



The Contractor General

An Overview Presentation

Greg Christie

October 2008

Presentation Overview

THE CONTRACTOR GENERAL

Commission of the Contractor General	3
Contractor General's Role and Primary Functions	5
Powers of the Contractor General	6
Limitations on the Powers of the Contractor General	8
Contractor General's Role & Secondary Functions - The NCC's Resource Provider	9
Independence of the Contractor General	12
Independence of the Contractor General - Background	14
Sanctions of the Contractor General	17
Reports of the Contractor General	18
Some Miscellaneous Matters	19
Disclaimer	20

Commission of the Contractor General

- The Contractor General is an independent Commission of Parliament which was established in 1986 by the Contractor General Act. (Section 3.1).
- The Commission of the Contractor General is constituted by one or more persons appointed as Contractor General by the Governor General, by instrument under the Broad Seal, after consultation with the Prime Minister and the Leader of the Opposition. (Section 3.2).

Commission of the Contractor General (Cont'd.)

- The paramount objective of the Office of the Contractor General is to ensure that the public sector procurement process delivers value to the tax-payer, is free from corruption, impropriety and irregularity and is transparent, impartial, competitive, fair, efficient and effective.
- The Contractor General is, therefore, arguably the State's leading anti-corruption agency since it is vested with significant and all-embracing monitoring and investigative powers, *inter alia*, over Government's expenditure on virtually all state contracts.
- The Contractor General discharges his mandate under the law with the assistance of officers who, when taken together, are conventionally referred to as the Office of the Contractor General (OCG).
- These officers are appointed and employed by the Contractor General under such terms and conditions as are approved by a special Commission of Parliament which is established under Section 13 of the Act.
- The Section 13 Commission is comprised of the Speaker of the House, as chairman, the President of the Senate, the Leader of Government Business in the House, the Leader of Opposition Business in the House and the Minister who is responsible for the Public Service.

Contractor General's Role & Primary Functions

- The Contractor General's primary functions are three-fold. They are as follows:
 - To monitor the award and implementation of government contracts to ensure that:
 - ◆ they are awarded impartially and on merit;
 - ◆ that the circumstances of their award or termination do not involve impropriety or irregularity;
 - ◆ that the implementation of contracts conforms to the terms thereof. (Section 4.1.a).
 - To monitor the grant, issue, suspension or revocation of prescribed government licences to ensure that:
 - ◆ the circumstances of their grant, etc. do not involve impropriety or irregularity;
 - ◆ that they are used in accordance with their terms. (Section 4.1.b).
 - To conduct investigations into any of the following:
 - ◆ the registration of contractors, tender procedures, the award and implementation of government contracts, the circumstances of the grant or revocation of prescribed licences and the practices and procedures related thereto. (Section 15).
- It should be noted that in respect of his monitoring functions, the Contractor General is mandated to monitor contracts and licences, whereas in respect of his investigative functions, he has a discretionary power. (Sections 4 and 15).
- An investigation under the Act may be undertaken by a Contractor General upon his own initiative or as a result of representations which are made to him, but only if in his opinion such an investigation is warranted. (Section 16).

Powers of the Contractor General

- To facilitate the effective discharge of the aforementioned functions, the Act enclothes the Contractor General with an abundance of powers. They include the following:
 - The right to be advised of the award of any Government contract by a public body. (Section 4.2).
 - Far-reaching powers of enquiry, inspection and discovery to enable him to secure access to certain premises, documents, records, stores, property or information which are associated with contracts or licences and/or which, in his discretion, he might deem vital to the discharge of his functions under the Act. (Section 4.2, 4.3 and 4.4).
 - The power to require any public body to furnish in such manner and at such times, as may be specified by him, any information regarding the award of any contract as he might consider desirable. (Section 4.3).
 - The power to require any public officer or any person to furnish in such manner and at such times, as may be specified by him, any information regarding the issue, suspension or revocation of any prescribed licence as he might consider desirable. (Section 4.4).
- Additionally, the Contractor General, in pursuit of his investigative powers, “may at any time require any officer or member of a public body or any other person, who, in his opinion, is able to give any assistance in relation to the investigation of any matter ..., to furnish such information and produce any document or thing in connection with such matter as may be in the possession or under the control of that officer, member or other person”. (Section 18.1).
- Further, a Contractor General, in pursuit of his investigative powers, may summon before him and examine on oath “any person who has made representations to him or any officer, member or employee of a public body or any other person who, in his opinion, is able to furnish information relating to the investigation”. (Section 18.2).

Powers of the Contractor General (Cont'd.)

- Most importantly, in the pursuit of his investigative powers under the Act, a Contractor General shall be deemed to have the powers of a Judge of the Supreme Court in respect of the attendance and examination of witnesses and the production of documents. (Section 18.3).
- Further “any obligation to maintain secrecy or any restriction on the disclosure of information or the production of any document or paper or thing imposed on any person by or under the Official Secrets Act, 1911 or 1939 of the United Kingdom (or any Act of the Parliament of Jamaica replacing the same in its application to Jamaica) or, subject to the provisions of this Act, by any other law (including a rule of law) shall not apply in relation to the disclosure of information or the production of any document or thing by that person to a Contractor General for the purpose of an investigation, and accordingly, no person shall be liable to prosecution by reason only of his compliance with a requirement of the Contractor General under this section.” (Section 18.4).
- Also, a Contractor General is empowered to adopt “whatever procedure he considers appropriate to the circumstances of a particular case and, subject to the provisions of the Act, may obtain information from such person and in such manner and make such enquires as he thinks fit”. (Section 17.1).
- Additionally, the Act provides that “the proceedings of a Contractor General shall not be rendered void for want of form”. (Section 22).
- The Act also provides that, in his conduct of an investigation, “nothing in this Act shall be construed as requiring a Contractor General to hold any hearing and no person shall be entitled as of right to comment on any allegations or to be heard by a Contractor General”. (Section 17.2).
- However, it should be noted that the Act provides that “no person shall, for the purposes of an investigation, be compelled to give any evidence (to a Contractor General) or produce any document or thing which he could not be compelled to give or produce in a court of law”. (Section 18.5).
- A Contractor General is empowered to initiate or continue any investigation and/or report thereon notwithstanding any legal proceedings relating to the subject matter of the investigation. However, the court may order a Contractor General not to publish a report or part thereof if the court is of the opinion that such publication is likely to prejudice any proceedings that are pending before the court. (Section 30).

Limitations on the Powers of the Contractor General

- As previously indicated, the monitoring and investigative powers of the Contractor General are far-reaching. Except for certain expressed exceptions which are outlined in Sections 15(2) and 19 of the Contractor General Act, they are intended to extend to all government contracts and licences which are awarded or issued by all public bodies.

Such public bodies would include ministries, departments and agencies of government, statutory bodies, statutory authorities and companies registered under the Companies Act in which Government or any agency of Government, whether by the holding of shares or by other financial input, is in a position to influence the policy of the company. (Section 2).

- The exceptions are as follows:
 - Contracts entered into or licences issued or granted for purposes of defence or for the supply of equipment to the Security Forces.

A Contractor General is prohibited from carrying out an investigation into any of the foregoing unless he obtains the prior approval of the Cabinet. The prohibition, however, does not extend to the contract monitoring activities of the Contractor General. (Section 15.2).
 - Where the Cabinet notifies a Contractor General that the disclosure by a Contractor General of any document or information would involve the disclosure of proceedings of Cabinet (relating to matters of a secret or confidential nature and is likely to be injurious to the public interest) or would prejudice Jamaica's relations with a foreign Government or international organization, or would prejudice the detection of offences, a Contractor General is thereby prohibited from communicating the said information or document. (Section 19.1.a).
 - Where the Cabinet certifies that the giving of any information or the answering of any question or the production of any document or thing would prejudice the security or defence of Jamaica, a Contractor General shall not further require such information or answer to be given or such document to be produced. (Section 19.1.b).

Contractor General's Role & Secondary Functions - The NCC's Resource Provider

- The Contractor General's secondary functions are related to the National Contracts Commission (NCC).
- In essence, the Contractor General has the responsibility of funding and satisfying the secretarial, administrative & technical resource requirements of the NCC. (Section 23J).
- However, it must be emphasized that notwithstanding this funding and resource provision obligation, the NCC is a separate and independent Commission of Parliament, fully distinct from the Commission of the Contractor General, and having its own powers and jurisdictional authority.
- The NCC was established by way of an amendment to the Contractor General Act in 1999. (Section 23 and the Third Schedule to the Act).
 - The NCC commenced its operations in 2000 and had its first full year of operations in 2001.
 - It is composed of 8 members who are appointed by the Governor General.
 - Like the Contractor General, the members of the NCC serve for an initial term of 7 years. The term of the first panel of members expired on May 16, 2006.
 - The stated and primary objectives of the NCC are the "promotion of efficiency in the process of award and implementation of government contracts and ensuring transparency and equity in the awarding of such contracts". (Section 23C).

Contractor General's Role & Secondary Functions - The NCC's Resource Provider (Cont'd.)

- The NCC, which currently convenes its meetings weekly, at the premises which are occupied by the OCG, basically attains its stated objectives by:
 - examining and approving (endorsing) recommendations for the award of Government contracts of \$4 million in value and above;
 - making recommendations to cabinet for the award of contracts of \$15 million in value and above;
 - registering and classifying contractors who are desirous of tendering on Government contracts;
 - continuously assessing the financial and human resources, and the technical, financial and managerial capacity and performance of contractors;
 - making recommendations to Cabinet for improving the efficiency of the procedures for the granting and implementation of Government contracts; and
 - overseeing the activities of its 7 sector committees, through which all requisite contract award recommendations which are intended for review by the NCC must be routed by the sponsoring State procurement agency. (Section 23D).
- The NCC is also empowered to make regulations prescribing the registration and classification requirements for contractors, the procedure for the submission of tenders for contracts, the requirement for contractors to enter into performance bonds, competitive bidding in relation to Government contracts, and the circumstances in which a contractor's registration may be cancelled. (Section 23E).

Contractor General's Role & Secondary Functions - The NCC's Resource Provider (Cont'd.)

- The OCG, through its technical services department, acts as the NCC's secretariat in ensuring that all technical, administrative and human resource requirements of the NCC are fully satisfied to enable it to effectively and efficiently accomplish its objectives and mandates under the law.
- Accordingly, and because of its subsidiary role as a resource provider to the NCC, the OCG is therefore fully privy to all of the activities and deliberations of the NCC.
- Notwithstanding, the 2 Commissions are separate and distinct and it must be emphasized that when the NCC discharges its mandates under law, such as when it endorses recommendations for Government contract awards, such endorsements must in no circumstances whatsoever be construed as an endorsement or approval by the Contractor General.
- Indeed, except for certain specified circumstances which are enumerated in Sections 15(2) and 19 of the Act (and which have already been addressed), the Contractor General retains an over-arching jurisdiction to review, monitor and investigate any part or component of the entire public sector procurement process, inclusive of the activities of the NCC and its and the Cabinet's contract endorsements.

Independence of the Contractor General

- To secure the almost complete independence of the Contractor General, the Contractor General Act makes express provision for the following:
 - The appointment of the Contractor General by the Governor General, after consultation with the Prime Minister and the Leader of the Opposition. (Section 3).
 - A 7 year tenure of service, in the first instance, following appointment. (Section 6).
 - An absolute prohibition against the removal from office of the Contractor General except on account of his “misbehavior”, his inability to discharge the functions of his office and where he trades with the Government without the prior approval of Parliament. (Section 7; See also provisions of Section 8.2).
 - Provision that the Contractor General, in the exercise of his powers, “shall not be subject to the direction or control of any person or authority”. (Section 5.1).

(NB. Special provision is however made for “the assignment, to a Minister of responsibility, for such aspects of the administration of the Act as are necessary or desirable to facilitate liaison between Parliament and a Contractor General”. (Section 5.2).
 - Provision that “... no proceedings whatsoever shall lie against a Contractor General or any person concerned with the administration of the Contractor General Act, for anything that he may do or report or say in the performance of his functions under this Act”. (Section 23.1).

Independence of the Contractor General (Cont'd.)

- The power of the Contractor General to “appoint and employ ... such officers and agents as he considers necessary to assist him in the proper performance of his functions under this Act”. (Section 13).

(NB. A Parliamentary Commission, comprising the Speaker of the House, as chairman, the President of the Senate, the Leader of Government Business in the House, the Leader of Opposition Business in the House and the Minister responsible for the Public Service, has the authority to approve the remuneration and conditions of engagement of said officers). (Section 13).

- Provision that “a Contractor General shall receive such emoluments and be subject to such other terms and conditions of service as may from time to time be prescribed by or under any law or by a resolution of the House of Representatives, such emoluments being not less than the emoluments which may, from time to time, be payable to a Puisne Judge”. (Section 11.1).
- Provision that “the emoluments and terms and conditions of service of a Contractor General ... shall not be altered to his disadvantage during the period of his appointment or re-appointment”. (Section 11.2).
- “Provision that the emoluments of the Contractor General must be paid out of the Consolidated Fund”. (Section 11.3).

Independence of the Contractor General - Background

- The intent of Parliament was to establish the Contractor General as a Commission of Parliament, specifically to ensure the independence of the Contractor General and to remove the Office of the Contractor General from the control of the executive arm of Government.
- A brief recourse to the germane provisions of *The Report of the Committee Appointed to Recommend Legislation for the Establishment of the Office of the Contractor General*, will provide an unequivocal substantiation of this assertion.
- The *Committee Appointed to Recommend Legislation for the Establishment of the Office of the Contractor General* (the “Committee”) was established on January 27, 1981, by the then Prime Minister, The Most Honourable Edward Seaga. Its chairman was the then Minister of Construction, The Hon. Bruce Golding. Mr. Golding is currently the Prime Minister of Jamaica.
- The Committee’s final report was submitted in March 1982.

Independence of the Contractor General - Background (Cont'd.)

- Germane, verbatim extracts from the Committee's report include the following:
 - "The Committee is of the view that a Commission of Parliament, consisting of one or more persons should be established, thereby formalizing the intention to give the Office of the Contractor General independent status". (Para. 2.19).
 - "This would mean that the Office of the Contractor General would not be a public office within the meaning of Chapter 9 of the Constitution, for which the appointment is required to be made by the Governor General, acting on the advice of the Public Service Commission". (Para. 2.19).
 - "The Committee therefore recommends that a Commission of Parliament be constituted to be known as the Contractor General consisting of one or more persons appointed by the Governor General, after consultation with the Prime Minister and the Leader of the Opposition". (Para. 2.21).
 - The Contractor General shall "have a direct relationship with Parliament and ... his office should not be a matter within the portfolio of any Minister of Government". (Para. 3.20).

Independence of the Contractor General - Background (Cont'd.)

- “Since it is not envisaged that the Contractor General will be a ‘public officer’ within the meaning of Chapter 1, Section 1 (1) of the Constitution, the Committee recommends that the Contractor General be empowered to make and submit to a Special Commission of Parliament, for approval, a budget showing in detail those costs and/or expenses and entitlements he considers necessary for the proper functioning of his office, and for himself and staff, and that the funds of the office consist of such sums as may be allocated to him by Parliament from time to time”. (Para. 3.34).
- “The Contractor General’s period in office should not coincide with the normal five-year term of office of the Government but should be for a period sufficiently long to give the incumbent a feeling of security of tenure ... It was therefore proposed that the term of office ... should be (for) an initial period of seven years.” (Para. 2.39).
- “It is felt that the Contractor General should be given the power to select and (to) appoint his own staff on terms and conditions approved by an appropriate Commission of Parliament, consisting of the Speaker of the House of Representative, the President of the Senate, the Leader of the House of Representatives, the Leader of Opposition Business in that House and the Minister responsible for the Public Service”. (Para. 2.44).

Sanctions of the Contractor General

- The *Committee Appointed to Recommend Legislation for the Establishment of the Office of the Contractor General*, after some debate, concluded that “the Contractor General’s means of exerting pressure on an Agency of Government, ... regarding a contract which was exhibiting irregularities and/or impropriety, should be to launch an investigation and make recommendations for rectification to the Agency concerned, his ultimate weapon being exposure by means of a Special or Annual Report to Parliament, the forum of the people”. (Para. 3.32).
- Accordingly, it is not surprising that under the Contractor General Act, the Contractor General has no power whatsoever to sanction a Government agency or a public official who is found to be involved in a contract award, implementation or termination irregularity or impropriety, or who is otherwise found to be culpable, in breach or guilty of misconduct, in respect of a matter which involves the public sector procurement process.
- That aside, the Contractor General Act however provides that any person who “willfully makes any false statement to mislead or attempts to mislead, ... or who obstructs, hinders or resists, ... or (who) fails to comply with any lawful direction of a Contractor General or any other person ... under this Act, ... shall be guilty of a (criminal) offence”. (Section 29).

Reports of the Contractor General

- Consistent with the recommendations of The Committee that the Contractor General's "ultimate weapon" is exposure by means of Reports to Parliament, the Contractor General Act makes ample provision for the Contractor General to expose the findings of his investigations as follows:

(1) After conducting an investigation, a Contractor General is obliged to inform, in writing, the principal officer of the public body concerned and the Minister having responsibility therefor of the result of that investigation and to make such recommendations as he considers necessary in respect of the matter. (Section 20.1).

(2) If during the course of his investigations, a Contractor General finds "that there is evidence of a breach of duty, or misconduct or criminal offence, on the part of an officer or member of a public body", he shall refer the matter to the competent authority and lay a special report thereon before Parliament. (Section 21).

(3) "A Contractor General may at any time be required by Parliament to submit a report to Parliament in respect of any matter being investigated by him". (Section 28.1).

(4) "A Contractor General shall submit to Parliament an annual report relating generally to the execution of his functions". (Section 28.2).

5) A Contractor General may at any time submit to Parliament a report "relating to any particular matter ... investigated by him which, in his opinion, requires the special attention of Parliament". (Section 28.2).

(6) A Contractor General may, in the public interest, publish in such manner as he thinks fit, reports relating to such matters as are mentioned in #2, #4 and #5 above, but only after such reports are laid before Parliament. (Section 28.4).

Some Miscellaneous Matters

Restrictions on employment (Section 9)

A Contractor General is required to devote his full time to his appointment and shall not accept paid employment in any other capacity while he holds office. (Section 9).

Oath of Secrecy (Section 14)

Every person who is appointed to the staff of the Contractor General shall take and subscribe to an Oath which is set out in the Second Schedule to the Act. The Oath binds the officer not to “directly or indirectly reveal any information or the nature or contents of any documents (which are) communicated ... in the performance of any functions assigned to (him/her)”.

Requirement for Secrecy and Confidentiality (Sections 24 and 29.c)

On pain of criminal prosecution, a Contractor General and every person who is concerned with the administration of the Act is generally required to regard as secret and confidential, all documents, information and things which are disclosed to them in the execution of the provisions of the Act.

One exception to this prohibition provides that “no disclosure which a Contractor General thinks necessary in the discharge of his functions or for the purpose of executing any of the provisions of Sections 20, 21 and 28 of the Act, shall be deemed to be inconsistent with the duty which is imposed by the Section”.

Disclaimer

The foregoing overview is a summary overview only. This document is not a legal document and it is not in any way intended to be relied upon as such nor is it intended to be relied upon as a complete, comprehensive or fully accurate representation of the provisions of the Contractor General Act or of the law as it pertains to the Commission of the Contractor General. Please see the Contractor General Act for a comprehensive statement of the law as it relates to the Commission of the Contractor General.



The Contractor General

An Overview Presentation

Greg Christie

October 2008