

OFFICE OF THE CONTRACTOR GENERAL

Exemption of Certain Specified Procurements from the Application of the Government Procurement Procedures Handbook (GPPH)

Statement of Chronology of Facts – From Dec. 2007 to Oct. 3, 2008

Consultation and Communications Process with the OCG Regarding Cabinet Approved Exemption Measures and Related Ministry of Finance Submissions

(This Document is Being Issued to the Media in the Interest of Public Transparency and Pursuant to the Discharge of the Functions of the Contractor General under the Contractor General Act and the Powers that are Reserved to him by Section 24 (1) (b) thereof)

October 6, 2008

INTRODUCTION

The Minister of Finance and the Public Service, the Hon. Audley Shaw, has made several public statements with respect to the nature and extent of the consultations and communications that have taken place with the Office of the Contractor General (OCG) in regards to the captioned Exemption Measures. The Measures were first approved by the Cabinet in December 2007 and again, in a revised format, on August 25, 2008.

Following after the Cabinet's first approval of the several Measures in December 2007, Mr. Shaw was quoted on the Nationwide News Network (NNN) 'This Morning Radio Talk Show', in an interview with Emily Crooks, on December 20, 2007, as follows:

"I believe that the National Contracts Commission or the Contractor General, either or both, was consulted in relation to this particular submission. It might be the Contracts Commission. We obviously would not have come up with that formula of the new thresholds and so on and the procurement policies for these special and sensitive agencies without consultation with the Contracts Commission. I think that there was that consultation... I don't think it is in the interest of the Government to have any sort of miscommunication with the Contractor General. I think that we need to take whatever steps are necessary to improve the flow of information with them."

Mr. Shaw was also quoted again on the 'This Morning Radio Talk Show', in an interview with Emily Crooks, on October 3, 2008, as follows:

"This final decision of the Cabinet (i.e. Cabinet's approval of the Measures on August 25, 2008) came out of extensive dialogue ... and a pretty rigorous process... The policy review began from as early as March 2007 ... that is last year March ..."

"It is important that we understand that the whole review of it started from March of last of last year. That also it is very important that we understand ... because the Contractor General's statement, while he mentions that he met with the Cabinet ... I think that he has not given enough of an idea to the public that there has been extensive consultations with him at various levels ... for instance he had 2 separate meetings with the Prime Minister, the NCC, the Attorney General, the Cabinet Office, and then it all culminated with the full Cabinet consideration on the 16th of June, 2008"

In a written Statement which was issued by him to the Media on October 3, 2008, Minister Shaw also stated thus:

“The Contractor General’s Statement (of October 2, 2008) gave the impression that the amendments were made without adequate consultation”.

The Minister’s public statements have therefore challenged, implicitly or otherwise, the credibility of the OCG in this matter. He has also challenged the integrity of the Statement which was issued by the Contractor General on October 2, 2008.

In the premises, it is imperative that the Public and the Taxpayers of Jamaica, whose interests the Contractor General is mandated to serve, are apprised in a fulsome manner of the relevant and germane facts of this very serious public interest matter.

Upon a careful examination of the chronology of events which have taken place, and which are set out below in great detail, it will become clear that Minister Shaw has significantly misled the Jamaican Public and Taxpayers.

Contrary to Minister Shaw’s assertions, the OCG was consistently stone-walled, frustrated, circumvented and obstructed by the Ministry of Finance and the Public Service (MOF) throughout the entire so called *consultation* and Cabinet approval processes that were related to the subject Exemption Measures.

This, in turn, has raised a reasonably credible question as to whether there was indeed any sincere intent on the part of the MOF to involve the OCG, in the first place, in the consultation process or to otherwise solicit its views and inputs.

The obstructionist and non-cooperative attitude of the MOF in this matter was so open and extensive that the MOF went as far as to ignore and defy the expressed instructions of the Hon. Prime Minister by preventing the OCG from gaining access to one of the subject MOF Revised Cabinet Submissions prior to it being sent to Cabinet.

Indeed, the facts will disclose that three (3) successive Cabinet Submissions, regarding the subject Measures, were drafted by the MOF and submitted to the Cabinet for its consideration and approval. The first MOF Submission was submitted for consideration by Cabinet in December 2007 Cabinet Meeting, the second for consideration in a May 26, 2008 Cabinet Meeting and the third for consideration at an August 25, 2008 Cabinet Meeting.

The OCG was never given the opportunity by the MOF to review or to comment on any of these MOF Cabinet Submissions prior to their respective dates of submission to the Cabinet.

Finally, Mr. Shaw should provide lawful and unimpeachable documentary evidence that the National Contracts Commission (NCC) was lawfully consulted in this matter. He should establish that the NCC did lawfully table, deliberate upon, voted upon and approved the referenced three (3) MOF Submissions before they were sent by the MOF to the Cabinet.

The relevant facts of this matter are as follows:

CHRONOLOGY OF FACTS

Fact #1 (December 17, 2007)

Cabinet first considers and approves the subject Measures after a formal written Submission is made to it by the MOF.

Fact #2 (December 20, 2007)

Contrary to Minister Shaw's inferences, the OCG first learns about Cabinet's approval of the new Measures, and the supporting MOF Submission, *after the fact* and through the Media.

The OCG immediately writes a letter to the Hon. Prime Minister requesting particulars regarding the Measures that the Cabinet had approved. The OCG also requests that it be "*afforded with the opportunity to be consulted on the matter before the referenced new measures are formally implemented*". The OCG's letter was copied to the Media via an OCG Media Release which was dated December 20, 2007. A verbatim extract of the letter is set out hereunder for ease of reference.

"December 20, 2007

*The Honourable Bruce Golding, MP.
Prime Minister of Jamaica
Office of the Prime Minister
1 Devon Road
Kingston 10*

Dear Prime Minister:

Re: Media Reports – Cabinet Approval of New Measures Regarding Alleged Relaxation of Government Procurement Procedures and Guidelines

I write with reference to stories which have been reported in the media during the past 24 hours which would suggest that the Cabinet has approved, inter alia, new measures to (a) increase the threshold for the endorsement of Government contracts by the National Contracts Commission and (b) accredit a select number of un-named Public Bodies to award contracts internally.

We do not make any assertions about the veracity of the subject reports. However, should the reports indeed prove to be true, we would be grateful if the Commission of the Contractor General is afforded with the opportunity to be consulted on the matter before the referenced new measures are formally implemented.

As you would appreciate, the Commission, having regard to its statutory mandates, would be concerned about the matter.

Firstly, we would want to receive a full understanding of exactly what has been proposed or approved. Most importantly, however, we would want to be satisfied that adequate systems, procedures and checks and balances are in place to prevent against any abuse by Public Bodies and Officers of the minimum standards of merit, impartiality and propriety which, by virtue of Section 4 (1) of the Contractor General Act, must guide the award of all Government contracts and the associated expenditure of the taxpayer's money.

I avail myself of this opportunity to renew to you the assurance of my highest considerations.

Very respectfully yours,

Greg Christie (Signed"

Greg Christie
Contractor General

Copy: The Dr. The Hon. Carlton Davies, OJ, CD, Cabinet Secretary
The Hon. Shirley Tyndall, OJ, CD, Chair, National Contracts Commission"

Fact #3 (December 20, 2007)

Minister Shaw appears on the *This Morning Radio Talk Show*, in an interview with Emily Crooks, and infers that prior consultations have taken place with the OCG and/or with the NCC regarding the Measures that had been approved by Cabinet earlier in the month.

This is what the Minister said:

"I believe that the National Contracts Commission or the Contractor General, either or both, was consulted in relation to this particular submission. It might be the Contracts Commission. We obviously would not have come up with that formula of the new thresholds and so on and the procurement policies for these special and sensitive agencies without consultation with the Contracts Commission..."

"I think that there was that consultation... I don't think it is in the interest of the Government to have any sort of miscommunication with the Contractor General. I think that we need to take whatever steps are necessary to improve the flow of information with them."

The fact of the matter, however, was that the OCG had never seen the Measures nor had it been consulted in any manner, shape or form regarding them. More importantly, the OCG had never seen the supporting MOF Submission which led to the Cabinet's approval of the Measures in December 2007.

Fact #4 (December 2007)

On December 20, 2007, Minister Shaw publicly states that *"We obviously would not have come up with that formula of the new thresholds and so on and the procurement policies for these special and sensitive agencies without consultation with the Contracts Commission ...(i.e. the National Contracts Commission)"*.

However, as far as the OCG is aware, the National Contracts Commission (NCC) was never formally consulted regarding the Measures, did not formally deliberate upon same, did not formally vote upon same and did not formally approve same, prior to the date that the original Measures were approved by the Cabinet in December 2007 (... nor prior to the date that the Revised Measures were tabled before Cabinet on May 26, 2008, nor prior to the date that the Revised Measures were approved by Cabinet on August 25, 2008).

It is instructive to note that the NCC is a creature of the Law and can, therefore, only make its decisions in the manner which is prescribed by Law. Section 8 (3) of Schedule 3 to the Contractor General Act expressly provides that the eight (8) member panel of the NCC must lawfully convene its meetings with a quorum of at least five (5) members. Thereafter, Section 8 (4) of Schedule 3 mandates that the decisions of the Commission shall be by a majority of votes. Very importantly, Section 8 (7) requires that *"Minutes in proper form of each meeting of the Commission shall be kept and shall be confirmed as soon as practicable at a subsequent meeting"*.

Accordingly, if the matter regarding the Exemption Measures and the related MOF's supporting Submissions was properly tabled before the NCC, considered by the NCC, voted upon by the NCC and approved by the NCC, then this should have been clearly documented in the formal Minutes of the NCC and Minister Shaw or, for that matter, the NCC, should have no difficulty in producing the relevant Minutes of the NCC for public scrutiny.

The foregoing must be clearly understood as the Deputy Financial Secretary (hereinafter referred to as "the DFS"), who is employed in the MOF, and who is the chief representative of the MOF in so far as the MOF's several Submissions to the Cabinet regarding the Measures are concerned, is also a NCC Commissioner. However, no single NCC Commissioner, inclusive of the Chair of the NCC, has, and, indeed, no less than five NCC Commissioners voting together, have, the lawful authority to bind the NCC.

(Minister Shaw also publicly stated on October 3, 2008, that "... I think that he (the Contractor General) has not given enough of an idea to the public that there has been extensive consultations with him at various levels ... for instance he had 2 separate meetings with the ... the NCC". However, contrary to Minister Shaw's assertions, the sitting Contractor General has never met with a duly convened meeting of the NCC during his entire tenure as the Contractor General of Jamaica save and except to briefly convey his regards and/or to welcome the new Commissioners of the NCC into office).

Fact #5 (December 28, 2007)

The Hon. Prime Minister conveys to the Contractor General a copy of the MOF's Submission. The documents were communicated to the OCG by the Prime Minister *after the fact* and then only after the OCG had made public its protest of the fact that it had been totally bypassed by the MOF, the Government and the Cabinet in the consultation process. In response to a follow-up letter from the Contractor General to the Cabinet, dated January 3, 2008, the Permanent Secretary in the Office of Prime Minister, under cover of a letter which is dated January 8, 2008, conveys to the Contractor General, a copy of the Cabinet Decision in the matter.

Fact #6 (January 28, 2008)

The OCG submits an eighteen page Report of Comments to the Hon. Prime Minister providing him with its Comments on the MOF's Submission and the Measures which the Cabinet had approved. In respect of the MOF's "*Proposed Accreditations of Public Bodies*" and the exemption of procurements from the ambit of the Government Procurement Procedures Handbook (GPPH), the OCG states unequivocally that "*the subject proposals do not have the support of the OCG*". The OCG has at all material times maintained this position and will continue to do so.

It is instructive to note that at page 8 of its Comments, the OCG also stated that "*The only excepting circumstances that the OCG is aware of are those which relate to the country's bauxite and alumina joint-venture entities of JAMALCO, WINDALCO and St. Ann Jamaica Bauxite Partners, whose procurement activities were exempted from the GPPH by Cabinet Decision #42/06, dated December 4, 2006. Based upon the establishment, mining and operating agreements that these entities have entered into with the Government of Jamaica, the funds which they spend are, for the most part, not public funds, and so the exemptions of their procurements from the GPPH can be reasonably justified*".

Fact #7 (February 22, 2008)

Meeting convened by the Prime Minister. Attendees include the Prime Minister, the Chair of the NCC, the DFS, the Cabinet Secretary, the Permanent Secretary in the OPM, the Contractor General, and a Director of the OCG. After preliminary discussions are held on the contending issues, the Prime Minister appoints a Review Committee to commence the consultative process on

the areas of divergence which exist between the MOF's Cabinet Submission and the OCG's Comments of January 28, 2008.

Fact #8 (March 4, 2008)

The first Meeting of the Review Committee is convened under the Chairmanship of the Permanent Secretary in the Prime Minister's Office (OPM). In attendance are the Permanent Secretary, the DFS, the Contractor General and a Director of the OCG. After approx. 15 minutes, the meeting comes to an abrupt end without any progress being made in the consultations, contrary to the inferences of Minister Shaw.

The OCG representatives felt constrained to withdraw in consequence of the demonstrated abusive behavior of the DFS and his stated injunction to the OCG, made in the presence of the Permanent Secretary of the OPM, that the OCG does not and "*cannot influence Government Policy*". It is instructive to note that the fact of these assertions was subsequently confirmed in writing and, to date, has not been challenged. (See Facts #9 to #11).

Fact #9 (March 4, 2008)

Letter written by the Contractor General to the Permanent Secretary, with copy to the Hon. Prime Minister, indicating that the OCG regrets the fact that the Review meeting came to an abrupt end and thanking them both for the opportunity that was afforded to the OCG to make an input into the process. The verbatim contents of the Contractor General's letter are as follows:

"March 4, 2008

*Mrs. Pat Sinclair McCalla
Permanent Secretary
Office of the Prime Minister
1 Devon Road
Kingston 10*

Dear Permanent Secretary

Re: Meeting of Special Committee Established by the Honourable Prime Minister to Review Proposed Procurement Thresholds and Amendments to the Government's Procurement Procedures

It is with deep regret that Mr. Craig Beresford and myself were constrained to prematurely withdraw from the above-captioned meeting which was convened by you today to advance the referenced matter.

The openly aggressive and abusive behaviour which was displayed by the Deputy Financial Secretary, in response to the positions of the Office of the Contractor General (OCG), which I had tried to articulate, left us with no choice in the matter.

*In his own words, the Deputy Financial Secretary has today made it pellucidly clear that the Commission of the Contractor General does not and "*cannot influence Government Policy*".*

We deeply regret this turn of events, particularly as we believe that it is our shared belief and that of the Honourable Prime Minister that a reasonable opportunity should be provided for all relevant stakeholders to make an input into this very important process, even if the authors of the submission which is now before us, do not see eye to eye with the views or recommendations of other stakeholders.

We would like to thank you and the Honourable Prime Minister for affording the Office of the Contractor General with the opportunity to contribute to this very important national endeavour by making the written submission which we did under the cover of letter which was dated January 28, 2008.

Very respectfully yours,

Greg Christie (Signed)

Greg Christie
Contractor General

Copy: The Hon. Bruce Golding, MP, Prime Minister of Jamaica"

Fact #10 (March 11, 2008)

Telephone discussion with the Permanent Secretary in the OPM and the Contractor General, in which the Permanent Secretary apologizes for the DFS' behavior and assures the Contractor General that the MOF's Revised Cabinet Submission will be sent to the OCG for its review.

Fact #11 (March 14, 2008)

Internal OCG Email, at the hand of the Contractor General, confirming matters set out above at Fact #10. The Email was time-stamped at 9.57 AM on March 14, 2008. A hard copy of this Email was sent to the Cabinet Secretary, with copy to the Prime Minister, Minister Shaw and the Permanent Secretary in the OPM, under cover of an OCG letter which was dated June 2, 2008. The germane verbatim contents of the Email are as follows:

"FILE NOTE - Revision of GPPH

On Tuesday, March 11, I received a telephone call from the Permanent Secretary in the Office of the Prime Minister, Mrs. Pat Sinclair-McCall. The PS alluded to the meeting which was convened on March 4, 2008 at the OPM, on the instructions of the Prime Minister, and my letter of the same date regarding the behaviour of the D-FS therein which prompted my departure from the meeting. The meeting had been convened to review the MOF's Proposals for certain amendments to the GPPH. The PS apologized for what happened at the meeting and assured me that the input of the OCG was considered important and that the MOF had been asked to ensure that their proposals were reviewed by the OCG. I reminded the PS that the OCG's comments on the initial MOF Submission to Cabinet had already been submitted to the Prime Minister under cover of letter which was dated January 28, 2008". (Signed: Greg Christie).

Fact #12 (May 10, 2008)

Meeting convened by the Hon. Prime Minister to review progress on a number of issues, inclusive of the consultative process as regards the subject Measures. In attendance are the Prime Minister, the Chair of the NCC, the Attorney General, the Permanent Secretary in the OPM, the DFS, and an OCG Director. The Contractor General is on vacation and is unable to attend the Meeting which was called for the Saturday at very short notice.

The meeting is advised that the Review Committee Meeting of March 4, 2008 was aborted and that the OCG has not yet received the promised MOF Revised Cabinet Submission. The DFS advises that he had sent the documents to the OCG. The Prime Minister instructs that the document should be sent to the OCG for its input and its review. Because the OCG had not received the Revised Submissions from the MOF, no substantive discussions or consultations regarding the issue took place during this Meeting, contrary to Minister Shaw's public pronouncements.

Fact #13 (May 14, 2008)

OCG Letter written to the Permanent Secretary in the OPM itemizing the list of documents that the Prime Minister had instructed should be sent to the OCG. The letter was copied to the Prime Minister, Minister Shaw, the Chair of the NCC and the DFS. The letter ends with the following request: "We would be grateful if the foregoing could be sent to the OCG as soon as possible". Despite these OCG requests, however, and as the facts will show, nothing happened.

Fact #14 (May 26, 2008)

The MOF's Revised Submission is apparently tabled at a Cabinet Meeting for Cabinet's consideration and approval without any prior reference to the OCG for its input, and contrary to the expressed directives of the Prime Minister. The matter, in consequence, is deferred. These developments, at the time, are wholly unknown to the OCG as the OCG is still awaiting the MOF's compliance with the Prime Minister's directives.

Fact #15 (May 29, 2008)

Further follow-up OCG Letter to the Permanent Secretary in the OPM expressing the OCG's concern that it has not yet received from the MOF the Revised Submission. It is important to note that this letter was copied to the Prime Minister and Minister Shaw. The verbatim contents of the letter are as follows:

"May 29, 2008

*Permanent Secretary
Office of the Prime Minister
1 Devon Road
Kingston 6*

Attention Mrs. Patricia Sinclair-McCalla

Re: Procurement Matters

Reference is made to the meeting held with the Prime Minister on May 10, 2008, and our letter to you dated May 14, 2008, both referring to the captioned.

Despite the agreements which were reached in the meeting with the Prime Minister, regarding the OCG being given an opportunity to review several documents, as outlined in our letter, we are still not in receipt of same from the Ministry of Finance and the Public Service.

We would like to place upon record our concern, especially since the Prime Minister expressed the urgency of these matters in unequivocal terms, and again ask for your intervention, to facilitate the OCG's receipt of the documents."

Regards.

Yours Sincerely,

Craig Beresford (Signed)

*Craig Beresford
Director, Non-Construction Contracts, Licences and Permits
For and behalf of the Contractor General*

*Copy: The Hon. Orette Bruce Golding, MP, Prime Minister
The Hon. Audley Shaw, Minister of Finance and the Public Service"*

Fact #16 (June 1 or June 2, 2008)

Letter, dated May 30, 2008, received from the Cabinet Secretary, faxed to the OCG, advising the OCG that (a) implicitly, the MOF's Revised Submission was actually tabled before Cabinet on May 26, 2008, that (b) Cabinet's consideration of the matter had been deferred and that (c) the OCG was being invited to provide the Cabinet with its Comments thereon.

The OCG is shocked at the revelation that the MOF has deliberately ignored the directives of the Prime Minister by presenting its Revised Submission directly to the Cabinet without affording the OCG with the opportunity to first review it and to make an input into the final draft. It is now becoming evident to the OCG that the entire so called "consultative" process might be a charade.

The verbatim contents of the Cabinet Secretary's letter which was directed to the OCG are as follows:

"30th May 2008

Mr. Greg Christie
Contractor General
Office of the Contractor General
16 Oxford Road
Kingston 5

Dear Contractor General:

Subject: Amendments to Procurement Procedures to Facilitate Efficient Operations of Public Bodies

The letter advises that on Monday, May 26, 2008, Cabinet deferred its consideration of a Submission entitled 'Amendments to Procurement Procedures to Facilitate Efficient Operations in Public Bodies'. You may recall that a Committee comprised of representatives from the Ministry of Finance and the Public Service, the Cabinet Office, the National Contracts Commission, the OPM and yourself was established to review the previous Cabinet Decision No. 45/07 with respect to the increases in contract approval thresholds and specific concessions for certain public bodies, and to draft a new submission for Cabinet's consideration.

In light of the aforementioned, your comments in respect of this Submission are being sought by the Cabinet to inform its decision making process. A copy of the Submission prepared by the Ministry of Finance and the Public Service is attached for ease of reference. Kindly submit these comments to the attention of the Cabinet Secretary at the Cabinet Office by Wednesday, June 4, 2008. You are also invited to attend on Cabinet at 10.30 AM on Monday, June 9, 2008, for a brief discussion on the Cabinet Discussion.

Thank you for your usual kind attention

Sincerely,

Onika Miller (Signed)

*Onika Miller
For Cabinet Secretary*

Encl. (1)"

Fact #17 (June 2, 2008)

The OCG writes to the Cabinet Secretary, with copy to the Prime Minister, Minister Shaw and the Permanent Secretary in the OPM, acknowledging receipt of his faxed letter of May 30, 2008. After outlining the chronology of events which has transpired in the matter between January 28, 2008 and May 29, 2008, the OCG protests, *inter alia*, as follows:

"You have also mentioned in your letter that the referenced revised Cabinet Submission was tabled at a Meeting of Cabinet on May 26, 2008, and was deferred. Therefore, it is clear that the Prime Minister's instructions were ignored, given that the referenced Submission was sent to a scheduled Cabinet Meeting without the OCG's input".

The OCG also advises the Cabinet Secretary that it has observed that the Appendices to the documents he had sent under cover of his May 30, 2008, are missing. The OCG requests these additional documents and advises the Cabinet Secretary that the OCG will get back to him.

Fact #18 (June 3, 2008)

An email is received by the OCG from the Cabinet Office. A verbatim transcript of the Email is set out hereunder in the interest of public transparency:

"Dear Mr. Beresford,

I have received your letter dated June 2, 2008, which indicated, inter alia, the absence of referenced Appendices. Unfortunately, I was unable to respond until this morning as I was attending to the Cabinet meeting yesterday (Monday, June 2nd) and upon returning to my desk after 5:30 pm, I had the first opportunity to see your correspondence.

Kindly see attached for your urgent review the referenced appendix marked "Appendix 1 – Recommended: Accreditation Thresholds for Public Bodies" received from the Ministry of Finance and the Public Service (MFPS) which, regrettably, was not enclosed with the main document. Also, for your information and review, kindly see attached copy of an addendum submitted by MFPS this morning which presents a rationale for the proposed measures. A hard copy of these two documents will also be sent to your offices for your records.

We look forward to receiving your comments tomorrow on the revised submission prepared by the Ministry of Finance and the Public Service to facilitate Cabinet's consideration on Monday, June 9th 2008.

Kindly confirm receipt of the appendix and addendum by replying to this email. Please do not hesitate to contact me at 927-9627 if you have any further queries.

Regards,

*Onika Miller
Chief Technical Director (Acting)
Cabinet Support and Policy Division
Cabinet Office"*

Fact #19 (June 4, 2008)

The Contractor General, in response, writes to the Cabinet in the following terms. The letter was copied to the Prime Minister, the Permanent Secretary in the OPM and Minister Shaw.

The letter seeks to address the fact that the Cabinet, in light of its Email, is only prepared to provide the OCG with one day (viz. June 3 to June 4, 2008), after receiving all of the requisite documents, to respond with its Comments in respect of the MOF's Revised Submission.

(Save and except for the opportunity which was kindly afforded to the OCG to consult with, and make its presentations to, the Cabinet on June 16, 2008, all of the foregoing, namely Facts #1 through #18, represent the "extensive dialogue", the "pretty rigorous process" and "the extensive consultations" that Minister Shaw said took place in this matter with the OCG).

"June 4, 2008

The Cabinet Secretary
Office of the Prime Minister
1 Devon Road
Kingston 10

Attention: Ms. Onika Miller

Dear Cabinet Secretary:

Re: Amendments to Procurement Procedures to Facilitate Efficient Operations of Public Bodies

Thank you very much for the two (2) documents which you have sent to us today, via email, in the captioned regard.

First, I must assure the Cabinet that the Office of the Contractor General (OCG) is fully committed to working with it in the referenced endeavour. We are overly cognizant of the fact that this is an endeavour which is not only far-reaching in its import and its implications but one which the Administration wishes to address with dispatch.

The OCG welcomes the opportunity to provide its further comments on the Revised Cabinet Submission.

Having regard to all of the foregoing circumstances, we would be grateful if the OCG is afforded with a reasonable time frame within which to carefully evaluate the documents which you have sent to us so that we can provide you with our considered comments thereon.

While we obviously cannot revert to you within one day, as you have requested, you have my assurance that we will send to you our comments no later than June 12, 2008.

Mr. Craig Beresford, our Director, Non-Construction Contracts Licences and Permits, will be contacting you today, by telephone, to clarify, what seems to be an error with the numbering of the Appendices.

Yours respectfully,

Greg Christie (Signed)

Greg Christie
Contractor General

Copy The Hon. Bruce Golding, MP., Prime Minister of Jamaica
Mrs. Pat Sinclair McCalla, Permanent Secretary, Office of the Prime Minister
The Hon. Audley Shaw, Minister of Finance and the Public Service"

Fact #20 (June 9, 2008)

In keeping with the terms of the foregoing commitment which the Contractor General gave to the Cabinet, under cover of a letter which is dated June 9, 2008, the OCG submits its Comments to the Cabinet Secretary. Both the letter and the Comments were copied to the Prime Minister and Minister Shaw. A verbatim transcript of the OCG's Comments in its entirety is reproduced hereunder in the interest of full public transparency and scrutiny.



The Office of the Contractor General

Comments on the MF&PS 29/08 Revised Cabinet Submission

Amendments to Procurement Procedures to Facilitate Efficient Operations in Public Bodies

June 9, 2008

1. Mandates and Interest of the Office of the Contractor General

The Office of the Contractor General's (OCG's) interest in this matter is mandated by Section 4 (1) of the Contractor General Act.

Section 4 (1) provides as follows:

1. Subject to the provisions of this Act, it shall be the function of a Contractor-General, on behalf of Parliament –
 - a. to monitor the award and the implementation of government contracts with a view to ensuring that --
 - i. such contracts are awarded impartially and on merit;
 - ii. the circumstances in which each contract is awarded or, as the case may be, terminated, do not involve impropriety or irregularity;
 - iii. without prejudice to the functions of any public body in relation to any contract, the implementation of each such contract conforms to the terms thereof;

The Government Procurement Procedures Handbook (GPPH), although it is promulgated by the Cabinet, must, accordingly, be congruent with the principles which are enshrined in Section 4 (1) of the Contractor General Act. It is also evident that the GPPH should always be such that it can facilitate the effective discharge of the several mandates which are imposed upon a Contractor General by the law.

2. Background Comments

The OCG is grateful for the opportunity to provide its Comments to the Cabinet regarding the captioned MF&PS Revised Cabinet Submission.

It is the OCG's understanding that the Revised Submission was tabled at the May 26, 2008 meeting of the Cabinet, but was deferred to facilitate the input of the OCG. The Revised Submission was not conveyed to the OCG until June 2 and 3, 2008.

In so far as the OCG is aware, the Revised Submission was submitted to the Cabinet in direct contravention of the expressed instructions of the Prime Minister. These instructions had required that the MF&PS should have sent the Revised Submission to the OCG for its prior review. The Prime Minister's instructions were given during a meeting which was convened by him on May 10, 2008.

In attendance at that meeting were the Hon. Prime Minister, the Chair of the National Contracts Commission (NCC), a Deputy Financial Secretary, the Attorney General, the Permanent Secretary in the OPM and the Director of Non-Construction Contracts, Licences and Permits in the OCG.

The OCG has documented the foregoing in formal letters, dated May 14, May 29 and June 2, 2008, to the relevant authorities, inclusive of the Prime Minister.

It is instructive to note that the original December 2007 MF&PS Submission in this matter was likewise submitted to the Cabinet without any prior reference to or input from the OCG. Cabinet approved the Submission in December 2007, as is evidenced by Cabinet Decision No. 45/07.

Following upon the OCG's protestations to the Prime Minister, Cabinet Decision No. 45/07 was suspended and the OCG was afforded the opportunity to provide its Comments on the original MF&PS Submission. The OCG's Comments were submitted, to the Prime Minister, in an 18 page document, under cover of a letter which was dated January 28, 2008.

The OCG has reviewed the captioned Revised MF&PS Submission. The Revised Cabinet Submission does not address any of the Concerns, Comments and/or Recommendations of the OCG of January 28, 2008, save and except for its Recommendation to expand the Cabinet approval threshold for contracts from J\$15 Million to J\$30 Million, instead of from J\$15 Million to J\$25 Million.

Be that as it may, the OCG has nevertheless responded, hereunder, to each of the Recommendations of the MF&PS as are set out in the captioned Revised Submission.

3. MF&PS Recommendation 1

For Cabinet to approve "The increase of the NCC and Cabinet thresholds to \$8 million and \$30 million respectively."

The OCG's Position

The OCG fully supports the proposed increases in the thresholds. However, the OCG wishes to respectfully restate its prior request made that it be allowed adequate time to complete the requisite internal IT, administrative and operating structural adjustments which will be rendered necessary by the adjustments.

Most importantly, the OCG will need to (a) revise, print and re-issue the requisite NCC Transmittal Forms, etc. and (b) issue fresh Statutory Requisitions to the roughly 190 Public Bodies which will be impacted by the change and who will now be required to submit, to the OCG, on a quarterly basis, Quarterly Contract Award (QCA) Reports covering contracts which are to be awarded in the value range of J\$275,000 to J\$7,999,999.99.

In the circumstances, the OCG respectfully requests that the implementation date for the new thresholds be set at October 1, 2008, i.e. the beginning of the 4th Quarter of the 2008.

4. MF&PS Recommendation 2

For Cabinet to approve “The accreditation of entities listed in Appendix 2 to refer to the NCC and Cabinet only contracts above the values indicated.” The indicated NCC thresholds are Air Jamaica (US\$150,000), Airports Authority of Jamaica (J\$10 Million), National Housing Trust (J\$15 Million for Development Works Only), National Water Commission (J\$10 Million), Norman Manley International Airport (\$10 Million), Petrojam Limited (J\$10 Million), and the Port Authority of Jamaica (J\$20 Million for the NCC and J\$75 Million for the Cabinet).

The OCG’s Position

The OCG respectfully objects, in principle, to the concept of allowing exceptional contract approval thresholds for certain Public Body entities. There is an agreeable proposal which is on the table to elevate the current NCC and Cabinet thresholds by 100% to J\$8 Million and J\$30 Million, respectively. The OCG does not understand why the same elevated approval thresholds should not be applied to all Public Bodies. The application of a common approval threshold has been the policy of successive Administrations since 1963.

5. MF&PS Recommendation 3

For Cabinet to approve “The afore-noted suite of specific recommendations aimed at improving the management of critical procurements at Air Jamaica, Petrojam, and the Port Authority”. The Recommendation, generally, seeks to exempt certain procurements from the ambit of the GPPH.

The OCG’s Positions

To the extent that the recommendation seeks to permit certain Public Bodies to utilize their own unique procurement processes, or rules, to determine how and to whom Government contracts should be awarded, the OCG views this proposal as a step in the wrong direction. The objectives that are desired can be achieved by other means without abandoning the GPPH.

Among the positions which the OCG has, or had conveyed in its Comments of January 28, 2008, in relation to the MF&PS proposals, are those which are expressed hereunder:

- (a) Section 4 (1) of the Contractor General Act requires that Government contracts should be awarded “*impartially and on merit*” and that the “*circumstances in which each contract is awarded*” should not “*involve impropriety or irregularity*”. These are concepts which can only work effectively within a framework of a common set of established procurement rules which, it should be noted, Jamaica has maintained since 1963 for all Public Bodies.

- (b) Accordingly, the OCG does not support giving Public Bodies the flexibility to develop or to use their own procurement rules, nor does it support the awarding of high value contracts without same being subjected to some level of independent scrutiny. In the interest of probity, transparency, accountability and to ensure that the tax-payer gets value for money, the GPPH should be applied as the common regulatory tool for all Public Sector procurements.
- (c) It is the OCG's considered opinion that to do otherwise will create an imbalance which will undermine and defeat the very objectives of the GPPH and the Government's Procurement Policy.
- (d) It is also instructive to note that historical reports of the Auditor General, and the Contractor General, have consistently brought forth empirical evidence which would suggest that there does not currently exist in the Jamaica Public Sector, an acceptable environment in which self regulation in public procurement and contracting can thrive and flourish.
- (e) Almost without exception, all special investigations which the OCG has conducted into the procurement practices of Public Bodies, over the past two (2) years, have disclosed wide-scale breaches and/or non-observance of the GPPH.
- (f) Additionally, the OCG's contract award monitoring activities have disclosed that all of the proposed "accredited" Public Bodies, despite the fact that they have made significant improvements in their procurement practices in the recent past are, notwithstanding, still exhibiting varying but un-acceptable levels of compliant self-regulation.
- (g) Any attempt, therefore, to exempt, *carte blanche*, any Public Body from the strictures of the GPPH, should be carefully examined and should not be embarked upon without caution.
- (h) If securing expedition in the award of public contracts and ensuring the financial and operational efficiency of the 'accredited' Public Bodies are the primary justifications for exempting the named Public Bodies from the GPPH, we would respectfully submit that there are other ways that such an issue can be effectively addressed. The issue can be dealt with whilst at the same time the elements of probity, transparency, competition, value for money and independent scrutiny – all necessary requirements for good governance in the public sector procurement process – are preserved.
- (i) **It is against the foregoing back-ground that the OCG would respectfully make the following counter-recommendations for Cabinet's consideration:**
- **Develop and implement, within the ambit of the GPPH, a "fast track" NCC and/or Cabinet contract evaluation and endorsement process for certain designated or "accredited" Public Bodies to address any procurement which may have serious financial and operational implications.**

- **Revise and extend the application of the current Procedures for Emergency Contracting (Ref. MOFP Circular #3, January 10, 2006), which are embodied in the GPPH, to deal with instances where there are very urgent reasons for contracting.**
 - **Within the ambit of the GPPH, make provision for the exemption of certain foreign contractors from the requirement of registering with the NCC where there are compelling and justifiable reasons for so doing.**
 - **Within the ambit of the GPPH, permit a more liberal use of the limited tender or “three quote” procurement methodologies for Works, Goods and Services contracting in foreign locations.**
- (j) **The OCG believes that Section 2.1.3.4 of the GPPH – Sole Source or Direct Contracting (dated September 30, 2005) – generally provides adequate provision for the specialized or sensitive procurements which have been listed in respect of the proposed “accredited” Public Bodies. The employment of the limited tender methodology, and/or the *pre-qualification of contractors* who are used routinely, but on an *ad hoc* basis, can also be utilized to address these and other procurements. Further, the OCG sees no reason why the same methodologies cannot be employed to accommodate the requirements which the Ministry has raised regarding the engagement of Attorneys.**
- (k) **It is the OCG’s considered view that the foregoing proposals, among others, would produce a “win-win” solution to the issues that are on the table – i.e. the need for efficiency, expedition, and a quick turn around in the contract evaluation and/or approval processes of critical, specialized and/or foreign-based procurements. At the same time, they would ensure that probity and independent scrutiny of the procurements are secured, via the requirement for the NCC and/or the Cabinet to review and to approve these contract award submissions.**

The OCG is concerned that if the MF&PS’s proposals are approved, they are likely to become the catalyst for the reversal of the significant gains which have been recently registered in the public sector procurement arena, in Jamaica, particularly in terms of enhanced probity, accountability, transparency, independent scrutiny and competition in the award of Government contracts.

The OCG wishes to assure the Cabinet that it is prepared to go to work, in good faith, with the Cabinet, the Ministry of Finance and all relevant Public Bodies, to effectively accomplish the counter-recommendations which it has set out above in an effort to secure the strategic objectives of the Administration as soon as possible.

6. Other OCG Positions

Increased Thresholds for Sole Source and Limited Tender Procurements

The MF&PS has recommended that the current Sole Source threshold of J\$1 Million should be increased, by a factor of 500%, to J\$5 Million. The Ministry, however, has offered no rationale or justification for its proposal.

The OCG continues to maintain its previously held view that the thresholds for the GPPH's Sole Source and Limited Tender methodologies should be increased by the same factor of 100% which has been proposed for the above-referenced increases in the NCC and Cabinet contract approval threshold levels of J\$4-8 Million and J\$15-30 Million, respectively.

Accordingly, the current Sole Source and Limited Tender thresholds of J\$1 Million and J\$4 Million, respectively, should be increased to J\$2 Million and J\$8 Million, respectively.

Unregistered Small Local Suppliers/Contractors

The OCG is reluctant to support any arbitrary recommendation which would further exempt local contractors from registering with the NCC.

Effective February 12, 2007, a contract value threshold of J\$275,000, beneath which contractors are exempted from registering with the NCC, was established by the MOFP in an effort to facilitate the expedition of contract awards to small suppliers. (See MOFP Circular #6 of 2007). The OCG envisages that the said threshold will be elevated periodically, by the Cabinet, as upward movements in the inflation rate may necessitate. There is no cost charged for a contractor to register as a Goods and/or Services Contractor.

The NCC contractor registration requirement is a vital and virtually indispensable pre-qualification component of the Government's Procurement Framework. It was established, *inter alia*, to enable the OCG and the NCC to determine the resource, experience and performance capabilities of contractors to satisfactorily execute Government Works, Goods and/or Services Contracts of varying values, grades and/or classifications.

The NCC registration regime was also established to ensure that entities that are desirous of bidding on Government contract opportunities are tax compliant and financially sound.

These are, therefore, matters which should not be disturbed lightly. Indeed, the strictures should be strengthened, not relaxed if we are to ensure that the taxpayer gets value for his/her money. Any further removal of the NCC registration pre-condition will erode the legitimacy of the Government's Procurement Framework and undermine the integrity of the process.

Contractor Grade Limits

The present Works Contractor Grade Limits should be revised and adjusted, by the NCC, simultaneously with the proposed increases in the above-referenced contract approval thresholds, in recognition of the common inflationary factors which have impacted same. The OCG had also made this recommendation in its Comments of January 28, 2008.

Fact #21 (June 16, 2008)

The Contractor General, the OCG's Director of Non-Construction Contracts, Licences and Permits, and the Contractor General's Administrative Assistant, attend a Meeting of the Cabinet. For approx. 2 hours, the Contractor General comprehensively articulates, clarifies and substantiates the OCG's Comments of June 9, 2008.

The OCG's presentation is predicated upon its recommendations, *inter alia*, that (a) no special or elevated approval thresholds should be afforded to any one particular Public Body and (b) that the focus should be on amending the GPPH to accommodate special and emergency procurements as opposed to exempting, *carte blanche*, special procurements from the purview of the GPPH.

Towards the end of the presentation, the OCG genuinely believes that it has persuaded the Prime Minister and the Cabinet to buy into its stated positions. At no time does the OCG retreat from its position that the GPPH should not be abandoned or that all Public Bodies should have the same common approval thresholds.

In consequence, the OCG makes the following concessions, namely (a) it proposes and agrees to an upgrade of the standing NCC \$8 Million approval threshold to \$10 Million, (b) it proposes and agrees to an upgrade of the standing Cabinet \$25 Million approval threshold to \$30 Million and (c) it agrees to the adjustment of the Sole Source threshold to \$3 Million. \$5 Million was previously proposed by the MOF and \$2 Million was previously proposed by the OCG.

Consistent with the OCG's perception that the Cabinet was agreeable to its proposal that special and emergency procurements should be addressed by way of an amendment to the GPPH, rather than via the non-application of the GPPH, the OCG is requested by the Hon. Prime Minister to urgently draft the proposed amendments to the GPPH and submit same to the Cabinet within 48 hours.

The Contractor General willingly gives the Prime Minister his commitment that he will comply with his request. The Meeting was adjourned shortly thereafter.

Fact #22 (June 18, 2008)

Under cover of a letter which is dated June 18, 2008, the OCG makes its Submission to the Cabinet Secretary in keeping with the request of the Hon. Prime Minister. A verbatim transcript of the letter and the Submission in its entirety are reproduced hereunder in the interest of public transparency and scrutiny. The OCG also copied its letter and its Submission to the Prime Minister, the Chair of the NCC and the DFS. The content of the Submission will speak for itself.

It is, however, instructive to note that the final paragraphs of the OCG's Submission read as follows:

"The foregoing proposals, which are outlined at Items #2 and #3, are being formally submitted by the OCG for the consideration of the Cabinet and other stakeholders. The OCG would respectfully recommend that once the approval of Cabinet is secured, the requisite revisions should be embodied in official MF&PS Circulars for formal issue to all Ministries, Departments and Agencies of Government.

The OCG, however, would be grateful if it is provided with the opportunity to review the draft MF&PS Circulars before they are formally issued.

"June 18, 2008

*The Cabinet Secretary
Office of the Prime Minister
1 Devon Road
Kingston 10*

Attention: Ms. Onika Miller

Dear Cabinet Secretary:

Re: Submission of the Office of the Contractor General in Response to Cabinet Decisions of June 16, 2008 – Amendments to Procurement Procedures to Facilitate Efficient Operations of Public Bodies

Further to my undertaking which was given to the Hon. Bruce Golding, Prime Minister of Jamaica, on June 16, 2008, please now find enclosed, herewith, my Submission of even date in the captioned matter.

Yours respectfully,

Greg Christie

*Greg Christie
Contractor General*

*Copy The Hon. Bruce Golding, MP., Prime Minister of Jamaica
 The Hon. Shirley Tyndall, OJ, Chair, National Contracts Commission
 The Financial Secretary (Attention: Mr. Robert Martin, Deputy Financial Secretary)*

Enclosure"



The Office of the Contractor General

Amendments to Procurement Procedures to Facilitate Efficient Operations in Public Bodies

OCG Submission in Response to Cabinet Decisions of June 16, 2008

June 18, 2008

1. Outline of Cabinet Approved Increases in Contract Award Approval Thresholds

| | CURRENT CONTRACT APPROVAL THRESHOLD | INCREASED CONTRACT APPROVAL THRESHOLD | REMARKS / EFFECTIVE DATE OF INCREASED THRESHOLDS AS DICTATED BY CABINET |
|-----------------------|--|--|--|
| NCC | \$4 Million | \$10 Million | All recommendations for the award of contracts of \$10 Million and above in value must be endorsed by the NCC before the contract can be awarded. (Ref. Sections 1.5.2.1 and 2.3, 3.4, 4.5 and 5.3.5 of GPPH). NB. Current GPPH advertising thresholds must also be revised. Effective Date: August 1, 2008 |
| CABINET | \$15 Million | \$30 Million | All recommendations for the award of contracts of \$30 Million and above in value must be approved by the Cabinet before the contract can be awarded. (Ref. Sections 2.3, 3.5, 4.6 and 5.3.6 of GPPH). NB. Current GPPH advertising thresholds must also be revised. Effective Date: August 1, 2008 |
| SOLE SOURCE | \$1 Million | \$3 Million | All Sole Source or Direct Contracting which is \$3 Million or greater in value must receive prior written approval from the NCC through the Accounting Officer. All Sole Source or Direct Contracting which is less than \$3 Million in value must receive prior written approval from the Accounting Officer. (Ref. Section 2.1.1.3 of GPPH). Effective Date: August 1, 2008 |
| LIMITED TENDER | \$4 Million | \$10 Million | Limited Tenders must have the prior written approval of the NCC for contracts which are \$10 Million and above in value. Limited Tenders must have the prior written approval of Accounting Officers for contracts which are less than \$10 Million in value. (Ref. Section 2.1.1.2 of GPPH). Effective Date: August 1, 2008 |

2. Proposed Revision to GPPH Requirement for Contractors to Register with the NCC – Exemption from Registration for Certain Foreign Contractors

Contractors, both local and foreign, who are desirous of participating in public sector procurement opportunities, are currently required to be registered with the NCC. (Ref. Section 2.6 of the GPPH). However, contractors who are bidding on contracts up to a value of \$275,000 are exempt from registering with the NCC. (Ref. MOFP Circular No. 6, dated February 12, 2007). Consultants are also exempt from registration.

In light of the MF&PS 29/08 Cabinet Submission, and the Comments of the OCG, dated June 9, 2008, which were made in response thereto, Cabinet, at its meeting of June 16, 2008, gave its approval, in principle, for certain Foreign Contractors to be exempted from this requirement. The OCG was requested by the Hon. Prime Minister to draft an appropriate amendment to the GPPH to provide for the proposed exemption.

The OCG's proposed amendment to the GPPH is as follows:

“A procuring entity may procure goods, services and/ or works from a Foreign Contractor who is not registered with the NCC where the prior written approval of the NCC is obtained through the Accounting Officer.

The Procuring entity must provide a compelling justification for the requested exemption together with reasonable proof that the Foreign Contractor, having regard to its experience, resources, professional qualifications, performance record, legal capacity to enter into contract, and managerial, technical and/ or financial capacities, is competent and qualified to satisfactorily perform the contract in an efficient and cost-effective manner.

The NCC may grant the exemption on such terms and conditions as it may deem fit, inclusive of specifying the time limits of the exemption and the procurement/procurements to which the exemption relates. The NCC shall maintain a register of “Exempt Foreign Contractors” in which it must record, inter alia, the name and address of any Foreign Contractor which it has exempted from registration and the Procuring entity to which the exemption relates.

*In any case in which the **Procedures for Emergency Contracting** are utilized and the emergency requires urgent action, the Accounting Officer may authorize the engagement of a Foreign Contractor who is not registered with the NCC and shall, within seven (7) days of the date thereof, inform the NCC in writing of the engagement and provide it with all relevant particulars.*

For the purposes of this provision, a Foreign Contractor shall be deemed to be a Contractor who is domiciled in, and who wholly or substantially operates from or within, a foreign jurisdiction”.

3. Proposed Revision to Procedures for Emergency Contracting

Ministry of Finance and Planning (MOFP) Circular No. 3, dated January 10, 2006, currently provides for the circumstances in which Emergency Contracting is permitted by the GPPH.

The preamble of Circular No. 3 specifies the following definition for an emergency contract:

“A contract for Emergency Works is one awarded by a Ministry, Department or Agency of Government for the repairs or remedial action necessary to preserve public safety or property or avoid great social harm or significant public inconvenience. The need for such Works must be sudden, unexpected and a pressing necessity or exigency”

“For the purposes of this definition, Emergency Works include construction works and the supply of goods and services”.

In light of the MF&PS 29/08 Cabinet Submission, and the Comments of the OCG, dated June 9, 2008, which were made in response thereto, Cabinet, at its meeting of June 16, 2008, gave its approval, in principle, for the Procedures for Emergency Contracting to be revised to expand the circumstances in which a Procuring entity will be permitted to undertake an emergency procurement. The OCG was requested by the Hon. Prime Minister to draft an appropriate amendment to MOFP Circular No. 3.

The OCG’s proposed amendment to the preamble of MOFP Circular No. 3 is 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 incur or 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 the national interest or 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”.

The foregoing proposals, which are outlined at Items #2 and #3, are being formally submitted by the OCG for the consideration of the Cabinet and other stakeholders. The OCG would respectfully recommend that once the approval of Cabinet is secured, the requisite revisions should be embodied in official MF&PS Circulars for formal issue to all Ministries, Departments and Agencies of Government.

The OCG, however, would be grateful if it is provided with the opportunity to review the draft MF&PS Circulars before they are formally issued.

Fact #23 (June 18 to September 29, 2008)

Interestingly, no response or documentation is received by the OCG from the Cabinet or from the MOF regarding the OCG's submission of its June 9, 2008 Comments to the Cabinet, the OCG's presentation thereon of June 16, 2008 to the Cabinet and the OCG's June 18, 2008 Submission of its draft GPPH revisions which were requested by the Prime Minister.

Fact #24 (September 29, 2008)

A fax is received by an OCG Inspector, from the Tax Administrative Services Department. The fax is a MOF Circular, No.#36, dated September 22, 2008, and is entitled "*Increased Approval Thresholds for Public Sector Procurement*". The Circular advises, *inter alia*, that the new contract threshold values were approved by Cabinet on August 25, 2008 and "*have been increased effective 22 September 2008*".

The Contractor General immediately telephones Minister Shaw and the Cabinet Secretary and expresses his surprise that the OCG, again, has been bypassed by the MOF, and has learned about the new Measures from a Public Body and not from the MOF or from the Cabinet Secretary.

The Cabinet Secretary advises that he has not yet seen the Circular. They both promise to look into the matter and to get back to the Contractor General the following day, September 30, 2008. Minister Shaw did not keep his promise.

For some unexplained reason, neither the Cabinet Secretary nor Minister Shaw alerted the Contractor General to the fact that the Cabinet had also at its meeting of August 25, 2008, granted the exemptions which the OCG had opposed. As at September 29, 2008, this fact is wholly unknown to the OCG.

Fact #25 (September 30, 2008 in the Morning)

The Contractor General writes to the Cabinet Secretary and Minister Shaw to formally document the OCG's concerns in the matter. The verbatim contents of the letter are re-produced hereunder in the interest of public transparency. The letter was copied to the Prime Minister, the Acting Financial Secretary and the Chair of the NCC.

"September 30, 2008

*Ambassador Douglas Saunders
Cabinet Secretary
Office of the Prime Minister
1 Devon Road, Kingston 10*

*The Hon. Audley Shaw, MP
Minister of Finance and the Public Service
Ministry of Finance and the Public Service
30 National Heroes Circle
Kingston 4*

Dear Sirs:

Re: Increased Approval Thresholds for Public Sector Procurement

I write further to my telephone discussions with you of last night to formally confirm the fact that the Office of the Contractor General (OCG) has not received any advance notice of the purported implementation of the above-referenced new Government Contract Approval Thresholds.

A copy of a Ministry of Finance Circular, #36, dated September 22, 2008, in which the new thresholds were notified to all "Permanent Secretaries and Heads of Procuring Entities", was faxed to an OCG Inspector yesterday, September 29, 2008, by the Tax Administrative Services Department. The Circular refers to a Cabinet Decision, "No. 28/08, dated August 25, 2008", from which the Circular is derived.

The Circular, a copy of which is enclosed, herewith, for your ease of reference, provides particulars of the new thresholds and expressly states that they came into effect on September 22, 2008, the very date of the Circular itself. The Circular is signed by the Acting Financial Secretary, Ms. Darlene Morrison.

The OCG is extremely concerned that once again it has been bypassed by the Cabinet and by the Ministry of Finance in the attempted implementation of new Government contract thresholds without any prior written notice being given to it of the intended date of their implementation. We have also noted that the Circular contains novel and ambiguous language regarding the definitions of "Sole Source" and "Direct Contracting" which has previously not appeared in any documentation which the OCG has seen. There is also no reference in the Circular to "Limited Tender" contracting. All this will have significant implications for the procurement process.

In December 2007, an attempt was made by the Cabinet to revise and to implement the existing thresholds without any prior consultation with the OCG. On that occasion, the matter, quite surprisingly, was brought to the attention of the OCG through the media. A formal protest was immediately lodged by me with the Prime Minister, whereupon the process was halted.

As you are aware, the OCG is mandated by Section 4 (1) of the Contractor General Act to monitor the country's ~ 190 Procuring Public Bodies, inter alia, in their compliance with the Government's Procurement Procedures and Guidelines, inclusive of the procedures as they relate to the approval of contracts which fall within the prescribed NCC and Cabinet approval thresholds.

The OCG is also mandated by Section 23J (1) of the Contractor General Act to provide the National Contracts Commission (NCC) with its support resources. To the extent, therefore, that it is the NCC which is required by law to approve recommendations for the award of contracts which fall within the prescribed threshold limits, it is only axiomatic that the OCG must, as a matter of course, be provided with reasonable advance notice of the specifics and proposed implementation date of any adjustment to the existing thresholds.

You will recall that the OCG had formally advised the Cabinet, in writing, that several internal adjustments to the OCG's forms, websites, and Quarterly Contracts Report (QCA) process would have to be made to facilitate any revisions to the existing thresholds.

You will also recall that, at the invitation of the Honourable Prime Minister, a presentation was made by me to the Cabinet, on the matter of the proposed revised thresholds, on June 16, 2008. At the end of my presentation, I was requested by the Prime Minister to make additional written recommendations to Cabinet to revise the existing procedures as they relate to Emergency Contracting and the Registration of Foreign Contractors.

I complied with the request within 48 hours, on June 18, 2008, on the understanding that I would be formally advised of the final decision of Cabinet regarding the entire matter as it related to the proposed thresholds and a definitive date for the implementation of same. In point of fact, my Submission to the

Cabinet of June 18, 2008, ended with the following request: "The OCG would be grateful if it is provided with the opportunity to review the draft MF&PS Circulars before they are formally issued".

Despite the foregoing, I am yet to receive any word either from the Cabinet or from the Ministry of Finance regarding the matter.

I should also point out that Section 23D (3) of the Contractor General Act requires the new threshold limits to be formally gazetted before they can lawfully come into force. I do not know if the provisions which are contained in Section 23D (3) have been complied with.

The OCG remains willing and ready to work with the Cabinet and the Ministry of Finance to resolve the situation in which we have found ourselves. We will, therefore, await the proposals of your Good Offices as to how best you would wish to have this done.

Very respectfully yours,

Greg Christie (Signed)

*Greg Christie
Contractor General*

*Copy: The Hon. Bruce Golding, MP, Prime Minister
Ms. Darlene Morrison, Acting Financial Secretary
Ms. Shirley Tyndall, Chair, National Contracts Commission*

Enclosure"

Fact #26 (September 30, 2008 in the Afternoon)

Copy of three MOF Circulars, #34 (Amendments to Procurement Procedures for Commercial Entities), #35 (Exemptions from the GPPH – re Legal Services and Artistic and Cultural Products and Services) and #36 (Increased Approval Thresholds for Public Sector Procurements), are received, by the OCG, from the MOF, under cover of a letter which is dated September 30, 2008. All three Circulars are dated September 22, 2008. They are also expressed to be effective September 22, 2008.

The Circulars are stated to relate to the approvals of the Cabinet which were granted on August 25, 2008. However, the author of the letter, the Senior Director – Procurement Policy and Implementation Unit in the MOF, curiously advises that despite the fact that the Circulars became effective on September 22, 2008, they *"are now only being officially disseminated to the various entities today, September 30, 2008"*.

Fact #27 (October 1, 2008)

The OCG dispatches a letter to the Acting Financial Secretary requesting that it be advised *"if the changes in the contract thresholds, as approved by Cabinet, (in MOF Circular #36) have been Gazetted in accordance with the provisions of Section 23D (3) of the Contractor General Act"*. The letter was copied to Minister Shaw and the Cabinet Secretary.

Fact #28 (October 2, 2008)

The Contractor General issues a Statement to the Media on the matter. A courtesy copy of the Statement was formally directed to the Cabinet Secretary by the Contractor General. The full text of the Statement is reproduced hereunder for ease of reference.

MEDIA RELEASE

STATEMENT OF THE CONTRACTOR GENERAL REGISTERING STRONG OBJECTION TO CABINET'S EXEMPTION OF CERTAIN PUBLIC ENTITIES FROM PROCUREMENT RULES

Kingston; October 2, 2008 – “The Office of the Contractor General (OCG) wishes to publicly register, in the strongest possible terms, its objection to certain procurement related measures which the Cabinet has recently approved for implementation.

The measures, which were published in a Ministry of Finance (MOF) Circular, dated September 22, 2008, are intended to exempt certain procurements of Air Jamaica Limited, Petrojam Limited, the Jamaica Tourist Board and Jamaica Vacations Limited, from the application of the Government's Procurement Procedures Handbook (GPPH).

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 un-specified “*internal procurement regimes*”, whereas the other two have been authorized to undertake certain procurement activities “*according to standard industry practice*”.

The exemption measure was one among several which had been previously considered and approved by the Cabinet in December 2007, without any prior reference or notice to the OCG. The measures were withdrawn after I had written to the Hon. Prime Minister, on December 20, 2007, to publicly protest the fact that the OCG had been wholly bypassed in the consultation process.

At the invitations of the Prime Minister, one of which was issued following after a second and repeated attempt by the MOF to circumvent the OCG, the OCG submitted two written Reports to Cabinet in which it outlined and substantiated the reasons why it was compelled to object to the measure. The Reports, which were respectively submitted on January 28 and June 9, 2008, were buttressed by a 2-hour presentation which was made by me to the Cabinet on June 16, 2008.

Despite the strong and vigorous objections of the OCG, the Government, however, seems determined to press ahead with the measure in so far as it relates to the named Public Bodies. Other Public Bodies which were previously listed for exemption were removed from the list, whereas the addition of the Jamaica Tourist Board and Jamaica Vacations Limited, to the original list, was only brought to the attention of the OCG on September 30, 2008. The objections of the OCG to the measure are premised primarily upon the following considerations:

1. Section 4 (1) of the Contractor General Act mandates the Contractor General 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*”. These are concepts which can only work effectively within a framework of a common set of established procurement rules which, it should be noted, successive administrations in Jamaica have maintained since 1963 for all Public Bodies.

2. Accordingly, the OCG does not support giving Public Bodies the flexibility to develop or to use their own procurement rules. Nor does it support the awarding of high value contracts in circumstances where there is no independent scrutiny at the pre-award stage.
3. In the interest of probity, transparency and accountability, and to ensure that the Tax-Payer gets value for money, the GPPH should be applied as the common regulatory tool for all Public Sector procurements. It is the OCG's considered opinion that to do otherwise will create an imbalance which will undermine and defeat the very objectives of the GPPH and the Government's Procurement Policy.
4. It is also instructive to note that historical reports of the Auditor General, and the Contractor General, have consistently brought forth empirical evidence which has proven that there does not currently exist in the Jamaica Public Sector, an acceptable environment in which self regulation in public procurement and contracting can thrive and flourish.
5. Almost without exception, all Special Investigations which the OCG has conducted into the procurement practices of Public Bodies, over the past two (2) years, have disclosed wide-scale breaches and/or non-observance of the GPPH. Additionally, the OCG's contract award monitoring activities have disclosed that in spite of recent improvements in their procurement systems, all of the exempted Public Bodies are currently exhibiting varying but un-acceptable levels of non-compliant self-regulation.
6. As an example, the Special Investigation that was recently concluded by the OCG into the procurement practices of Air Jamaica Ltd., has conclusively established that many of the Airline's procurements lacked transparency and competition and, above all, compliance with contracting best practices. One of the glaring irregularities which was identified was the fact that the Airline had awarded several contracts to private contractors yet was unable to produce formal agreements evidencing the terms of same. (The Report of Investigation is available for reading on the OCG's website at www.ocg.gov.jm).

Is this the type of "*internal procurement regime*" that the Cabinet is now signaling that it is satisfied with?

7. The OCG is concerned that if the Government proceeds with the exemptions, they will become the catalyst for the reversal of 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.
8. The OCG, therefore, views the measure as a step in the wrong direction. It is also one which will most certainly inflict grave damage to the credibility of the administration's public pronouncements that it is supportive of the principles of transparency, accountability and discipline in public contracting, and that it is all about strengthening the integrity of the procurement process.
9. The concept of permitting Public Bodies to do as they please in determining when, how, to whom and in what values Government contracts should be awarded, and to give Public Officers an unfettered hand in spending the Tax-Payers' money, cannot, in the OCG's view, be countenanced in any country which values the rights of the Tax-Payer and

certainly not in any country which has just slipped 12 places on an internationally renowned corruption perception index to become the 96th least corrupt country in the world.

10. As a final consideration, the question needs to be asked as to what will become of these exempted entities if and when the present administration criminalizes breaches of the GPPH as it has promised to do. Since the exempted entities are exempted from the GPPH, it clearly follows that they and their Officers will also be exempted from any criminal culpability for their actions, whilst other non-exempt Public Bodies and their Officers will not be so lucky.

It is in light of all of the foregoing that the OCG is unable to give its support to the measure. If it stands, the country's procurement regulatory regime would have been compromised. Consequently, the OCG, in the discharge of its responsibilities under the Contractor General Act, will be obliged to utilize all the powers that are available to it to subject the exempted entities, their officers and their contracting practices, to an intensified and sustained level of scrutiny, the likes of which will be unprecedented in the 23 year history of the OCG.

Perhaps it should be stated at this juncture that the job of the Contractor General is not to fearfully, willingly or recklessly lend his acceptance to every measure or desire of the Government of the day.

Rather, it is the job of the Contractor General, as an Independent Commission of Parliament, to stand firmly, between the Government and the Taxpayer, as an inviolable check and balance. He must at all times act dispassionately, fearlessly and resolutely in ensuring that the interests of the Taxpayers are protected, whenever and wherever their money is being spent by Public Officials on the award of Government contracts.

On a final note, I am obliged to record that the primary justification which was advanced by the MOF for granting the exemptions is that "*the procurement procedures have severely impaired their (i.e. the entities') ability to conduct their businesses efficiently and in a manner consistent with the demands of their business environments*". The OCG has, however, categorically rejected this argument as one which is based upon (a) a fallacious reasoning, (b) a misunderstanding of the purpose and the ambit of the GPPH and (c) an apparent unwillingness on the part of the entities to be bound by any rules.

Further, in its several submissions to the Cabinet, the OCG has articulated numerous recommendations, inclusive of suggested modifications to the GPPH, all of which were designed to ensure expedition in the contract award process as well as to guarantee the financial and operational efficiency of the named entities.

The recommendations were also predicated on the premise of the maintenance of the general application of the GPPH and, thus, the preservation of the good governance elements of probity, accountability, transparency, competition, value for money and independent scrutiny in the entities' contracting processes".

-END-

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Fact #29 (October 2, 2008)

Letter from the Cabinet Secretary, dated September 30, 2008, and written in response to the Contractor General's letter, is received by the OCG.

The Cabinet Secretary advises, *inter alia*, that:

"As I indicated to you in our conversations yesterday, the Cabinet Office neither was aware of nor had received the Ministry of Finance and the Public Service (MFPS) Circular (No. 36) to which you had alluded and which you were kind enough to append to your letter under reference".

"Whilst this Office is not in a position to attest to the status of the copy circular in question (from the Tax Administrative Services Department), you will be happy to know that no circular has been, up to now, disseminated to Ministries and Agencies by the MFPS. This would explain why this Office had not received any such Circular."

"I also understand, however, that the NCC, for which as you indicate, the OCG provides support resources, was already privy to the agreed changes".

"I am further advised that the MFPS will be writing to you very shortly on the matter, and I expect that this Office will be kept abreast of developments".

Fact #30 (October 3, 2008)

Minister Shaw issues a Statement to the Media and makes several verbal public comments, on air, throughout the course of the day, regarding the matter.

At approx. 11.00 AM, the Contractor General telephones Minister Shaw and alerts him to the fact that, earlier in the morning, he had made certain misleading statements to the Public on the Nationwide News Network (NNN) 'This Morning Radio Talk Show'.

The Contractor General suggests to Minister Shaw that the statements may have been made by him inadvertently and that he would be faxing to him certain documents which he, the Minister, may wish to be guided by. The documents that are faxed to Minister Shaw are some of the very documents that are referenced in this Statement. Minister Shaw apologizes to the Contractor General and thanks him for his offer to fax the documents. Minister Shaw also promises that he will telephone the Contractor General once he has read the documents.

The Contractor General then promptly faxes the documents. The Minister's office then telephones the Contractor General to acknowledge receipt of the documents. Minister Shaw, however, did not telephone the Contractor General as he had promised that he would.

At approx. 5.35 PM, Minister Shaw goes on air as the guest interviewee on the NNN News Programme "Cover Story" with Cliff Hughes and Elon Parkinson. Upon listening to Minister Shaw, the Contractor General feels compelled to speak to the hosts of "The Cover Story" to alert them, *inter alia*, to the fact that Minister Shaw has again misled the Public and that the Contractor General would be issuing a detailed Statement on the matter on Monday, October 6, 2008. The Contractor General speaks on the programme for approx. 35 minutes.

Fact #31 (October 3, 2008)

The OCG believes that it is critically important, in the public interest, to outline herein-below, the various categories of procurements which the Cabinet has exempted from the GPPH.

They are in no way confined to emergency situations, such as when spare parts must be procured for a disabled Air Jamaica aircraft. This is the example of choice that Minister Shaw repeatedly used in his several public statements to the Media on October 3, 2008. Minister Shaw appeared to have done this in his effort to justify the Cabinet's exemptions of that type of procurement from the GPPH and, implicitly, all of the other categories of procurements that are listed below.

The public needs to be aware of the fact that procurements which are related to non-emergency items, such as "*Products for use on onboard aircraft, e.g. Pillows and blankets*", and "*Goods, services and works to Air Jamaica's overseas stations*", as well as procurements for "*Supplies of goods and services to overseas offices of the JTB*", have all been completely exempted from the GPPH. The latter categories of goods would include, for example, motor vehicles, office furniture, office equipment and supplies, office-cleaning services, etc.

Why would the MOF and the Cabinet desire to remove such procurements entirely from the purview of the GPPH, when the GPPH imposes procedures which are as basic as requiring that at least three (3) competitive quotes should be obtained before any procurement decisions are made, unless, of course, a 'sole-source' tender procurement can be justified.

Other items which have been exempted from the application of the GPPH are Air Jamaica's "*Lease of aircraft and ... purchase of support equipment for aircraft handling*". These are high-value, multi-million dollar items that Governments and airlines worldwide do not simply procure overnight, but only very infrequently, and only after substantial due-diligence and extensive costs, operating, financing, revenue and other analyses are conducted in keeping with the medium to long term strategic plans of the Airline.

Recent commercial history is replete with examples of procurement decisions for the acquisition of aircraft, and support equipment, for national airlines being made by corrupt public officials. Many such officials have been imprisoned for receiving bribes from aircraft dealers, several of whom were shown to regard the practice of paying bribes and kick-backs as a normal way of conducting business.

Why then, would the Government of Jamaica, after 45 years of maintaining a common set of procurement rules for all Public Bodies, would not want to ensure that such procurements are subjected to rigid, stringent and documented anti-corruption procurement procedures, such as the GPPH - this as opposed to abandoning the rules and leaving such procurement decisions to be guided by something which is as flexible and equivocal as "*Air Jamaica's internal regime*"?

It is also interesting to note that very little or nothing was heard from Minister Shaw, on October 3, 2008, about the categories of procurements which the Cabinet has exempted from the GPPH for the Jamaica Tourist Board and Jamaica Vacations Limited.

The foregoing represents just a small sampling of the concerns which the OCG has had in this matter and the reasons why it has so vigorously opposed the exemption measure.

In the interest of public scrutiny, the verbatim germane elements of MOF Circular #34 are now re-produced, hereunder, as follows:

“Air Jamaica Limited

Air Jamaica’s internal regime will apply to the following procurements:

- (i) Procurement of goods and services and works to Air Jamaica’s overseas stations;
- (ii) Procurement of goods, services and works for which the standards and suppliers are regulated by the Jamaica Civil Aviation Authority (JCAA), Federal Aviation Authority (FAA), other regulatory bodies or manufacturers;
- (iii) Lease of aircraft or procurement of repair services in a situation of Aircraft on Ground (AOG);
- (iv) Procurement of goods, services or works in security restricted areas;
- (v) Procurement of Aircraft Fuel;
- (vi) Accommodations for Crew Layover;
- (vii) Interline Agreements and Code Share Agreements;
- (viii) Purchase and maintenance of support equipment for aircraft handling, eg. Paymovers, Passenger steps, baggage carts, etc.
- (ix) Products for use onboard aircraft, eg. Pillows and blankets; and
- (x) Purchases from unregistered suppliers;

Petrojam Limited

Petrojam’s internal regime will apply to the following:

- (i) Spot Procurement of Petroleum Products, Crude Oil, LPG, and Freight;
- (ii) Procurement of LPG, MTBE and Freight;
- (iii) Tank Cleaning and Repairs;
- (iv) Use of Pre-Approved Contractor List – Petrojam may use its pre-approved contractors list for the selection of contractors by limited tender for specific work on the Refinery, provided that the list is large enough for competition; these contractors also become registered with the NCC and Petrojam advertise annually for contractors to be pre-approved;

Port Authority of Jamaica

The Head of the Port Authority may approve sole source contracting up to J\$5,000,000.00. Above this value will require the prior approval of the NCC. Cabinet’s prior approval is required for values above J\$50,000,000.

Jamaica Tourist Board & Jamaica Vacations Limited

The following activities are exempt from coverage under the procurement rules and guidelines and these activities will be undertaken according to standard industry practice.

- (i) Co-sponsorship arrangements;
 - (ii) Trade and travel road shows;
 - (iii) Supplies of goods and services to overseas offices of the JTB; and
 - (iv) Cooperative advertising;
1. All other procurements conducted by the above-named entities will be subject to standard tender rules and procedures as contained in the GPPH.
 2. The exemptions do not discharge entities from their responsibility to advise their portfolio Ministers of developments taking place within these entities.
 3. Notwithstanding any internal approval, the NCC must be advised of all contract awards within the NCC thresholds on a quarterly basis”.