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## **MEDIA RELEASE**

### **OFFICE OF THE CONTRACTOR GENERAL RESPONDS TO STATEMENT OF THE MINISTER OF FINANCE AND REQUESTS THAT EXEMPTIONS BE RE-CONSIDERED**

**Kingston; October 6, 2008** – The Office of the Contractor-General (OCG) firstly maintains that its previous Media Release of October 2, 2008 presents an accurate characterization of the process of effective consultation which took place between the Government and the OCG in respect of the exemptions of certain procurements for Air Jamaica Limited, Petrojam Limited, Jamaica Tourist Board and Jamaica Vacations Limited, from the application of the Government Procurement Procedures Handbook (GPPH).

Secondly, the OCG reaffirms the validity of the arguments that it has proffered against the ultimate product of these consultations – the now acknowledged procurement exemption measures which were approved by Cabinet on August 25, 2008 and published in the Ministry of Finance and the Public Service’s (MOF) Circular #34, dated September 22, 2008.

Since the release of the Contractor General’s Statement to the Media on October 2, 2008, the Ministry of Finance and the Public Service (MOF) has issued one of its own under the hand of the Hon. Minister Mr. Audley Shaw. The MOF Release has presented a response that, in the OCG’s view, is significantly misleading in several material respects.

One aspect of Minister Shaw’s comments had to do with the consultations in the matter, which he has characterized as “*extensive*” and “*rigorous*”, and the extent of which he said the Contractor General’s Statement did not disclose. In an effort to address Mr. Shaw’s allegations, in the interest of public transparency and to ensure that the Jamaican Public and Taxpayers are fully informed of all of the details of this matter, the OCG has prepared a detailed **Statement of Chronology of Facts – From December 2007 to October 3, 2008** on the issue.

The OCG’s **Statement of Chronology of Facts**, which includes verbatim pieces of correspondence between the parties, as well as verbatim copies of the actual OCG Submissions and Recommendations that were directed to the Cabinet, will fully address the nature and extent of all germane consultations and communications that have taken place between the OCG and the Government as regards the referenced Government exemption measures.

The Statement is being issued in conjunction with this Media Release and should be read in its entirety. Any reference in this Media Release to an event which has taken place between December 2007 and October 3, 2008, has been amply documented and substantiated in the OCG’s **Statement of Chronology of Facts**.



Before substantively addressing the other statements that Mr. Shaw has made, however, the OCG believes that it may be useful to retrace the history of the creation of the OCG in Jamaica, and the succeeding developments which are associated with it. This will offer an important window into the rationale for the Contractor-General's strenuous objections, which portends the grave implications for the future for transparency, probity and accountability in the award and implementation of contracts involving Taxpayers' money in Jamaica.

- (1) This unprecedented move by the Administration, as at August 25, 2008, to exempt certain Public Bodies from certain procurement oversight measures, dramatically alters the public procurement landscape in Jamaica, and should the new contours of the Administration's approach harden into a new policy position which is then followed by successive Administrations, it would expose Taxpayers' money to increasingly significant risks of corruption.

The gravity of this development cannot be overstated. Since the building out of the anti-corruption architecture in Jamaica, with the OCG being one of its principal planks, no Administration – particularly one that has made stamping out corruption one of its stated overarching objectives – has sought to roll back the regulatory regimes that have historically been used to monitor the award and implementation of contracts by the OCG, to this extent.

- (2) The OCG was established in 1985 amid widespread public outcries that were prompted by allegations of corruption in the award and implementation of contracts that involved Taxpayers' money. Friends, family members and supporters of some public officials and politicians were rewarded with contracts and Taxpayers' money under a regime that provided little or no oversight and scrutiny, whilst many otherwise capable but politically unaffiliated contractors were left out in the cold. Old-style back-room dealing and corruption thrived.

Local industry suffered since the capacity of these domestic contractors, who were not part of the system of the political *quid pro quo*, was compromised. Further, many overseas investors were turned off by the pervasive stigma of corruption that seemed to be associated with doing business in Jamaica.

- (3) The OCG was to change much of that. The Contractor-General Act established the role and functions of the Contractor General as an Independent Commission of Parliament. Its office-holder was insulated, by law, from any political maneuverings which could compromise his ability to carry out his functions in a fearless and dispassionate manner. The Contractor-General was mandated by Section 4 of the Act to monitor the award of Government contracts to ensure that they are awarded "*impartially and on merit*" and in circumstances which do not "*involve impropriety or irregularity*".

Significantly, the mandates, which are framed by these principles, were not exhaustively spelled out because the Act implicitly recognizes and relies upon the Government Procurement Policies and Procedures – which were in existence at the time – to serve as the standards for determining what was "*improper*" and "*irregular*" and what awarding procedures were "*impartial*" and "*done on merit*".

Indeed, the promulgation of the establishment of the Commission of the Contractor-General was predicated on the existence and reliance of these very Government policies and procedures. To underscore their importance, consider this: Without these Government policies and procedures, against what would a Contractor General be able to measure the procurement practices of a Public Body?



- (4) Today, these Government policies and procedures are formally embodied in the Government Procurement Procedures Handbook (GPPH). Specific procedures of the GPPH may, from time to time, be supplemented and or superseded by Government Circulars, such as the ones that were issued recently by the MOF. The MOF Circular, #34, dated September 22, 2008, purports to exempt certain Public Bodies from the application of the GPPH within certain specified categories.

Instead of having to comply with the requirements of the GPPH, two of these Public Bodies have been authorized to execute certain procurements and award certain Government contracts using their own unique but unspecified "*internal procurement regimes*", whereas the other two have been authorized to undertake certain procurement activities "*according to standard industry practice*".

- (5) Except for the country's bauxite and alumina joint ventures, whose establishment agreements impose special provisions which justify their exemption from the GPPH, this August 25, 2008 exemption measure is unprecedented. The implications of the move are far-reaching and fundamental. From a narrower perspective, what this does is to allow Public Officials in these Public Bodies to dispense with the GPPH in respect of certain specified categories and to institute their own rules or, for that matter, no rules. This, in effect, will allow them to do as they please in determining when, how, to whom and in what values certain Government contracts should be awarded, and will give Public Officers an unfettered hand in spending Taxpayers' money.

This raises the frightening spectre of a return to the pre-anti-corruption regime days where Government contracts were given to favoured individuals and companies without transparency, probity or accountability. It threatens to unravel the significant gains which have been recently registered in the Public Sector procurement arena, particularly in terms of enhanced probity, rule compliance, accountability, transparency, independent scrutiny and competition in the award of Government contracts. In stark terms, the exemption measure has the real potential to become a corruption-enabling facility as it will increase the risks now that corruption can go wholly undetected below the radar of public scrutiny and oversight.

- (6) From a wider perspective, the exemption measures have also created an unprecedented and sharp imbalance in the application of the Government Procurement Guidelines between respective Public Bodies. Some Public Bodies would be required to adhere to the GPPH guidelines in respect of the specified categories, while the '*favoured four*' would not. Apart from the fundamental questions of fairness which this raises, and the obvious tensions this would create, what is there to say that the Government at some later stage, will not add more Public Bodies to this list of "*favoured*" Public Bodies against the protestations of future Contractors General and a seemingly quiescent public that is unaware of the damage which is being done and the risks of corruption seeping back into the system?

The Hon. Finance Minister has sought to dismiss and/or to deflect the arguments that are set out in the OCG's previous Media Release. He has casted the OCG's concerns as a dispute about a consultation process that has gone awry and sweeping procurement requirements that have to yield in the face of governmental efficiencies that are being compromised by an overbearing set of rules. With respect, this could not be farther from the truth.

The OCG has painstakingly highlighted in its Media Release why these arguments were without merit and, here again, reiterates some of them in response to the Minister's Press Release of October 3, 2008.



## Emergency Procedures

The Hon. Minister has cited in his response examples of Emergency situations involving the operations of the specified Public Bodies which, in his words, “*would not allow for even the application of the normal emergency procedures*” that are embodied in the GPPH and that are the cause of the severe constraints that are being imposed upon the commercial operations of these entities. On the face of it, almost any reasonable person would conclude that this is a compelling argument. Upon closer scrutiny, however, one would recognize that this is a fallacious argument that is merely being used as a façade to conceal one of the real reasons that appears to be driving this issue: Public Officers who do not understand the ambit and purpose of the Procurement Rules and, who, quite frankly, seem to be unwilling to be subjected to any form of accountability or probity in the way that they spend the Taxpayers’ money.

This is borne out, in part, by the facts. On June 16, 2008, the Hon. Prime Minister requested that the Contractor-General draft (a) new provisions to regulate the contracting of foreign contractors and (b) expanded Emergency Procedures that would, *inter alia*, accommodate the previously cited examples that were invoked by Minister Shaw and the various other concerns which were raised by these entities – such that business efficiency does not become a hostage to inflexible rules. Two days later, the Contractor-General submitted the redrafted Procedures to the Prime Minister for his consideration and final approval.

The OCG’s draft of the Expanded Emergency Contracting Provisions read as follows:

*“A contract for Emergency Works is one which is awarded by a Ministry, Department or Agency of Government:*

- (a) for repairs or remedial action necessary to preserve public safety or property or to avoid great social harm or significant public inconvenience; or*
- (b) for the procurement of works in any extenuating circumstances in which the operations, operating functions or business objectives of the procuring entity are likely to be significantly impeded or placed in great jeopardy if the procurement is not executed on an emergency basis; or*
- (c) for the procurement of works in any extenuating circumstances in which the procuring entity is likely to suffer substantial financial loss if the procurement is not executed on an emergency basis; or*
- (d) for the procurement of works in any circumstances in which national security considerations demand that the procurement be undertaken on an emergency basis.*

*The need for such Works must be sudden, unexpected and a pressing necessity or exigency. For the purposes of this definition, Emergency Works includes construction works and the supply of goods and services”.*

As is evident, all of the examples of “Emergency” situations that were cited by the Minister could easily fall within one or more of the procedures that are set out above. Once activated by these circumstances, these entities would not need to go through the normal procedures of contracting but would be shifted to a special regime, under the GPPH, and not outside of the GPPH, which would ensure expedition in the procurement process whilst ensuring that certain specified and documented accountability and transparency checks and balances are complied with. Is this so unreasonable? Isn’t this better than giving Public Officers free rein in spending the Taxpayers’ money as they like and with whom they like?



We would imagine that most reasonable persons would think so. It is, after all, Taxpayers' money, and what this would do is to allow for some measure of accountability and probity. Furthermore, it addresses the concerns of ensuring the achievement of business efficiencies in commercial operations, whilst preserving the integrity and stability of the nation's procurement policy structure and ensuring a level playing field for all Public Bodies.

Based upon the tenor of the consultations up to this point, it was widely presumed that the redrafting exercise which was requested by the Prime Minister was simply the precursor to the formal adoption of the Revised Procedures by publishing them in new MOF Circulars.

Inexplicably, however, after receiving the drafts of the revisions to the GPPH from the Contractor-General, the Cabinet abruptly ceased communications with the OCG on the issue. To date, the Cabinet has neither acknowledged the receipt of the drafts nor has it communicated with the OCG on what it intends to do with them. Indeed, the Cabinet approved the new exemption measures, together with others, on August 25, 2008, and the OCG had to learn about it first, on September 29, 2008, from another entity which was being monitored by the OCG.

Quite interestingly, Minister Shaw, in all of his public discourses on the issue so far, has left the uninformed public with the false impression that the exemption measure is justified on the basis that it is intended to address emergency procurements. What he has not told an unsuspecting public is that there are several other categories of procurements which have been exempted from the GPPH, especially in the case of Air Jamaica Limited, the Jamaica Tourist Board and Jamaica Vacations Limited, which have absolutely nothing to do with emergencies. In the interest of public scrutiny, the OCG has set out in its **Statement of Chronology of Facts**, the complete list of these exempted procurements.

Further, Minister Shaw has alluded to the procurement of specialized or propriety equipment which the entities, particularly Petrojam Limited and Air Jamaica Limited, in some instances, are constrained to securing from a specified supplier or suppliers, in an expeditious manner. What was not stated, however, is that the GPPH, in its present form, already makes adequate provision to satisfactorily address such peculiar circumstances via the utility of its 'Sole Source', 'Direct Contracting', 'Limited Tender' and/or 'Frame-Work Agreement' facilities.

### Modifications

Minister Shaw further makes reference in his response to "modifications" arrived at by the Cabinet in respect of these procurement related measures. Unfortunately, the Minister presents a selectively vague and misleading account of the nature and extent of the Contractor-General's input and the eventual "modifications" that were made to the measures.

As the saying goes, "the devil is in the details", and it is in selectively cherry-picking what details to offer to the Media, that the Minister makes it appear that a reasonable mid-point was reached between the competing interests of the OCG and the other entities.

From the Minister's account of "a rigorous process that was engaged in consultations between the entities involved", it might be thought that the OCG was involved in the process of "extensive" consultations that led up to the formal publishing of the referenced MOF's Circular on September 22, 2008. In fact, what happened was that after an initial briefing meeting, on February 22, 2008, between the Prime Minister, the Cabinet Secretary, the Permanent Secretary in the Prime Minister's Office, the Chair of the National Contracts Commission, a



Deputy Financial Secretary, the OCG and other persons, the Prime Minister established a Special Review and Consultation Committee to consult with the OCG. However, this did not happen, and instead, a puzzling series of events unfolded.

The upshot of it was that the sole meeting of the Committee, which was convened on March 4, 2008, was aborted because of the behaviour of the Deputy Financial Secretary. Thereafter, the MOF comprehensively obstructed, blind-sided and circumvented the OCG. Effectively, and in the end, the only comprehensive consultation opportunity that the OCG was afforded, was its 2-hour meeting with the Cabinet on June 16, 2008, when the Contractor General formally presented, discussed and clarified, the OCG's June 9, 2008 Comments regarding the proposed MOF measures.

### Self-Regulation

The referenced MOF Circular, which now permits exemptions of the four Public Bodies from applying the GPPH, also purports to empower them to develop or use their own procurement rules. In short, they are now allowed to self-regulate themselves.

We have already alluded to the historical reports of the Auditor-General and the Contractor-General that have consistently demonstrated that, at present, Public Bodies in Jamaica are unable to effectively regulate themselves. As an example, we have also cited the grave lapses that have occurred at Air Jamaica in terms of its failure to adopt best practices in public and even commercial contracting. Notwithstanding, the Administration appears to be satisfied with the so called Air Jamaica "*internal procurement regime*".

Countless other examples could be provided by the OCG, but what they would all ineluctably reinforce, is the idea that Taxpayers in these situations will almost always get the short end of the stick.

Much has changed since the advent of the OCG. Despite the persistence of certain problems in the award and implementation of Government contracts in Jamaica, many Jamaicans at least now feel that they can get their fair shakes from the process. With these gains, unfortunately, there has also been an accompanying sense of complacency that has caused many stakeholders to forget how quickly many of these gains can still be unraveled.

The present Administration, to its credit, has begun the preliminary process of elevating the GPPH to statutory regulations, effectively imbuing them with the force of law. But the MOF Circular that has authorized the exemption measures would place these '*favoured*' Public Bodies and their Accountable Officers beyond the grasp of the law, should they breach the standards that are set out in the GPPH in respect of the specified categories. Conversely, other Public Bodies and their Accountable Officers may do the very same things that their counterparts in the other '*favoured four*' will do, but unlike them would have to face administrative, criminal and or civil sanctions as a result. This, obviously, would be fundamentally unfair.

Furthermore, should the Government of the day decide to add other Public Bodies to this list, they would, in effect, be gutting the law of much of its effectiveness and perpetuating a regime that criminalizes the behaviour of some but not all.

It is for all of the foregoing reasons that the OCG respectfully but profoundly believes that the Prime Minister, the Most Hon. Bruce Golding, who ultimately has responsibility for the Government, and the portfolio Minister, the Hon. Audley Shaw, should reconsider the implications of the taking of this step.



In the circumstances, the OCG would respectfully and publicly call upon the Government to review its decision in the matter and to give further consideration to withdrawing the measure in the interest of preserving fairness, transparency, probity, competition, accountability and value for money in the country's procurement system and, above all, to do so in the interests of the People and Taxpayers of Jamaica.

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