

21 THE WITNESS: Acknowledge that. And if I do get
22 to that point, I will acknowledge that I'm not comfortable
23 with that direction of questions and then go from there.

24 CHAIRMAN EVANS: Thank you.

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DENNIS LISTER

called as a witness, being first duly sworn, testified as follows:

EXAMINATION

BY MR. HARGUN:

Q Good morning, Mr. Lister.

A Good morning.

Q Mr. Lister, my name is Narinder Hargun. I'm acting as Counsel for the Commission. I will ask some questions from you and after that, it's possible and likely that the Commissioners will have some questions.

Is that okay?

A Sure. Just an issue if you don't mind, I do have a witness statement that you may want to take it, I have a copy of it now if you'd like.

Q Oh, okay. And that's very helpful. I can --

CHAIRMAN EVANS: Is it very long, Mr. Lister?

THE WITNESS: No, I could read it if you'd like me to read it.

CHAIRMAN EVANS: Let's have it copied and then we'll see where we get. Can we copy that?

(Inaudible discussion.)

CHAIRMAN EVANS: Well, we had said in the past that we wouldn't encourage witnesses to read statements in advance. So we'll go on at the moment without it.

1 THE WITNESS: Sure.

2 CHAIRMAN EVANS: If you can come back to it later
3 if you want.

4 THE WITNESS: No problem at all.

5 **BY MR. HARGUN:**

6 Q And Mr. Lister, can we just confirm so that
7 there's no confusion, you were Minister of Public Works in
8 certainly 2007?

9 A From the fall of 2006 to the fall of 2007,
10 correct.

11 Q Fall of 2007. So just pinning it down, that
12 would be you changed ministries when, when did you retire
13 as Minister of Public Works?

14 A November, December of 2007.

15 Q November, December 2007. And did you stay in
16 Cabinet after that?

17 A No, sir.

18 Q Okay. So you were still around when the contract
19 with Landmark Lisgar was entered into?

20 A I was the Minister.

21 Q Yes.

22 A When the contract was entered into.

23 Q Yes. And construction sort of started, as I
24 understand it, around December 2007?

25 A It started just prior to my time ending as

1 Minister.

2 Q Okay. And after that, after you retired as
3 Minister of Public Works around November 2007, is it right
4 that Minister Burgess took over?

5 A Minister Burgess did succeed me, correct.

6 Q And you say that after that, you were not in the
7 Cabinet?

8 A Not in the cabinet.

9 Q Therefore, you would not know what happened with
10 the Cabinet after November 2007?

11 A Can't speak to anything that happened in the
12 Cabinet since the fall of 2007.

13 Q Fair enough, thank you. Can we talk about the
14 Dame Lois Browne Building, at that particular project and
15 contract?

16 A Sure.

17 Q Can we look at, Mr. Lister, the evaluation which
18 was made by the technical officers. The easiest place to
19 find that would be if you go to Tab 10 of the binder in
20 front of you. And you will find that at page 27.

21 Do you have the same page, Mr. Lister?

22 A Sure.

23 Q Is that page 27?

24 A 27.

25 Q And that's a document dated 27 October 2007, and

1 this is the tender evaluation.

2 I take it that this is tender evaluation by the
3 technical officers of the Ministry?

4 A Correct.

5 Q And just take you through some of the relevant
6 passages, if you look at the under Scope of Work, the third
7 full paragraph it says that the Ministry of Works and
8 Engineering's estimated costs of the project is 73,974,247
9 Bermudian dollars; yes?

10 A Uh-huh.

11 Q So that was within the context of Bermuda
12 infrastructure projects, a reasonably substantial project?

13 A Correct.

14 Q And this calculation was obviously, this
15 estimation of the value and the likely cost was by the
16 technical officers; yes?

17 A Correct.

18 Q And if you look at, just at the bottom of that
19 page, Mr. Lister, you see that the firms which were invited
20 to submit to the tender.

21 When I say invited, because they were
22 pre-qualified so that only firms which have been
23 pre-qualified could actually bid for it; yes?

24 A Correct.

25 Q And the firms are set out, DMJ, BCM, Apex

1 Construction, Landmark Construction, and Bermuda Building
2 Services.

3 And if you look at Paragraph 4, Mr. Lister,
4 you'll see the tender evaluation. You'll see that
5 paragraph on Bermuda Building Services, and then there's a
6 B, the responses for Landmark Lisgar Construction Company
7 and Apex Management Limited are listed and summarized below
8 and then there's a comparison.

9 And you'll see that for Landmark Lisgar is 72
10 million, Apex is effectively 73 million, about a million
11 dollar difference.

12 A Correct.

13 Q And then this by the technical officers, their
14 analysis, they say at Paragraph C, This joint venture, this
15 is Landmark Lisgar Construction Limited, "This joint
16 venture was incorporated as a company in Bermuda under the
17 name of Landmark Lisgar Construction Company Limited on the
18 16 August 2007."

19 So just pausing there, this was a company which
20 was specifically incorporated just for this project?

21 A Correct.

22 Q And the principals of the company are Mr. Bryan
23 McLeod, Mr. Lee Matvey, Mr. Gino Bifulchi and John
24 Bifulchi. Yes?

25 A Based on what's in front of me, yeah, I couldn't

1 confirm that on my own knowledge but that's what's in front
2 of me.

3 Q No, understood. Did you know Mr. Bryan McLeod?

4 A Not really.

5 Q Did you know Mr. Lee Matvey?

6 A No.

7 Q Have you ever met them?

8 A No.

9 Q And what about the two Canadian gentlemen, Gino
10 Bifulchi and John Bifulchi?

11 A No.

12 Q And then the technical officers say, "This
13 project would be the first project in Bermuda for the new
14 company. However, Landmark Construction Limited have
15 carried out work for Government in the past. Recent
16 projects include a new Hamilton bus terminal and
17 the Sessions House parking area. Landmark Construction
18 Limited is in good standing with the Department of Social
19 Insurance and the Tax Commissioners Office." Yes?

20 A That's what it says.

21 Q And then there is further analysis of the bid
22 made by Landmark Construction. And they say, if you look
23 at 10-29, the second full paragraph, they say, "However,
24 the details of the cost breakdown by elements of the
25 original bid form which was required submission was not

1 completed. This was submitted with the word included in
2 each line and the word see former tender in the title line.
3 The allowances noted above which were part of the breakdown
4 form where noted on a separate document they labeled Bid
5 Form Appendix B1 Schedule of Allowances."

6 Did you see their entire bid at any time,
7 Mr. Lister?

8 A No, sir.

9 Q Okay. And they said, These qualifications are
10 summarized and commented on here Under, A, the assumption
11 of payment of bonus equivalent to 25 percent of the
12 difference between GMS and the actual final cost of work.
13 Although the payment of a bonus incentive for bringing in
14 the project below the guaranteed maximum sum is
15 contemplated by the Ministry of Works and Engineering and
16 had been indicated during the pre-qualification process.
17 The actual bonus percentage was not identified and the
18 final bid documents did not mention this incentive.

19 You see somebody, and I assume it's technical
20 officers, has written in the manuscript, 'where did the
21 bidder get this information', i.e., where did the bidder get
22 the information that the bonus would be 25 percent.

23 You see that?

24 A I see some handwriting on the side.

25 Q Yes, the handwriting on the side.

1 A Uh-huh.

2 Q What is being suggested is that that wasn't
3 information which was available to any of the bidders.

4 Do you recall discussing this with the technical
5 officers, that how come Landmark knew that the bonus would
6 be as high as 25 percent?

7 A Let me assist you here and make a reference to what
8 would have been in the witness statement. The witness
9 statement clearly lined out the fact that there were
10 certain documents in this binder, the 41 pages contained in
11 the information that was sent to me. There's very little
12 in here that I can actually speak to.

13 Most of what's contained in here is technical
14 officers' exchanges of information that would not have come
15 to me. So I really can't speak to --

16 Q That's fine.

17 A I've agreed to what I've seen in front of me as far
18 as some figures and stuff, but all those side notes and
19 information would not have been shared necessarily with me.
20 Those were exchanges between the technical officers and
21 plus with the PS, but not necessarily with the Minister.

22 Q So the side notes, you say that --

23 A I'm not familiar with any of that.

24 Q That's fair enough. That's good. Now let's look
25 at --

1 But you did see the, Mr. Lister, the tender
2 evaluation document itself without the -- without the
3 handwritten notes. They would have been shown to you as the Minister, surely?

4 A I had been briefed on certain aspects of it. I
5 can't tell you whether I saw the full document as it is but
6 I was briefed along the process as we went through the
7 whole tendering exercise.

8 Q But this wasn't -- just let's talk through this.

9 This was obviously for the Ministry of very, very
10 substantial project?

11 A Yes, it was.

12 Q And clearly, only the Cabinet could ever approve
13 that; yes?

14 A Correct.

15 Q And you were going to be taking the
16 recommendation or otherwise to the Cabinet; yes?

17 A Correct.

18 Q And in the ordinary course when the technical
19 officers carry out an evaluation in relation to a contract,
20 the document which is the contract award evaluation is, in
21 fact, given to the Minister, is it not?

22 A And it's discussed but whether all the hand notes and
23 the side notes you have here, I can't speak to any of
24 those.

25 Q I'll fully accept that. You obviously may not, you say

1 you have not seen them, then I accept you have not seen
2 them.

3 But it would be odd if you did not at least see
4 the typed document without the handwritten notes, do you
5 accept that?

6 A I will accept that there was information shared
7 with me. It's been ten years. I can't tell you exactly
8 what I saw. I did not say as far as being able to make a
9 reference to it right now, I haven't had access to any of this
10 information in ten years and still don't have access to it.
11 It's not like I could have pulled up a file to refresh myself on it.
12 Okay? So I stand reserved in that response.

13 Q Understood. And just going through the
14 evaluation by the technical officers, then under Paragraph
15 D they say an assumption that the application for payment can be
16 made for materials for which payment had to be made prior to
17 their shipment to Bermuda. Generally, the policy of
18 Ministry of Works and Engineering, not to pay for materials
19 until they have been delivered to the site of Works.
20 And that's just an observation by the technical officers.

21 And then after Paragraph E, they say, The bid as
22 received was considered incomplete and conditional because
23 of the additional qualifying statements, assumptions or
24 comments. The bid can therefore deem to be nonresponsive.

25 Did you understand that it was technical

1 officers' view that the bid from Landmark Lisgar was not
2 complete and that the bid was deemed to be nonresponsive?

3 A I wouldn't put it in those terms, no. I
4 understood they had some challenges that they were still
5 working to resolve and I'll leave it at that.

6 Q But this is, this was their written evaluation;
7 in that written evaluation they seemed to be saying that the
8 bid is, in effect, incomplete and nonresponsive?

9 A I stated where I stand on it.

10 Q Okay, fair enough. And then they say, On 12
11 October 2007, after the closing date, Mr. Bryan McLeod,
12 managing director of Landmark Lisgar Construction wrote to
13 the Permanent Secretary of Ministry of Works and
14 Engineering to submit further information to make certain
15 corrections to their bid.

16 Were you aware of it that in this case, the
17 bidder actually sent information subsequent to the closing
18 date. Were you aware of that at the time?

19 A Not at the time that it was done, no.

20 Q You would agree with me, would you, Mr. Lister,
21 that it is highly unusual after the closing date for a
22 bidder to be adjusting their bid?

23 A I'll go back to where I was before. I understood
24 that there were issues that they were still trying to
25 resolve from my briefing, and I can't speak to the process

1 that actually took place.

2 Q Okay, fair enough. But understood. I'm just..

3 How long were you Minister of Public Works, Mr Lister?

4 A Just about 11 months.

5 Q Eleven months?

6 A Hadn't been there long, not at all.

7 Q So when I say, would you accept it's highly

8 unusual, you're relying upon your --

9 A There's no scale to measure that against because
10 we hadn't, I hadn't, overseen any projects of development at that point.

11 Q Fair enough. And then if you look at on page 30,
12 this is the technical officers' evaluation in relation to
13 the bid received from Apex Construction Management Limited.

14 And then they say, Apex Construction Management
15 Limited incorporated in Bermuda in 2004... So the company's
16 been there for some years. The principal of the firm is
17 Mr. Gilbert Lopes. You know of Mr. Gilbert Lopes?

18 A I know of Gilbert Lopes.

19 Q Have you ever met him?

20 A Everybody meets everybody somewhere on line, so I
21 can't say never. We don't have a relationship. There's no
22 personal friendship or any connection in that regard.

23 Q He's well known in Bermuda?

24 A He's well known in Bermuda, yes.

25 Q Apex has carried out several large commercial

1 residential projects. Recent projects include the mix use
2 retail and residential complexes at Dundonald Street, 6 and 10
3 Dundonald Street. Apex Construction Management Limited, a totally
4 Bermudian owned company, has not been awarded a contract by the
5 Government in the past. Another company owned by Mr. Lopes, GL
6 Construction has, however, carried out work for Government
7 on the Southside Police Station.

8 The company's also currently the developer of the
9 Loughland's project. Based on the information provided and
10 similar size project successfully executed recently, Apex
11 has most recent knowledge of carrying out a project of
12 this scope in Bermuda. The firm is in good standing with
13 the Department of Social Insurance and the Tax
14 Commissioner's Office.

15 And then there is a recommendation by the
16 technical officers. And that you will find at page 10-31
17 and specifically Paragraph 6. You see that, Mr. Lister?

18 The technical officers say, based on the bid
19 information on the 14 September 2007, analyze for costs,
20 evaluated for correctness, completeness, conditional
21 qualifying statements, and further discussions with the
22 consultants, it is recommended that the construction
23 management contract where the construction manager is also
24 the constructor of the project for the new Magistrates'
25 Court Hamilton Police Station project be awarded to Apex

1 Construction Management Limited for a management fee of
2 such and such.

3 And they guaranteed maximum sum of \$69.7 million.
4 And then the Cabinet is invited to authorize the Ministry
5 of Public Works to award the contract for the construction
6 management to Apex Construction.

7 So as we just read this document, their reasons
8 are obviously set out as they are by the technical officers
9 in this memorandum.

10 In relation to the Canadian partners, the two
11 Bifulchi brothers, did the technical officers share their
12 views as to their competence and experience to construct a
13 building such as the police station at the Magistrates
14 Court with you?

15 A Technical officers, no.

16 Q Let me show you --

17 A I made [inaudible 10:21:51] discussion I'm not sure.

18 Q I mean PS, yes. And had PS expressed
19 reservations as to their capability and their experience of
20 building such as the building which was being proposed
21 here?

22 A I would say, and I'm going to paraphrase in a
23 sense, to the best of my recollection I was made to
24 feel comfortable that they were capable of doing this
25 project because they'd been involved in projects of this

1 scale and larger prior to this. That was my understanding
2 of the conversation.

3 Q Let me show you a document, Mr. Lister, and you
4 can tell me whether you were made aware of that document or
5 at least what is contained in that document.

6 This is... You'll find a memorandum dated 7
7 November 2008.

8 A Which is which page?

9 Q This would be at 10-43.

10 A 10-43?

11 Q Yes.

12 A What page, my book only goes up to 10-41.

13 Q Go to the main binder.

14 A Here's where I need legal advice. Should I be
15 responding to something I haven't seen until now? This was
16 a binder that was sent to me.

17 Q Yes.

18 A I perused this binder, I do not know what's in
19 that binder.

20 Q Well, let me ask you the question and then if you
21 can't answer it, just say so, yeah.? Is that fair?

22 A Sure.

23 Q Okay. This is a memorandum, internal memorandum,
24 about the Magistrates' Court building and so on. And it's
25 referring to, if you look at page 10-44, about a tour by

1 the, I think your technical officers in Canada to meet the
2 Landmark Lisgar Construction Company personnel and the
3 people behind it. If you look at 10-44, second line, you
4 see the sentence starting with After the tour.

5 "After the tour, the brochure was reviewed
6 with consulting architects, Sam Spagnula of CSP Architects,
7 Inc.

8 You are familiar with CSP Architects, were you,
9 Mr. Lister? They were the architects who were engaged here
10 on this project. Do you remember? It's a long time ago.

11 Who recognized the the (indiscernible 10:24:30)
12 facility and recommended that Lisgar Construction were not the
13 contractors for the building. They may have a minor role on a
14 subcontract as the leading... As the consulting architect
15 investigation did not go into depth or detail.

16 The most recent facility, Lisgar Construction
17 completed (by/was) the sewage treatment plant in Kazakhstan
18 which is not indicative of a similar building type. Concerned
19 that the team of Landmark Lisgar Construction were not
20 experienced in the building type were conveyed by the
21 project manager to the Permanent Secretary.

22 What is being said is that there was a concern
23 expressed as to whether Lisgar Construction, Lisgar, part
24 of the Landmark Lisgar, had the relevant experience and that
25 concern was expressed by the project manager to the

1 Permanent Secretary.

2 Did the Permanent Secretary express that concern
3 to you?

4 A This is the first time I'm hearing this
5 information.

6 Q So the answer is no?

7 A No.

8 Q Okay. And you were obviously made aware of the
9 recommendation by the technical officers which we've just
10 gone through, yes, Mr. Lister?

11 A Yes.

12 Q That's dated 27 of October?

13 A Yes.

14 Q And after that, we can pick up a story by looking
15 at the witness statement of the Permanent Secretary, Dr.
16 Binns, which if I can ask you to please have a look at the
17 witness binder, go to tab 2, Mr. Lister. There's a witness
18 statement by a Dr. Derrick Binns, who if you've been
19 following these proceedings, gave evidence the week before
20 last substantially in accordance with his witness
21 statement.

22 And the relevant part in relation to the Dame
23 Lois Browne Building, it starts at Paragraph 21, and I can
24 perhaps pick up with you and we can sort of work slowly
25 through that at Paragraph 23.

1 Do you see Paragraph 23 there, Mr.
2 Lister, yes? He says, Dr. Binns says, "I recall that the
3 day before the meeting of the Cabinet on the 23rd of
4 October" -- so the 23rd of October -- "the Minister and I
5 discussed his wish for LLC to be awarded the contract. He
6 indicated that the recommendation for Apex as it was
7 written could not proceed."

8 Is that right that you indicated to Permanent
9 Secretary Binns that it was your wish that LLC should be
10 awarded the contract and not Apex?

11 A I think before I respond to that, I should put it
12 into context of something that's missing in this
13 conversation if you don't mind.

14 Q Certainly.

15 A Conversation: what should be brought into conversation
16 is, part of I guess what was the basis of decision-making process.
17 As you know, The Progressive Labour Party won the government
18 after long years in the opposition and not having a Government change.
19 When we came into government part of the mandate of many different was to
20 objectives that we had was to try to give opportunity where there hadn't
21 been opportunity before.

22 And looking at that, we looked at how could we
23 give the chance for smaller persons, businesses, et cetera,
24 to be able to grow [proudly] in the incidents where they
25 prepared themselves to accept an opportunity.

1 In this case, it was one of those where a smaller
2 organization, and I believe out of all the ten companies that
3 did, there were probably three or four like this who were
4 small Bermuda companies who had gone and partnered with an
5 entity overseas to be able to bring to the table the
6 capacity that they lacked locally; and that's a criteria which I
7 was looking at, Landmark Lisgar marriage, if I want to use
8 that term of those two companies come together - the local
9 company and the overseas company.

10 All, again, it's three or four of them, I can't
11 remember, all of those companies, in talking to PS leading
12 up to this, what were the makeup of the different
13 companies, and these were three of those companies or four
14 of those companies that met that criteria.

15 When we got down to the final list of who was
16 being presented, the two companies, one was a company that
17 had fit that criteria, had looked to see if we can expand
18 and grow, gone overseas and find a partner that was
19 presented to me as being reputable, capable and being able
20 to perform as was required for this job.

21 So, as the Minister making that decision, that's
22 going to be one of the measurements that I used to make
23 that decision, is this an opportunity that we can take the
24 philosophy of the Government and say let's offer an
25 opportunity here. That's the difference that's not being

1 highlighted in here as part of those conversations that had
2 taken place throughout with the Permanent Secretary more than
3 I don't think the technical staff, and I may have had that
4 discussion, but the Permanent Secretary was well aware of
5 the concern of wanting to see the philosophy of the PLP
6 Government exercise where we had gotten, wherever we had
7 the opportunity to exercise it.

8 Q Minister Furbert (*sic*) giving evidence here last
9 week said that he was trying to encourage small black
10 Bermudians... Burgess. Burgess. Forgive me.

11 Mr. Burgess was giving evidence and he said that
12 he was keen to encourage Government giving contracts to
13 small contractors who were black Bermudians.

14 Did you share that philosophy?

15 A I just explained the philosophy. The philosophy
16 was, where we can give an opportunity to the smaller guys who
17 may not have had an opportunity in the past to do projects of
18 this size; and projects... Not just projects, but do anything
19 for Government who, whether it's been supplying materials or
20 whatever, has not been allowed at the table before.

21 If they were, had gone out and prepared themselves
22 now, meaning sought the necessary strength that they were
23 required to adjust the weakness that they may or may not
24 have had as a smaller company, then let's see if we can bring
25 them to the table.

1 Q And specifically, were you concerned with black
2 Bermudian contractors?

3 A Part of it was to make sure those who hadn't had
4 the opportunity, small Bermudian, in the main, yes, black
5 Bermudian companies, black Bermudian individuals, but the
6 exercise was to see that if a company had gone out and done
7 the correct things as far as trying to prepare themselves
8 in partnering with a company overseas that, as far as I had
9 been informed, was capable of being able to adopt
10 themselves. This piece that you just showed me, I'm never...
11 I'm not aware of that at all. I can't speak to that.

12 Q But in this case, had you ever met with Matvey
13 and McLeod?

14 A I don't remember meeting them to be honest with you.

15 Q So --

16 A I know that the part of that discussion of the
17 outstanding pieces, the technicals and the PS were having
18 exchanges back and forth. A lot of those meetings when
19 the Permanent Secretary had meetings, some of those
20 meetings took place in my office on different topics. I may
21 have met, I just can't remember sitting here and meeting them.

22 Q But if it was the recommendation of the technical
23 officers that the bid as received from Landmark was actually an
24 incomplete bid. So they, one of the reasons why they
25 were not going to recommend Landmark was that the bid which

1 was actually put in didn't actually comply with the, through the
2 regulations, it was an incomplete bid.

3 A Uh-huh.

4 Q But did that not dissuade you that perhaps you
5 should not be recommending a contractor who had not
6 actually submitted a complete bid?

7 A At that time, I don't think the directness
8 as you are putting it was presented to me in that term. It was
9 presented to me that there were shortfalls and my response was
10 can you work to those shortfalls. Again, trying to address the
11 philosophy that was just expressed to you.

12 Q But this is set out in great detail as to why it
13 is an incomplete bid in the tender evaluation which is a
14 detailed five-page document prepared by the technical officers
15 which must have been given to you.

16 A As I said to you, a lot of what is in the binder
17 that I received was not necessarily shared with me in the
18 full context. There was discussions around some of those,
19 and I acknowledge that. I can't acknowledge the full
20 context of that because it's just been too long for me.

21 Q I understand. All I'm saying to you, Mr. Lister,
22 is that in the evaluation of which your technical officers
23 have prepared, they've gone to great lengths to say
24 what are the strengths and the weaknesses of the Landmark
25 Lisgar Construction Limited, strengths and weaknesses of

1 Apex, and they gave reasoned decision as to why they are
2 recommending Apex, and specifically why they're not
3 recommending Landmark Lisgar.

4 And one of the reasons which they give is that
5 among others is that the bid as received is incomplete.

6 What I'm trying to understand from you is, why did
7 you disagree with that?

8 A Why did I disagree with it, and you're putting it
9 in a context again. Let me break it back into context. Part of
10 that discussion would not have been -- may not -- that's
11 standard to say in that respect -- may not have been in the
12 full context which you're presenting today.

13 But it was my wish to, again, use the measuring
14 stick that we were bringing to the table to give opportunity
15 which is a view and discussion that I've had many times
16 with the PS; and to say where the opportunity is, can we
17 work our way through differences to try and make those
18 opportunities happen. Okay.

19 There was never a... what I do want to say... There
20 was never a full stop, period, put in front to say we can't do that.
21 It was, can we work our way through. That was the gist of the
22 conversation. The PS interpreted that as the Minister's wish to see
23 if he could continue -- we could continue this exercise and it
24 went on.

25 Q We asked Dr. Binns as to whether you explained to

1 Dr. Binns as the Permanent Secretary what the reason was
2 that you were going against the recommendation of the
3 technical officers, as to whether you ever disclosed your
4 reasons for doing so, and he said no, that you did not
5 share your reasons for disagreeing with the technical
6 officers' recommendations and going with Landmark Lisgar.

7 Do you accept that?

8 A If he says that, that's his interpretation. And
9 it's been ten years. But if you look at practices, this
10 wasn't the first time that we had assisted, my word, in
11 ensuring that the philosophy of the government was carried out
12 in assisting those who come to the table who previously
13 had been denied getting opportunities.

14 This was the biggest project but there were
15 other projects that had taken place while I was a Minister
16 that would say, here's the list of persons who have bidden,
17 here's the guys who are normally bidding for this contract,
18 here's an opportunity for someone else who is first time at
19 the table. Let's see what we can do with this individual.

20 Q But in this case here, Mr. Lister, this company
21 has, the Landmark Construction Company had carried out
22 Government work in the recent past. They were given the
23 Hamilton Bus Terminal and the Sessions House parking area.
24 I mean, the company had recently received work from
25 Government. This wasn't a company which had never

1 received --

2 A I acknowledge that. It wasn't a company that
3 necessarily had big projects from Government though. And this
4 was a smaller company that had --

5 (Multiple voices -- inaudible discussion.)

6 A This was a smaller company that done work for
7 Government and is now seeking to go up to the next level and
8 gone overseas and got a partner that can take them to the next level.

9 Q On the contrary, Apex Construction hadn't received any
10 work from Government.

11 A I think in another former company they had. I
12 think you listed it there in your reading, one of the --

13 Q The related companies?

14 A Related companies, correct.

15 Q Okay. So okay. Can we just go back to the
16 statement by Dr. Binns. If you go back to Paragraph 23,
17 and after the sentence, He, that is you, indicated that the
18 recommendation for Apex as it was written could not
19 proceed, I advised him that it would not be wise to put
20 Cabinet in a position to select a recommendation other than
21 given by the technical officers without a clear rationale
22 for doing so.

23 The Minister agreed and suggested that we should
24 not submit a Contract Award Recommendation but instead
25 submit a Cabinet paper that presented a balance report

1 between the total cost submitted by each contractor and
2 invite the Cabinet to decide which company they preferred.

3 I advised the Minister that this might not
4 reflect well on him with his colleagues as they were
5 expecting to bring a recommendation to them. He said that
6 he understood this but preferred to invite them to select.

7 Do you recall that, Mr. Lister?

8 A I cannot recall that in those exact term. I know the
9 PS and I had a great deal of conversation regarding this
10 and how the Cabinet papers should proceed.

11 Q Yes.

12 A Whether those specific points were agreed,
13 disagreed is part of it, I can't remember that.

14 Q Fair enough. What he's saying is that you were
15 saying that we should not -- when I say we -- you should
16 not present the recommendation that the technical officers
17 had given you as the recommendation which is generally how
18 it's done, but instead there should be a Cabinet paper
19 which the PS should prepare which would say these are the
20 bids we've received, this is the information, you decide.

21 Do you remember that or not?

22 A I can't remember in that context. What I can
23 remember is that we had a difference of view on that final
24 paper.

25 Q Okay.

1 A Part of my view was to present both rather than
2 just a single.

3 Q Yes. And do you recall that your Permanent
4 Secretary was basically cautioning you against that?

5 A He had concern.

6 Q Yes, he had concern. And we can look at the
7 Cabinet Memorandum which was given -- that would be in my
8 binder, I have it at 10-32, but you may have it in the
9 smaller binder. Is it in there?

10 A Which conclusion number?

11 Q This is conclusion number... In fact, nothing
12 was decided. This is Cabinet Memorandum for decision at page,
13 should be at page (6?) of your binder.

14 A Okay.

15 Q You see that?

16 A Uh-huh.

17 Q So instead of giving the recommendation of the
18 technical officers, what the Cabinet received were these
19 two pages which set out the details of the bids.

20 And just confirm, if you don't know, please say
21 so, Mr. Lister, it is right, isn't it, that the five-page
22 recommendation which was prepared by the technical officers
23 was not given with this Cabinet Memorandum? It doesn't say
24 that it's included.

25 It would be odd if it was because the reason for

1 presenting that was because you did not want to give the
2 recommendation to the Cabinet?

3 A I'm not going to confirm or deny because I just
4 can't remember.

5 Q So if you look at Paragraph 10, the memorandum
6 says, Both bidders have submitted bids that are comparable
7 to the Ministry estimate, differing from each other
8 by 1.4 percent approximately.

9 Whilst Apex Construction Management Limited has
10 undertaken major projects in Bermuda, Landmark Lisgar
11 Construction Company brings the experience of their
12 Canadian partner, Lisgar Construction Company. Based on the
13 total bid, both companies are evenly balanced.

14 Accordingly, the Cabinet is invited to approve
15 either Apex Construction Limited or Landmark Lisgar
16 Construction who is also the contractor for the new
17 Magistrate Hamilton Police Station Project at the tender
18 price submitted in the bid.

19 And conclusion, the Cabinet memorandum neglected
20 to include... This is written by, I don't know who has
21 written this, the October 23, 2007 Cabinet Memorandum
22 neglected to include the concern raised by the chief
23 Architect.

24 Do you know what this is referring to?

25 A I have no clue what that refers to because it's

1 someone's individual handwriting that's placed there. It's
2 not typed or included as part of the document as was
3 submitted.

4 Q And this is right, is it, that the Cabinet, and
5 that was presented to the Cabinet on the 23rd of October,
6 and you'll see that on page 10-34. And that for decision.

7 And if you look at page 35, in the second full
8 paragraph, The Minister noted - that's you, Mr. Lister, I
9 think?

10 A Yes.

11 Q "The Minister noted that the principal of Apex
12 Construction Management, Mr. Gilbert Lopes, had provided a
13 complete cost breakdown by elements without additional
14 qualifying statements or assumptions. He noted that Apex
15 Construction Management Limited had recently completed the
16 mix-use retail and residential complex located at number 6 and
17 10, Dundonald Street."

18 And then, next paragraph, "The Minister informed
19 Cabinet that the principals of Landmark Lisgar Construction
20 which was a joint venture between local and Canadian
21 companies were Bryan McLeod," I think it should be "Lee
22 Matvey, Gino Bifulchi and John Bifulchi."

23 Just help me there, Mr. Lister, you were
24 disclosing the principals of Landmark Lisgar Construction
25 here. That is standard practice, is it not?

1 A Well, if you look at both paragraphs, we disclosed
2 who the persons were involved with either company. First
3 paragraph names Mr. Lopes, the second paragraph names the
4 principal in the second company.

5 Q I agree with you. No, no, I agree with you.

6 And I'm just asking you to confirm that it is
7 standard practice when contracts are submitted to the
8 Cabinet for approval, that the names of the principals are
9 set out?

10 A I'm pausing because I can't remember the answer to that,
11 meaning, you asked if it's standard practice, it's been a long
12 time since I've sat in Cabinet. So I can't confirm whether that
13 was standard practice or not.

14 Q Let me put it this way. In your long stint of 11
15 months as the Minister, maybe you can't remember that far back,
16 do you not recall that every time there was a proposal made to
17 the Cabinet for decision in relation to a particular
18 construction project, the names of the companies were set
19 out, more importantly the principals behind their companies
20 were always set out?

21 A I can't recall.

22 Q Fair enough. That's fine. But here they are set
23 out.

24 And then if you look at the next paragraph, "The
25 Minister noted that both bidders had submitted bids which

1 were comparative to the Ministry's estimate differing one
2 being 1.4 percent."

3 And the next sentence, "It was the Minister's
4 view that both companies were evenly balanced and he asked
5 Cabinet to either approve Apex Construction Limited or
6 Landmark Lisgar Construction Limited as the construction
7 management for the project."

8 So your view was that both companies could do the
9 projects?

10 A Correct.

11 Q And your view was that they were evenly balanced?

12 A Based on what was shared with me, yes.

13 Q But this was at odds with the recommendation made
14 by Permanent Secretary Binns and the technical officers?

15 A We had disagreements.

16 Q Yes.

17 A I wouldn't say we're necessarily odd. We had
18 disagreements over many different things that came up in the Ministry.

19 Q Did you -- this Minute does not appear to show
20 that.

21 But it's right, isn't it, that you did not
22 disclose to Cabinet that the technical officers had taken a
23 different view?

24 A I can't speak to that because I just can't
25 recall.

1 Q And then in response to the question from the
2 colleagues, the Minister confirmed that he was recommending
3 Landmark Lisgar should be awarded the contract.

4 So you said that both were evenly balanced but
5 your recommendation was Landmark Lisgar, yes?

6 And I see the Minister of Labour, that at the time
7 was Mr. Burgess, wasn't it, Mr. Lister, next paragraph, when
8 you were the Minister of Public Works?

9 A Yes, it would have been.

10 Q So, both Minister of Labour, that's Mr. Derrick
11 Burgess, and the Minister of Education indicated their
12 support for Landmark Lisgar Construction Company, yes?

13 A Yep.

14 Q So in 2007, Mr. Derrick Burgess was supporting at
15 the Cabinet level the award to Landmark Lisgar, yes?

16 A Based on the conclusion of this Cabinet meeting,
17 correct.

18 Q Yes. And if you look at the penultimate paragraph,
19 the Minister of Public Works, Safety and Housing indicated
20 that due to the contents of Paragraph 9 of the
21 memorandum - that's your memorandum at page 33 - at which
22 indicated that the bids submitted by Landmark Lisgar
23 Construction had not been completed. He was not prepared
24 to support the recommendations contained in the memorandum
25 in its present form.

1 Do you recall that?

2 A That's what's recorded here.

3 Q Yes. And the Premier was of the view that the
4 memorandum should contain a clear rationale for the
5 recommended company which was based on an assessment of the
6 bid, and should have included recommendation from the
7 Minister for Cabinet consideration.

8 And the Cabinet agreed that the consideration of
9 the memorandum should be carried over until it was amended
10 to reflect a clear rationale for the recommended company
11 and a clear recommendation from the Minister.

12 So the Cabinet, in effect, refused to make a
13 decision on that memorandum at that time. They deferred it?

14 A They did.

15 Q Yes. And let's just go back to the witness
16 statement of Dr. Binns. We can pick it up at Paragraph 25.

17 He says, "On 26th October 2007, the Cabinet
18 papers presented to the Cabinet on 23rd of October were
19 sent back to the Ministry with a request that the Minister
20 return with a clear recommendation and a rationale for that
21 recommendation. I advised the Minister that his best
22 course of action was to submit a Contract Award
23 Recommendation that presented the result of objective
24 evaluation."

25 Now, so that we get it clear, what PS Dr. Binns

1 is saying is that he advised you that the best course in
2 those circumstances was to present to the Cabinet the
3 contract award evaluation of the 23 October 2007 which
4 recommended that the contract be awarded to Apex.

5 Do you remember that?

6 A Not at all.

7 Q Do you not recall the recommend -- this statement
8 by Dr. Binns at this stage?

9 A No.

10 Q Okay, fair enough. And he further says, "I
11 further advised that the objective assessment must reveal
12 that Apex would be recommended, be the recommended
13 firm because Landmark Lisgar had not submitted sufficient
14 detail to support their total bid and had attached a number
15 of assumptions and qualifiers to the total bid.

16 I therefore advised the Minister that there was a
17 risk associated with Landmark Lisgar bid because we could
18 not be certain that the total bid price submitted addressed
19 all the issues we had asked them to identify.
20 Consequently, the Landmark Lisgar bid could not be
21 considered complete."

22 Now this is Dr. Binns' sworn evidence which he
23 confirmed when he gave evidence a week before last, and he
24 says this is what he advised you.

25 Do you recall that?

1 A Not at all.

2 Q But you don't dispute if Dr. Binns says that's
3 what he advised you that he did?

4 A I would put it in these terms. I know that Dr. Binns
5 was a PS. We had discussions back and forth about the way to
6 proceed with this. My view, as I've expressed to you
7 earlier, we've got to give an opportunity where opportunity
8 had been denied, was always a key to how the situations
9 came to the Minister to assess whether we go A or B in that
10 regard.

11 As I said to you before, this was not the first
12 time that the Minister had chosen based on that measuring
13 stick, wasn't the first time. So when you implied earlier
14 that the Minister could not speak to my rationale -- the PS
15 could not speak to my rationale -- I'm concerned by that
16 because it wasn't the first time I had used that rationale,
17 and he was clear on that.

18 So, all this conversation here seems to avoid, or
19 it's void, I should say, of the rationale that had been
20 expressed on previous occasions as well as this occasion.

21 Q Well, we -- I mean, I want to be absolutely clear
22 with you -- we asked him the specific direct question as to
23 whether you ever shared your own assessment as to why the
24 contract should be given to Landmark Lisgar, and he was
25 clear in his evidence that, no, you did not.

1 A Well, we have a stern strong disagreement on
2 that. That's how I'll put that.

3 Q And I mean, one of the main reasons why he said
4 that he could not recommend Landmark Lisgar, and he says it
5 here, it's set out in the technical assessment, the
6 evaluation was that the bid as submitted by Landmark Lisgar
7 was incomplete.

8 Do you recall that?

9 A No. As I said to you, I was under the
10 interpretation that there were some issues - and I'll put
11 into those terms and my view was, again, using the measuring
12 stick that I had, can we work through those issues, can the
13 technicals, can the PS, can the Ministry work through those
14 issues. Okay? That was the gist of the conversation.

15 Q But it is right if you go back to the Cabinet
16 discussion at 10-35, one of the reasons the Cabinet did not
17 go along with your recommendation was because the Minister of
18 Public Works and Housing said that the memorandum which you
19 had, which had been prepared indicated that the bid as
20 submitted by Landmark Lisgar had not been complete and he
21 was not prepared to support the recommendation.

22 Do you remember we saw that paragraph?

23 A When we sit around Cabinet table making
24 decisions, we never have all the Cabinet Ministers agreeing
25 on anything, but it's majority. People express their view.

1 A Minister expressed his concern.

2 Q Fully accept that. The point I'm making here is
3 and I'm asking... You said you can't remember whether you were
4 aware of whether the bid was complete or not. All I'm
5 saying is that one of the reasons why the Cabinet didn't
6 actually approve this particular company on the 23rd of October
7 2007 was because the Minister of Public Works said, how can we
8 approve it because the bid is not complete.

9 Do you remember that?

10 A I take it for being in the note.

11 Q Well, it's in the Minutes. But indeed, which the
12 memorandum you had presented to the Cabinet -- Well anyway,
13 I think this is sufficient that was one of the rationales.

14 So, let's just go back to the statement by
15 Dr. Binns. Go back to Paragraph 25, and we can pick it up
16 at the last sentence on page 6, Paragraph 25.

17 He says, "In addition, the bid by Apex did not
18 have the same degree of assumption and qualifiers as that
19 of Landmark Lisgar bid. As a result, the Apex bid had to
20 be considered superior and less risky.

21 Now, you may have disagreed with that, but do you
22 recall Dr. Binns expressing these views to you?

23 A I cannot recall the context as defined here. I
24 can recall there were concerns. As I've said to you, we've
25 talked, we discussed those concerns through. In understanding

1 the direction that I was seeking, part of why the
2 memorandum was originally set because I believe it was
3 important to make sure everything was put on the table for
4 Cabinet in that regard that the memo contained. But again,
5 the measuring stick was one that we discussed many times
6 about how can we make this fit if it has the ability to fit.

7 Q And Paragraph 26, "I advised the Minister that if
8 he did not recommend Apex, he could be challenged as to why
9 he recommended the riskier of the two bids. I further
10 advised him that the allegation might then be made that he
11 had an interest in seeing the riskier bid awarded the
12 contract. I reminded the Minister that the entire file
13 would be available to the Auditor General who might
14 legitimately ask these questions and he must therefore be
15 prepared to answer them.

16 Do you recall such a discussion?

17 A That discussion never took place.

18 Q Never took place?

19 A Never took place. I have never been questioned
20 of my interest in this project at any level.

21 Q No, no.

22 A At any level. No, you implied that I might have
23 had an interest.

24 Q No, no, no. Please, it's very important, Mr. Lister,
25 you understand what's being said. This is your Permanent

1 Secretary who's your advisor. And he says that he advised
2 you that if you did not recommend Apex, you could be
3 challenged as to why you're recommending the riskier of the
4 two bids. And more importantly, he says he also advised
5 you that the allegations **might** be made, not that he was
6 making them, but that the allegations **might** be made that
7 you had an interest in seeing the riskier bid awarded the
8 contract. And he was telling you that it's a risky
9 proposition because the entire file would be available to
10 the Auditor General who might legitimately ask these
11 questions and then you must be prepared to answer them.

12 He's just giving you a health warning, that if
13 you do that, these are the issues which will be presented
14 to you.

15 A Nowhere at no time can I recall ever being --
16 I'm looking for the right word -- cautioned. That's it.

17 Q Yes.

18 A That it could imply that I had an interest in
19 this project. That was never put to me at any time. Never
20 was I informed or advised of this piece of the Auditor
21 General. That conversation, I do not recall. I can
22 clearly state to that my interest was never put in question
23 in regard to any concern that was [inaudible 10:59:52].

24 Q Yes. I mean, perfectly understandable. I just
25 want to make sure we're not speaking at cross purposes.

1 I think all the Permanent Secretary is saying to
2 you at that stage is that, Minister, be careful if you go
3 with the bid which is not recommended by the technical
4 officers, people **might** say, people **might** say that you are
5 recommending the bid not recommended by the technical
6 officers because you might have an interest in it.

7 Do you understand that?

8 A I said to you it's ten years ago. I don't have
9 the privilege of being able to go into files. PS
10 apparently seems to have that access. I don't have that access.
11 As a former Minister, I don't have access particularly as a
12 former Minister in a different Government. I would never
13 have access to that file.

14 However, if at any time I was being cautioned
15 about the implication that someone may read into this that
16 Dennis Lister had an interest in this, that would stay with me.
17 I would have remembered that. But I don't and never did.
18 So I don't remember this conversation.

19 Q Okay. So let's have a look at Paragraph 27.

20 "On 29 October 2007, the Minister indicated to me
21 that a revised Cabinet paper was due the following day. I
22 reiterated my advice that his best course of action would
23 be to submit a Contract Award Recommendation in support of
24 Apex. I further indicated that I had prepared a Contract
25 Award Recommendation to this end, but was awaiting, as you

1 clarified, comment from the Auditor's Section. The Minister
2 indicated that he would be making a recommendation for
3 Landmark Lisgar.

4 I think you recall that, do you or not?

5 A I don't recall.

6 Q Fair enough. Then the following day the
7 Minister informed me that he had decided to recommend
8 Landmark Lisgar and indicated changes he wished to have
9 made to the Cabinet paper. He indicated that he would
10 proceed by a Cabinet paper rather than a Contract Award
11 Recommendation.

12 So you decided that you did not want the Contract
13 Award Recommendation made by the technical officers to be
14 presented to the Cabinet, but you would instead present a
15 Cabinet paper, yes?

16 A I can't remember. Here's my concern at this
17 point. When you asked me to submit, I was given a binder
18 of this short 40 pages which I perused to come here today.
19 I had never seen any of this documentation here that's
20 before me right now.

21 Q You mean in the witness statement?

22 A I have never seen this documentation.

23 Q It's actually on the website.

24 A I haven't been following this.

25 Q Okay.

1 A I haven't followed it. I'm going by what you
2 sent me; what the Chairman, Commission, sent me a binder that
3 is this thin. You see what you got in front of me here,
4 two whole binders that are three or four times what was
5 sent to me.

6 My preparation for today was based on what you
7 sent to me, what was sent to me by the Commission. And I
8 expressed that to the Commission as the Chairman opened up,
9 my concern about not having proper legal representation if
10 it was going to turn out something like this.

11 I have no preparation for all this because I haven't
12 seen any of those. It seems that as detailed as this has
13 been compiled by the PS, as if he had some ongoing file
14 that he kept on all of this. I've never been privy to any of
15 this. I've never been privy to any of that.

16 Q In relation to this issue, whilst there are a lot
17 of big binders in front of you, I'm only referring to two
18 pages out of the witness statement which was made by --

19 A Which I had not been privy had to until I walked
20 into this room.

21 Q Let me finish. The witness statement of
22 Dr. Binns deals with a number of issues, number of
23 contracts, including the contract which we are concerned
24 with now, the Dame Lois Browne Building. And as I say, the
25 relevant part of that is only two pages, that's all.

1 Just as you've given us the witness statement
2 this morning, the witness statements which other people
3 have given us over a period of time, and once they have
4 actually given the evidence, we have put their witness
5 statements on the website.

6 So, in relation to the -- It's important you
7 understand --

8 A As an individual sitting here who was called
9 before this Commission by the Commission, was a part
10 of the instruction that I should be following what's on the
11 website? I would have thought that whatever was going to be
12 in reference to my role would have been contained in the binder
13 before me that was sent to me.

14 Q Absolutely. But it's very important you
15 understand, Mr. Lister, that in relation to the Lois Browne
16 Building, right, the documentation which you have are the
17 documentation which was sent to Dr. Binns. He wasn't sent
18 any other additional documents. Okay?

19 A I'm accepting that. But I'm saying that all the
20 information contained in here which makes a strong
21 reference to myself --

22 Q He's doing this from his memory of, in relation to
23 this contract, how was it that the technical officers made
24 a recommendation which wasn't taken to the Cabinet but
25 another company was recommended. And he's recounting this

1 and he's recounting it in fairly strong terms in the sense
2 that --

3 A I agree that he's recalling it in very strong
4 terms which is a concern to me as to what it's being
5 directed to and not having been privy to that.

6 Q No. Okay. Let's just finish this then shall we? If
7 you look at Paragraph 28. As I said.. Well, I'd read the first
8 sentence that you wanted a Cabinet paper, not the technical
9 officers' recommendation.

10 And then he says in the third sentence, in that
11 paragraph, "I was satisfied that I had provided the
12 Minister with sound and impartial advice, that he had taken
13 my advice into consideration and that he had made a
14 decision which was his prerogative of a Government
15 Minister.

16 I then assisted the Minister to give effect to
17 his decision by amending the Cabinet paper in accordance
18 with his directions."

19 And let's have a look at the cabinet paper which
20 was then pretended, which you will see at 10-37.

21 CHAIRMAN EVANS: This was the Cabinet on the
22 following week, October 30, '07?

23 MR. HARGUN: Yes. This is the Cabinet meeting
24 held on October 30, 2007 for decision.

25 Q And introducing this revised memorandum, which

1 had been carried over from the last meeting to enable the
2 submission to be amended to reflect a clearer rationale for
3 the recommended company and a clear recommendation from the
4 Minister, the Minister of Works and Engineering once again
5 informed his colleagues that its purpose was to seek
6 Cabinet approval for the award of the contract for the
7 construction manager for the new Magistrates Court,
8 Hamilton Police Station.

9 The minister noted that the construction manager
10 would also be responsible for the management of the
11 construction for the period. He stated the Minister's
12 estimate was 73.9 million and then the construction costs
13 bid by Landmark Lisgar and Apex as set out.

14 The Minister stated that both bidders had
15 submitted bids that were comparable to the Ministry
16 estimate. And then he stated that while Apex Construction
17 Management had undertaken major projects in Bermuda,
18 Landmark Lisgar brought the experience of their Canadian
19 partner.

20 He noted that based on the total bid, both company
21 was evenly balanced. He stated that he was satisfied that
22 Landmark Lisgar offered the best option for the Government
23 and recommended them as the successful bidder.

24 Now, just to confirm there, Mr. Lister, you did
25 not present to them the evaluation which sets out the

1 strengths and weaknesses of each of the candidates?

2 A I can't recall, but I want to refer back to the
3 earlier Cabinet papers that basically gave more details
4 than that last one. The last one was basically directed
5 and based on the previous week to just come back with what
6 my recommendation was going to be. End of story.

7 Q I mean, the last one I think we said that it
8 didn't appear from the last one that you presented to the
9 Cabinet the five-page evaluation recommendation which set
10 out why the technical officers were not recommending
11 Landmark Lisgar and why they were recommending Apex.

12 We didn't... It wasn't presented to the Cabinet
13 last time. It does not appear that it was shown to the
14 Cabinet at this meeting on the 30th of October.

15 A It doesn't appear to.

16 Q No. And you say it was the **best** option, that's
17 how whoever has recorded it has said the **best** option. And
18 they were comparable bids. It doesn't record why you told
19 the Cabinet that this was the **best** option.

20 A Ministers don't write the actual wording on these
21 documents, only... That was the term that was written in? As I
22 said Minister doesn't necessarily draft the words of these
23 documents. I'll just support what's on the document.

24 Q Do you recall, I mean it doesn't appear, but tell
25 us, I mean, do you recall whether you said to the Cabinet

1 that, you know, you should know that the recommendation of
2 the technical officers of the Department is that it should not
3 be given to Landmark Lisgar --

4 A I can't recall it. We're talking ten years ago.
5 I can't recall.

6 Q Okay. And we were... If you look at the next page,
7 page 39, you will see that there is an email from Lawrence
8 Brady, the Chief Architect to Dr. Binns.

9 And if you look under Contractual Discussion with
10 Landmark Lisgar, the Chief Architect says, "For
11 clarification and the record, I would like to reaffirm that
12 the analysis carried out on the three submissions received
13 on September 14th by the technical officers in this
14 department came to a different conclusion, to that, the
15 decision to enter into the contractual discussion with
16 Landmark Lisgar."

17 Do you see that?

18 A Yes.

19 Q And then, there's a response from the Permanent
20 Secretary, Dr. Binns, to the Chief Architect.

21 He says, "I am keenly aware of the outcome of the
22 analysis of the technical officers. However, I'm also
23 aware that the Minister completed **his own** analysis and came
24 to a different position when he then recommended to his
25 colleagues and obtained their approval for the same."

1 I asked Dr. Binns as to what was your different
2 analysis, what was your analysis. And his answer was that
3 he was unaware of it.

4 And the implication indeed in expressed terms, he
5 said that you did not share the reasons why you came to
6 select Landmark Lisgar in favor of, other than, as opposed
7 to Apex, that that rationale you did not share with him.

8 A I strongly disagree.

9 Q Fair enough.

10 A Meaning that I've said to you all morning. There
11 is a philosophy that was being applied here as to a policy
12 of giving opportunity. PS was strongly aware of my interest
13 and seen when and wherever it could be applied, it would be
14 applied.

15 CHAIRMAN EVANS: Can I just be clear about that?

16 What was put to you, was that you did your own
17 analysis rather than --

18 THE WITNESS: No, I didn't do an analysis. I
19 did the -- I didn't do an analysis. I'm glad to clear that.
20 I didn't do an analysis. Based on the conversation, as I've was
21 said this morning; based on what presented to me, based on, here's
22 the two companies that made it to this point - in that they started
23 from roughly ten submissions of interest, we're now down to the final two.

24 CHAIRMAN EVANS: That's how I understood your
25 evidence. You reached the point where the Cabinet wanted a

1 recommendation. You went back and recommended Landmark
2 Lisgar.

3 THE WITNESS: Correct.

4 CHAIRMAN EVANS: Now Dr. Binns says that he
5 didn't do it - or is it Mr. Brady - they didn't do any
6 further work in the department. Dr. Binns said that you
7 had made your own analysis of the situation.

8 THE WITNESS: The word analysis is misleading and
9 I'm glad you pointed that out.

10 CHAIRMAN EVANS: Just let me finish. I think what you're
11 saying is, you took your decision then on the policy ground...

12 A Correct.

13 CHAIRMAN EVANS: -- that you've mentioned to us.

14 THE WITNESS: Correct.

15 CHAIRMAN EVANS: You didn't do any analysis.

16 THE WITNESS: No analysis, no.

17 **BY MR. HARGUN:**

18 Q As I understand your evidence, you say that one
19 of the primary reasons for picking Landmark Lisgar was to
20 encourage small disadvantaged companies, yes?

21 A In basic terms, correct.

22 Q Yes, sir. It's right, isn't it, that nowhere in
23 the documentation, either in the memorandum presented to
24 the Cabinet or in Government Minutes or in any
25 communications with the Permanent Secretary, there is the

1 explanation that Landmark Lisgar is being recommended
2 because of the Government policy to encourage small
3 disadvantaged companies?

4 A Nowhere in -- Repeat your question.

5 Q In the documentation which exists which have been
6 provided to you consisting of communication within the
7 Department, consisting of memoranda being presented to the
8 Cabinet, consisting of Minutes of the meetings of the
9 Cabinet, there is no suggestion in that material, in that
10 documentation, that the decision to award the contract to
11 Landmark Lisgar is due to the fact that it is the
12 Government's policy to advance small disadvantaged
13 companies?

14 A It may not be in the writing of the Cabinet
15 paper, I accept that. To acknowledge that it's no memo or
16 anything of that nature in any paperwork, let me explain
17 something. PS sat there as my right-hand person. We
18 discussed constantly daily different issues that came to
19 the Ministry.

20 I did not create a paper trail of those
21 conversations, as seems to be what the Minister has done by
22 detailing all of what he's put back - the PS has detailed
23 back. I as the Minister had no reason to paper trail every
24 and each conversation I had with the PS because I worked
25 with the PS in trust and confidence.

1 Q Sure.

2 A Which concerns me about the detail of all of this
3 that's flowing back. I had no reason to think that I
4 should be detailing work or documentation, documentation of
5 the conversations that existed between the PS and I. So
6 no, there's no memo exchange following this conversation and
7 this tone of conversation from my behalf, on my behalf, no.
8 I didn't see a need to have to document what I am discussing
9 with my Permanent Secretary on that scale.

10 Q It's the wording. I mean, just look back at
11 10-37, last reference to that Minute. This is when the
12 decision was made. This is on the 30th of October.

13 And you say after the figures are set out, you
14 say, in one sentence you say, He, that is you, Mr. Lister,
15 noted that based on the total bid, both companies were
16 evenly balanced and that's what you represented to the
17 Cabinet.

18 And then apparently you said this, this is how
19 it's recorded. The Minister stated that he was satisfied
20 that Landmark Lisgar offered the best option for the
21 Government, and recommended them as the successful bidder.
22 You say that they are the best option. It doesn't appear
23 that you said I am selecting them, they're evenly balanced
24 but I'm selecting Landmark Lisgar because I want to advance
25 the Government's policy of promoting small disadvantaged

1 companies.

2 A I accept earlier what's written there. What I
3 said to you earlier was also that the Minister doesn't pen
4 the Cabinet papers. Cabinet papers are normally penned by the
5 Permanent Secretary or someone else. I don't know. And if
6 it's in the right gist of where we are moving, it's normally
7 moved forward. If sitting here now, maybe it's an
8 advice that in the future if I have that opportunity, maybe
9 I should draft my own wording so that I can defend my own
10 wording maybe.

11 But I can't defend the wording there in that regard
12 because it covered the gist of where we were moving. So
13 I'm not going to sit here and go back and forth with you
14 about every little word that was used in that regard. It's
15 just not acceptable to go back and forth. I'm not the one who
16 penned it and yes I agreed to go forward because it was moving
17 in the direction and the gist that we wanted to go in,
18 the Minister wanted to go in.

19 Q You left the Cabinet in November 2007, and
20 Mr. Burgess took over as the Minister of Public Works?

21 A We already agreed on that.

22 Q Yes. And you have remained a member of
23 Parliament?

24 A Correct.

25 Q Even though not in Cabinet.

1 And you know that about a year later, your successor
2 Minister was unhappy with the Canadian (partners). Yes?

3 A I know that -- put it this way. When I left the
4 Ministry, when I walked, I walked out clean. I didn't
5 fall, I didn't trap anything that's going on, so I can't
6 speak to any specifics that may have happened after I left.
7 So I'm not going to get into specifics.

8 I know that things changed and that's the best I
9 can describe.

10 Q Well, yeah. Let's just, I mean, I'll get your
11 reaction. If you look at the, what the, a year later, this
12 is in November 2008 and a Cabinet Minute - bearing in mind
13 that this company was recommended because of the expertise
14 of the Canadian partners.

15 A A year later your successor Minister is saying
16 this. And if you look at page 40, he is telling the
17 Cabinet, in the third paragraph; The Minister, this time
18 Mr. Burgess, also reported that it became increasingly
19 clear from all of the reports received that the Canadian
20 participants, Lisgar and LLC were not as proficient as he
21 had previously thought in the construction management of
22 the project of this size.

23 So that seemed to confirm the technical officers'
24 fear. He also confirmed that from an early stage technical
25 officers within Works and Engineering had identified the

1 scheduling personnel provided by Lisgar as less than
2 adequate in the performance of their tasks.

3 And as a result, the relations between senior
4 Lisgar representatives and both the architectural and
5 engineering staff within Works and Engineering and CSP
6 often resulted in time consuming and time/delay producing
7 difficulties, sometimes accompanied by acrimonious
8 exchanges, both personally and by email.

9 And I accept that this is after your time, but
10 that's happening about 12 months afterwards, yes?

11 A I can only go by what's in front, I can't refer
12 to it or confirm it.

13 Q And you will see in the next paragraph, if you
14 look at about the last full sentence, "As a result, he
15 noted that Landmark was poised to arrange for the takeover
16 from Lisgar of its minority shares in LLC, and that
17 subsequent to the drafting of the memorandum, Lisgar had
18 withdrawn from the project."

19 Do you see that? I mean you're familiar, you are
20 familiar that Lisgar withdrew from the project about a year
21 later?

22 A I know that there was changes.

23 Q Yeah. And Lisgar withdrew by selling their
24 shares, their interest to the company. In fact --

25 A I didn't know how the arrangement was done so I

1 can't speak to that.

2 Q So after that, the company was just left with
3 Mr. Matvey and Mr. McLeod, yes?

4 A I don't know.

5 Q Yes. And also, they had issues with the Canadian
6 architects, CSP, and they were also fired.

7 A I can only go by what's been presented and if that's
8 been presented, it's fine. But you're asking me to speak from
9 knowledge of it, I don't know my knowledge after I left in
10 2007.

11 Q Would you accept, and it is with the benefit of
12 hindsight, that the concerns which the technical officers
13 had in relation to the Landmark Lisgar partnership actually
14 came into being a year afterwards?

15 A I can't confirm or deny it. I have nothing to
16 base that on, just two paragraphs. I can't base it on that.

17 Q Well, there's a Minister saying that --

18 A You're asking me to speculate on something I have
19 no insight into.

20 Q Fair enough. Fair enough.

21 I'm reminded it's 11:30. If you have to take a break?

22 CHAIRMAN EVANS: We will take a ten-minute break
23 now, Mr. Lister, and what we can do is read your witness
24 statement during that ten minutes. Is there just the one
25 copy or --

1 THE WITNESS: There were two copies.

2 (Inaudible discussion.)

3 CHAIRMAN EVANS: This is what you gave us this
4 morning. There is just the one copy.

5 THE WITNESS: There were two copies.

6 CHAIRMAN EVANS: Oh, there are. Well, we can read
7 the one and Counsel can read the other, and let's make it
8 15 minutes so we've got time to do that. And we'll start
9 again at 20 to 12.

10 Will you be very careful during this break, don't
11 talk about your evidence or these matters to anybody.

12 **BY MR. HARGUN:**

13 Q Mr. Lister, we also sent you a second letter, you
14 remember, about the store building, the Maintenance and the
15 Store Building?

16 A If you read my witness bundle, witness statement,
17 I responded in there saying that I never received a second
18 bundle. I received a letter dated late September
19 saying they wanted to include in my submission a second
20 item under Tab 2. Again, began this meeting by saying
21 this was the only documentation I received as my witness
22 bundle. It contains 41 pages that are all listed under Tab
23 No. 1. There is no Tab No. 2. In fact, the letter that
24 you're referring to says that I should have evidence in my
25 witness bundle under Tab No. 2. There is no Tab No. 2.

1 Q There are only ten pages which are worth looking
2 at in relation to that.

3 A In relationship to?

4 Q Tab 2. The entire Tab 2 consists of 17 pages,
5 but the (quantity) of it is just irrelevant stuff. For
6 present purposes, if you want to look at, if you can look
7 at the first ten pages, cast your eye on them, right.

8 A Not at this time. Not at this time. I'm being
9 exposed to a lot of stuff since I've sat here in a last
10 hour and a half and I had not been privy to before I walked
11 in here. Now you want to throw something else and say, let's
12 go down this road too. That's not acceptable. That's not acceptable.

13 CHAIRMAN EVANS: Well, Mr. Lister, we'll leave it
14 on that basis. But Counsel has told you that the
15 documents you haven't seen before today as you've told us
16 are available.

17 MR. HARGUN: There are ten pages.

18 CHAIRMAN EVANS: You can look at them if you want
19 to.

20 THE WITNESS: No.

21 CHAIRMAN EVANS: And we'll see where we are after
22 the break. Right. 20 to 12.

23 **(Recess taken) (Recess ended)**

24 CHAIRMAN EVANS: Mr. Lister, we've read your
25 statement. Thank you very much. I think you've covered

1 most of that ground in the evidence you've given. Is that
2 a correct impression?

3 The other matter I was going to mention was this.
4 You said that you received the second letter from the
5 Commission which was asking you questions about I think it
6 was called Bundle 2, but you never got Bundle 2.

7 THE WITNESS: Never received Bundle 2.

8 CHAIRMAN EVANS: I don't think you told us that
9 you hadn't received Bundle 2, and I can't be sure that
10 there's any record that you were given Bundle 2. So we'll
11 accept from you that you didn't receive it.

12 However, we think the best course, Mr. Hargun, is
13 the following: Would you be prepared to respond in writing
14 with a further statement to the second request, to the
15 Bundle 2 request? If you will do that, we can read what you
16 say about it.

17 We're going to have a further session of evidence
18 at the end of November, and if it's necessary, and I'm not
19 saying it will be, you can come back at the end of November
20 to talk about Bundle 2.

21 How does that strike you?

22 THE WITNESS: What exactly was Bundle 2 in
23 reference to?

24 CHAIRMAN EVANS: It's the Maintenance and Stores
25 Building.

1 MR. HARGUN: A short point, Maintenance Stores
2 Building. Won't take you long.

3 THE WITNESS: That didn't take place under my
4 watch.

5 MR. HARGUN: I think it did.

6 CHAIRMAN EVANS: Maybe your answer will be a
7 short one. I should make a claim; the letter told you what
8 it was about, but you say you didn't receive the bundle.
9 We'll accept that and we'll say, you can have the bundle
10 today, if would be willing to make a short, presumably
11 short written statement to us so we can then decide whether
12 it might or might not be necessary to ask you to come back.
13 It would be either November the 28th or 29th or 30th,
14 thereabout.

15 Is that acceptable to you?

16 THE WITNESS: That's acceptable.

17 CHAIRMAN EVANS: And on that basis, Mr. Hargun, we
18 can leave the matter today.

19 **BY MR. HARGUN:**

20 Q Mr. Lister, just looking at the principals of
21 Landmark Lisgar and Apex Construction; Mr. Matvey, I
22 understand it, he's a white Bermudian, yes?

23 A If you say so.

24 Q Did you know that?

25 A If you say so. I don't know. I don't remember meeting him.

1 Q And Mr. McLeod gave evidence, he's also, as I
2 understand, a white Bermudian?

3 A Okay.

4 Q Mr. Gilbert Lopes, I think we know he's a white
5 Bermudian, yes?

6 Can you in your own word given the policy of the
7 Government as you articulated it, to assist disadvantaged
8 business people and companies, can you please explain in
9 your own words why you decided that Landmark Lisgar should
10 be given the contract and not Apex Construction?

11 A Basically as I said to you earlier, the
12 opportunity to when we saw that there was a small
13 organization that was attempting to use expertise from
14 overseas so it could grow itself is what brought it to
15 our attention.

16 As I said to you in earlier conversations along
17 this with the Minister - with the PS - I think I would identify
18 possibly three other companies or a total of three, I just
19 can't remember which, that fell in that Category. Three of
20 the smaller companies that had gone overseas to partner and
21 you may correct me whether it was three or not, but I think
22 it was at least three companies that had gone overseas and
23 partnered with outside entities so that they can now grow to
24 that level.

25 Q The Commissioners may have questions in relation

1 to that. Let's just look at a slightly different aspect.

2 Presumably one of issues you as Minister would be
3 concerned with, particularly a project of this size would
4 be the financial condition of the company, yes?

5 A I would think that I want to know they were sound, yes.

6 Q I mean, what was your understanding of the
7 financial condition of the Bermuda company, Landmark?

8 A Based on, again conversations back and forth with
9 the PS that I had no documentation for, is that they were
10 strong - the strength of the company was strong enough to
11 deliver, my words.

12 Q We had heard evidence from Mr. Matvey last week
13 He came and he sat in your chair. And he --

14 A Not my chair, not my chair.

15 Q It's your chair for the time being.

16 A I'm occupying it but it's not my chair.

17 Q A char which you're occupying now, he was
18 occupying the same chair last week. And he told us under
19 oath that his company didn't have the financial resources
20 to do a project like this unless they could partner with
21 somebody from outside.

22 Was that your understanding?

23 A That was part of the purpose for them going
24 overseas. As we looked to see, and when I made reference to
25 the fact that they would go overseas or an individual

1 company, business went overseas to partner. Part of what was
2 missing was the expertise, the equipment, the finances
3 and know how. When you partner I'd expect their partner
4 would bring those things to the table.

5 Q And he told the Commission that after Lisgar
6 parted company a year afterwards, they were left in a
7 precarious financial position.

8 A He said it, he said it. I can't speak to it.
9 That was after my time.

10 Q Yes. And he was giving evidence that he needed
11 other financial backers, and he gave evidence that among
12 others, that the financial backers were one Winter Burgess
13 and Vincent Hollinsid. And for present purposes, you don't
14 have to concern yourself with that. He said that they were
15 not shareholders in the company, but Winter Burgess
16 received 22 percent profit from the company. And Vincent
17 Hollinsid received 20 percent profit in the company; plus, in
18 the case of Winter Burgess, 11,000 a month; and the case of
19 Vincent Burgess, \$6,000 a month. That was the arrangement.

20 Can you tell the Commission, when did you first
21 come to learn of this arrangement?

22 A Those details as you're sharing with me, details
23 that are being exposed to me now. I would have not known
24 the makeup of the company as far as shares, who got paid, how
25 they got paid, no knowledge.

1 Q And when... So --

2 A Other than what was in the newspaper, let me put
3 that in parenthesis.

4 Q These details were actually in the newspaper?

5 A They were in the newspaper, so let me stand
6 corrected in that regard. They were in the newspaper.

7 Q So your evidence is the first time you knew
8 Winter Burgess was receiving 22 percent was when you read
9 it in the newspaper?

10 A Correct.

11 Q And Vincent Hollinsid was receiving 20 percent
12 was when you read it in the newspaper?

13 A Correct.

14 Q Let me just -- I don't know whether you've seen this
15 document or not, but if not, it's just one sentence in that
16 document I want to show you. It's a Royal Gazette article.
17 If you look at 10-57?

18 A Ten... Mine only goes up to 41. I've got to go to
19 yours for 10-57.

20 Q Okay. You see this is an article, it's actually
21 in January 2009. If you look at just, not the last two
22 sentence/lines, but the paragraph before that.

23 "Mr. Burgess confirmed to us that two of the
24 principals of LLC are Winter Burgess and Edmond Matvey.
25 Mr. Winters was at Proactive when it was building the new

1 Berkeley Institute. It was subsequently taken off the job.
2 But Mr. Burgess declined to comment on this."

3 Do you recall becoming aware that Mr. Winter
4 Burgess was one of the principals around January 2009?

5 A On January 2009, I can't refer to that. As I
6 said, I was long out of Cabinet by then and that's just
7 an article that appeared in the paper. I can't confirm.

8 MR. HARGUN: Mr. Chairman, I don't have any
9 further questions.

10 CHAIRMAN EVANS: Thank you.

11 (Inaudible discussion.)

12 **BY MR. BARRITT:**

13 Q Mr Lister, if I could, good morning.

14 A Morning.

15 Q One thing that I'm trying to understand, we, on
16 the Commissioner are, why in the first instance when you went
17 to Cabinet did you not go with the recommendation and just
18 a paper asking Cabinet to, in effect, make a decision?

19 A Why did I not go with --

20 Q Yeah. Go to Cabinet and say, The Ministry or I'm
21 recommending that the contract be awarded to this company;
22 but instead went basically with a paper asking Cabinet to
23 make the decision?

24 A I think part of it was based on the fact that the
25 PS had concerns and I was trying to be accommodating

1 really. That's why you saw it drafted as it was. I could
2 have as the Minister said, No, this is the direction we're
3 going, we're going to write it that way from the very first
4 time. And maybe we wouldn't be here having this conversation
5 over that now but I was being accommodating to the concerns
6 that the PS was expressing, saying let's put it on the table,
7 draft a paper with both indications in there.

8 Q Were you surprised when Cabinet said
9 to you, No, no, no, no, go back and come to us with the
10 recommendation? I mean, that seems odd, again looking back
11 and looking at it from the outside, it seems odd.

12 A I weren't necessarily surprised. You know,
13 Cabinet had -- I've seen Cabinet do both in that regard.
14 I've seen them accept issues; I've seen them go back and
15 say no, we want something direct. So I've seen it happen
16 on both ends.

17 Q With respect to your...

18 A Well, not respect to this one but I've seen it with respect to other
Cabinet matters.

19 Q No, no, no, but respect to your portfolios in Works and
20 Engineering?

21 A Not necessarily in my portfolio but on other matters that came
22 before them. (Multiple voices.)

23 Q During the time when you were there?

24 A Yes.

25 Q So that wasn't unusual?

1 A Not necessarily.

2 Q As far as you're concerned.

3 The other thing, and again, looking from the
4 outside as we are, and you know, and there's some distance
5 here in terms of time.

6 I think what Mr. Hargun was asking you and it's
7 one I'm going to ask as well, is that I understood the
8 Progressive Labor Party mandate, its philosophy back then, and
9 I understood and I understood from evidence that you and
10 others have given, that it was driving a lot of what the
11 Progressive Labour Party was doing and trying to do.

12 And again, what strikes as I think is odd is that
13 it's not recorded anywhere in any of the Cabinet memoranda
14 or Minutes that this is the overriding - overriding may be
15 too strong a word - but the underlying philosophy.

16 As you know, and I would have thought, that would
17 have been pretty well understood, not just by people around
18 the table but those who were drafting Minutes?

19 A I can't speak to what was drafted in that regard
20 and then not being there, but around Cabinet's table it was
21 part of the understanding that we were providing opportunity
22 when opportunity presented itself, we would provide.

23 I didn't see having to be -- I'm trying to
24 respond to that by trying to recall whether on any of the other
25 occasions that opportunities were provided we had drafted that

1 into a memorandum, in a Cabinet memorandum. I don't recall.

2 (Multiple voices - inaudible
3 discussion.)

4 Q Where we're coming from, we look back on it, we say on
5 such a big major project that should have been, one would
6 expect to see that in a Minute or a note or a memorandum.
7 And that's what gives us pause.

8 A Okay.

9 Q The next thing is, and I want to go back to this
10 as well.

11 If I understood your answer to Mr. Hargun's
12 question as to why you chose -- recommended Landmark Lisgar
13 over Apex is because Apex didn't have an overseas partner,
14 is that what it came down to?

15 A No. It was, again, you got to walk through the
16 whole process. The processes from start to finish. As I'm
17 being briefed and updated, there were - again off the top of
18 my head - ten submissions to the request for an interest.
19 That progressed long and as those came in, the conversation
20 again with Permanent Secretary and I on a regular
21 conversation, what does that look like for the persons who
22 are trying to upgrade themselves to be able to compete at
23 this level.

24 And there were three or four, I can't remember
25 exactly, companies that had done such by recognizing that

1 they had weaknesses, as they were constructed - or
2 constructed may be the wrong word to use for a constructing
3 company - as they were an individual company. But they had
4 done the right thing by taking steps to partner with
5 outside entities to see if they can bring the strength that
6 was required to be able to bid on this contract.

7 And here's where those three companies or four
8 companies, I can't remember the exact number, but here's
9 where they were, who they are as far as the names of the
10 companies. So when we get down to the final list and one of
11 those companies were there, it was a breath of fresh air
12 for me to see that one of those companies actually made it
13 to the finals, - my word.

14 Q That's how Landmark Lisgar qualifies in your mind
15 to fit it in with the Progressive Labour Party mandate as it
16 was back then?

17 A It was one of those that was taking the right
18 steps to attempt to grow and extend itself.

19 Q And I have to say, when I consider that
20 mandate, and I look at some of the other companies that
21 initially bid, I can see the force of that argument with
22 some of those, the smaller contractors. But I have -- I
23 personally have some difficulty seeing how Landmark Lisgar
24 fits into that profile, if I could put it that way.

25 And you did, I mean, you thought they -- because

1 they had Government work before, like Gilbert Lopes had
2 Government work before, just didn't look like they were
3 ones that were meeting that criteria. We'll just have to
4 simply disagree on that.

5 A Disagree.

6 Q I wanted to share with you looking on the outside
7 now and looking back with the benefit of outside how it can
8 be seen that way.

9 A Okay.

10 **BY MS LUCK:**

11 Q Can I just ask, sometimes when we're making a
12 decision between two, it's obviously that you look at the
13 strengths of the party that you're going to recommend, but
14 you sometimes look and say, and actually there's a negative
15 here.

16 So were there negatives, I mean, we recognize the
17 technical officers recommended Apex. In your mind, were
18 there negatives that you thought through in terms of Apex? I
19 mean, if Landmark Lisgar had gone away, would you have been
20 happy to recommend Apex?

21 A More than likely I probably would have, if it wasn't
22 a choice between the options that were on the table.

23 Q Okay. Thank you.

24 A It wasn't a direct to say, no, I don't want that
25 particular company.

1 Q Right.

2 **BY CHAIRMAN EVANS:**

3 Q I've just got three matters altogether.

4 A Sure.

5 Q The first is this, the bidder Landmark Lisgar was
6 a newly-formed company.

7 A Uh-huh.

8 Q Lisgar was representing a Canadian company, Messrs
9 Bifolchi. Now I think you said you didn't know either of
10 those.

11 Do you remember who introduced Lisgar to this
12 transaction, when was the first you heard about them?

13 A I wouldn't know that. An interest... A request for
14 interest went out as normal and persons, companies,
15 entities responded.

16 Q Yeah. Fair. So the first you knew about
17 Lisgar was when --

18 A When they appeared on the list of various
19 companies who responded.

20 Q Then that's when Lisgar come alongside Landmark?

21 Now, how much did you learn about the Canadian
22 company or Lisgar, what their experience was? Later on it
23 turned out they'd built a sewage plant in Kazakhstan? But apart from that.

24 A Well, basically in the conversation with the PS, and
25 again, I can't document, I don't have a documented file. He

1 seems to have a photographic memory, I don't have that.
2 But in ordinary conversations that was part of what would
3 have been a regular conversation was these, again, the three
4 or four companies that partnered overseas, what do those
5 partnerships look like? Are they real people, are they a
6 real company, can they do what they're supposed to do.

7 And along that line of conversation it's not just
8 at the end when we get to who that final company is, it was,
9 you know, here's the ten applicants, my word, ten
10 submissions, can those who have (won a part ?)... because,
11 obviously, that attracted my attention to see that persons
12 or entities were prepared to actually take the step to try
13 and partner, to strengthen their organization.

14 So are they, those partnerships, solid
15 partnerships basically? And the conversation's going on,
16 so it didn't get down to that final day, so to speak, to say
17 okay, give me an idea of your thought. It was part of the
18 conversation and through that ongoing conversation with the Permanent
19 Secretary, who are these people. The conversation led me to feel
20 that they were solid, and that was in reference to all of those three
21 or four companies that had partnered with overseas people.

22 Q But there are really two points here, I think. The
23 first is, how much did you know about Lisgar?

24 A I knew nothing about Lisgar before at this point.

25 Q And well, therefore, the question doesn't arise.

1 But you knew nothing about them before.

2 But you must have satisfied yourself to some
3 extent that you knew something about them by the time you
4 came to the Cabinet?

5 A Yes, meaning, again, the ongoing conversation
6 with the Permanent Secretary and who are these? The
7 companies that were local, I knew even though I don't know
8 the principals and personalities behind the companies, I
9 knew the names of the companies.

10 When you see the list that says there's these
11 three or four companies who are now partnering with
12 overseas people. Well, who is that overseas entity, what do they
13 look like? Part of that was a regular conversation that
14 took place with the Minister and getting the (comfort).

15 (Inaudible discussion.)

16 Q Did you get any information about Lisgar from
17 anyone except the Permanent Secretary?

18 A No.

19 Q You didn't make any other inquiries?

20 A No.

21 Q What did you understand from him?

22 A I was under the impression that all the
23 companies that were overseas entities that partnered with
24 Bermudian, Bermudian entities, were of sound foundation.

25 Q And when the matter got to Cabinet, have you got

1 the Minutes? It's at page 35 of Bundle Binder 3.

2 A Uh-huh.

3 Q Page 35 is the Minute for the first meeting, the
4 23rd of October.

5 Do you see halfway down. This was when you left
6 the matter to Cabinet, you said either or, either Landmark
7 or Apex. And then according to the Minute, in response to
8 questions from his colleagues, the Minister, that's you,
9 confirmed that you were recommending that Landmark Lisgar
10 should be awarded the contract?

11 A Uh-huh.

12 Q Then it goes on, "Both the Minister of Labor,"
13 that's Mr. Burgess, "and the Minister of Education," I'm
14 not sure we know who that was, "indicated their support for
15 Landmark Lisgar and noted that Landmark's overseas partner,
16 Lisgar had the expertise and experience to complete the
17 project."

18 A Uh-huh.

19 Q Now you, from what you said, hadn't said anything
20 specific to Cabinet, had you, about the experience and
21 expertise of Lisgar?

22 A What Cabinet conclusions miss are the full gist
23 of exchanges of conversations. I think they highlight the
24 points that are raised and not the full gist. And I'm sure
25 as I look at all these Cabinet Minutes - and Mr. Barritt sat

1 in Cabinet for the period of time as well - I'm sure
2 there's detail or part of the conversation exchanges that
3 don't get detailed in here in its full context. So, whether
4 or not part of an exchange that who they were, someone may
5 have asked, I could have enlightened based on what I knew
6 from my discussions around my Permanent Secretary and
7 myself in the office.

8 It wouldn't have come from any outside source of
9 me because I didn't do any outside search or any outside
10 analysis. Now, whether the other, whether the Ministers
11 knew anything else, I can't speak to them. But I think it
12 would have just come from us, just in conversations across
13 the table.

14 CHAIRMAN EVANS: Thank you.

15 **BY MR. BARRITT:**

16 Q Just one other thing, actually there's two.

17 In your witness statement under the heading
18 Cabinet Paper, you put, "It is important to address the
19 amendments to the Cabinet paper informing the Cabinet of
20 the Minister's recommendation which is included in the
21 Witness Bundle. There was concern within the Ministry that
22 the technical officers' recommendation should be known to
23 Cabinet for whatever reason which caused challenges between
24 the Minister and PS and the drafting of that particular
25 paper. Thus the reason for the two drafts included in the

1 binder."

2 You're not meaning drafts, you mean the Minutes
3 as they're reported?

4 A Basically, what I meant was the two papers, the
5 paper that went first and then we came back and done the second paper.

6 Q Right. And you said there was this concern within the
7 Ministry that the technical officers' recommendation should
8 be known to Cabinet.

9 Who was expressing that concern?

10 A Again, what I was... My recollection of ten years
11 ago was part of that exchange back and forth with the PS
12 and I. I think the PS had expressed in large detail his
13 view, but that was why the two papers ended up being the
14 two papers.

15 Q And it's resolved not to share the technical
16 officers' recommendation?

17 A The drafting was, as you saw, the first paper
18 went forward recommending, here are the two finalists
19 and then we came back with the second paper.

20 Q Right. And not to include that long list of
21 recommendation evaluation was, I think Dr. Binns says, was
22 your decision, not his?

23 A It was basically my decision because it was an
24 internal... Most of that documentation, most of the technical
25 information. It was all internal matters. As I said to you

1 when this started today, a lot of what's contained in here really
2 I don't remember seeing. I don't think I saw all of that as the
3 technicals were doing their analysis.

4 Q All right. As we look back now with the benefit
5 of hindsight, would you agree or disagree that in future it
6 might be good practice to have the technical officers'
7 recommendation always go to the Cabinet whether the
8 Minister agrees or disagrees, so the Cabinet has all of the
9 facts?

10 A I would think that... Maybe I'd ask that in two
11 ways, maybe I'd try and have it addressed and fixed before
12 it gets to Cabinet, meaning, find a way that the Minister
13 and the technicals can go hand in hand comfortable down the
14 road.

15 Q Well, that wasn't possible in this case, so I'm
16 saying in future cases would you think that it would be
17 good practice to do that?

18 A It could be.

19 Q Yeah. And lastly, I'm going to ask the question that
20 everybody's thinking. And I don't mean to put you on the
21 spot but I will ask the question.

22 A Sure.

23 Q You left Cabinet shortly after this?

24 A Yes.

25 Q And I'm going to ask you the question whether you

1 can share with us why you did depart Cabinet and whether or
2 not it had anything to do with this?

3 A If you recall, in the fall of 2007 there was an
4 election. And the Premier after election put a new Cabinet
5 in place. And I wasn't part of that Cabinet.

6 Q All right. Thank you for reminding me. I had forgotten
7 that. Happens to all of us.

8 A No problem.

9 MR. BARRITT: Thank you.

10 (Inaudible discussion.)

11 CHAIRMAN EVANS: I wondered about the dates
12 because the second Cabinet meeting we've seen Minutes for
13 was the 30th of October. And you said that you ceased to
14 be Minister in November.

15 THE WITNESS: Whenever the election was - November
16 December, something like that.

17 MR BARRITT: First Friday in November.

18

19 **BY CHAIRMAN EVANS:**

20 Q I see. And then it's just a question that you
21 were not invited to go back, to go into the new Cabinet?

22 A Who sits in Cabinet is at the choice and wish of
23 the Premier, no one else.

24 Q Yes. And that was one question I was going to
25 ask you. The remaining one is this.

1 If you look at the Minutes for the second Cabinet
2 meeting, that's page 37 of 10-37 of Bundle 3, the figures
3 given there in the middle of the page - you may not be able
4 to read them very clearly.

5 But what they show I think, and I'd like you to
6 confirm this is right, that this was not a straightforward
7 construction contract. It was a contract for construction
8 management; is that right?

9 A It indicates construction management and..

10 Q And if we look at the totals of about \$72 million,
11 the actual construction which was a guaranteed maximum cost was
12 \$66 million. And then on top of that was a fee, a
13 construction manager's fee which was 6,900... Six
14 million nine hundred thousand dollars - \$6,900,000.

15 So is that, I just want to be sure I've got the
16 nature of the contract right, this was awarding a contract
17 which would produce a fee of \$6,900,000. The
18 construction manager would arrange for construction with a
19 guaranteed maximum construction cost of \$66 million?

20 A Your interpretation is probably spot on, but
21 again, that piece is left to the technicals as to how the
22 contract is drafted and bid and put together. The
23 Minister has no role in how that was put together.

24 Q But we've heard that when the contract was
25 renegotiated without Lisgar in the following year, it

1 became, I think I'm right in saying, a straightforward
2 construction contract?

3 A I can't speak to that.

4 Q But taking this one and with this very
5 substantial fee element, you weren't involved in the
6 negotiation of that construction?

7 A None whatsoever.

8 CHAIRMAN EVANS: Thank you. Any questions? No?

9 VOICE: No questions.

10 CHAIRMAN EVANS: Thank you. Mr. Hargun.

11 MR. HARGUN: I have no further questions.

12 CHAIRMAN EVANS: Well, Mr. Lister, thank you very
13 much and overlooking past stumbles. We're most grateful
14 that you've come today, and thank you for your evidence.

15 We're leaving it on the basis that you will take
16 Bundle 2 away with you, that you will give us a short
17 witness -- or a witness statement on that matter, and we
18 may or may not come back to you and ask you to come again
19 to give all evidence at the end of the November.

20 THE WITNESS: No problem.

21 CHAIRMAN EVANS: Thank you very much indeed.

22 (Inaudible discussion.)

23 CHAIRMAN EVANS: Shall we adjourn now until 10:00
24 tomorrow morning, but the present program will involve a
25 sitting tomorrow and possibly a sitting on Wednesday.

1 Thank you.

2 (End of audio.)

3 **End of Day's Proceedings**

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R E P O R T E R ' S C E R T I F I C A T E
I, Scott A. Huseby, Court Reporter,
do hereby certify that this transcript
is a true and accurate record of the
electronically recorded proceedings,
transcribed under my direction
this the 27th day of October, 2016.



SCOTT A. HUSEBY