

**JAMAICA'S CORRUPTION PROBLEM WITH EMPHASIS ON THE MAIN MECHANISMS THAT
ARE LIKELY TO FACILITATE GRAND CORRUPTION IN PUBLIC PROCUREMENT
AND RECOMMENDATIONS TO ADDRESS THEM AND TO SIMPLIFY THE PROCUREMENT
'RED-TAPE' TO IMPROVE THE EFFICIENCY OF THE PROCESS
AND TO STRENGTHEN ITS EFFECTIVENESS**

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ACRONYMS

CAFFE	CITIZENS ACTION FOR FREE AND FAIR ELECTIONS
CDF	CONSTITUENCY DEVELOPMENT FUND
CG	CONTRACTOR GENERAL
CGA	CONTRACTOR GENERAL ACT
CHEC	CHINA HARBOUR ENGINEERING COMPANY LIMITED
CIF	CABINET INFRASTRUCTURE COMMITTEE
CIPS	CHARTERED INSTITUTE OF PURCHASING AND SUPPLY
CPC	CORRUPTION PREVENTION COMMISSION
CPI	CORRUPTION PERCEPTION INDEX
DP	DEVELOPMENT PARTNER
DPP	DIRECTOR OF PUBLIC PROSECUTIONS
ECJ	ELECTORAL COMMISSION OF JAMAICA
FAAA	FINANCE ADMINISTRATION AND AUDIT ACT
FCPA	FOREIGN CORRUPT PRACTICES ACT
FID	FINANCIAL INVESTIGATION DIVISION
GOJ	GOVERNMENT OF JAMAICA
GPPH	GOVERNMENT PROCUREMENT GUIDELINES HANDBOOK
HOPE	HEAD OF PROCURING ENTITY
IDB	INTER-AMERICAN DEVELOPMENT BANK
INCSR	INTERNATIONAL NARCOTICS CONTROL STRATEGY REPORT
IP	INTEGRITY PACT
ITB	INVITATION TO BID
JCF	JAMAICA CONSTABULARY FORCE
JLP	JAMAICA LABOUR PARTY
MDA	MINISTRY, DEPARTMENT, AGENCY
MDB	MULTILATERAL DEVELOPMENT BANK

M&E	MONITORING AND EVALUATION
MIND	MANAGEMENT INSTITUTE FOR NATIONAL DEVELOPMENT
MOF	MINISTRY OF FINANCE
MOF-PAPU	MINISTRY OF FINANCE PROCUREMENT AND ASSET POLICY UNIT
MOP	METHOD OF PROCUREMENT
MP	MEMBER OF PARLIAMENT
MSME	MICRO, SMALL AND MEDIUM ENTERPRISES
NCC	NATIONAL CONTRACTS COMMISSION
NIA	NATIONAL INTEGRITY ACTION OF JAMAICA
OCG	OFFICE OF THE CONTRACTOR GENERAL
ODPP	OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS
PE	PROCURING ENTITY
PIU	PROJECT IMPLEMENTATION UNIT
PNP	PEOPLE'S NATIONAL PARTY
PPP	PUBLIC PRIVATE PARTNERSHIP
QCA	QUARTERLY CONTRACT AWARDS
SBD	STANDARD BIDDING DOCUMENT
TI	TRANSPARENCY INTERNATIONAL
UNCAC	UNITED NATIONS CONVENTION AGAINST CORRUPTION
UNCITRAL	UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW
UKBA	UNITED KINGDOM BRIBERY ACT
UP	UNSOLICITED PROPOSAL
WEF	WORLD ECONOMIC FORUM

EXECUTIVE SUMMARY

Jamaica is a developing country which has been facing significant and challenging socio-economic problems. Despite having what some have come to regard as a fairly comprehensive anti-corruption institutional framework, Jamaica is also perceived, both internationally and locally, as being highly corrupt.

There is a general consensus that these problems have impeded the country's economic growth and development prospects. There is also the well-founded perception that because of its high corruption stigma, the country has become less attractive to foreign investors.

Despite the promises that have been made by successive governments to tackle corruption and, in particular, to combat corruption in public procurement, very little has, however, been done to address the issue in concrete, visible and convincing terms.

There is also every reason to believe that the situation in Jamaica will worsen if the government fails to address the nation's corruption problem urgently and to do so in a decisive and proactive way.

The objective of this paper is to facilitate a broader understanding of the issue of corruption, and its associated considerations as they relate to Jamaica, and to advance considered remedial recommendations for dealing specifically with the problem of corruption in public procurement. If purposefully and effectively adopted, and enforced, these recommendations will substantially fix the problem.

This paper will, therefore, briefly examine the aforementioned considerations as well as Jamaica's anti-corruption and procurement institutional regimes, as a back-drop to the assessment of the issue of the problem of corruption in public procurement, the genesis of Jamaica's efforts to deal with the issue, the key elements of an effective procurement system and, generally, the ways in which corruption will typically manifest itself in the various stages of the procurement process.

The paper's focus will then turn upon an analysis of the main mechanisms that are likely to facilitate grand corruption in public procurement in Jamaica and the considered remedial measures or recommendations for combating each of the said mechanisms.

Among the 9 major corruption-enabling mechanisms in public procurement, in Jamaica, that will be examined are (a) the fact that a Contractor General (CG) has no power to stop a procurement that is non-compliant, or which is exhibiting the signs of irregularity, impropriety or corruption; (b) the abuse of the government's emergency contracting facility which allows public bodies to bypass standard procurement methodologies; (c) the improper or irregular involvement of politicians in the procurement process; (d) the lack of regulatory scrutiny in the award of sub-contracts for the procurement of works on major investment and infrastructural projects; and (e) the inexplicable low level of anti-corruption investigations and prosecutions that is currently prevailing in Jamaica.

The paper will then enumerate a comprehensive and expanded list of remedial recommendations which are designed to close the grand corruption-enabling loopholes that are presently existing in public procurement in Jamaica.

Finally, the paper will examine the issue of inefficiency in the Government of Jamaica's (GOJ's) procurement system. The process has been often characterized as cumbersome, complicated, bureaucratic or mired in red-tape.

While, in some respects, these claims are legitimate, care must, however, be taken to ensure that efforts to improve the efficiency and effectiveness of the process, do not come at the cost of diluting the checks and balances that must be preserved to insulate the system from abuse and corruption, and to ensure that the tax-payer gets value for his money.

The paper will, therefore, take a brief look at this issue before outlining some of the initiatives that the Office of the Contractor General (OCG) has taken, and the recommendations that it has advanced, to enhance efficiency in the GOJ's contract award process.

A comprehensive Inter-American Development Bank (IDB) sponsored assessment of Jamaica's public procurement system was conducted by Mr. John Brooks of the Anjo Global Consulting Limited of Ottawa, Canada, between June and July 2012. The consultant's report is dated November 22, 2012.

An expansive outline of some of the consultant's findings are presented in the paper, together with slightly edited extracts of the several detailed recommendations that he has advanced for significantly improving the effectiveness and efficiency of the system.

According to the consultant, if the report's recommendations are adopted, "the ultimate result for Jamaica will be public procurement that attains a world-class standard".

It is also instructive to note that a common thread which runs throughout the IDB's recommendations is that "care should be taken that (the recommended) changes do not detract from the credible oversight role of the OCG in the procurement process", and that "in all of this, a clear objective should be maintained of not weakening the required role of the OCG in its oversight function".

1. INTRODUCTION

1.1. Country, socio-economic and procurement expenditure overview

Jamaica is an island Commonwealth nation which is roughly 10,991 sq km (4,244 sq ml) in area. Situated in the Caribbean Sea, 150 km (93 ml) south of Cuba, and 645 km (390 ml) east of the Central American mainland, it is the largest of the English speaking Caribbean islands.

Once the globe's leading producer of bauxite, Jamaica, with its unique and internationally recognized brands of tourism, music and cuisine, has also been blessed with the world's seventh largest natural harbour which is positioned on the southern shores of its capital, Kingston, which, itself, lies on the south-eastern side of the island.

With a population of approx. 2.7 million, and ranked as the third most populous Anglophone country in the Americas, Jamaica, which received its independence from Britain over 50 years ago, at the end of 2013, had recorded a GDP of JA\$1,420 billion and a per capita GDP of JA\$522,600, or US\$5,168.¹

Despite its relatively high per-capita GDP ranking, Jamaica, however, has been beset with a significant stream of socio-economic problems over the past 3 to 4 decades.

Among them are one of the world's highest debt to GDP ratios of 147%² spurred by a national debt which stood at J\$1.94 trillion as at March 2014³; the sixth highest murder rate in the world at 39.3/100,000, as at 2013⁴; a high unemployment rate which, in 2013, stood at 15.2%⁵; a rapidly declining currency with roughly 27% of value lost in the past 2 years and almost 5% of value lost in the first 5 months of 2014⁶; high energy costs at US\$0.42 per Kwh⁷; and poor social services.

According to one recent study, some 1.1 million Jamaicans, or 41% of the population, are currently living below the poverty line, "fuelling an inter-generational crisis".⁸

Taken together, these issues have seriously inhibited the country's development and growth prospects to the point that the Jamaican economy has recorded growth of less than 1% on average over the past 40 years.

In an effort to access multi-lateral financing and to significantly reduce its debt, while improving its fiscal management practices, the GOJ, in April 2013, entered into a 48-month US\$948.1 million extended fund facility loan agreement with the IMF.

¹ PIOJ, Economic and Social Survey of Jamaica, 2013.

² 2013 debt to GDP ratio. See Jamaica Information Service (JIS) News Article – 'Jamaica's debt to GDP ratio will be reduced', March 2, 2014, <http://jis.gov.jm/jamaicas-debt-gdp-ratio-will-reduced/>

³ See Jamaica Gleaner Article – 'Sliding dollar pushes up debt stock', May 14, 2014, <http://jamaica-gleaner.com/gleaner/20140514/business/business3.html>

⁴ UNODC, Global Study on Homicide, 2013.

⁵ Supra. Note 1.

⁶ See Bank of Jamaica Historical Forex Rates. May 21, 2012: US\$1.00 to J\$87.84; January 1, 2014: US\$1.00 to J\$106.38; May 21, 2014: US\$1.00 to J\$111.18, http://www.boj.org.jm/foreign_exchange/fx_historical_rates.php

⁷ Hon. Minister Phillip Paulwell, Jamaica Government Energy Minister. Contribution to the 2014/2015 Sectoral Debate, May 6, 2014.

⁸ See Jamaica Gleaner Article – 'Jamaica's Poverty Rating Worsens', March 26, 2014.

However, and while the government appears to be consistently meeting the set quarterly IMF targets with success, to the man-in-the-street, his socio-economic conditions are deteriorating. His disposable income is getting less and less as consumer prices soar under the pressure of the continuing decline in the value of the Jamaican dollar and the attendant rise in the cost of electricity.

Total GOJ expenditures for 2011 and 2012 were JA\$403.2 billion and JA\$399.3 billion, respectively.⁹ The overwhelming majority of the GOJ's discretionary spending is generally dedicated to the procurement of goods, works and services.

Public procurement in Jamaica is administered by roughly 200 GOJ public bodies. They include ministries, departments, agencies, statutory authorities, parish councils and statutory corporations.

In 2012, 10,911 goods, services and works contracts, each valued at \$500,000 or more in value, and estimated at JA\$49.98 billion in aggregate, were reportedly approved for procurement by GOJ public bodies.¹⁰ Of the total, JA\$14.47 billion was expended on works or construction contracts.

In 2011, 11,707 goods, services and works contracts, with each valued at \$275,000 or more in value, and estimated at JA\$46.15 billion in total, were approved for procurement by GOJ public bodies.¹¹ Of that total, JA\$16.48 was expended on works contracts.

1.2 The perception that Jamaica is highly corrupt – the international perspective

There is, however, another major underlying and contributory factor to Jamaica's socio-economic predicament that requires separate treatment. It is the fact that the country is perceived, both globally and domestically, to be highly corrupt.

When taken in concert with the country's notorious brand of practiced political tribalism, this perception has significantly stymied Jamaica's development prospects, and, in the minds of many, is obstructing the country from attaining its full socio-economic potential.

According to Transparency International (TI)¹², Jamaica, Trinidad and Tobago, and Guyana, are currently perceived as the three (3) most corrupt countries in the English-speaking Caribbean, having received CPI scores of 3.8, 3.8, and 2.7, and country rankings of 83, 83, and 136, respectively, in TI's 2013 Annual Corruption Perception Survey¹³.

But the available historical data paints an even more damning picture since it suggests that all three (3) jurisdictions are mired in corruption that is perceived to be systemic.

⁹ Supra. Note 1.

¹⁰ OCG Annual Report, 2012. The total is likely to be less as the OCG has presented two (2) sets of contract award data which overlapped. <http://www.ocg.gov.jm/ocg/view/annual-reports>

¹¹ OCG Annual Report, 2011, <http://www.ocg.gov.jm/ocg/view/annual-reports>

¹² TI, CPI <http://www.transparency.org/research/cpi/>

¹³ Ibid.

The data, for example, reveals that, over the past 12 years, Jamaica and Trinidad have recorded an average CPI score of 3.5/10 and 3.8/10, respectively, while, over the last 9 years, Guyana's CPI average has been only 2.6/10¹⁴, where "0" means that a country is perceived as highly corrupt, and "10" means that it is perceived as very clean.

This means that Jamaica, when compared to its English speaking Caribbean counterparts, is ranked as the second most corrupt country within the region, and is perceived to have significant deficits in its governance, accountability and transparency standards.

In fact, it is noteworthy that in no single year, since 2002 when TI's surveys of Jamaica began, has Jamaica scored above 4.0 on TI's Annual CPI Index.

Transparency International Annual Corruption Perception Index – Jamaica Rankings				
Year	CPI Score	Country Rank	Total Countries Ranked	Independent Surveys Used
2013	3.8	83	177	6
2012	3.8	83	176	6
2011	3.3	86	182	7
2010	3.3	87	178	5
2009	3.0	99	180	5
2008	3.1	96	180	5
2007	3.3	84	180	5
2006	3.7	61	163	5
2005	3.6	64	159	6
2004	3.3	74	145	6
2003	3.8	57	133	5
2002	4.0	45	102	3

Source: Transparency International Corruption Perception Index¹⁵

Not surprisingly, the global perception that Jamaica is 'highly corrupt' is also supported by the World Economic Forum's (WEF's) most recent survey, the results of which are contained in its 2013/2014 Global Competitiveness Report.¹⁶

According to the report, corruption was ranked as the third most problematic factor, after inefficiency in government, and crime, for investors in Jamaica, out of the 16 factors against which 148 countries world-wide were assessed by the Forum.¹⁷

¹⁴ Ibid.

¹⁵ Ibid.

¹⁶ WEF, Global Competitiveness Report, 2013-2014.

¹⁷ Ibid. Page 228.

An even more compelling feature of the report is the fact that Jamaica was ranked 113 out of 148 countries on 'public trust in politicians', 107 on 'favouritism in decisions of Government officials', 99 on 'transparency of government policy-making', 97 on 'ethical behaviour of firms', 88 on 'diversion of public funds', and 79 on 'irregular payments and bribes'.¹⁸

Of equal import, is the fact that in its 2014 Department of State International Narcotics Control Strategy Report (INCSR), the United States Government expressed the view that "corruption (in Jamaica) remains entrenched, widespread, and compounded by a judicial system that has a poor record of successfully prosecuting corruption cases against high-level law enforcement and government officials".¹⁹

Interestingly, similar language was utilized by the United States Government to describe its perception of Jamaica's corruption problem in its 2013, 2012 and 2011 INCSRs²⁰, thus suggesting that, despite the passage of years, in its view, the gravity of the problem for Jamaica is one that has remained consistent.

1.3 The perception that Jamaica is highly corrupt – the domestic perspective

Instructively, Jamaicans, themselves, do not see their country any differently.

A local Don Anderson 'Most Negative Thing About Jamaica' Poll, which was carried out in 2010, found that "too much corruption" was the most significant problem in Jamaica, easily beating out other public concerns such as the 'breakdown in law and order', 'bad examples set by leaders', 'dishonesty in general', and 'violence and crime'.

What was most significant about the poll, however, was that it came on the heels of the closure of year 2009 when Jamaica recorded 1,682 murders (or 60 per 100,000), its highest ever tally of murders in any single year.

In 2010, the same year as the Don Anderson Poll, the Latin American Public Opinion Project (LAPOP) Poll also ranked Jamaica as the 2nd most perceived corrupt country in the Americas, when Jamaicans scored the country at 81.7 points on a 100 point scale, where '0' indicates 'no perceived corruption', and '100' means 'perceived widespread corruption'.

Not surprisingly, the overwhelming majority of Jamaicans also view corruption as a vice that has infiltrated even the country's leading national institutions.

In TI's 2013 Global Corruption Barometer Report, an astounding 85% of the Jamaicans who were polled expressed the view that the country's political parties were "corrupt or extremely corrupt", while as many as 74% held a similar view of the country's Parliament.²¹

¹⁸ Ibid.

¹⁹ United States Department of State, International Narcotics Control Strategy Report (INCSR), 2014.

²⁰ United States Department of State, International Narcotics Control Strategy Reports (INCSR), <http://www.state.gov/j/inl/rls/nrcrpt/>

²¹ TI, Global Corruption Barometer Report, 2013, <http://www.transparency.org/gcb2013/country/?country=jamaica>

Additionally, year over year, the annual and investigative reports of Jamaica's Office of the Auditor General, and its OCG which is entrusted with the statutory mandate to ensure probity and propriety in the award of government contracts and the issue of licenses, have confirmed that public procurement in Jamaica is inundated, at a minimum, with suggestive evidence of endemic corruption, and conclusive evidence of persistent impropriety and irregularity.²²

Many Jamaicans have, therefore, become sensitized into feeling that Jamaica's corruption problem is firmly rooted in its public procurement practices and that its primary actors are public officials and politicians.

The situation has not been helped by the added perception that the Jamaica justice system is corrupt,²³ and that there appears to be a reluctance, on the part of the police and the Office of the Director of Public Prosecutions (ODPP), to investigate and/or prosecute highly placed public officials.

Indeed, TI's 2013 Global Corruption Barometer Report found that 47% of Jamaicans were of the view that the country's judiciary was "corrupt or extremely corrupt", while a shocking 86% viewed the country's Police force in a similar light.²⁴

It is also instructive to record that the OCG has repeatedly contended that, despite the making of several referrals to the Director of Public Prosecutions (DPP), the Commissioner of Police, the Attorney General, the Auditor General and the Corruption Prevention Commission (CPC), for punitive action to be initiated against public officials, including members of parliament and cabinet ministers, little or no action has been taken.²⁵

In his 2009 annual report to the parliament, the Contractor General (CG) lamented that between March 5, 2008, the date that the incumbent DPP, Ms. Paula Llewellyn, was appointed into office, and up to December 31, 2009, the OCG had made over 30 formal criminal offence referrals to her. However, he said, none of the referrals had given rise, whether directly or indirectly, to a criminal charge, arrest or prosecution.²⁶

The OCG is not alone in its complaints of ineffectiveness on the part of the country's DPP.

In February 2011, the CPC publicly expressed concerns about the failure of the ODPP to prosecute literally thousands of matters, involving public officers, which had been referred to it by the Commission.²⁷

²² Greg Christie, 'An Overview of Transparency International's Integrity Pact Concept and its Applicability to the Jamaican Context', February 2013, Paper prepared for NIA.

²³ See, for example, the statement of then Minister of Justice, the Hon. Delroy Chuck, on October 8, 2011, who branded Jamaica's Justice system as corrupt. The Minister asserted that "there is corruption within the courts and the Justice system, where the police have been paid to say they cannot find a witness, or persons have been paid to have documents destroyed - amongst many other things".

²⁴ Supra. Note 21.

²⁵ Greg Christie, 'The Fight to Secure Integrity, Transparency and Accountability in the Award of Government Contracts in Jamaica', October 2011, pages 18 to 19, Seventh Annual Lecture in the Caribbean International Lecture Series, New York, October 26, 2011.

²⁶ OCG Annual Report, 2009, page 13.

²⁷ Jamaica Gleaner Article - 'Anti-Corruption Body Dissatisfied With DPP', February 18, 2011.

In particular, the CPC lamented the fact that, since its establishment 11 years prior to its complaint, although more than 18,000 persons had been referred to the ODPP, only 512 of the matters had been acted upon. The Commission also signaled that it was dissatisfied with the number of matters that were thrown out by the ODPP, noting that this had frustrated the oversight body's efforts at reducing corruption.²⁸

Not surprisingly, despite repeated anti-corruption remedial recommendations which have emanated from the OCG, together with commitments that have been made by successive Jamaican administrations and Prime Ministers to tackle the scourge of corruption in the country, only one high profile Jamaican public official has been convicted and imprisoned for corruption in the past 25 years.²⁹

The problem of corruption in Jamaica, the perception that it is institutionalized and that it is prevalent in public procurement, and the general view that the country lacks the leadership as well as the political will to decisively and aggressively tackle the scourge of corruption are, therefore, positions that should be regarded as being very troubling.

Against the foregoing, this paper will, therefore, seek first to overview Jamaica's anti-corruption and procurement institutional regimes, and some of the reasons why the country is perceived to be corrupt.

The paper will then examine the problem of corruption in public procurement generally, the main mechanisms that are likely to facilitate it in Jamaica in its 'grand' form, and a listing of considered remedial recommendations to tackle the problem.

Finally, the paper will discuss the issue of the inefficiencies and deficiencies in the GOJ's procurement process, and outline a number of recommendations to simplify the procurement 'red-tape' in an effort to improve the efficiency of the process and to strengthen its effectiveness.

²⁸ Ibid.

²⁹ See Jamaica Observer Article – 'Kern Spencer is no turn off for Holness', May 4, 2014, http://www.jamaicaobserver.com/news/Kern-Spencer-case-no-turnoff-for-Holness_16585272. A Senior Superintendent of Police was convicted, on May 15, 2014, of attempting to pervert the course of justice. He was fined J\$800,000 or 6 months in prison. However, the SSP opted to pay the fine. See Jamaica Gleaner Article – 'SSP Forbes fined \$800,000 or six months in prison', May 15, 2014, <http://jamaica-gleaner.com/latest/article.php?id=52902>

2. JAMAICA'S ANTI-CORRUPTION INSTITUTIONAL REGIME

Despite the perception that exists, both globally and locally, that Jamaica is highly corrupt, the country, notwithstanding, has what many have come to regard as a fairly comprehensive anti-corruption institutional framework – at least on paper.

In the words of one of Jamaica's most respected jurists, Dr. the Hon. Lloyd Barnett, Jamaica's anti-corruption model comprises an extensive institutional and legal framework for fighting corruption, and inhibiting the unjust enrichment of public officials. It embraces a significant body of common law, statutory, and constitutional law provisions, as well as international treaty instruments. Among them, are the following:

- (1) The Parliament (Integrity of Members) Act (1973) – which provides for the establishment of an Integrity Commission to investigate the assets, liabilities and income of parliamentarians to determine, among other things, if they are enjoying any unexplained income which could be attributable to corruption.
- (2) The Contractor General Act (1983) – which provides for the establishment of an independent Commission of Parliament, called the CG, supported by the OCG, to monitor and to investigate the award and implementation of government contracts, and the issue of government licenses, with a view to ensuring that contracts are awarded, and licenses are issued, impartially and on merit, and in circumstances that do not involve impropriety or irregularity.
- (3) The Contractor General Act Amendment (1999) – which provides for the establishment of an independent National Contracts Commission (NCC) to evaluate and to register government contractors, and to independently review and endorse all recommendations for the award of government contracts which are \$15 million and over in value.
- (4) The Constitution of Jamaica (Sections 120 and 122) – which makes provision for the establishment of an independent Auditor General.
- (5) The Finance Administration and Audit Act (FAAA) (1959) – which imposes responsibilities upon the Financial Secretary, the Auditor General and the accounting and accountable officers of public bodies, to secure public funds from irregular, improper and illegal expenditure.
- (6) The Representation of the Peoples Act (1944) – which seeks to prohibit corrupt and illegal practices in the conduct of political elections.
- (7) The Electoral Commission (Interim) Act (2006) – which has established an independent Parliamentary Electoral Commission of Jamaica (ECJ) which is charged with the responsibility of overseeing the conduct of political elections.
- (8) The Constitution of Jamaica (Sections 40 and 41) – which requires Members of Parliament and Senators to secure a parliamentary exemption in respect of any interest which they may have in a GOJ contract, failing which their seats are liable to be declared vacant.

- (9) The Constitution of Jamaica (Sections 94 to 96) – which makes provision for the establishment of an independent ODPP.
- (10) The Access to Information Act (2002) – which seeks to prohibit corruption in government by facilitating access to certain GOJ documents, thereby ensuring transparency and accountability in government.
- (11) The Public Bodies Management and Accountability Act (2001) – which seeks to ensure minimum standards in the audits and reporting of accounts of certain public bodies, and to impose upon the boards of directors of statutory corporations, certain fiduciary and statutory duties of care.
- (12) The Corruption (Prevention) Act (2001) – which establishes an independent CPC, and which purports to give effect to the 1996 Inter-American Convention against Corruption and seeks, among other things, to prohibit and criminalize corruption by public servants.
- (13) The 2007 Proceeds of Crime Act – which deals with money laundering and makes provision for the forfeiture of assets and the proceeds of certain unlawful activities.
- (14) The Anti-Corruption Branch of the Jamaica Constabulary Force (JCF), the Major Organized Crime and Anti-Corruption Task Force (MOCA) of the JCF, and the Financial Investigation Division (FID) of the Ministry of Finance, all of which are dedicated to fighting, *inter alia*, corruption and organized crime.
- (15) Jamaica is also a party to the 1996 OAS Inter-American Convention against Corruption as well as the 2005 United Nations Convention against Corruption (UNCAC). The former was ratified by Jamaica on March 16, 2001, and the latter on March 5, 2008.

3. JAMAICA'S PROCUREMENT ADMINISTRATIVE AND REGULATORY REGIME

Jamaica's procurement administrative and regulatory regime is prescribed by a number of legislative, policy and regulatory instruments. The entire process is controlled and administered by a variety of specified government and state authorities.

3.1 Principal elements of Jamaica's public sector procurement system

The principal administrative and regulatory elements of the Jamaica Public Sector Procurement System are the Cabinet, the Ministry of Finance's Procurement and Asset Policy Unit (MOF-PAPU), the accounting and accountable officers of the country's ~200 public bodies, the procurement and evaluation committees of the said public bodies, the CG/OCG and the NCC.

The Cabinet directs and/or approves the national policy for public procurement in Jamaica. It also approves contract award recommendations, over the JA\$40 million value threshold, which emanate from the NCC. The Cabinet is supported by a Cabinet Infrastructure Committee (CIF).

The CIF reviews and makes recommendations to the Cabinet for the approval of the above-referenced contract award recommendations, and it also makes recommendations for improving the efficiency and effectiveness of the GOJ's contracts' award system.

Under the management of a dedicated Deputy Financial Secretary, the MOF-PAPU has overall responsibility for the Jamaica public sector procurement system. It develops the public sector procurement policy and procedures, and it oversees the reform and development of the country's procurement legislation.

Accounting and accountable officers are the officers who are employed within GOJ public bodies with whom final responsibility rests, under the law, and particularly under the FAAA, for public sector procurements.

Typically, an accounting officer is deemed to be the permanent secretary under whose portfolio of responsibilities a specified public body falls, whereas an accountable officer typically includes the head of a public body as well as its senior financial, accounting and procurement officers.

Every public body is required by the government's procurement procedures to establish a procurement committee, and an evaluation committee, to independently over-view the procurement activities of the public body.

3.2 The Commission of the Contractor General

The public procurement, contract award and licence issue processes in Jamaica are subjected, by law, to the oversight jurisdiction of the anti-corruption commission of the CG.

Established in 1983, under the Contractor General Act (CGA)³⁰, as an independent commission of parliament, the CG is vested with the exclusive mandate to ensure that GOJ contracts and licenses are awarded, or issued, as the case may be, impartially and on merit, and in circumstances that do not involve impropriety or irregularity.

Section 5 (1) of the CGA reinforces the independence of the CG by providing that "In the exercise of the powers conferred upon him by this Act, a CG shall not be subject to the direction or control of any other person or authority."³¹

The CG conducts his monitoring and investigating activities generally on 2 levels – (a) to ensure compliance with the GOJ's procurement procedures, guidelines and regulations, and (b) to ensure compliance with the CGA's contract award standards and other laws.

After he concludes an investigation, a CG is required to inform the relevant public body and portfolio minister of the outcome, and to make remedial recommendations should he so deem necessary.³²

In any case in which he finds evidence of misconduct, or a breach of duty, or the commission of a criminal offence, on the part of a public officer, a CG is also required to advise the relevant authorities and to table a formal report of his findings in both houses of parliament.³³

To facilitate the effective discharge of his functions, the CG is accorded the powers of a Judge of the Supreme Court of Jamaica, with wide quasi-judicial powers of enquiry, search, discovery and subpoena.³⁴

Included among his far-reaching powers, is his entitlement to be advised of the particulars of the award of any Government contract or licence, as well as his authority, with few exceptions, to secure unimpeded access to any public office, officer, person, document, record, information or thing which, in his discretion, he might deem vital to the discharge of his functions under the Act.³⁵

Further, to re-enforce the enquiry powers of the CG, the CGA provides for three (3) specified criminal offences – the failure to comply with a lawful requirement of a CG; obstructing a CG; and making a false statement to mislead or attempting to mislead a CG.³⁶

The CG, who is appointed by the Governor General, after consultation with the Prime Minister and the Leader of the Opposition³⁷, for a term of 7 years³⁸, is supported by an OCG staff establishment of 65 persons. His annual budget of approx. JA\$200 million³⁹ is provided by Parliament at the direction of the Ministry of Finance.

³⁰ The CGA (1983), <http://www.ocg.gov.jm/ocg/view/laws>

³¹ Ibid.

³² Ibid. Section 20.

³³ Ibid. Section 21.

³⁴ Ibid. Sections 4, 15, 16, 17, 18 and 19.

³⁵ Ibid.

³⁶ Ibid. Section 29 (a) and (b).

³⁷ Ibid. Section 3.

³⁸ Ibid. Section 6.

³⁹ OCG Annual Report, 2012, page 224.

The OCG organization has four (4) operating divisions. They are the construction contracts division, the non-construction contracts and licenses division, the special investigations division and the technical services division. The functions of these divisions receive critical administrative and other support through the operations of the OCG's other 2 divisions – the information services division and the corporate services division.⁴⁰

In addition to its primary monitoring and investigation mandates, the OCG is also vested with the responsibility, by law, to provide support services and resources to the NCC.⁴¹

In 2011, the OCG monitored roughly 200 GOJ public bodies in their award of 11,755 contracts, each valuing \$275,000 or above, with an aggregated value of \$46.15 billion. This compares with no more than 350 contracts per annum that were monitored by the OCG prior to 2006. Of the 11,755 contracts that were monitored in 2011, 1,092 were monitored on a sustained basis.⁴²

The OCG conducts roughly 5 to 15 special investigations each year. During the 7-year period which ended in December 2012, the OCG completed 58 investigations, 40 enquiries and 24 audits. This compares with only 2 investigations that were conducted in the 3-year period prior to 2005.⁴³

In a November 2011 national Don Anderson-Market Research Services poll, which was commissioned by the independent National Integrity Action (NIA) of Jamaica, and conducted in 180 communities island-wide, the OCG was ranked, from among Jamaica's 7 leading law-enforcement and anti-corruption agencies, as having earned the highest level of public satisfaction in the fight against corruption in the island.⁴⁴

The other 6 national agencies, which were ranked, were the Anti-Corruption Branch of the JCF, the CPC, the Office of the Auditor General, the ODPP, the Parliamentary Integrity Commission, and the Office of the Commissioner of Customs.⁴⁵

3.3 The National Contracts Commission

The NCC is a statutory commission of Parliament. It was established via a 1999 amendment to the CGA⁴⁶.

The primary responsibility of the NCC is to promote efficiency, transparency and equity in the Jamaica public sector contract award process by (a) reviewing and approving all public body recommendations for contract awards above \$15 million in value, and (b) by maintaining an approved list of government works, goods and services contractors who are qualified to bid on GOJ contracts that are \$500,000 or above in value.

⁴⁰ Ibid. Page 1.

⁴¹ Supra. Note 30. Section 23J.

⁴² OCG Annual Report (2011), Pages 2 to 6, <http://www.ocg.gov.jm/ocg/view/annual-reports>

⁴³ Ibid.

⁴⁴ Ibid.

⁴⁵ Ibid.

⁴⁶ Supra. Note 30. See Part IIIA.

The 8-member NCC panel is appointed by the Governor General for a term of 7 years. It is composed of a chair, that is recommended by the CG; 5 public officers that are designated by the Cabinet; one commissioner that is appointed from a panel of 5 that is recommended by the Joint Consultative Committee (JCC) of the Building Industry; and 1 commissioner from a panel of 5 that is recommended by the Professional Societies Association of Jamaica.⁴⁷

All administrative and technical support services requirements of the NCC are provided by the technical services division of the OCG. The NCC, which convenes its meetings once each week, is supported by 7 NCC sector committees to which all ~200 procuring public bodies are assigned.

Recommendations for the award of government contracts are channeled, by the relevant public body, through the appropriate sector committee, to the NCC, which independently reviews and approves same for award by the public body. In instances where the value of the recommended award is above J\$40 million, the approved recommendation is forwarded, by the NCC, to the Cabinet for its review and approval.

During calendar year 2012, 512 recommendations for the award of goods, works and services contracts, with an aggregated value of J\$24.23 billion, were approved by the NCC.⁴⁸ Of the total, 124 recommendations, with an aggregated value of J\$18.20 billion were forwarded, by the NCC, to the Cabinet for review and approval.⁴⁹

As at December 2012, 1,632 contractors were qualified and registered with the NCC to bid upon government contracts. Of this number, 1,397 were goods and services contractors, while 235 were works contractors.⁵⁰

3.4 Principal legislative, policy and regulatory instruments governing Jamaica's public sector procurement process

The principal legislative, policy and regulatory instruments which govern the Jamaica public sector procurement process have, in the main, been outlined above in Section 2.

They include the Constitution of Jamaica, which makes provision for the establishment of the Cabinet and the Auditor General, both of which play a significant role in public sector procurement in Jamaica; the 1983 CGA which, as previously mentioned, establishes both the CG and the NCC,⁵¹ the 1959 FAAA,⁵² the GOJ's Procurement Policy,⁵³ the Government Handbook of Public Sector Procurement Procedures (GPPH) (Revised October 2010),⁵⁴ the Contractor General Act Public Sector Regulations (2008),⁵⁵ the Public Bodies Management & Accountability Act (2001)⁵⁶ and the Corruption Prevention Act (2001).⁵⁷

⁴⁷ Supra. Note 30. See Third Schedule to the CGA.

⁴⁸ OCG Annual Report, 2012, page 184.

⁴⁹ Ibid. Page 185.

⁵⁰ Ibid. Page 183.

⁵¹ Supra. Note 30. See <http://www.ocg.gov.jm/ocg/view/laws>

⁵² See <http://www.ocg.gov.jm/ocg/view/laws>

⁵³ See <http://www.ocg.gov.jm/ocg/view/goj-procurement-documents>

⁵⁴ Ibid.

⁵⁵ Supra. Note 52.

⁵⁶ Ibid.

⁵⁷ Ibid.

It is instructive to note that the GPPH is issued under the authority of the Ministry of Finance, pursuant to the FAAA and the provisions of the CGA. It outlines the procedures and the methods that must be utilized by public officers who are engaged in planning and managing the procurement of works, goods and services, on behalf of GOJ public bodies.

4. WHY IS JAMAICA PERCEIVED TO BE CORRUPT DESPITE HAVING WHAT APPEARS TO BE A FAIRLY COMPREHENSIVE ANTI-CORRUPTION INSTITUTIONAL REGIME?

Many have expressed surprise regarding what appears to be a contradiction in terms between what is considered as a seeming comprehensive anti-corruption institutional framework in Jamaica, and the perception that Jamaica is a highly corrupt country.

Some of the reasons for this phenomenon were recently examined by the author in a presentation to the University College of the Cayman Islands 2014 International Conference which had as its theme 'Toward a Corruption-Free Caribbean: Values, Ethics and Morality'.⁵⁸

They are reproduced, hereafter, as follows:

At the top of the list of reasons for this seeming disconnect is that Jamaica's leading anti-corruption institutions, although they may look good on paper, are generally dysfunctional – whether by reason of flawed constructs, structural deficiencies, being components of a disjointed system, inadequate resources, poorly trained staff, non-aggressive leadership, lack of critical support from the State, being undermined by elements within the executive arm of the State, and/or by virtue of the simple fact that they have failed to effectively discharge their mandates.

The second key reason is that there is, in Jamaica, a demonstrated lack of political will to proactively and aggressively tackle the scourge of corruption that has long afflicted the country.

This is empirically evidenced, in part, by the failure of successive GOJ administrations to effectively remedy the aforementioned deficiencies, despite having made solemn commitments to combat corruption, either while campaigning on the political electoral platform, or while delivering prime ministerial inaugural speeches.

Additionally, successive Jamaican governments and parliaments have failed to implement repeated recommendations which have been advanced to strengthen the effectiveness of the country's anti-corruption institutional framework, and to insulate the public procurement process from inefficiency, impropriety, irregularity, fraud and corruption, particularly in keeping with evolving global anti-corruption and anti-graft best practices.

Many of these recommendations were advanced by the author during his tenure as Jamaica's fourth CG, between December 2005 and November 2012.⁵⁹

A third and associated reason is that there is also lacking, in Jamaica, strong, decisive and courageous leadership to do what is right by Jamaica, as opposed to what is politically expedient. Many Jamaicans have attributed this deficit to the pervasiveness of the country's notorious brand of two-party political tribalism and garrison politics.

⁵⁸ Greg Christie, 'The Jamaican Anti-corruption Model – With Reflections and Lessons for the Region Derived from the Role as the Former Contractor General of Jamaica'. Presentation at the UCCI International Conference, Grand Cayman, March 21, 2014.

⁵⁹ Supra. Note 11. See Contractor General's Opening Remarks, pages 1-68.

These considerations, in turn, have significantly helped to fuel substandard practices of governance that are now generally considered to be the norm, rather than the exception.

Topping the list of the referenced practices are (a) the failure of the political directorate to hold public officials accountable for their breaches of the public trust; (b) a general lack of respect for the rule of law; (c) disregard for the rulings and/or recommendations of the OCG; (d) governmental decision-making that is devoid of transparency; and (e) seemingly institutionalized nepotism.

In addition to the foregoing, there are also widely held notions in Jamaica which have not only aided the perception that Jamaica is a highly corrupt country, but which may have also stifled public pressure for corrective action. Among them are the following:

- (1) The seeming accepted view that there are two sets of anti-corruption laws in Jamaica – one for the ordinary Jamaican; and another, which is seldom enforced, for senior public officials, Parliamentarians, the powerful, the connected and the rich.
- (2) The perception that the investigation and prosecution of corruption offences in Jamaica is neither a priority for law enforcement nor for the DPP. This perception is supported by empirical evidence.
- (3) The perception that there are politicians, Parliamentarians, public officials, powerful individuals, as well as private sector institutions, that would seem to have a vested interest in maintaining the status quo.
- (4) The oft-spoken suggestion that some elements of the media, and even civil society, are politically aligned and are thus compromised in their independence.
- (5) The general perception that corruption is attributable essentially to the public sector, and not to the private sector, thus removing any focus from the latter.
- (6) And, finally, apathy on the part of the general populace towards the problem of corruption. A sub-set of this consideration is the seeming reluctance of Jamaicans to publicly call a spade a spade for fear of being branded, victimized or isolated, particularly because of the highly politicized and politically tribal environment which obtains in Jamaica.⁶⁰ The politically corrupt are well aware of this, and are thus emboldened to pursue their conduct, not only with impunity, but also with arrogant indifference to the brave few who are prepared to call them out.

⁶⁰ Greg Christie, 'Overcoming the Problem of Corruption in Jamaica'. Presentation to the Rotary Club of St. Andrew North, Jamaica, June 25, 2012.

5. THE PROBLEM OF CORRUPTION IN PROCUREMENT

Defined generally as the abuse of public office for private gain, the threat that corruption poses is foremost in its so-called 'grand' forms.

Bribery, kickbacks, embezzlement of public funds, cronyism, links between politicians and organized criminal elements, influence peddling, and the abuse of one's public office for political gain, or to pervert the course of justice, are but a few of its far-reaching manifestations.

5.1 The costs of corruption in procurement

Corruption is a global concern if only because there is abundant evidence that it has the capacity to undermine democracy, stability and the rule of law, as well as to drive fragile countries towards State capture or State failure. Indeed, its cancerous and corrosive impact is alarmingly horrendous and devastating in reach and, more-so, for the developing world.

Corruption diverts public funds away from the provision of critical social necessities, such as health-care, education, water, roads and electricity.

Additionally, corruption leads to human rights violations, steals political elections, distorts financial markets, reduces investor confidence, increases the price of goods and services, undermines or destroys confidence in critical public institutions, and enables organized crime, terrorism and other threats to human security to flourish.

In a January 2014 publication, the Center for Strategic and International Studies (CSIS) confirmed that the annual cost of corruption globally was estimated at \$1 trillion. Additionally, in the same study, the CSIS said that private-sector bribery in developing countries was costing at least \$500 billion a year, or more than three times the total amount of all foreign assistance that was advanced in 2012.⁶¹

But of all the types of corruption, probably none is more pervasive or has higher costs than corruption that is related to procurement, or the public purchasing of goods, works and services.⁶² Donald Strombom, who is a former chief procurement officer at the World Bank, says that where corruption is systemic, "it probably adds at least 20 to 25 percent to the costs of government procurement".⁶³

TI seems to concur, In a May 2010 publication, it said that although the cost of corruption in procurement is difficult to measure quantitatively because of the clandestine environment in which it takes place, it nevertheless estimated that, expressed as a percentage of the value of the contract, the cost of corruption in procurement was, on average, between 10 and 25 percent and, in the worst cases, as much as 50 percent".⁶⁴

⁶¹ CSIS, 'The Costs of Corruption', 2014, http://csis.org/files/publication/140204_Hameed_CostsOfCorruption_Web.pdf

⁶² Donald Strombom, 'Corruption in Procurement', November 1998, https://www.fas.org/irp/news/1998/11/98112508_clt.html

⁶³ Ibid.

⁶⁴ TI, 'Corruption and Public Procurement', May 2010.

The TI study also reported that in Morocco, despite positive reforms to the procurement system, recent calculations by industry experts suggested that corruption in procurement was still costing that country roughly 5 percent of the value of each procurement contract. In the Philippines, on the other hand, business insiders have speculated that the cost could reach as high as 50 percent.

In 2002, TI estimated that the amount that was lost to bribery in government procurement alone was at least \$400 billion annually, globally.

Another study that was conducted by Price Waterhouse Coopers (PwC) in February 2014, and which solicited responses from 5,128 representatives in 95 countries, found that bribery and corruption cases were on the rise globally and had increased by as much as 13 percent overall since 2011, with procurement fraud recording the second highest jump at 29 percent.⁶⁵

For the developing world, including countries such as Jamaica, which is ranked as being highly corrupt, the issue of corruption in public procurement must therefore be taken very seriously. Indeed, it was Mr. Jim Yong Kim, the President of the World Bank, who incisively characterized the gravity of the problem when, on December 19, 2013, he said: "In the developing world, corruption is Public Enemy #1".⁶⁶

No one knows what is the magnitude of the direct costs to Jamaica of corruption in procurement.

What is known, however, is that the perception about the incidence of corruption in the country is, in some instances, corroborated by the harsh reality of the depth of the problem, among them being the recent startling admission by Jamaica's Minister of National Security, the Hon. Peter Bunting, that criminals who have supported political party candidates have been rewarded with government works contracts by the country's politicians.⁶⁷

Jamaica must also come to grips with the reality that, from all indications, it is no longer anything near an attractive destination for foreign investors.

Among the top surveyed reasons why this is so is that the country is perceived to be inundated with corruption and a lack of respect for the rule of law, such that judicious investors would feel that they will either be required to pay bribes, or otherwise conduct business on a playing field that is not level.⁶⁸

⁶⁵ See Article – 'Bribery, corruption cases on the rise; up 13% since 2011: Report', February 19, 2014, <http://m.economictimes.com/news/politics-and-nation/bribery-corruption-cases-on-the-rise-up-13-since-2011-report/articleshow/30678592.cms>

⁶⁶ See <http://www.worldbank.org/en/news/press-release/2013/12/19/corruption-developing-countries-world-bank-group-president-kim>

⁶⁷ See Jamaica Gleaner Article – 'Politicians have a hand in Jamaica's crime problem – Bunting', May 15, 2014, <http://jamaica-gleaner.com/gleaner/20140515/lead/lead7.html>

⁶⁸ Supra. Notes 17 and 18.

Kroll's and Compliance Week's 2014 Anti-Bribery and Corruption Benchmarking (ABC) Report, which outlines the results of a survey of roughly 200 corporate compliance executives worldwide, representing global companies with a median revenue of \$3.5 billion annually, and an average workforce of 9,600 employees, is instructive on how major global corporations view corruption and, in particular, bribery risks.⁶⁹

When compliance executives were asked exactly what types of misconduct qualified as "corruption" that they were responsible for addressing, to no surprise, bribery topped the list, having been cited by 95 percent of the respondents, followed by bid-rigging, money laundering and price-fixing.

Also of note, is that 51 percent of respondents said that they expected such risks to increase in the next 2 to 3 years, as did 57 percent of US companies, and 57 percent of large companies (\$5 billion or more in annual revenues).

In an article that appeared in the Business Section of the Moscow Times on February 25, 2014, entitled: 'FCPA and UKBA Predictions for 2014'⁷⁰, the direction that many of those global operating companies are likely to take, in minimizing their corruption risk exposures, was explicitly stated as follows:

"Anyone with experience in emerging markets knows that the perception of corruption can deter many foreign companies from entering a market ... We may see an increasing tendency of companies to preemptively withdraw from markets whose compliance risks are perceived as too great."

That said, a harsh reality that Jamaicans are currently contending with is the country's failure to attract major "blue chip" entities, with an established and proven global track-record, to participate in two (2) successive but aborted open-tender exercises to construct a 500+ mw LNG energy plant in Jamaica – a mega-project which is estimated to cost almost US\$1 billion.

5.2 The genesis of Jamaica's efforts to curb corruption in procurement

Jamaica first took serious stock of the problem of corruption in procurement in 1975 when the then Leader of the Opposition, the Most Hon. Edward Seaga, during the Parliamentary Budget Debates of that year, questioned the methods and practices by which publicly-financed GOJ contracts were awarded and monitored, and licenses and permits issued.⁷¹

⁶⁹ See Article – 'Bribery, corruption cases on the rise; up 13% since 2011: Report', February 19, 2014, <http://m.economictimes.com/news/politics-and-nation/bribery-corruption-cases-on-the-rise-up-13-since-2011-report/articleshow/30678592.cms>

⁷⁰ Moscow Times Article – 'FCPA and UKBA Predictions for 2014' by Attorney, Ethan Heinz, February 25, 2014,

http://www.themoscowtimes.com/business/business_for_business/article/b2b-fcpa-and-ukba-predictions-for-2014/495148.html?ask_mobile=Y

⁷¹ Report of the Committee Appointed to Recommend Legislation for the Establishment of the Office of the Contractor General, March 1982.

Although the author has found evidence of a rudimentary procurement regime in Jamaica, going all the way back to November 18, 1963,⁷² Mr. Seaga's concerns, in 1975, were, nevertheless, conveyed amid widespread public outcries that were prompted by allegations of corruption in the award and implementation of GOJ contracts.

At the time, there was very little competition and transparency in the award of contracts. Friends, family members, supporters and cronies of some public officials and politicians, were rewarded with contracts and taxpayers' money under an obscure regime that was perceived as providing little or no oversight, scrutiny or enforcement powers.⁷³

Additionally, many otherwise capable, but politically unaffiliated contractors were left out in the cold. Old-style back-room dealing and corruption thrived. Some of those who did receive contracts were alleged to have paid kick-backs to corrupt public officials. The perception was that this was, indeed, the order of the day.

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

The OCG was expected to change much of that.

In January 1981, three months after his party's landslide victory at the polls, Mr. Seaga, having been appointed as the Prime Minister of Jamaica, in turn appointed a Committee to develop recommendations for the establishment of the OCG.

The Committee, which was chaired by the then Minister of Construction, and former Prime Minister of Jamaica, the Hon. Orette Bruce Golding, submitted its Report in March 1982.⁷⁴ This, in turn, led to the promulgation of the CGA of 1983.

With all of this, a significant change was expected in the manner in which lucrative government contracts and were to be awarded and licenses issued. Probity, transparency, competition, value for money, accountability, impartiality and regularity, were all considered to be the key deliverables that would thereafter characterize GOJ contract awards going forward.

However, because of certain structural shortcomings in the CGA itself, together with other deficits and loop-holes which have been identified in the country's procurement guidelines and processes, but which have never been remedied by the executive and legislative arms of the State despite their receipt of repeated remedial recommendations, the CG regime has never been able to achieve its full potential.⁷⁵

⁷² Ministry of Finance Notification #182/02 (Circular #43) to Permanent Secretaries and Heads of Departments, regarding revised Cabinet procedure. The Circular dealt, *inter alia*, with the establishment of the GOJ Contracts Committee (GCC), the employment of private architects, the control of GOJ contracts, and the tender and award processes to be utilized in connection with certain GOJ contracts, inclusive of works projects over 10,000 pounds in value. Signed by G. A. Brown, then Financial Secretary.

⁷³ Supra. Note 25. Comments made by author.

⁷⁴ Supra. Note 71.

⁷⁵ Supra. Notes 25 and 59.

Of course, the ineffectiveness of the OCG as an anti-corruption agency has also been compounded by the several other considerations that have been outlined above, and particularly in Section 4, which have contributed to the overall ineffectiveness of the entire Jamaica anti-corruption institutional framework.

5.3 The key elements of an effective procurement system

It is an understatement to say that public procurement plays a critical role in any economy. At the same time, public procurement presents an enormous opportunity for fraud, outright theft and corruption at the hands of crooked public officials and unscrupulous private sector contracting elements.

Consequently, an effective public procurement system should be designed to deliver goods, works and services to the government in a timely and efficient manner; at economical, competitive and market-based prices; in a manner which is open, fair, competitive and transparent; and in a meritorious manner which ensures that contracting opportunities are secured only by those who are most competent and qualified to perform the contract and who make the best offers.

Strombom postulates that underlying such a system should be the notion that public officials are held accountable for the proper use of public funds and should not enrich themselves in the process. However, he contends that because all of these elements or concepts are not universally accepted or practiced, therein lies one of the primary causes or reasons for corruption in public procurement.⁷⁶

Strombom also argues that "international experience has shown that a procurement system which satisfies the foregoing criteria can be best achieved through a process that is based upon appropriately designed methods of competition among qualified suppliers".⁷⁷

He then lists the following as the main elements in a competitive bidding process in respect of which there is "broad agreement".⁷⁸

- (a) Public notification of bidding opportunities;
- (b) Documents that clearly set out the needs, describe the bidding process and contract terms and conditions, and give the criteria for choosing the winning bidder;
- (c) Submission of secret bids that are opened in the presence of the bidders at a specified time and place;
- (d) Impartial evaluation and comparison of bids by competent evaluators without interference by bidders or other parties;
- (e) Award of the contract to the bidder complying with all requirements and offering the best bid, as defined by the published selection criteria.

TI says that for a procurement system to effectively reduce corruption, rule of law is essential.⁷⁹

⁷⁶ Supra. Note 62.

⁷⁷ Ibid.

⁷⁸ Ibid.

⁷⁹ Supra. Note 64.

At a minimum, for states such as Jamaica, that have ratified the UNCAC, Article 9 of the Convention should be the foundation of a national public procurement system.⁸⁰ There are also other Articles in UNCAC which complement Article 9, by imposing upon a State Party the obligation to establish specific anti-corruption systems and mechanism.⁸¹

In many respects, the requirements of Article 9, which has only 3 broad paragraphs, impose upon a State Party, the treaty obligation to adopt procurement system elements that are similar to the elements that are set out above – plus more. Paragraph #1 is worth reproducing verbatim as follows:

(1) Each State Party shall, in accordance with the fundamental principles of its legal system, take the necessary steps to establish appropriate systems of procurement, based on transparency, competition and objective criteria in decision-making, that are effective, inter alia, in preventing corruption. Such systems, which may take into account appropriate threshold values in their application, shall address, inter alia:

(a) The public distribution of information relating to procurement procedures and contracts, including information on invitations to tender and relevant or pertinent information on the award of contracts, allowing potential tenderers sufficient time to prepare and submit their tenders;

(b) The establishment, in advance, of conditions for participation, including selection and award criteria and tendering rules, and their publication;

(c) The use of objective and predetermined criteria for public procurement decisions, in order to facilitate the subsequent verification of the correct application of the rules or procedures;

(d) An effective system of domestic review, including an effective system of appeal, to ensure legal recourse and remedies in the event that the rules or procedures established pursuant to this paragraph are not followed;

(e) Where appropriate, measures to regulate matters regarding personnel responsible for procurement, such as declaration of interest in particular public procurements, screening procedures and training requirements.

On the macro level, the United Nations Commission on International Trade Law (UNCITRAL), in 2011, developed a Model Law on Procurement⁸² for countries to adopt.

The UNCITRAL Model Law was particularly designed for developing countries to implement as they transitioned to market driven economies, with the objective of preventing inefficiency, ineffectiveness, and abuse in public procurement arising from a splintered or ineffective procurement legislative framework.

⁸⁰ UNCAC (2005), Article 9 – Public procurement and management of public finances, <https://www.unodc.org/unodc/en/treaties/CAC/>

⁸¹ Ibid. Article 5 – Preventative anti-corruption policies and practices; Article 6 – Preventative anti-corruption body or bodies; Article 12 – Private sector; Article 15 – Bribery of national public officials; Article 17 – Embezzlement, etc. by a public official; Article 20 – Illicit enrichment; Article 21 – Bribery in the private sector; Article 34 – Consequences of acts of corruption; Article 36 – Specialized authorities to combat corruption through law enforcement.

⁸² UNCITRAL Model Law on Public Procurement (2011), http://www.uncitral.org/uncitral/en/uncitral_texts/procurement_infrastructure/2011Model.html

While Jamaica does have a procurement and anti-corruption legislative framework which, in the view of many, appears to be fairly comprehensive, the truth is that its framework is far from effective and, in point of fact, falls short of Jamaica's UNCAC treaty obligations. Additionally, the country's procurement legislative regime is a far cry from the cohesive and comprehensive standards that are prescribed by the UNCITRAL model law.

This deficiency is one of the principal reasons why Jamaica's procurement and anti-corruption legislative framework has proven to be dysfunctional and ineffective.

As regards the inadequacies of the country's procurement system, some of the findings of a November 2012 Inter-American Development Bank (IDB) consultant's report on public procurement in Jamaica, are instructive.⁸³

While the overall findings will be examined in greater detail elsewhere in this paper, suffice it to say that the following observation appears on page 18 of the report.⁸⁴

Currently, GOJ does not have specific legislation addressing public procurement. Relevant provisions are combined with the Office of the Contractor General Regulations (2008), and further enhanced with guidelines as contained in the Handbook (2012) and related SBDs (Standard Bid Documents) and the Public Sector Procurement Policy (2010). In summary, the current procurement 'documentation', although relatively complete is diverse and in addition it:

- *Lacks clarity, with inconsistencies between the various documents*
- *Continues the operational role of the OCG in the procurement process⁸⁵*
- *Does not address some of the new international developments for public procurement including:*
 - *Aspects of the 2011 the United Nations Commission on International*
 - *Trade Law's (UNCITRAL) 'Model Law on Procurement'*
 - *e-Procurement*
 - *Sustainable procurement*
 - *Set asides for micro, small and medium enterprises (MSMEs)*
 - *Educational requirements/qualification for procurement staff*
 - *Use of alternative service delivery modalities such as 'build, own, operate and transfer' (BOOT), 3Ps, Framework agreements*

Beyond the foregoing inadequacies in the Jamaica anti-corruption and procurement legislative and institutional framework, there have been many other best practice developments on the anti-corruption front which Jamaica has failed to adopt.

⁸³ IDB/Anjo Global Consulting Limited, Ottawa, Canada; 'Public Procurement Jamaica', November 22, 2012

⁸⁴ Ibid.

⁸⁵ Ibid. This is presumably a reference to the OCG's provision of technical services to the NCC.

These include broad anti-bribery institutional regime concepts that can be extracted from the developments that have been heralded by the 1977 United States Foreign Corrupt Practices Act (amended in 1988), the 1997 OECD Anti-Bribery Convention, and the 2010 United Kingdom Bribery Act, as well as other emerging best practices in combating corruption, such as mandating public registers of corporate beneficial shareholders, and forcing the disclosure of political campaign finance contributions.

5.4 The way in which corruption manifests itself in the various stages of the procurement process

Corruption in procurement occurs at all of the general phases of the procurement cycle, whether it be at the pre-tendering stage, the tendering stage, or at the post-tendering stage.

According to TI, the typical procurement process, whether it is openly competitive or restricted, can be divided into 5 discrete stages, each of which faces specific corruption risks. However, these risks can be responded to by good procurement best practices and the recommended system elements which have been outlined above.

The progressive stages, as listed by TI, are (1) the needs assessment stage; (2) the preparation of tender criteria stage; (3) the contract/supplier selection and contract award stage; (4) the contract execution stage; and (5) the final accounting and payment stage.⁸⁶

In the first stage, politicians or public officials can collude with corrupt agents or contractors to create an artificial or unnecessary demand for goods, works or services or, otherwise, to collude to stage a contract award to a specified connected party. Typically bribes or kickbacks will be involved.

TI observes that these problems can arise as the result of conflicts of interest on the part of government officials that are involved in the procurement process. "Their decisions may respond to previous political commitments, reflect undue influence by the private sector, or be made based upon their plans to leave public office and enter the private sector (i.e. the 'revolving door' phenomenon)".⁸⁷

Bid-rigging typically occurs at the second stage of the procurement process. Tenders can be tailored to restrict competition, restrict publicity, and/or abuse confidentiality.

According to TI, at this stage, "corruption risks are often associated with consultants preparing a design that favours a particular bidder, issuing bidding documents with biased or inaccurate technical specifications, developing award criteria that make competition impossible, and/or improperly using exceptions to open competitive bidding".⁸⁸

⁸⁶ Supra. Note 64.

⁸⁷ Supra. Note 64.

⁸⁸ Supra. Note 64.

At the contract award stage, TI postulates that the most common corruption risks involve the sharing of confidential or privileged information with a bidder to grant it an advantage over other bidders; biased or delayed application of evaluation or award criteria to benefit a particular bidder; or changes to the basic elements of the proposal when signing the contract with the successful bidder.⁸⁹

During the fourth stage – the contract execution stage – corruption can be manifested in the alteration of contract conditions which then results in the acceptance of inferior, incomplete or below standard goods, works or services, and/or the waiver of penalties which would otherwise become payable by the contractor. In many instances, the contractor deliberately supplies an inferior quality product in order to offset the added costs which will result from the payment of bribes.⁹⁰

Additionally, during this phase of the process, collusion can lead to the value of the contract being deliberately inflated, via unjustified costs overruns, part of which will then be paid back by the contractor as a kick-back or bribe.

In the final accounting and payment stage of the procurement process, corruption risks are typically associated with the acceptance of false accounting or cost mis-allocations, fraudulent or duplicate invoicing, or false certification of the project's successful completion.⁹¹

The potential for the incidence of corruption, as described above, in the various stages of the procurement process is a universal phenomenon. Procurement in Jamaica is no exception and, consequently, the foregoing observations are instructive.

⁸⁹ Supra. Note 64.

⁹⁰ Venkata Rama Sastry Pidaparthi, 'Supply Side Issues in Procurement Corruption: Is the Developed World Responding Adequately to the Needs of the Developing World?'

⁹¹ Supra. Note 64.

6. THE MAIN MECHANISMS THAT ARE LIKELY TO FACILITATE GRAND CORRUPTION IN PUBLIC PROCUREMENT IN JAMAICA

Against the background of the foregoing, this paper will now examine some of the main mechanisms that are likely to facilitate grand corruption in procurement in Jamaica.

Although most jurisprudential systems do not distinguish between types of corruption, in discussing the subject a distinction is nevertheless sometimes made between two broad classification of corruption, namely petty corruption and grand corruption.

The former arises in instances in which relatively small sums of money are paid to corrupt public officials, to either '*grease the wheels*', forego police enforcement action for infractions of the criminal law, or simply to cut through bureaucratic red tape.

Grand corruption, on the other hand, is typically exhibited in instances in which huge sums of money, or bribes, are fraudulently paid to politicians, or to top ranking public officials, in order to win high value government contracts; to secure the divestment of lucrative state assets; or to benefit from the grant of priceless government licenses or permits; or otherwise to have the public official abuse his office in some way to secure a significant benefit to the briber.

6.1 A CG has no power to stop a procurement process that is non-compliant or which is exhibiting signs of irregularity, impropriety or corruption

Paramount among the CGA's major structural failings is that although Section 4.1⁹² of the Act expressly mandates a CG to "ensure" impartiality, merit, propriety and the lack of irregularity in the award of government contracts and licenses, nowhere does it give him the power to bring to a halt a government contracting or licensing process which he has good reason to believe is exhibiting signs of corruption, impropriety or irregularity and, in so doing, to prevent corruption.

Consequently, despite his enormous powers of subpoena and investigation, a CG, in reality, is confined merely to filing reports, and making recommendations and referrals to the relevant State authorities.

He has no punitive, interventionist or curtailment powers and, thus, is functionally ineffective to prevent corruption in public contracting or to stop it if and when he sees it while discharging his statutory contract monitoring mandate.

It is in this respect, therefore, that his lack of the referenced power constitutes a primary mechanism which, in and of itself, will promote corruption in public procurement.

⁹² Supra. Note 30.

This incredible anomaly in the CGA essentially renders what is regarded as the State's leading anti-corruption commission, in fighting corruption in the public procurement, literally toothless, useless and ineffective.

The failure to accord the CG preventative anti-corruption powers constitutes, among other things, a potential breach of Jamaica's UNCAC treaty obligations. Article 6 of UNCAC (Preventative anti-corruption body or bodies) requires, *inter alia*, a State party to ensure the existence of a body or bodies that **"prevent corruption"** and to grant to said body or bodies **"the necessary independence ... to enable (same) to carry out their functions effectively"**.⁹³

Several and repeated formal recommendations have been made by the author to the executive and legislative arms of the Jamaican State to remedy this glaring deficiency in the CGA and, by extension, in the country's anti-corruption institutional framework.

Indeed, in the OCG's May 2011 609-page 'LNG' investigation report⁹⁴, which was formally laid in both Houses of Parliament (and which documents the re-tendering costs that were suffered by Jamaica as a result of the refusal of the GOJ to initially heed the CG's recommendation to halt the procurement of a major energy plant project because of rampant evidence of irregularity and impropriety), the matter was addressed at length at pages 591 to 597 of the report⁹⁵. The following questions were asked:

"The inescapable question which must be forcefully asked, therefore, is what good purpose is served by maintaining, in place, a Commission of the Contractor General, at a cost to the Jamaican taxpayer which is currently in excess of \$180 million per annum, if the considered concerns, recommendations, injunctions and/or findings of the OCG can be summarily and arbitrarily ignored by the Executive arm of the State, the very authority which the OCG was established to monitor and to investigate?"

Is it that the OCG was intended by the Executive and Legislative arms of the Jamaican State to be a toothless bulldog?

Or is it that Parliament, in enacting the Contractor General Act, and by requiring a Contractor General to swear to a solemn Oath to "ensure" that Government contracts are awarded 'impartially and on merit and in circumstances that do not involve impropriety or irregularity', was being insincere in its injunction by virtue of the simple fact that it has refused and/or has failed to date to give to the Contractor General the very tools and powers which he obviously requires to enable him to effectively discharge and to enforce his mandate?

*It is respectfully submitted that these are very serious and critical questions in respect of which the taxpayers of Jamaica must demand, and should be provided with, credible and responsible answers, not only from the incumbent Administration, but also from the State".*⁹⁶

⁹³ Supra. Note 80. Article 6 – Preventative anti-corruption body or bodies

⁹⁴ OCG Special Report of Investigation: 'Allegations Regarding the Proposal for the Financing, Development, Ownership and Operation of a FSRU LNG Re-Gasification Terminal and Natural Gas Transportation System', May 2011, <http://www.ocg.gov.jm/ocg/view/investigation-reports>

⁹⁵ Ibid.

⁹⁶ Ibid. Page 593.

Not surprisingly, Jamaica was again to suffer significant and yet to be calculated economic costs and reputational damage because of the CG's inability to halt a non-compliant procurement process, and the GOJ's refusal to heed the considered recommendations of the OCG to do so.

The issue in question arose quite recently when a subsequent ruling of the OCG, issued in September 2013⁹⁷, to abort the re-started energy plant tendering process, because of procedural irregularities, was ignored by the incumbent Simpson-Miller administration.

The process, to the detriment of the country, which is struggling under the high costs of electricity at US\$0.43 kWh,⁹⁸ was continued by the GOJ until early May 2014, at which time it was left with no alternative but to abort the procurement after the IDB, on April 29, 2014, refused to extend financing to the 'winning' bidder that had emerged from the flawed process.⁹⁹

With all of this, it is perhaps, therefore, not surprising that Jamaica has now reached the point where the IDB feels the need to warn it 'to pay attention to transparency and good procurement practices.'¹⁰⁰

The posture of the GOJ, as described above, is neither consistent with the requirements of UNCAC, nor international best practices in public procurement oversight and regulation.

It is instructive to record that Section 7 (h) of the 2008 Sierra Leone Anti-Corruption Act¹⁰¹ provides that one of the objects for which that country's anti-corruption commission was established, is "to issue instructions to public bodies of changes in practices or procedures which are necessary to reduce or eliminate the occurrence of corrupt practices".¹⁰²

Section 8 of the Act requires public bodies to comply with the said instructions and directives of the commission, failing which the head of a delinquent public body will be held liable for committing a criminal offence, in addition to being subjected to disciplinary measures, inclusive of dismissal or removal from office.¹⁰³

Closer to home, and closer to the subject of procurement, the Trinidad and Tobago 2014 **Draft Public Procurement and Disposal of Public Property Bill**¹⁰⁴, which was formally laid in that country's Senate on April 2, 2014, similarly provides, at Clause 14 (1) (c), that the Office of Procurement Regulation may, in the performance of its functions, "issue directions to public bodies to ensure compliance with Act"¹⁰⁵.

⁹⁷ OCG Special Report of Investigation – 'Right to Supply 360 Megawatts of Power to the National Grid', September 2013, <http://www.ocg.gov.jm/ocg/view/investigation-reports>

⁹⁸ Supra. Note 7.

⁹⁹ See Jamaica Observer Article – 'Paulwell Stunned', April 30, 2014, http://m.jamaicaobserver.com/mobile/news/Paul-Stunned_16565921 and Jamaica Gleaner Article - 'PSOJ Happy with Revocation of EWI Licence', May 7, 2014, <http://jamaica-gleaner.com/latest/article.php?id=52720>

¹⁰⁰ See Jamaica Gleaner Article – 'Inter-American Development Bank On EWI: Pay Attention To Transparency Issues', April 29, 2014, <http://jamaica-gleaner.com/latest/article.php?id=52576>

¹⁰¹ Sierra Leone Anti-Corruption Act (2008), <http://www.sierra-leone.org/Laws/2008-12.pdf>

¹⁰² Ibid.

¹⁰³ Ibid.

¹⁰⁴ See <http://www.ttparliament.org/legislations/b2014s02.pdf>

¹⁰⁵ Ibid.

In the final analysis, if a country's procurement regulatory or anti-corruption authority is not vested with the power to step in and to review or halt an ongoing procurement process that is non-compliant, irregular, improper or seemingly corrupt, then clearly that body would be ineffective and useless in **preventing** corruption in procurement.

So long, therefore, as this deficiency in the CGA is left un-remedied, the deficiency itself will constitute a major corruption facilitation mechanism in public procurement in Jamaica.

Corrective Recommendation: Amend the CGA to expressly empower a CG to issue directives or instructions to public bodies (a) to prevent, reduce or eliminate the occurrence of irregular, improper or corrupt practices, (b) to ensure that their procurement practices and procedures are compliant with the GPPH and the CGA, and (c) to suspend or halt a procurement process that is non-compliant or which, in the view of a CG, is exhibiting evidence of irregularity, impropriety or corruption.

6.2 Insistence by Jamaica's incumbent Works Minister, Dr. the Hon. Omar Davies, that the OCG should not have the power to monitor the pre-contract stages of the procurement process

Closely aligned with the foregoing corruption threat mechanism, but potentially more formidable in its impact on the integrity of the Jamaica public sector procurement process, is the seeming unrelenting efforts by Jamaica's incumbent Works, Transport and Housing Minister, Dr. the Hon. Omar Davies, to abolish the statutory power of the OCG to monitor the pre-contract/licence stages of the award of GOJ contracts and the issue of licenses.

The OCG, since its very inception, in keeping with a logical interpretation of its functions under the 1983 CGA, to prevent "impropriety and irregularity" in the award of government contracts¹⁰⁶, has monitored the pre-contract stages of the procurement process.

Indeed, as much as 70% of the organization's work, on a day to day basis, has generally been dedicated to this function under the supervision of five (5) successive CGs, the author being the fourth.

Additionally, the pre-contract monitoring and investigative powers of the OCG was unequivocally affirmed by the Supreme Court of Jamaica, more than 2 decades ago, in the 1991 case of *Lawrence v. Ministry of Construction (Works) and the AG*.¹⁰⁷

¹⁰⁶ Supra. Note 32. CGA – Section 4 (1).

¹⁰⁷ *Lawrence v. Ministry of Construction (Works) and the AG* (1991) 28 JLR. 265, <http://www.ocg.gov.jm/ocg/view/court-rulings>

However, despite the 1991 ruling of the Supreme Court, on June 22 2012¹⁰⁸, in an alarming attempt to block the OCG from enquiring into the GOJ's negotiations with 'sole-sourced' contractors on at least 2 major mega-projects – one of which was the GOJ/CHEC¹⁰⁹ US\$600+ million North-South Link of Highway 2000 project – Minister Davies took the unprecedented step of filing several judicial review applications in the Jamaica Supreme Court to, among other things, obtain a declaration that the OCG had no such power.¹¹⁰

In his initial statement, regarding the OCG and the OCG's insistence that a project of that magnitude should be put to competitive tender to, among other things, ensure transparency and value for money in the process, particularly in light of the fact that CHEC was (and still is) black-listed and debarred by the World Bank under its Fraud and Corruption Sanctioning Policy, Dr. Davies, on April 24, 2012, reportedly told the Parliament that his government 'refuses to allow the OCG to be a stumbling block in the engagement of private entities as the State moves to take advantage of investment opportunities'.¹¹¹

However, the CG, in his response, said that "the OCG is of the view that economic development must be pursued in a sustainable and responsible manner, and within an appropriate system of institutionalized and independent checks and balances which will ensure that the Jamaican Taxpayer can be guaranteed value for money and that all Government commercial transactions will withstand the highest levels of scrutiny and probity".¹¹²

As was anticipated, the Supreme Court, on February 1, 2013¹¹³, summarily dismissed¹¹⁴ all of the Minister's Applications against the OCG.

¹⁰⁸ Minister of Transport, Works and Housing v. the Contractor General (2013),

<http://www.ocg.gov.jm/ocg/view/court-rulings>

¹⁰⁹ China Harbour Engineering Company (CHEC).

¹¹⁰ For a full account of the OCG's perspectives and considered positions on the matter, see OCG Media Releases dated, April 27, 2012: 'Official Statement of the OCG Regarding Assertions Made by Dr. the Hon. Omar Davies in Parliament on April 24, 2012'; May 1, 2012: 'Open Statement by the OCG Regarding the Proposed Highway 2000 North/South Link and the Container Trans-shipment Hub Projects'; May 14, 2012: 'OCG Issues Statutory Requisition to Government's 'Independent' Oversight Panel (IOP)'; June 4, 2012: 'OCG Raises Fresh Concerns Amidst Discovery that CHEC has been Debarred by World Bank under its Fraud and Corruption Sanctioning Policy'; June 19, 2012: 'Ruling Administration Resists OCG's Requisition Directed at Independent Oversight Panel to Secure Public Transparency in its Activities'; and June 21, 2012: 'OCG now in Possession of Legal Opinion from Queen's Counsel Confirming Validity of OCG's Positions on Independent Oversight Panel (IOP)'.

<http://www.ocg.gov.jm/ocg/view/press-releases>

¹¹¹ Ibid.

¹¹² Ibid. It is also instructive to note that former Prime Minister, the Most Hon. Edward Seaga, writing in the Jamaica Gleaner on May 11, 2014, in an article entitled: 'Good governance at work', commented that "... these actions (similar to that which Dr. Davies characterized as a 'stumbling block') are not to be considered delays. They are insurance against wrong decisions from which government can only benefit". See: <http://jamaica-gleaner.com/gleaner/20140511/cleisure/cleisure4.html>

¹¹³ Jamaica Gleaner Article – 'Court denies Davies' Application over OCG decision', February 1, 2013.

¹¹⁴ Supra. Note 108.

However, and not surprisingly, while Minister Davies' lawsuit was pending against the OCG, the GOJ not only denied repeated Queen's Counsel-backed OCG requests for information to be supplied regarding the projects, but, in fact, reportedly proceeded to consummate the North/South Link of Highway 2000 contract with CHEC¹¹⁵, as well as an MOU¹¹⁶ with CCCC, CHEC's parent.¹¹⁷

Dr. Davies, having failed at his efforts to strip the OCG of several of its powers in the Courts, did not stop there. On May 29, 2013, in the House of Representatives, the country's Attorney General reportedly announced that it was the objective of Dr. Davies to submit, to the Cabinet, a proposal to have the CGA amended in order to remove the CG's power to monitor the pre-contract stages of major projects¹¹⁸.

The announcement was met with strong objections from several quarters, including the country's civil society groups.¹¹⁹

Perhaps the most scathing criticisms, however, of Dr. Omar Davies and the GOJ came from Generation 2000 (G2K), the young professional arm of the Opposition Jamaica Labour Party (JLP), which said the plan would be "a backward step towards the precipice of corruption".¹²⁰

The following is an extract of the author's report of the G2K statement, which is taken from the NIA's June 2013 Media Review¹²¹:

"This move highlights the hypocrisy of this Administration as it flies in the face of every pronouncement by this Government of plans to strengthen the OCG and, more so, of its commitment to rooting out corruption by promoting transparency and accountability", said Floyd Green, the President of G2K.

G2K noted that "the OCG was established to monitor the award and implementation of contracts so as to ensure that the contracts are awarded impartially and on merit and that the country is getting value for money. The organization, therefore, finds it fool hardly for the Government to consider removing the ability of the Contractor General to examine the process before the contracts are signed".

"What is clear is that this Government and the Minister of Transport wants to bring the Contractor General in on the contracting process when the proverbial horse has already gone through the gate. Our Government should aim at preventing corruption – not mopping up the ill effects.

¹¹⁵ Ministry of Works Media Release – 'Implementation and concession agreements signed for North/South Link of Highway 2000', June 25, 2012, <http://go-jamaica.com/pressrelease/item.php?id=686>

See also Jamaica Gleaner Article – 'Gov't to sign contracts for multi-million project', June 21, 2012, <http://jamaica-gleaner.com/latest/article.php?id=38036>

¹¹⁶ Jamaica Gleaner Editorial – 'We support the MOU, but ...', July 26, 2012, <http://jamaica-gleaner.com/gleaner/20120726/cleisure/cleisure1.html>

¹¹⁷ China Communications Construction Company (CCCC).

¹¹⁸ See, for example, Jamaica Observer Article – 'Angry reactions to reducing OCG's powers', May 31, 2013, http://securejam.mediaspanonline.com/news/Angry-reactions-to-reducing-OCG-s-powers_14380848

¹¹⁹ Ibid.

¹²⁰ See NIA Media Review, June 2013, pages 1-2

¹²¹ Ibid.

Moves like this confine Jamaica to the perennial view of a corrupt state as noted by our consistent poor ranking on Transparency International's Corruption Prevent Index", added Floyd Green.

G2K also said that it had "found it odd that the Cabinet submission is coming from the Minister of Transport and Works and not the Attorney General. The organization reminds the people of Jamaica that this is the same Minister who was the brunt of a scathing report about his interventions into the (2007) sale of Air Jamaica's London Heathrow Slots and who, in the organization's view, has launched a sustained attack on the OCG¹²²".

If a country's procurement regulatory body has no power to monitor and scrutinize the pre-contract stages of the procurement process, particularly having regard to the high propensity that exists at this juncture for corruption and the abuse of the process, then it follows that the body will be rendered functionally useless and ineffective, and should be regarded as being no more than a façade of an anti-corruption body.

Such is the gravity of the issue that should Dr. Davies succeed in his efforts, then the deficiency in the CGA that was discussed in the immediately preceding section, and the need to give the CG the power to halt a non-compliant procurement process, would be rendered academic since a CG would have had no monitoring powers over the pre-contract process in the first place.

Corrective Recommendation: Formal representations should be made to the Prime Minister, the Cabinet of the GOJ, and the Parliament of Jamaica, to ensure that the efforts of the incumbent Works Minister, Dr. Omar Davies, to dilute the powers of the OCG to monitor the pre-contract stages of the procurement process, do not bear fruit. To put the matter beyond doubt, formal representations should also be made to ensure that the CGA is amended to expressly confirm the powers of a CG to monitor the pre-contract/licence stages of the award of GOJ contracts and the issue of GOJ licenses.

6.3 Abuse of the GOJ's emergency contracting facility

The GPPH makes provision for the bypass of the standard competitive contracting and tendering methodologies in the event of a defined 'emergency'.

¹²² OCG Report of Investigation – 'Conducted into the Sale/Divestment of Air Jamaica Ltd.'s London Heathrow Slots, <http://www.ocg.gov.jm/ocg/view/investigation-reports>

Author's Note: In the referenced OCG Investigation Report, which was formally submitted by the Contractor General to the Parliament of Jamaica, the Attorney General and the Director of Public Prosecutions, on March 31, 2009, the OCG ruled that Dr. Omar Davies, in his former capacity as the Minister of Finance, had unlawfully, improperly and irregularly intervened in the 2007 sale of Air Jamaica's London Heathrow Slots, when he directed that the Slots should be sold to Virgin Atlantic Airways, although the Executive Management of Air Jamaica had, at all material times, fully supported and recommended the acceptance of the bid/proposal that had been advanced by British Airways. The OCG found that, in consequence, the process of evaluation, selection and approval of the Virgin Airways proposal lacked merit, transparency, fairness and impartiality. The Findings of the OCG Report, and the evidence that was presented therein, also implicated Dr. Davies for allegedly attempting to mislead a Contractor General in contravention of Section 29 (a) of the Contractor General Act, and/or for knowingly and willfully making a false statement or statements to a Contractor General, in a material particular, contrary to Section 8 of the Perjury Act. To date, as far as the author is aware, neither the Commissioner of Police, to whom the matter was subsequently referred by the DPP, nor the DPP, has publicly announced the final outcome of their deliberations regarding the referral, concerning Dr. Davies, which was formally made to the DPP, by the OCG, more than five (5) years ago.

Section 1.1.5 of Volume 2 of the GPPH defines four (4) circumstances¹²³ in which the emergency contracting methodology can be utilized for the procurement of goods, works and services. Additionally, it provides that the need for such procurement must be sudden, unexpected and a pressing necessity or exigency.

When an emergency situation exists, as is defined by the GPPH, the procuring entity is entitled to engage a contractor by means of “direct contracting”, i.e. where only one (1) contractor of the procuring entity’s choice is invited to participate in the procurement.

The head of the procuring unit is the only authority that is required to approve the procurement as well as the selection of the specified contractor. In instances in which the procurement exceeds J\$3 million, the particulars of the award and the justification for the award are required to be reported to the NCC within 1 month after the award is made.

In its monitoring of the utilization of the emergency procurement methodology by GOJ public bodies, the OCG has consistently expressed its concern that the procedure is open to abuse and is in fact being abused. In particular, in its last 2 annual reports – the 2011 and 2012 annual reports – the matter was the subject of extensive enquiry and reporting¹²⁴.

Paramount among the OCG’s concerns is the fact that the emergency procedure is being utilized when other standard procurement procedures could have been easily used to, among other things, ensure value for money, competition and transparency, whilst at the same time ensuring that the so called ‘emergency’ would be dealt with in a timely, efficient and satisfactory manner.

Indeed, in his 2011 annual report, the CG, at page 14¹²⁵, felt constrained to state as follows:

“It is not lost on the OCG that this methodology can be deliberately used by public bodies to avoid the scrutiny of the respective regulatory agencies, inclusive of the OCG, and also to award contracts to ‘preferred’ pr ‘connected’ contractors.”

The implications are clear. The emergency contracting procedure, as presently structured, is a massive corruption enabling facility, that is devoid of real-time checks and balances, but which has been legitimized by the GPPH.

¹²³ Supra. Note 35. “Emergency contracting is permitted in any of the following circumstances:

(a) for the repairs or remedial action necessary to preserve public safety or property; or to avoid great social harm or significant public inconvenience;

(b) for the procurement of goods, services or works in any extenuating circumstances in which the Procuring Entity is likely to incur or suffer financial loss if the procurement is not executed immediately;

(c) for the procurement of goods, services or works in any circumstance in which the national interest and/or national security considerations demand that the procurement be undertaken immediately; or

(d) for business-sensitive procurement of goods, services or works in any extenuating circumstances in which the operating functions or business objectives of a Procuring Entity are likely to be significantly impeded, or placed in jeopardy if the procurement is not executed in a limited timeframe.”


¹²⁴ OCG Annual Report (2011) at pages 14, 110 and 111; OCG Annual Report (2012) at pages 21 to 24;

<http://www.ocg.gov.jm/ocg/view/annual-reports>

¹²⁵ Ibid.

In addition to the foregoing, the OCG has also expressed its concerns that contractors who are not registered in the grades that are appropriate for the relevant works, or who have already exceeded their work limits, are being awarded emergency works contracts thus creating an environment for poor quality works, time overruns and/or costs overruns.

The entire matter is one with significant implications since in 2011 alone, single works contracts with values as high as J\$230.5 million, and totaling \$1.4 billion in aggregate value, or 8.5% the value of all works contracts that were awarded, were awarded using the emergency contracting procedure¹²⁶.

 **Corrective Recommendation:** The GOJ's emergency contracting procedure is way too lax and overly generous in its latitude. There is no question that, as presently structured, it is a prime corruption-enabling mechanism that is often used to direct lucrative state contracts to a preferred contractor under the guise of same being an emergency contract, albeit that, in some instances, the so-called 'emergency' has operated for as long as a year prior to the award of the contract. At a minimum, it needs to be re-structured to add additional layers of scrutiny, and checks and balances to prevent corruption, abuse of the process, and to ensure probity and adequate due-diligence, whilst ensuring that genuine emergency situations are addressed effectively and efficiently and in an expedited manner.

6.4 The use of shell companies to conceal the identity of the human beneficiaries of GOJ contracts and licenses

It is now accepted universally that the concealment of the true beneficial shareholders of corporate entities substantially facilitates corruption, tax-evasion, money-laundering and organized crime.

Consequently, many States have already taken steps, or are currently engaged in the process of taking steps to mandate a central registry of the human beneficial shareholders of corporate entities that are incorporated in their jurisdictions.

Among them are the United Kingdom¹²⁷, the G8 countries¹²⁸, the European Union¹²⁹, the United States¹³⁰ as well as the British Overseas Territories¹³¹, which include Anguilla, Bermuda, the British Virgin Islands, the Cayman Islands and the Turks and Caicos Islands.

¹²⁶ Ibid. OCG Annual Report (2011), pages 110 and 111.

¹²⁷ See News Article – 'UK to go ahead with beneficial owners registry', April 22, 2014, <http://www.international-adviser.com/news/uk/uk-to-go-ahead-with-beneficial-owners>

¹²⁸ Ibid.

¹²⁹ See News Article – 'EU Parliament votes in favour of public ownership register', March 13, 2014, <http://www.international-adviser.com/news/tax---regulation/eu-parliament-votes-in-favour-of-public>

¹³⁰ See News Article – Beneficial Ownership Legislation Proposal, April 4, 2014, <http://m.whitehouse.gov/blog/2014/04/04/beneficial-ownership-legislation-proposal>

¹³¹ See News Article – 'British PM pushes tax havens to publish list of company owners', April 25, 2014, <http://www.trust.org/item/20140425171350-psfxr>

Shell corporations can also be effectively utilized to disguise or conceal the true human beneficiaries of public contracts and licenses, and to hide the assets that have been derived therefrom.¹³² To that extent, it is a major corruption-facilitating mechanism as corrupt public officials, through this medium, can illicitly and surreptitiously direct lucrative state contracts and licenses to themselves, their family members or their close associates.

Although the aforementioned anti-crime and anti-corruption initiatives, regarding the illicit use of shell companies, are currently underway in the developed world, it is, however, instructive to note that concerns about the matter and, particularly, its implications for corruption in public procurement in Jamaica, were first formally raised by the author from as far back as in 2008.

At that time, as Jamaica's then CG, the author expressed the following concerns in his annual report to the Jamaican Parliament and requested that the GOJ take immediate steps to mandate any private company that was desirous of bidding on a GOJ contract to disclose the "certified particulars of all of its beneficial shareholders"¹³³:

"Another prominent area of concern for the OCG is one which arises from the grim spectre of the emergence of a significant and sophisticated corruption-enabling facility that enjoys the colour of law, unless urgent steps are taken to ensure that an appropriate regulatory mechanism is created to ensure that the clear mandates of the Contractor-General, regarding probity and propriety in the award of Government contracts, are not frustrated.

The OCG has observed that there is a growing trend of on-shore and off-shore incorporated private companies that are receiving Government of Jamaica contracts, but whose shareholders and/or beneficial shareholders are substantially unknown.

These practices have posed significant concerns for the OCG, particularly regarding the issue of transparency in the expenditure of the Taxpayers' money, given that the overwhelming number of the more than 10,000 Government contracts, valued at over J\$250,000.00, that were awarded during the reporting period, were awarded to corporate entities.

Since the lawful jurisdiction of a Contractor-General is confined to Jamaica, the OCG, acting on behalf of the Contractor-General, has been generally frustrated in its ability to obtain certified particulars of the shareholders and certified particulars of all of the beneficial shareholders of companies which are incorporated in foreign jurisdictions and which have benefitted from Government of Jamaica contracts.

This challenge also has a peculiar constitutional dimension in that the Constitution of Jamaica expressly requires Parliamentarians to make declarations about any interests which they may have in commercial entities which do business with the Government of Jamaica.

¹³² See, for example, TI's observations – 'Public consultation in Jersey: Chance to come clean', April 30, 2014, <https://blog.transparency.org/2014/04/30/public-consultation-in-jersey-chance-to-come-clean/>

¹³³ OCG Annual Report (2008), Pages 10-11, <http://www.ocg.gov.jm/ocg/view/annual-reports>

Having regard to the foregoing, it is essential that immediate steps should be taken by the Cabinet to amend the Government Procurement Rules to require that any private corporate entity that is desirous of tendering on any Government of Jamaica contract must, as a mandatory pre-requisite, submit to the relevant contracting Public Body, certified and sworn particulars of its incorporation documents, certified particulars of its shareholders and certified particulars of all of its beneficial shareholders”.

The matter, which was also the subject of a Jamaica media story in February 2009, has presented road-blocks for at least 2 OCG Special Investigations¹³⁴.

Additionally, the OCG was compelled, in 2009, to repeat its recommendation to the GOJ to require the mandatory disclosure of the particulars of the beneficial shareholders of private corporate contracting entities to prevent public officers from benefiting from GOJ contract awards in irregular or improper circumstances¹³⁵.

Having been ignored by the GOJ, the OCG, again, on February 2010, submitted a detailed proposal to the GOJ to force “the mandatory disclosure of particulars of the beneficial owners of all private entities that are desirous of bidding or tendering on GOJ contracts which exceed \$275,000 in value”.

An extract from the relevant OCG media release, which was issued at the time, reads as follows:

“By implementing this very important and ground-breaking anti-corruption measure, we will finally know the true identity of the persons, public officials, parliamentarians and politicians and related parties, inclusive of their friends, relatives and associates, who have been receiving Government contracts”, said the Contractor General. “Additionally, once the appropriate election campaign financing laws are enacted to, among other things, force the disclosure of the identity of political campaign donors and financiers, the OCG and other State anti-corruption agencies will have the ability to cross-check these names against an electronic database of persons who are the beneficial recipients of Government contracts. The OCG has already discussed the matter with the leadership of the Citizens Action for Free and Fair Elections (CAFFE) and will commit to the development of that electronic database”, assured Mr. Christie¹³⁶.

The continued lack of laws in Jamaica to force the disclosure of the identity of the human beneficiaries of lucrative GOJ contracts, licenses and divested state-owned assets, and the continued failure of the GOJ to implement repeated recommendations to effectively remedy the problem, should be of significant concern.

¹³⁴ See Jamaica Gleaner Article – ‘Hiding overseas - Offshore companies getting Government contracts’, February 1, 2009, <http://jamaica-gleaner.com/gleaner/20090201/news/news6.html>

¹³⁵ OCG Special Report of Investigation (January 2009) – ‘Conducted into the Allegations of Irregularity Surrounding an Alleged Proposal by SportsMax Limited to Supply Satellite Services for Simulcast Racing from South Africa and the United Kingdom to Caymanas Track Limited’, Page 169, <http://www.ocg.gov.jm/ocg/view/investigation-reports>

¹³⁶ OCG Media Release (February 19, 2010) – ‘OCG submits anti-corruption proposal for mandatory disclosure of beneficial owners of private entities who are desirous of bidding on government contracts), <http://www.ocg.gov.jm/ocg/view/news-items>

The issue is now the subject of worldwide attention, not only because it facilitates corruption in public procurement, but also because of the huge adverse implications that it portends for money laundering, organized crime, tax-evasion and illicit political campaign financing.

Corrective Recommendation: The GOJ must be pressured into following the rest of the international community in implementing, at a minimum, a central beneficial shareholder registry to be made available for use by law enforcement, anti-corruption, and other pertinent regulatory agencies.

6.5 Poor rule of law – low levels of anti-corruption investigations and prosecutions of high level public officials

Although Jamaica is today regarded as one of the most corrupt countries in the Americas, it is an open and embarrassing secret that it has been experiencing a shockingly low level of anti-corruption investigations and prosecutions, particularly against high-ranking public officials.

As was previously observed, no high-profile public official has been convicted and imprisoned for corruption in Jamaica in the past 25 years.¹³⁷

It is also an open secret that many are of the view that the situation has worsened with the appointment of the incumbent DPP, Paula Llewellyn, who assumed office effective March 5, 2008.¹³⁸

The failure and/or seeming reluctance of Jamaica's law enforcement authorities to undertake criminal anti-corruption investigations against public officials in high places, and/or for the DPP to likewise initiate criminal prosecutions, whether for breaches of the CGA or otherwise, have emboldened many to act with impunity, since there appears to be no fear or risk that they will be investigated, arrested and/or prosecuted.

Indeed, when the former Commissioner of Customs, the Hon. Danville Walker, was referred by the then CG, to the DPP, in December 2011, for criminal prosecution under Section 29 of the CGA¹³⁹, he arrogantly brushed off the referral. He reportedly commented that he not think that much would come of it since "... nine times out of ten the DPP disagrees with him (the CG) anyway".¹⁴⁰

The United States Department of State, in its last 4 annual INCSRs, has taken note of the unusual phenomenon of low anti-corruption criminal investigations and prosecutions in Jamaica, and has repeatedly recorded its concerns.¹⁴¹

¹³⁷ Supra. Note 29.

¹³⁸ Section 96 (1) of the Jamaica Constitution provides that a DPP shall hold office until age 60. There is a proviso for a DPP to remain in office for a further period not exceeding age 65.

¹³⁹ Supra. Note 30.

¹⁴⁰ See RJR News Report – 'Walker brushes off threat of criminal charges', December 16, 2011, <http://rjnnewsline.com/local/walker-brushes-off-the-threat-of-criminal-charges>

¹⁴¹ Supra. Notes 19 and 20.

As has been seen, at the local level, the OCG and the CPC have also expressed their frustrations regarding the problem and have made repeated representations to the Parliament of Jamaica about the matter and the serious threat that it is posing in the fight against corruption on the island.¹⁴²

But, it is also instructive to note that even the very architect of the CGA, himself, the former Prime Minister, the Most Hon. Edward Seaga, has acknowledged the problem and the adverse consequences that have resulted.

Writing in his regular Jamaica Gleaner column on February 13, 2011¹⁴³, Mr. Seaga identified at least two (2) of the major failings of the CGA's regulatory regime. One of these, he said, was that a CG has no power to prosecute – a position that the author, as CG, had represented *ad nauseam* prior to that, and has continued so to do since then.

The Prime Minister observed that although criminal prosecutions were the responsibility of the DPP, the incumbent DPP was unable to respond to the OCG in a timely manner. He said that this had, in turn, resulted in criminal prosecutorial inaction that had reduced "the bite of the OCG to a bark (thus) diluting its effectiveness to suppress corruption".¹⁴⁴

Mr. Seaga further observed that unless the holder of the CG's office was prepared to speak out, to fight, and to be "aggressive", nothing would come of the OCG. It was for this reason, he said, among others, that the OCG had not lived up to his (Mr. Seaga's) own expectations prior to the author's appointment as CG in December 2005.¹⁴⁵

Several procurement-related matters, in which the OCG has implicated high-level public officials, have been referred to the incumbent DPP, by the author, for action. In her published rulings, the incumbent DPP has, however, either refused to prosecute or has so far failed to provide a final ruling in the over-whelming majority of the matters.

For example, matters involving Parliamentarians in respect of which the DPP has returned unfavourable rulings against the OCG, have included referrals that were related to the Jamaica Labour Party's (JLP's) Member of Parliament (MP) Everaldo Warmington¹⁴⁶, former JLP MP and Minister of Agriculture, Dr. Christopher Tufton¹⁴⁷, and former PNP Senator, Information Minister and Party Secretary, Colin Campbell.¹⁴⁸

¹⁴² Supra. Notes 26 to 28.

¹⁴³ See Jamaica Gleaner Article 'Public Watchdogs are instruments of discipline', February 13, 2011, <http://jamaica-gleaner.com/gleaner/20110213/focus/focus1.html>

¹⁴⁴ Ibid.

¹⁴⁵ Ibid.

¹⁴⁶ OCG Strathairn Special Investigation Report (September 2011), <http://www.ocg.gov.jm/ocg/view/investigation-reports>

¹⁴⁷ OCG Ministry of Agriculture/Aubyn Hill Contracts Investigation Report (September 2010), <http://www.ocg.gov.jm/ocg/view/investigation-reports>

¹⁴⁸ OCG Trafigura Investigation Report (August 2010), <http://www.ocg.gov.jm/ocg/view/investigation-reports>

Examples of the referrals of senior public officials in respect of which the incumbent DPP has or had failed to publish a final ruling, despite the passage of several years, include that of former JLP MP and State Minister, Joseph Hibbert¹⁴⁹, former PNP Finance Minister and current PNP Works, Transport and Housing Minister, Dr. Omar Davies¹⁵⁰, and former Chairman of Caymanas Track Limited (CTL), the Hon. Patrick Rousseau¹⁵¹.

It is also instructive to record that there are a number of rulings which the incumbent DPP has returned against the OCG, regarding procurement related matters which were referred to her, in respect of which the OCG has formally questioned the legal standing and integrity of the rulings.

An account, as at 2009, of some of the referenced inconsistencies and anomalies in respect of the DPP's rulings, was presented to the Jamaica Parliament in the OCG's 2010 Annual Report.¹⁵² The OCG's contentions were also the subject of review by a former Jamaica DPP, Kent Pantry, CD, QC, in his commissioned paper for the NIA, entitled 'The Corruption Prevention (Special Prosecutor) Act 2011'.¹⁵³

The matter concerning the glaring failure of the JCF and the DPP to aggressively go after the so called 'big fish' and 'untouchables' in Jamaican society was also the subject of a paper that was presented by the author at the First Regional Law Enforcement Anti-Corruption Conference in Jamaica in March 2011.¹⁵⁴

In that presentation, as well as in others, inclusive of representations to the country's leaders and OCG reports to Parliament, the case has been made by the author for the OCG to be granted independent criminal investigative and criminal prosecutorial powers, either as a stand alone institution or, preferably, for the OCG to be merged with the CPC and the Integrity Commission, into a single, independent anti-corruption agency for Jamaica, and vested with criminal investigative and prosecutorial powers, together with police powers of arrest, in respect of all corruption-related matters.¹⁵⁵

¹⁴⁹ OCG Mabey and Johnson Investigation Report (October 2009), <http://www.ocg.gov.jm/ocg/view/investigation-reports>

The OCG's referral was made to the DPP and the Commissioner of Police (COP) on October 8, 2009. However, Mr. Hibbert died on June 16, 2013, while awaiting a final ruling on his matter from the DPP and the COP. A public ruling was subsequently issued.

¹⁵⁰ Supra. Note 122.

The OCG's referral was made to the DPP on March 31, 2009. However, and despite the passage of more than 5 years, a final ruling (as far as the author is aware), from the DPP, is yet to be made public.

¹⁵¹ Supra. Note 124. OCG Caymanas Track Limited Investigation Report (January 2009), <http://www.ocg.gov.jm/ocg/view/investigation-reports>

The OCG's referral was made to the DPP and the COP on January 22, 2009. However, and despite the passage of more than 5 years, a final ruling (as far as the author is aware), from either the COP and/or the DPP, is yet to be made public.

¹⁵² See OCG Annual Report (2010), Pages 21 to 29, <http://www.ocg.gov.jm/ocg/view/annual-reports>

¹⁵³ See Kent Pantry, QC – 'The Corruption Prevention (Special Prosecutor) Act 2011', March 7, 2012, Commissioned by NIA for its 'Combating Corruption' Program.

¹⁵⁴ See Greg Christie – 'The Need for Political Will and Effective Law Enforcement in the Fight Against Corruption in Regional Jurisdictions – Jamaica Case Study: Proposal for a Single Independent National Anti-Corruption Agency', First Regional Law Enforcement Anti-Corruption Conference, Kingston, March 23, 2011.

¹⁵⁵ See OCG Annual Report (2009), Pages 15 to 19, <http://www.ocg.gov.jm/ocg/view/annual-reports>
CG's Open Letter to the Executive and Legislature (March 22, 2010), <http://www.ocg.gov.jm/ocg/view/ocg-proposals>,
OCG Annual Report (2010), Pages 14 to 21, <http://www.ocg.gov.jm/ocg/view/annual-reports>, and
CG's Letter to the Chairman of the Justice Minister's Advisory Committee (June 18, 2012)
<http://www.ocg.gov.jm/ocg/view/ocg-proposals>

The fact that a CG has no power to prosecute corruption or other criminal offences that are associated with breaches of the GOJ's procurement, contracting and licensing laws, whether in his own right, or via a broad fiat which is issued by the DPP, constitutes a major corruption enabling facility.

Coupled with the fact that a CG's remedial recommendations can be lawfully ignored by the Government, the inability of a CG to initiate his own prosecutions in an environment in which there are little or no criminal investigations by the JCF, or criminal prosecutions by the DPP, means that the corrupt in Jamaica are literally enjoying a 'field day'.

The situation, in the author's view, has long passed disproportionate if not crisis levels.

It is no secret that corruption, in Jamaica, has historically competed unsuccessfully for the attention of the JCF, the DPP, and the Judiciary. The present-day situation is no different. Corruption has repeatedly lost out, for attention, to offences against the person and, in particular, to an average national murder rate which now stands at more than 1,200 per annum for the past 15 years.

It is also an irrefutable fact that the country's inordinately high rates of violent crime have literally swamped the already limited resources and assets of the JCF, the 41 attorney staffed ODPP, and the local Courts' system.

But, in the words of Patricia Ferrick, the recently appointed head of the Connecticut, USA, Federal Investigation Bureau (FBI) Division, "... you have to look for corruption to find it. It doesn't walk in the door".¹⁵⁶

It appears, however, that the JCF neither has the resource capacity, nor the resolve, to 'look for corruption' in high places, and the same appears to be case with the ODPP in respect of criminal prosecutions.

The relatively low clear-up rate for serious crimes, as well as the massive backlog of cases which are currently before the Jamaican Courts, and which some estimates have placed as high as 400,000, also paint a telling picture of the disturbing and unacceptable inadequacies of Jamaica's anti-corruption, law enforcement and criminal justice systems.

This has, in turn, prompted the author to proffer an associated recommendation for the establishment of a special Anti-Corruption Court or, in lieu thereof, to give corruption matters precedence in the current Jamaica Courts' system.¹⁵⁷

But as if to deepen the problem regarding corruption in Jamaica, it is also arguable that neither the JCF nor the Office of the DPP, was, in the first place, structured, or adequately resourced, to effectively and efficiently investigate and prosecute sophisticated crimes of corruption, or other potentially complex white collar crimes which have now come to the fore.

¹⁵⁶ See News Article – 'New head of FBI in Connecticut to target corruption', January, 15, 2014, <http://www.nhrregister.com/general-news/20140115/new-head-of-fbi-in-connecticut-to-target-corruption>

¹⁵⁷ Supra. Notes 154 and 155.

The situation was, perhaps, vividly illustrated by the very high-profile corruption case which involved the former PNP Junior Energy Minister, Kern Spencer, that was prosecuted by the DPP, herself, in the Magistrates Court, during the past 5 to 6 years.

The case, which was initiated by a February 2008 OCG referral to the DPP, suffered from innumerable adjournments and legal contentions, and was recently dismissed, in March 2014, when the Sitting Magistrate upheld a defence 'no-case submission' motion against the DPP.¹⁵⁸

To put it bluntly, the situation regarding the investigation and prosecution of corruption matters in Jamaica requires immediate and effective address if the country is to stand any chance whatsoever of winning the battle, not just against corruption in public procurement, but also against corruption generally.

To win the battle against corruption in any jurisdiction, a key prerequisite must be the effective enforcement of the state's anti-corruption laws, inclusive of the effective adjudication of those laws.

This means, in part, that the judicial process must be, and perceived to be, impartial, efficient and transparent. The rule of law must be enforced against all and respected by all. Put another way, the system must be one which is based on a 'Zero Tolerance' approach.

Effective adjudication will require speedy and effective investigation of suspected acts of corruption and, above all, aggressive, dispassionate and fearless prosecution. Indeed, if the criminal investigative, prosecutorial and judicial arms of the State are not operating in lock-step with relevant anti-corruption agencies, such as the OCG, there will be no effective enforcement.

It stands to reason, therefore, that adequate provision should be made for corrective adjustments to be effected to the country's anti-corruption and law enforcement institutional framework, and for the recall or removal from office of the leadership of any constituent institution, whenever or wherever minimum standards of probity or accountability, or functional effectiveness and efficiency, are not being met.

Corrective Recommendation: In the circumstances, I would therefore repeat the recommendation that I had first made over 4 years ago, on March 22, 2010. At a minimum, the OCG, the CPC and the Integrity Commission should be merged into a single anti-corruption agency for Jamaica, having independent criminal investigative, arrest and prosecutorial powers. The new agency must be provided with the requisite resources and specialist expertise and skill-sets to enable it to discharge its mandates efficiently and effectively, and, above all, it must be subjected to appropriate checks and balances to ensure that it operates dispassionately, effectively and efficiently.¹⁵⁹

¹⁵⁸ See Jamaica Gleaner Article – 'Kern Spencer Trial Timeline', March 25, 2014, <http://jamaica-gleaner.com/gleaner/20140325/lead/lead3.html> and

OCG 4M Light Bulb Investigation Report (February 2008) <http://www.ocg.gov.jm/ocg/view/investigation-reports>

¹⁵⁹ For details of the recommendation, see CG's Letter to the Chairman of the Justice Minister's Advisory Committee (June 18, 2012), <http://www.ocg.gov.jm/ocg/view/ocg-proposals>

6.6 Poor rule of law – Low criminal sanctions for breaches of the CGA and GPPH encourage corruption

Closely aligned with the deterrent-disabling fact that procurement related offences in Jamaica are not being effectively or efficiently investigated and/or prosecuted, and that there is a paucity of such investigations and prosecutions against high-level public officials, is the fact that the sanctions that are associated with the said offences themselves are so low that they cannot possibly serve as a deterrent – even if the offences were to be prosecuted.

First and foremost in this regard are the prescribed sanctions for the three (3) anti-corruption offences that are specified under the CGA¹⁶⁰.

Despite innumerable documented recommendations from the OCG to have the matter remedied, the subject sanctions have remained, for the past 31 years, at the inexplicable low level of a fine not exceeding J\$5,000 (US\$45) and/or to imprisonment for a term not exceeding 12 months¹⁶¹.

Even the incumbent DPP, Ms. Paula Llewlyn, has seemingly thrown cold water upon the CGA's Section 29 offences by classifying at least one of them as being akin to an 'administrative breach'.

Further, in one major case – the Trafigura Beheer case¹⁶² – she actually refused to prosecute partly because she was of the view that the relevant CGA Section 29 offence was "... a summary offence and one for which the maximum penalty is J\$5,000."¹⁶³, thus inferring that it was too *de-minimis* to warrant her attention.¹⁶⁴

The situation with respect to criminal breaches of the GPPH is not dissimilar. If anything, it is shockingly worse.

Despite solemn public promises that were made by former Prime Minister, the Hon. Bruce Golding, on September 11, 2007, on the occasion of his official inauguration into office, to impose sanctions for breaches of the rules governing the award of GOJ contracts, and to make it "more difficult, more hazardous with stiff penalties for violations"¹⁶⁵, the sole sanction that was eventually promulgated into law was a fine not exceeding J\$1,000, or imprisonment for a term not exceeding three months, or both.¹⁶⁶

One thousand Jamaican dollars (J\$1,000), at current rates of exchange, is equivalent to less than US\$9. Obviously, then, this has made a total mockery of the commitment that was given by the then government that it was genuinely serious about fighting corruption when it acceded to the OCG's requests to criminalize breaches of the GPPH.

¹⁶⁰ Supra. Note 36.

¹⁶¹ Ibid.

¹⁶² Supra. Note 148.

¹⁶³ Supra. Note 152. Page 26. The DPP, in making the referenced statement, misstated the law since Section 29 of the CGA provides for the imposition of a fine *and/or imprisonment*.

¹⁶⁴ Ibid. Page 27.

¹⁶⁵ See Jamaica Gleaner Article – 'Prime Minister Bruce Golding's Inaugural Speech', September 16, 2007, <http://jamaica-gleaner.com/gleaner/20070916/lead/lead5.html>

¹⁶⁶ See Section 40 of the CGA Public Sector Regulations (2008), <http://www.ocg.gov.jm/ocg/view/goj-procurement-documents>

Mr. Golding, as a former Jamaica Prime Minister, was not alone in his recognition of the fact that the absence of stiff penalties for breaches of Jamaica's public sector procurement rules is a primary, if not the leading cause for the breaches themselves – and thus a root cause for corruption in public procurement in Jamaica. In fact, it was his expressed view that “corruption in Jamaica is much too easy, too risk-free”.¹⁶⁷

The Most Hon. P.J. Patterson, Jamaica's longest serving Prime Minister, who preceded Mr. Golding in office, also recognized the importance of having tough anti-corruption laws and sanctions, if corruption in public procurement was to be effectively tackled. However, there is no empirical evidence that the imposition of sanctions have become 'swifter and surer', as Prime Minister Patterson himself had reportedly promised in May 2005.¹⁶⁸

Additionally, and not unlike her predecessors in office, in the December 20, 2011 National Leadership Debates, which preceded the general elections of the same month, then Leader of the Opposition and the current Prime Minister of Jamaica, the Most Hon. Portia Simpson-Miller, also promised to fight corruption by, among other things, 'strengthening the OCG'.¹⁶⁹ However, and not surprisingly, quite the opposite has occurred.

As has been seen, within less than 6 months of being sworn into office as the Prime Minister of Jamaica in January 2012, Mrs. Simpson-Miller implicitly sanctioned the unprecedented actions of her Senior Cabinet Minister, Dr. Omar Davies, when he filed several applications in the Supreme Court of Jamaica¹⁷⁰ in an unprecedented attempt to block the OCG's scrutiny of several mega-projects which his Ministry – the Ministry of Works, Transport and Housing – was overseeing. In so doing, the GOJ had sought to weaken – and not strengthen – the powers of the OCG.

It is, therefore, crystal clear that the situation in Jamaica is one that is in dire need of critical address, having particular regard to the expressed actions of the incumbent Administration and its seeming disregard for the rule of law and best practices in good governance.

An environment of deterrence must be urgently created and maintained to dissuade acts of corruption, for it is an incontrovertible fact that whenever a criminal's perception of the attendant risks is too low, he will proceed with his criminal conduct for the simple reason that his risk/benefit analysis of the situation will suggest to him that it will be beneficial for him to proceed.

¹⁶⁷ Supra. Note 165.

¹⁶⁸ See Jamaica Observer Article – ‘PM promises swifter sanctions against corrupt public officials’, May 14, 2005, http://www.jamaicaobserver.com/news/80426_PM-promises-swifter-sanctions-against-corrupt-public-officials

¹⁶⁹ See verbatim comment by then Leader of the Opposition, Portia Simpson-Miller made during the December 20, 2011 National Leadership Debate with then Prime Minister, the Hon. Andrew Holness: “I am very strong ... in terms of fighting corruption and will not tolerate any form of corruption in a People's National Party Government and that's why when I'm returned to power, as Prime Minister, I will ensure the strengthening of these institutions, like the Office of the Contractor General and all the institutions having to investigate corruption and deal with corruption when they are reported... I will be very firm and strong on corruption, I do not believe that we should allow anyone to corrupt the system of government, and that's why consultation is so important and bring people into the heart of government and governance in this country so that they can feel comfortable to communicate with their government and their leaders thereby we will get more information.”

¹⁷⁰ Supra. Note 108.

There must be such a high perception of risk, about engaging in corrupt activities, that anyone who contemplates the commission of an act of corruption, irrespective of his station in life, or his status in society, must anticipate that in all likelihood he will be promptly detected, investigated, prosecuted and convicted.

Significantly tougher criminal sanctions must, therefore, be legislated, and dispassionately enforced, if corruption in public contracting is to be effectively tackled in Jamaica. These elevated sanctions must include mandatory custodial and economic based penalties, where appropriate.

Currently, the criminal sanctions for corruption, under the Corruption Prevention Act (2001)¹⁷¹, provide the Courts with wide discretion to impose a fine of no specified minimum amount and/or a custodial sentence – again of no specified minimum amount.¹⁷²

In the case of a corruption-related matter which is being heard in a Magistrate's Court, the sanction is limited to a maximum of J\$1 million and/or 2 years in prison for a first offender and, for a second offender, a maximum of J\$3 million and/or 3 years in prison.

In the case of a corruption-related matter that is being heard in the Circuit Court, before a Jury, the upper limit of the sanction is a maximum of J\$5 million and/or 5 years in prison for a first offender and, for a second offender, a maximum fine of J\$10 million and/or 10 years in prison.

Despite the relatively high upper limits that are prescribed for Circuit Court matters, a cursory review of the corruption charges that have been brought in Jamaica would, however, suggest that the over-whelming majority of them are proffered before the Magistrate's Court with the Court, upon handing down a ruling of 'guilty', invariably opting for the imposition of a fine.¹⁷³

¹⁷¹ See Corruption Prevention Act (2001), <http://www.ocg.gov.jm/ocg/view/laws>

¹⁷² Ibid. Section 15.

¹⁷³ See, for example, Edited Transcript from NIA's May 2013 Media Review based upon 2 Jamaica Gleaner May 22, 2013 News Articles – 'More cops to be hauled before courts – Police officers head list of public sector worker who shun filings', <http://jamaica-gleaner.com/gleaner/20130522/lead/lead2.html> and 'Shady dealings - Public sector workers under scrutiny for questionable assets, false declarations', <http://jamaica-gleaner.com/gleaner/20130522/lead/lead1.html> :

"Two (2) May 22, 2013 Gleaner newspaper stories have further exposed the inadequacies of Jamaica's anti-corruption institutional framework, and the failure of the system, and the Courts, to effectively curb corruption by deterring corrupt conduct on the part of public officials.

The stories reveal that several public-sector employees are now under investigation for declaring assets which the Commission for the Prevention of Corruption (CPC) believes are not supported by their income, and/or for making false statements. Under the 2001 Corruption Prevention Act, more than 25,000 public-sector employees and officials are required to make annual declarations of their assets, income and liabilities.

Those who fail to provide a satisfactory explanation in instances in which their declared assets are not supported by their legitimate incomes, and/or who knowingly make a false statement on their statutory declarations, can be prosecuted, under the CPC Act, for the corruption offence of 'Illicit Enrichment'.

However, in the last two (2) years, the Commission, which has only two (2) Investigators, has reportedly successfully prosecuted only four (4) such public officers. Among them was a former customs officer who had an annual salary of just under \$1 million, but who had filed declarations between 2003 to 2007 "showing growth in assets in excess of \$12 million", inclusive of "\$7 million in unregulated investment schemes". The officer, who was unable to "satisfactorily" explain his wealth, was fined only \$700,000 for one count of illicit enrichment, and \$100,000 each for three (3) counts

Strong mandatory or minimum custodial and/or economic based penalties, and the imposition of other punitive sanctions, such as the confiscation of corruptly acquired property, and the forfeiture of pensions, will, however, not become a reality without the taking of proactive and strategic steps to achieve such an outcome, and without the political will to do so.

Whether, if and when this will become a reality in Jamaica is, therefore, yet to be seen since it is now evident that successive Jamaican Prime Ministers have demonstrated that their seeming solemn promises about tackling corruption, inclusive of corruption in public procurement, should not be taken seriously.

Corrective Recommendation: Bring pressure to bear upon the GOJ and the Parliament to impose significantly tougher criminal sanctions, inclusive of minimum or mandatory custodial and/or economic based penalties, for all corruption related offences and breaches of the GPPH and CGA.

6.7 Irregular involvement of members of the GOJ political directorate in the procurement process

During the preliminary and contract award phases of the procurement cycle, corrupt politicians or public officials can, in a variety of ways, collude with a contractor to illicitly secure the award of a contract to it and to be compensated via the payment of a bribe or a kickback.

of making a false statement on a declaration.

Two (2) former National Works Agency (NWA) Assistant Parish Managers were also among those prosecuted by the Commission. They were charged after the Commission discovered that they had failed to declare their interest in a company that "performed contractual duties with the NWA" between 2003 and 2007. Both men were fined a paltry \$50,000 on each of the six (6) counts.

Last month, the former head of the National Solid Waste Management Authority (NSWMA), Joan Gordon-Webley, was reportedly charged and convicted and fined a mere \$16,000 for multiple breaches of the Corruption Prevention Act, having failed to file her Assets, Income and Liabilities Declarations for five (5) straight years, from 2008 to 2012. The CPC has further revealed that the country's police personnel currently account for the highest number of public-sector employees who have ignored their obligations to file annual statutory declarations. As many as 48 rank-and-file police personnel, with ranks ranging from constable to senior superintendent, were hauled by the CPC before the Corporate Area Resident Magistrate's Court on May 20. Of the 48, 33 pleaded guilty for breaches of the CPC Act and were reportedly fined a stunning aggregated total of only \$276,000.

What is surprising, is that notwithstanding the serious implications of these corruption offences, the Jamaican Courts have failed to exercise their sentencing discretions to impose harsh monetary fines and/or custodial sentences to make an example of deviant public officials and, by so doing, to help to create an environment of fear to deter any such future or similar conduct. In this regard, it is instructive to note that the CPC Act makes provision for a maximum fine of \$1 million and/or imprisonment for a term not exceeding 2 years, for CPC breaches which are tried before a Resident Magistrate; and a maximum fine of \$5 million and/or imprisonment for a term not exceeding 5 years, for CPC breaches which are tried before the Circuit Court.

Having long recognized the nature of the problem, former Contractor General, Greg Christie, has proposed, on innumerable occasions, that Jamaica's corruption laws be amended to require the imposition of minimum mandatory fines and/or custodial sentences for corruption offences. However, nothing has been done to address the issue."

An artificial or unnecessary demand for goods, works or services can be staged; the submission of an unsolicited proposal can be secretly arranged; the tender can be rigged to favour the contractor; confidential information can be leaked to the contractor; or the tender evaluation criteria can be adjusted to benefit the contractor. These are but a few of the instances in which the integrity of the procurement process can be undermined.

Corruption in public procurement often works in a clandestine way and, therefore, it is not always easy to identify. Nevertheless, the many reported cases, in a variety of countries across the globe, of senior political officials being investigated, charged and/or convicted for corruption in procurement related matters, assures us that the practice is pervasive, alive and well, even if its not being detected in its entirety.

During the month of May 2014, a former Omani Commerce Minister was jailed for 3 years in a US\$1 million bribe payment matter which was intended to win an airport construction contract.¹⁷⁴ Additionally, and also in May, former Israeli Prime Minister, Ehud Olmert, was sentenced to 6 years in prison for accepting bribes in return for facilitating the development of a controversial residential project.¹⁷⁵

Earlier this year, on February 12, the former Mayor of New Orleans, Ray Nagin, was also convicted on 20 of 21 federal counts of corruption charges involving illegal dealings with city contractors who received lucrative contracts in return for paying bribes to the Mayor.¹⁷⁶

It is instructive to note that the Judge, in the Olmert case, in handing down the Court's sentence, observed that the Prime Minister had "acted in a closed space, hidden from the public eye".¹⁷⁷

As has been previously noted, no senior public official, in recent memory, has been convicted of corruption in public procurement in Jamaica, and imprisoned.

However, as we have seen, Jamaica's politicians and parliamentarians are perceived, both locally and internationally, as being highly corrupt.¹⁷⁸ Indeed, and as was previously stated, the issue was put beyond doubt quite recently by none other than the country's Minister of National Security, the Hon. Peter Bunting, who is, himself, a Member of Parliament.

In a May 15, 2014 Jamaica Gleaner article¹⁷⁹, it was reported that the Minister, while speaking in Parliament, urged his fellow politicians to "acknowledge our contribution" to Jamaica's crime problem, after he claimed that the connection between elements of both political parties, and criminal gangs and dons, is one of the causal factors in the culture of violence in Jamaica.

¹⁷⁴ See News Article – 'Former Omani minister jailed for three years for corruption', May 18, 2014, <http://uk.mobile.reuters.com/article/id1KKBN0DY0FC20140518?irpc=932>

¹⁷⁵ See News Article – 'Former Israeli Prime Minister Ehud Olmert sentenced to 6 years in prison', May 13, 2014, <http://www.haaretz.com/mobile/1.590298?v=82B8D0394D930E3185C38B13261D4DB9>

¹⁷⁶ See News Article – 'Ray Nagin, former New Orleans Mayor, convicted of federal corruption charges', Feb 12/15, 2014, http://www.nola.com/crime/index.ssf/2014/02/post_370.html

¹⁷⁷ Supra. Note 175.

¹⁷⁸ Supra. Notes 18 and 21.

¹⁷⁹ Supra. Note 67.

The Minister then reportedly acknowledged that, historically, Jamaica's politicians have infiltrated and undermined the GOJ's works contracting process to illegally direct contracts to criminal elements who had supported their political objectives. He was quoted as saying that "criminals would support party candidates and were often rewarded with contract works. Hopefully, the worst days of this criminal gang/political nexus are now behind us, but we must acknowledge our contribution".¹⁸⁰

It is also well known in Jamaica that the annual reports of the Auditor General and the CG, that are tabled in Parliament, as well as the special investigation reports of the CG, are inundated with repeated instances of irregularities in the GOJ's public procurement process, some of which have implicated politicians.

Remedial and/or punitive recommendations are made by the CG in almost every such instance, but little or nothing is done to address the issue.

In terms of the irregular interference in the procurement process, by senior members of the political directorate, the OCG's finding in its March 2009 Report of Special Investigation into the Air Jamaica London Heathrow Slots (AJLHS) Divestment matter, stands out as one of the most prominent ones.¹⁸¹

In that case, the OCG found that the then Hon. Minister of Finance and Planning, Dr. Omar Davies, had (a) unlawfully intervened in the divestment process and, (b) having done so, usurped the authority of the State's accounting and accountable Officers for the national airline, the airline's board of directors, and the very Cabinet itself, by unlawfully binding the Government and people of Jamaica to the sale of the slots to Virgin Atlantic Airways, when the divestment process had already selected British Airways as the favoured bidder.¹⁸²

The OCG, in that matter, was moved to make the following repeated recommendation¹⁸³:

"The OCG recommends that appropriate mechanisms should be immediately established to ensure that members of the Executive and the Political Directorate of Government are prohibited from committing the Government and State of Jamaica to binding contracts, contrary to applicable laws and Government accounting and procurement regulations and procedures.

*The OCG laments the fact that the foregoing Recommendation is identical to a Recommendation which was previously made in the OCG's **4M Energy Saving and Light Bulb Distribution Investigation Report**. That Report was tabled in the House of Representatives and in the Senate in February 2008. Regrettably, however, to date, no discernable action has been taken by the Government or by the State to give effect to the Recommendation.*

¹⁸⁰ Ibid.

¹⁸¹ Supra. Note 122

¹⁸² Ibid.

¹⁸³ Ibid. Page 38.

There must be a strengthening of the relevant due diligence systems to ensure that members of the Political Directorate cannot and do not usurp or bring undue influence to bear upon the lawful authority of the administrative arm of Government and, in particular, upon the authority of the Accounting and Accountable Officers of Government, thereby inflicting damage to the principles of good public sector accounting, management and governance”.

More recently, the GOJ's Constituency Development Fund (CDF)¹⁸⁴ which has been often criticized as a ‘feeding trough’¹⁸⁵ for the country's Parliamentarians, was also cited by the OCG as the object of irregular “interference” by a senior Cabinet Minister/Parliamentarian, the Hon. Derrick Kellier, MP.¹⁸⁶

The OCG found that the Hon. Derrick Kellier, although he, himself, did not award contracts, recommended the award of contracts and, in so doing, was able to influence the persons to whom the National Works Agency (NWA) awarded contracts in his, Mr. Kellier's, own Constituency.¹⁸⁷

The OCG said that it had found that at least one (1) contract was awarded, by the NWA, to Mr. Kellier's brother in keeping with the recommendation of Mr. Kellier, but in circumstances in which (a) the recommendation “was not interpreted as a mere recommendation’ by the NWA official” and (b) the OCG was “led to conclude that there is a *prima facie* case of nepotism, concerning the recommendations made by the Hon. Derrick Kellier, and the consequent award of at least one (1) contract to Mr. Martin Kellier”.¹⁸⁸

The OCG, in its conclusion, recommended that the practice should be abandoned and “that Public Bodies should, in keeping with the stipulated Procurement Guidelines, establish robust and transparent systems and processes to ensure that the selection of contractors ... is free from the perception of bias and political interference in the award of the referenced contracts”.¹⁸⁹

The matter is one of critical importance. The threat that it poses becomes even more serious and urgent particularly when one considers that if Dr. Omar Davies succeeds in his efforts to curtail the OCG's pre-contract monitoring powers¹⁹⁰, there will be nothing to stop the political directorate from subjecting the preliminary phases of the GOJ's procurement process to undue influence or irregular or improper interference.

¹⁸⁴ ‘The CDF is a fund established to provide members of Parliament with financial resources to execute approved social and economic programs within their constituencies’ – OCG Annual Report (2012) at Page 37, <http://www.ocg.gov.jm/ocg/view/annual-reports>

¹⁸⁵ See, for example, Jamaica Gleaner Editorials: ‘Family feeding at the CDF trough’, July 11, 2011, <http://jamaica-gleaner.com/gleaner/20110711/cleisure/cleisure1.html>

‘Derrick Kellier defends the trough’, August 20, 2012, <http://jamaica-gleaner.com/gleaner/20120820/cleisure/cleisure1.html>

¹⁸⁶ See OCG Report of Special Investigation – ‘Contracts awarded to Contractors Allegedly Selected by the Hon. Derrick Kellier, MP’ (February 2014), <http://www.ocg.gov.jm/ocg/view/investigation-reports>

¹⁸⁷ Ibid. Pages 52 to 55.

¹⁸⁸ Ibid. Pages 52 to 55.

¹⁸⁹ Ibid. Page 60.

¹⁹⁰ See Section 6.2 above.

Additionally, there is also a political 'governance mind-set' hurdle which has to be addressed. For example, in the Kellier case, as far as the Minister was concerned, it would seem that he was of the view that he had done nothing wrong.¹⁹¹

Finally, it is also instructive to record that the concern, regarding the danger of having the Jamaica political directorate, and even the Cabinet, insert itself into the GOJ contract award process, was one that was highlighted in 2006 by the World Bank and the IDB as follows:

*"An additional complication is the routine involvement of the Cabinet in contract awards, potentially introducing a political element in the procurement decision-making process, which ideally should be based exclusively on transparent legal and technical considerations. In Common Law countries, it is generally accepted that Cabinet may intervene in procurement decisions that have major implications in terms of cost or national security. However, this practice in Jamaica is based on relative low thresholds and does not follow well-defined criteria. It is not clear whether Cabinet can reverse an NCC decision only for procedural non-compliance or for other considerations as well".*¹⁹²

Corrective Recommendation: There must be a strengthening of the relevant laws, procedures and due diligence systems to ensure that members of the executive and political directorate (a) are prohibited from committing the GOJ to binding contracts, contrary to applicable laws and government accounting, and procurement regulations and procedures, and (b) cannot and do not usurp or bring undue influence to bear upon the lawful authority of the administrative arm of the government and, in particular, upon the authority of the accounting and accountable officers of government, thereby inflicting damage to the principles of good public sector accounting, management and governance, as well as transparency, fairness and competition in public procurement in Jamaica.

6.8 The lack of regulatory scrutiny in the award of sub-contracts for the procurement of works on major investment and infrastructural projects

On June 3, 2010, the OCG issued a media release in which it publicly called upon the GOJ to implement certain recommendations that were made to "stem corruption in the award of (GOJ) contracts". One of the referenced recommendations was the following:

"The Office of the Contractor General (OCG) is also highlighting an earlier recommendation which it had made that Sub-Contractors who are engaged on high value Government works projects should be subjected to the same 'checks and balances' regime to which Government Contractors are subjected.

¹⁹¹ See, for example, Gleaner Articles – 'Kellier defends action after OCG probe', August 14, 2012,

<http://jamaica-gleaner.com/latest/article.php?id=39250>

'Kellier not worried by OCG probe', August 15, 2012,

<http://jamaica-gleaner.com/gleaner/20120815/lead/lead6.html>;

'Derrick Kellier defends the trough', August 20, 2012,

<http://jamaica-gleaner.com/gleaner/20120820/cleisure/cleisure1.html>

¹⁹² Source: 'Jamaica Joint Country Financial Accountability Assessment (CFAA) and Country Procurement Assessment (CPAR)' by the World Bank and the IDB, April 12, 2006.

Under law, a Government Contractor is the contractor who is directly awarded a Government contract by a Public Body. Such a contractor must not only be tax compliant but must also be assessed, graded and registered each year by the National Contracts Commission (NCC) in respect of its resource and performance capabilities. Additionally, the award of a Government contract to a Government Contractor is also subjected to a plethora of laws, inclusive of the Government's Procurement Regulations and the Contractor General Act.

A Sub-Contractor, however, to whom a Government Contractor can now freely issue a substantial portion of a Government contract award, is exempted from all of the foregoing checks and balances.

"We believe that the situation is untenable and is inimical to the public interest. Not only does it provide a loop-hole through which Government contracts can be legitimately directed to unqualified, under-resourced and unregulated persons, but it also constitutes a perfectly legal conduit through which corrupt politicians and public officials can direct substantial portions of State contracts to their cronies and supporters", said Mr. Christie."

The OCG has repeated its recommendation and/or expressed its concerns on numerous occasions. However, it is instructive to record that the subject recommendation is yet to be implemented by the GOJ.

Indeed, and fortuitously, the expressed concerns of the OCG have since been heightened, particularly because the US\$400 million Jamaica Development Infrastructure Programme (JDIP), and the US\$600+ million North-South Link of Highway 2000 projects, in respect of which agreements were entered into between CHEC and the GOJ, have since been implemented.¹⁹³

In both instances, these mega-contracts¹⁹⁴, which are among the largest GOJ works contracts of any kind in Jamaica's recent history, were awarded on a sole-sourced basis, by the GOJ to CHEC.

CHEC, in turn, has had to issue sub-contracts to local contractors but in circumstances which are devoid of the scrutiny of the OCG in its mandated efforts to ensure probity, transparency, competition, merit and value for money, for and on behalf of the taxpayers of Jamaica, in the expenditure of their money.¹⁹⁵

¹⁹³ See, for example, OCG Annual Report (2010) at Pages 70 to 71; OCG Annual Report (2011) at Pages 112 to 115; and OCG Annual Report (2012) at Pages 30 to 32.

<http://www.ocg.gov.jm/ocg/view/annual-reports>

¹⁹⁴ In the case of the North-South Link Highway Project, the GOJ has issued a 50-year licence/concession to CHEC to facilitate its operation of the completed highway. Section 4 (1) (b) of the CGA gives a CG monitoring jurisdiction over the grant or issue of GOJ licenses.

¹⁹⁵ See, for example, OCG Media Release – 'OCG publishes particulars of JDIP sub-contractors and contract awards', June 27, 2011, <http://www.ocg.gov.jm/ocg/view/press-releases>

The magnitude of the issue, and the opportunities that it poses for abuse and potential corruption, in the case of the JDIP project alone, can be gleaned from the fact that 49 sub-contracts were awarded by CHEC to 15 local sub-contractors, in an aggregated amount of J\$14.39 billion – all without any scrutiny by the OCG, or without being subjected to the rigours of the GPPH.¹⁹⁶

The serious implications of the matter are further revealed when one considers that the total value amount of J\$14.39 billion, in un-scrutinized JDIP sub-contract awards, is almost equivalent to the J\$14.47 billion in value of all works contracts that were awarded by the GOJ in 2012.¹⁹⁷

SUMMARY OUTLINE LIST OF SUB-CONTRACTORS CURRENTLY ENGAGED UNDER JDIP AND NUMBER AND VALUE OF CONTRACTS AWARDED ¹⁹⁸				
	Name of Sub-Contractor	Number of Contracts Awarded	Total Value (Aggregated Contract Sum plus Variations) JS	Percentage of Grand Total
1	Y.P. Seaton & Associates Co. Ltd.	11	3,780,971,639.98	26.26
2	Build Rite Construction Co. Ltd.	3	2,151,702,448.08	14.94
3	Rogers Land Development	8	1,760,652,848.47	12.23
4	Dwights Construction Ltd.	2	1,621,118,859.56	11.26
5	Alcar Construction & Haulage Co.	5	1,470,964,092.01	10.22
6	Asphaltic Concrete Enterprise	5	1,144,758,601.71	7.95
7	General Paving Company Ltd.	3	595,983,868.11	4.14
8	Construction Solutions Ltd.	2	501,098,069.81	3.48
9	Valley Slurry Seal (Caribbean Ltd)	1	424,083,098.52	2.95
10	Brighton Engineers Ltd.	2	312,435,978.32	2.17
11	Surrey Paving & Aggregates Co. Ltd.	3	320,313,032.19	2.22
12	N.F. Barnes Const. & Equipment Co.	1	178,047,213.99	1.24
13	Chin's Construction	1	50,727,806.42	0.35
14	Nakash Construction Co.	1	44,131,175.00	0.31
15	Pavement & Structures	1	42,815,383.13	0.30
	Grand Total	49	14,399,804,115.30	100.00

The single sub-contractor who received the majority of the sub-contracts, received 11 sub-contracts with an aggregated value of J\$3.78 billion, while the contractor who was awarded sub-contracts with the overall lowest value received only 1 contract valued at J\$42.81 million.¹⁹⁹

Corrective Recommendation: Amend the CGA and the GPPH to require sub-contractors who are engaged on high value GOJ works projects, as well as the sub-contracts that they receive, to be subjected to the same 'checks and balances' and OCG oversight regimes to which GOJ contractors and GOJ contracts are subjected.

¹⁹⁶ Ibid.

¹⁹⁷ Supra. Note 10.

¹⁹⁸ Supra. Note 195.

¹⁹⁹ Ibid.

6.9 Lack of focus on the supply side of corruption in public procurement

The causative factors that underlie corruption in Jamaica, inclusive of corruption in public procurement, are ones that are almost invariably placed at the feet of the public sector.

No one, it seems, has focused, or is prepared to focus, upon the supply side of the problem – the private sector – although this very lack of focus constitutes one of the major corruption-enabling mechanisms that currently exists in Jamaica, particularly in the area of the bribery of public officials.

In a paper that was presented by me in June 2012²⁰⁰, this was how I introduced the subject:

'The phenomenon of systemic corruption is significantly related to poor standards of governance, accountability and transparency in government, and a cursory review of Jamaica's governance landscape, over the past several years, will provide abundant evidentiary circumstances of a country that is pervasively corrupt.

Deficiencies in institutional checks and balances on entrusted power; governmental decisions that are shrouded in secrecy; a system which does not hold its public officers accountable for their actions; and a country in which the rule of law is neither fully enforced nor respected; are all typical governance features that are associated with systemically corrupt countries.

So too, where there is a general lack of confidence in a country's anti-corruption, law enforcement and justice institutions; where the said institutions are inadequately resourced, or are perceived to be ineffective; or where anti-corruption laws are inadequate, or are not backed up by significant criminal sanctions; corruption will, no doubt, run rampant.

The situation is obviously even further aggravated where there is, as is the case with Jamaica, a seeming systemic failure, on the part of law enforcement and prosecutorial authorities, to dispassionately investigate and prosecute allegations of corruption in high places.

In all of these instances, the mistake must never be made to relax the regulatory system, for corruption that is driven primarily by a deep rooted culture of greed and dishonesty, cannot be effectively addressed until and unless a country's anti-corruption institutional framework, and its public good governance systems, are significantly strengthened.

But it is also important to recognize that the causative and influencing factors of systemic corruption are not confined to poor standards of 'public sector governance' alone.

The influencing factors are much broader in scope, since systemic corruption is a phenomenon that is also closely associated with certain societal considerations, such as low social, moral and ethical values, as well as poor integrity and governance standards in the private sector.

²⁰⁰ Supra. Note 60.

... The fight against systemic corruption cannot, therefore, be a fight that is confined to the strengthening of a state's anti-corruption laws or its institutions. Nor can it be confined to just improving the standards of governance in the public sector alone.

The behavioral and attitudinal patterns of private sector entities, as well as that of the individual citizen, must also, as a matter of necessity, be similarly and contemporaneously addressed

Accordingly, and in so far as the Jamaica private sector is concerned, one possible way of assisting with the resolution of the problem of corruption in Jamaica is for institutions such as the Private Sector Organization of Jamaica (PSOJ), the Jamaica Chamber of Commerce (JCC), and the Jamaica Manufacturers Association (JMA), to insist upon the implementation, and effective enforcement, of stringent corporate governance, anti-corruption and corporate social responsibility (CSR) compliance policies, on the part of their members.”²⁰¹

But even this alone will not suffice. In addressing the University College of the Cayman Islands' recent International Anti-corruption Conference, I also called for the imposition of “tough criminal and civil sanctions upon private sector entities for the bribery of public officials”, together with the requirement that they should be compelled “to develop, implement and enforce company-wide anti-bribery compliance programmes”.²⁰²

The targeting of the private sector in the fight against corruption and, in particular, corruption which manifests itself in the bribery of public officials, especially in procurement related matters, is currently regarded as an emerging global anti-bribery best practice.

It goes beyond the base UNCAC Article 15 provision²⁰³ of the bribing of a public official by any person – a provision which, admittedly, has been adopted, *inter alia*, by Section 14 (2) and (3) of the Jamaica Corruption Prevention Act²⁰⁴ – to holding a private sector entity criminally and administratively responsible when one of its employees or officers bribes a public officer.

The stage has been long set for criminalizing private sector bribery of foreign public officials. In great measure, this has been accomplished through the trans-national anti-bribery institutional regimes of the 1977 United States Foreign Corrupt Practices Act (amended in 1988), the 1997 OECD Anti-Bribery Convention, and the 2010 United Kingdom Bribery Act.

However, some anti-bribery regimes, inclusive of the recently promulgated Brazilian Anti-Corruption Law, which came into effect on January 29, 2014, will now hold private sector entities criminally and civilly responsible, to a significantly higher standard, for the actions of their employees if they bribe local public officials.²⁰⁵

²⁰¹ Ibid.

²⁰² Supra. Note 58.

²⁰³ Supra. Note 81. Article 15.

²⁰⁴ Supra. Note 171. Section 14 (2) and (3)

²⁰⁵ See IACC Article – ‘Brazilian Anti-Corruption Law: Time for greater corporate responsibility’, February 5, 2014, <http://16iacc.org/brazilian-anti-corruption-law-time-for-greater-corporate-responsibility/>

Punitive sanctions can go as high as 20% of the company's gross annual revenues or, in the worst case, even resulting in the dissolution of the company²⁰⁶. Additionally, and as is the case under the OECD, FCPA and UK Bribery Act regimes, the company can also be compelled to institute significant and far-reaching company-wide administrative anti-bribery compliance programmes.

Quite interestingly, in recognition of the massive impact that the supply side of the corruption problem has had upon the incidence of corruption itself, Section 7 of the UK Bribery Act²⁰⁷ has gone one step further to introduce the innovative concept of 'a failure of commercial organizations to prevent bribery' on their behalf.

The offence is one of strict liability. This means that there is no need for the prosecution to prove any kind of intention or positive action on the part of the culpable commercial organization. It is also one of vicarious liability in the sense that a commercial organization can be found guilty of the offence even if the bribery is carried out by an employee, an agent, a subsidiary, or another third-party.²⁰⁸

Consequently, the burden of proof shifts to the organization, with the standard of proof being "on the balance of probabilities". The company must show that it had established adequate procedures to prevent persons who were/are associated with it from committing bribery offences²⁰⁹, failing which the commission of the offence stands.

In essence, therefore, what Section 7 has done is to force commercial organizations to implement comprehensive and effective anti-bribery programmes across their organizations on the pain of the certainty of a criminal conviction in the event that a person or entity that is associated with it commits a bribery offence.

Jamaica is perceived to be a highly corrupt country. If, therefore, it is to effectively rid itself of this stigma, it is axiomatic that radical anti-bribery and anti-corruption measures, of the kind that have been outlined above, must be proactively implemented and enforced.

Corrective Recommendation: Impose tough criminal and civil sanctions upon private sector entities for the bribery of public officials by their employees, agents and associates, and require them, by law, to develop, implement and enforce company-wide anti-bribery compliance programmes.

²⁰⁶ Ibid.

²⁰⁷ UK Bribery Act (2010), <http://www.legislation.gov.uk/ukpga/2010/23/contents>

²⁰⁸ Ibid.

²⁰⁹ See Explanatory Notes to the UK Bribery Act (2010), <http://www.legislation.gov.uk/ukpga/2010/23/notes/division/5/7>

7. COMPREHENSIVE HIGH-LEVEL LIST OF REMEDIAL RECOMMENDATIONS TO CLOSE GRAND CORRUPTION-ENABLING LOOPHOLES IN PUBLIC PROCUREMENT IN JAMAICA

- (1) Amend the CGA to expressly empower a CG to issue directives or instructions to public bodies (a) to prevent, reduce or eliminate the occurrence of irregular, improper or corrupt practices, (b) to ensure that their procurement practices and procedures are compliant with the GPPH and the CGA, and (c) to suspend or halt a procurement process that is non-compliant or which, in the view of a CG, is exhibiting evidence of irregularity, impropriety or corruption;
- (2) Formal representations should be made to the Prime Minister, the Cabinet of the GOJ, and the Parliament of Jamaica, to ensure that the efforts of the incumbent Works Minister, Dr. Omar Davies, to dilute the powers of the OCG to monitor the pre-contract stages of the procurement process, do not bear fruit. To put the matter beyond doubt, formal representations should be made to ensure that the CGA is amended to expressly confirm the powers of a CG to monitor the pre-contract/licence stages of the award of GOJ contracts and the issue of GOJ licenses;
- (3) The GOJ's emergency contracting procedure is way too lax and overly generous in its latitude. There is no question that, as presently structured, it is a prime corruption-enabling mechanism that is often used to direct lucrative state contracts to a preferred contractor under the guise of same being an emergency contract, albeit that, in some instances, the so-called 'emergency' has operated for as long as a year prior to the award of the contract. At a minimum, it needs to be re-structured to add additional layers of scrutiny, and checks and balances, to prevent corruption, abuse of the process, and to ensure probity and adequate due-diligence, whilst ensuring that genuine emergency situations are addressed effectively and efficiently and in an expedited manner;
- (4) The GOJ must be pressured into following the rest of the international community in implementing, at a minimum, a central beneficial shareholder register to be made available to law enforcement, anti-corruption, and other pertinent regulatory agencies;
- (5) Establish a single independent anti-corruption state agency, with specialist resources, having exclusive criminal investigation and prosecutorial jurisdiction, and full police powers of arrest and detention, over all corruption and corruption-related offences. At a minimum, the OCG, the CPC and the Integrity Commission should be merged into the proposed new agency. The agency must be provided with the requisite resources and specialist skill-sets to enable it to discharge its mandates efficiently and effectively, and, above all, it must be subjected to appropriate checks and balances to ensure that it operates dispassionately, effectively and efficiently;
- (6) Impose significantly tougher criminal sanctions, inclusive of minimum or mandatory custodial and/or economic based penalties, for all corruption related offences and breaches of the GPPH and CGA;

- (7) There must be a strengthening of the relevant laws, procedures and due diligence systems to ensure that members of the executive and political directorate (a) are prohibited from committing the GOJ to binding contracts, contrary to applicable laws and government accounting, and procurement regulations and procedures, and (b) cannot and do not usurp or bring undue influence to bear upon the lawful authority of the administrative arm of the government and, in particular, upon the authority of the accounting and accountable officers of government, thereby inflicting damage to the principles of good public sector accounting, management and governance, as well as transparency, fairness and competition in public procurement in Jamaica;
- (8) Amend the CGA and the GPPH to require sub-contractors who are engaged on high value GOJ works projects, as well as the sub-contracts that they receive, to be subjected to the same 'checks and balances' and OCG oversight regimes to which GOJ contractors and GOJ contracts are subjected;
- (9) Strengthen the GPPH's "unsolicited proposal" provisions to ensure greater transparency, competition and value for money, on the ground that same is a corruption enabling device which can be clandestinely utilized by corrupt politicians and public officials to corruptly direct lucrative State contracts to a preferred or connected contractor in consideration for bribes or kick-backs.
- (10) Impose tough criminal and civil sanctions upon private sector entities for the bribery of public officials by their employees, agents and associates, and require them, by law, to develop, implement and enforce company-wide anti-bribery compliance programmes;
- (11) Mandate the implementation of Integrity Pacts (IPs) as an integral component of all GOJ contracts over a minimum value threshold. An IP is a binding agreement that is entered into between a public body that offers a contract, and the entities that bid for it. The agreement prescribes that all parties will abstain from bribery, collusion and other corrupt practices for the extent of the contract through all of its phases. To ensure accountability and compliance, provision is made in the IP for the imposition of punitive sanctions in the event of its breach, either by the procuring agency or by any of the bidders. Additionally, and very importantly, the IP includes provision for a monitoring function that is typically carried out by civil society groups. An IP is one way of creating a financial disincentive for private-sector contractors to illegally collude with corrupt politicians and public sector officials to obtain government contract awards;
- (12) Establish a Corruption Court to adjudicate all corruption related offences. In the alternative, give priority to corruption cases in the prevailing Courts' system;
- (13) Strengthen and enhance the independence, effectiveness, accountability and competence levels of existing anti-corruption institutions, and take all requisite measures to insulate them from government, political or third-party influence, direction or interference;
- (14) Legislate minimum standards of integrity and good-governance conduct for politicians and public officials, and enforce same via impeachment provisions;

- (15) Legislate appropriate political donation and campaign finance laws;
- (16) Impose added sanctions, inclusive of the imposition of term bans from office, and forfeiture of pensions, in the case of public officers who are found guilty of corruption, or breach of prescribed good-governance and integrity standards. Public officials who are found to have flagrantly violated the GOJ's contract award or licence issue procedures, regulations or laws, should be barred from holding, in the future, any public office in which they can influence the award of contracts or the issue of licenses;
- (17) Continuously review anti-corruption laws to cauterize loop-holes, criminalize new developments in corrupt behaviour, and elevate existing sanctions, where necessary, to deter unwanted conduct;
- (18) Implement a national system for the de-certification, debarment and/or cross-debarment of government contractors who engage in fraudulent practices, or who are consistently non-complaint or fail to perform their contracts to the required standard;
- (19) Require the public filing and disclosure of assets, income and liabilities for all parliamentarians, politicians and critical-level public officials;
- (20) Implement a minimum 1-year public sector to private sector 'revolving door' ban for certain classifications of public officers;
- (21) Develop and deploy a mandatory 2-3 hour ethics, public trust, and anti-corruption on-line course to be taken by all public sector employees; and supplement same with annual follow-up refresher courses.

8. RECOMMENDATIONS TO SIMPLIFY THE PROCUREMENT RED-TAPE IN AN EFFORT TO IMPROVE THE EFFICIENCY OF THE PROCESS AND TO STRENGTHEN ITS EFFECTIVENESS

8.1 Introduction

With the continuing challenges that are being presented to countries worldwide to combat corruption and bribery, national governments are being increasingly pressured to insulate their public procurement systems from attack, to ensure elevated standards of probity, transparency, economy, value for money, and competition in public contracting and licensing.

At the same time, governments must also ensure that their procurement systems can respond to national expenditure requirements, and deliver the goods, services and works that are required, in a timely, efficient and effective manner.

Whereas some countries have proactively responded to these challenges, and some have been forced to respond, others have, however, failed to proceed in a way that is satisfactory or worthy of commendation.

One of the obvious challenges is to ensure that the integrity of a country's procurement system is not diluted to the point where corruption becomes easier. Neither should a government be allowed the free rein to relax the rules under the guise that they are an unnecessary hindrance, when in fact the hidden objective is to facilitate those who would be inclined to abuse the system.

In Jamaica, there is no question that Jamaicans have lost confidence in the integrity of the country's public procurement system.

This has been reflected, not only anecdotally in the numerous international and domestic surveys which have concluded that Jamaica is perceived as being systemically corrupt²¹⁰, but the belief can find support in the many reports of the Auditor General and the CG²¹¹ which, from time and time, have pointed to innumerable and repeated instances of irregularity and impropriety in public contracting in Jamaica.

It is also a fact that Jamaica's procurement system has also been criticized as being too cumbersome and complicated, such that procurements are alleged to take too long to go through the process. Others have also contended that government contractors are subjected to an unnecessary complicated registration and re-registration process.

Some of these criticisms are valid and must be addressed.

However, there have been, in some instances, highly questionable, conflicting and sometimes even seemingly suspicious attacks upon the procurement process, the GPPH and/or the oversight regime.²¹²

²¹⁰ See Sections 1.2 and 1.3 above.

²¹¹ See OCG Annual Reports (1986 to 2012), <http://www.ocg.gov.jm/ocg/view/annual-reports> and OCG Investigation Reports (June 2005 to March 2014), <http://www.ocg.gov.jm/ocg/view/investigation-reports>

²¹² See, for example, OCG Media Release – 'OCG Cautions Government and Parliament not to Dilute Anti-Corruption Checks and Balances in Jamaica's Procurement Regulatory System', March 7, 2012, <http://www.ocg.gov.jm/ocg/view/news-items>

See also Jamaica Gleaner Article – 'Don't relax procurement rules', March 11, 2012, <http://jamaica->

Likewise, there have been misguided and unwarranted attempts to cast blame upon the OCG for the cumbersome nature of the process, notwithstanding the fact that it is well known that (a) the GPPH, which dictates the process, is written by the GOJ itself and not by the OCG/CG, and (b) the OCG is not 'a stage' within the procurement process, but the agency which polices the GOJ's procurements.

In policing procurements as they move through the GOJ's prescribed procurement process, the OCG is merely discharging its statutory mandates, under the law, to ensure that the procurements are compliant with the GPPH and that they are not being executed in circumstances which are irregular or improper.

Further, it must also be recalled that a CG has no coercive power, nor authority, under the law, to halt or to suspend a procurement and, thus, cannot 'hold up' a procurement.

The case of the attempts by the GOJ Works Minister, Dr. Omar Davies, to block the OCG from scrutinizing the pre-contracting process of least 2 mega-contracts, inclusive of the US\$600+ million North-South Link of Highway 2000 project, must again be cited.

Prior to initiating his June 2012 Court action against the OCG, Dr. Davis was reported as stating that he would not allow the OCG to be 'a stumbling block' in the engagement of private entities as the State moved to take advantage of investment opportunities.²¹³

The Minister, who was speaking from the floor of the House of Representatives on April 24, 2012, was also quoted as saying that "we (the PNP Administration) do not accept impotence as an option".²¹⁴

Curiously, however, on June 30 of the previous year, 2011, when Minister Davies' government, the PNP, occupied the seat of Jamaica's Parliamentary Opposition, it had publicly insisted that the very same US\$600+ million North-South Link of Highway 2000 project, should be put to competitive tender by the then JLP government – in keeping with the OCG's recommendation – and also that the procurement should be scrutinized and monitored by the OCG and the Auditor General.²¹⁵

It is only reasonable, therefore, to question what would have accounted for the sudden 'about turn' of the PNP Administration's position. How could the very thing that an Opposition party had wanted the OCG to do in July 2011, namely to scrutinize a US\$600+ mega-contract, could be regarded, 1-year after, when the party now held the reins of government, as something which was so unlawful that it was constrained to apply to the Court to prevent the OCG from enquiring into its dealings regarding the contract?²¹⁶

gleaner.com/gleaner/20120311/cleisure/cleisure2.html

²¹³ See Jamaica Gleaner Article – 'No to impotence', April 25, 2012, <http://jamaica-gleaner.com/gleaner/20120425/lead/lead1.html> and the OCG's responses at Supra – Note 110.

²¹⁴ Ibid.

²¹⁵ See Jamaica Gleaner Article – 'PNP calls for toll road contract to be opened for international tender', June 30, 2011, <http://jamaica-gleaner.com/latest/article.php?id=29775>. Also see the CG's Open Letter to the Prime Minister and the Leader of the Opposition, dated September 12, 2012 at Pages 61 to 66 of the OCG's Annual Report (2011), <http://www.ocg.gov.jm/ocg/view/annual-reports>

²¹⁶ Ibid. CG's Open Letter to the Prime Minister and the Leader of the Opposition, dated September 12, 2012 at Pages 61 to 66 of the OCG's Annual Report (2011), <http://www.ocg.gov.jm/ocg/view/annual-reports>

Clearly, issues such as these are unequivocal 'red-flags' which should invite added scrutiny, particularly if such a government should now propose that the procurement rules be relaxed or that the powers of the State's anti-corruption agencies be diluted.

8.2 OCG remedial efficiency initiatives and recommendations

The OCG, over the years, has implemented a number of initiatives and submitted innumerable remedial recommendations to both the executive and the legislative arms of the state, in an effort to generally improve the integrity, efficiency and effectiveness of the GOJ's procurement system.

Many of the referenced initiatives and recommendations have been made, in a concerted and diligent effort; (a) to significantly enhance transparency, competition, accountability and probity in public contracting and licensing in Jamaica; (b) to ensure compliance with the GPPH; (c) to prevent fraud and corruption in government contracting; (d) to strengthen the independence of the OCG; and generally (e) to win the battle against corruption in Jamaica.

But, in addition to the foregoing, the OCG has also spearheaded several initiatives and/or advanced recommendations, some of which were 'general and high level' recommendations, to the relevant state authorities, that were designed to expedite the GOJ's procurement system, to make it more efficient and responsive, and to eliminate waste in the award of GOJ contracts.

Included among them were/are the following:

- (a) Initiatives to train GOJ public officials, accounting officers and accountable officers that are engaged in the procurement process, and the development and submission of recommendations to formalize said training on a certifiable basis through the programmes of the Management Institute for National Development (MIND).

The training of Public Bodies in the GPPH is the responsibility of the MOF-PAPU.

Notwithstanding, the OCG, over the years, and despite its lack of designated resources for this purpose, has conducted procurement workshops and seminars for several public bodies free of cost and on a request basis. At the height of the initiative in the earlier years of 2005 and 2006, the OCG conducted 17 and 25 workshops, respectively, for more than 50 public bodies.²¹⁷

Special presentations and training modules were developed and deployed, by the OCG's Inspectorate and Technical Services staff, with the objective of improving public bodies' understanding of the procurement process, increasing their knowledge of the GPPH, and highlighting how public sector entities are expected to conduct the GOJ's procurement process.

²¹⁷ See OCG Annual Report (2005), page 5 and pages 35 to 37; OCG Annual Report (2006), pages 8 to 9 and pages 74 to 75, <http://www.ocg.gov.jm/ocg/view/annual-reports>

Consequent upon (a) the high demand for the work-shops, (b) the OCG's belief that an improved understanding of the GPPH by GOJ procurement officers would significantly improve the efficiency and effectiveness of the procurement process, and (c) the fact that the OCG's Inspectorate and Technical Services staff were becoming increasingly pre-occupied with the discharge of the OCG's core statutory mandates of monitoring and investigating the award of government contracts, and providing increased resource support assistance to the NCC, it was determined by the OCG, in late 2006, that it was imperative that a comprehensive procurement training programme should be established as soon as possible for GOJ accounting and accountable officers.

To this end, on January 16, 2007, and after having consulted with the Management Institute for National Development (MIND), the author, as the then incumbent CG, acting on behalf of the OCG, submitted to MIND, a formal proposal for the joint development and implementation of such a programme.²¹⁸

However, subsequent to the submission of its proposal to MIND, the OCG was advised in writing by the MOF that it was also the Ministry's intention to develop a similar programme. Additionally, the Ministry advised that procurement training for public body officers continued to be done by the MOF-PAPU on "an identified need basis".

In the circumstances, and with effect from February 26, 2007, the OCG began to refer requests for the conduct of procurement workshops to the MOF-PAPU.

Notwithstanding the intervention of the MOF, the OCG's assessment, in the years that followed, revealed that there still remained a grave need for a formal programme of procurement training for all levels of GOJ public officers that were involved in the GOJ procurement process.

The OCG, in recognition of the referenced deficit, and despite its resource shortcomings, consequently continued to develop special initiatives to address the problem.

Among them was a 'Get to Know You and Us' presentation initiative that was formally rolled-out, during the second and third quarters of 2009, to the GOJ's then 188 procuring public bodies by OCG 3-person teams.²¹⁹

²¹⁸ Ibid.

²¹⁹ See OCG Media Release – 'Office of the Contractor General Commences Conduct of One-on-One 'Get to Know You and Us' Presentations to 188 Public Bodies' (March 25, 2009), <http://www.ocg.gov.jm/ocg/view/press-releases>

The stated objectives of this initiative were (a) to formally introduce OCG Inspectors to the senior management and procurement staff of the public body to which the relevant Inspectors were assigned; (b) to formally inform public bodies of the functions, roles and responsibilities of the OCG and the NCC; (c) to explain how the OCG executes its contract monitoring and investigation functions and, most importantly; (d) to provide an opportunity for each public body to highlight to the OCG any significant procurement related challenge, issue or problem that it was experiencing, consequent upon which the OCG would then design a remedial response or intervention for the affected public body.²²⁰

Another major strategic initiative, in the foregoing regard, that was spearheaded by the author prior to his demitting office in November 2012, was the commencement, in March 2012, of the delivery of a series of 'Special Procurement-Related Training Presentations' to the country's permanent secretaries as well as to the accountable officers of the roughly 200 public bodies which then fell within the purview of the OCG's contract monitoring and investigation jurisdiction.²²¹

A section of the OCG's March 12, 2012 Media Release, that was issued regarding the matter, is instructive particularly as to the substance and depth of the OCG's initiative. It reads as follows:

"The Presentations, which will be geared, among other things, towards sensitizing Permanent Secretaries and their Accountable Officers to their respective roles and responsibilities in the Jamaica Public Sector procurement process, and highlighting and correcting deficiencies in Public Body procurement practices, will commence with Presentations to key Ministries, Departments and Agencies of Government, some of which will soon be undertaking major procurements or procurements of a strategic nature.

The first round of Presentations will also target a number of Public Bodies which have exhibited weaknesses of one type or the other in their procurement practices.

Although the OCG is not charged with the responsibility of conducting procurement-related training within the Jamaica Public Sector, the OCG believes that its assistance in providing such training is one way in which a greater understanding of and compliance with the Government's Procurement Process can be readily achieved.

The OCG is also hopeful that its targeted interventions will assist Public Bodies to execute their procurements in a more timely, efficient and cost-effective manner.

The Ministry of Justice, the Ministry of Transport, Works and Housing, the Ministry of Local Government and Community Development, and the Ministry of Science, Technology, Energy and Mining, and their respective portfolio Public Bodies, are the Public Bodies which will be scheduled to receive the first round of OCG Presentations during the month of March.

The referenced Ministries have already received formal communications from the OCG advising them of the intended Presentations. The content of the specially designed Presentations will be far reaching and will include coverage of the following topics:

²²⁰ Ibid.

²²¹ See OCG Media Release – 'OCG to Commence Special Procurement-Related Training Presentations to Permanent Secretaries and Public Body Accountable Officers' (March 12, 2012), <http://www.ocg.gov.jm/ocg/view/press-releases>

- Overview of the OCG, its role, functions and powers;
- Overview of the National Contracts Commission (NCC), its role and its functions;
- Overview of the Inspectorate Division of the OCG;
- Deficiencies observed by OCG Inspectors during the administration and application of the Government's Procurement Procedures by Public Bodies;
- Deficiencies observed in the administration of contracts by Public Bodies;
- Instances of non-compliance with the Procurement Procedures identified on the part of Public Bodies;
- Deficiencies observed in Public Body Internal Procurement Processes;
- The role of the Accounting and Accountable Officers;
- Shortcomings on the part of Accounting and Accountable Officers;
- Applicable Legislation Governing Public Body Accounting and Accountable Officers and Board Members;
- Key Recommendations, including appropriate Corrective and Remedial Measures to be implemented by Accounting and Accountable Officers.

In each instance, the Presentations will be conducted by a team of at least five (5) OCG Officers. Prior to the scheduled date of the Presentation, each Ministry will be required to submit to the OCG a listing of all of its portfolio Departments and Agencies, as well as a listing of the names and the respective positions of the officers who will be attending the Presentation.

*The OCG will also incorporate into each Presentation, any procurement-related matter or concern which any Ministry or its Portfolio Public Bodies may wish to have addressed during the Presentation. Consequently, Ministries have been or will be invited to inform the OCG, in writing, of all such matters, by no later than five (5) days prior to the scheduled date of the Presentation.*²²²

- (b) Recommendations to improve the procurement planning process in an effort to expedite procurements.

This recommendation, which has been repeatedly made by the OCG, over the years, was a 'general and high-level' recommendation that was directed primarily to the Cabinet, to the country's accounting officers, including its permanent secretaries, as well as to the GOJ's principal accountable officers.

It is well known that the failure of any entity to proactively plan, or to commence, a specific procurement with adequate lead times, is a major factor that will retard the efficiency of the procurement process. Indeed, the OCG's warning, from as far back as 2006, in the foregoing regard, is instructive²²³. It reads as follows:

"Too many works contracts, in 2006, continued to suffer from late or inadequate planning, the lack of proper project management, a paucity of on-site supervision, as well as insufficient financial resources on the part of both the contractor and the Government procurement entity. These are factors which have all impacted negatively upon the outcome of the contracts and, thus, the public purse.

²²² Ibid.

²²³ See OCG Annual Report (2006), page 24, <http://www.ocg.gov.jm/ocg/view/annual-reports>

The Government, through its Cabinet, its Permanent Secretaries Group and the Ministry of Works, needs to be more proactive and aggressive in implementing and enforcing the requisite corrective measures and monitoring mechanisms that are desperately needed to cost-effectively govern the planning, execution and management of Government works contracts.

*Until this is done, it should come as no surprise if the problems that have historically plagued these projects are the same ones that the OCG continue to report each year.*²²⁴

- (c) Initiatives to electronically publish GOJ procurement opportunities, via the utility of a single page in the daily newspapers, once each week, with published links back to the websites of the relevant procuring public bodies.

From as early as 2006, the first year of the author's tenure of service as the CG, there was a recognition that significant efficiencies and cost-savings could be attained if the GOJ were to implement, among other things, an e-procurement notice board on which GOJ procurement opportunities could be advertized for the benefit of interested parties. Consequently, a formal, particularized and justified recommendation was made in 2006, by the author, to the GOJ, to address the issue.²²⁵

However, despite the CG's recommendation, nothing was done by the GOJ. The following extract, which is taken from the OCG's 2007 Annual Report, is instructive:

"Another matter which was raised by the OCG in its 2006 Annual Report and in respect of which the OCG had expected some level of action in 2007, had to do with its recommendation for the Government to implement an E-Procurement Notice Board to consolidate the advertising of all Government contract opportunities – this as against the current and highly expensive practice of advertising Government contract opportunities in the print media.

Although the OCG had estimated that the proposal, if accepted, was likely to save the Jamaican tax-payer in excess of J\$80 Million annually in print media advertising costs, nothing was done by the Government to act upon the recommendation during 2007.

The proposal, which is today considered to be a procurement best practice and which is surprisingly very simple and inexpensive to initiate, would see the creation of a single website on which the full particulars of all Public Body tender invitations or Government procurement opportunities would be published.

The present practice of placing these advertisements in the print media would be abandoned in favour of one (1) single weekly consolidated newspaper advertisement in which all of the said procurement opportunities would be listed – but listed as four (4) liner items, together with a directive for interested contractors to log-on to the designated website to view the full particulars of each contract opportunity.

It should be recalled that the Government's policy for Public Sector procurement calls for maximizing economy and efficiency in the procurement process. In the premises, it is the OCG's considered view that addressing these relatively expensive newspaper expenditures will be a key step in achieving the desired economy and efficiency in public procurement.

²²⁴ Ibid.

²²⁵ See OCG Annual Report (2006), pages 23 to 24, <http://www.ocg.gov.jm/ocg/view/annual-reports>

*I would, therefore, respectfully call upon the Government and the Parliament of Jamaica, once again, to give serious consideration to the implementation of the referenced proposal in 2008, in the public interest.*²²⁶

The recommendation was repeated again by the OCG on a number of subsequent occasions²²⁷, but it appears that it was not until 2013/2014 that the recommendation was, to some extent, finally implemented.²²⁸

- (d) Initiatives to require GOJ public bodies to provide, to the OCG, on a regular basis, electronic particulars of contracts awarded by them.

In May 2006, the OCG developed and implemented its Quarterly Contract Awards (QCA) Report Regime. This unprecedented and ground-breaking anti-corruption initiative was designed, among other things, to utilize technology to enhance the effective capacity of the OCG to monitor and to investigate the procurement and contract award activities of the country's then 180 procuring public bodies.

Primarily, the QCA Report Regime was structured to provide the OCG with an effective, efficient and practical way of scrutinizing contract awards which fell beneath the NCC's then \$4 million contract endorsement value threshold, with the objective of determining, among other things, if they were compliant with the GPPH.

The computerized regime, which has since been overhauled to capture all GOJ public body contract awards above the \$500,000 value threshold, requires all procuring public bodies to file, in arrears, quarterly electronic spreadsheet reports with the OCG, of the material particulars of their contract awards. The Reports are required to be filed within 30 days of the ending of the calendar year quarter to which they relate.

Due to the high rates of public body delinquency, in filing QCA Reports, that had initially prevailed, a Zero Tolerance Policy was introduced and inflexibly enforced by the author, effective with all 2006 fourth quarter QCA Reports.

The Policy, which calls for the automatic referral, for criminal prosecution, of any non-compliant public body or accounting/accountable officer, succeeded, as at the time that the author demitted office in November 2012, in registering a 100% compliance public body filing rate for 13 consecutive quarters.

At the outset, the highest public body compliance rate that was ever recorded by the OCG was a mere 13%.²²⁹

The QCA initiative, apart from significantly improving the effectiveness of the OCG's contract-monitoring capacity, has also been responsible for heralding a new institutional culture within the GOJ procurement process. It has forced public bodies and GOJ procurement officers to be more disciplined and efficient in their administration of the process, and in their due observance of the requirements of the GPPH.

²²⁶ See OCG Annual Report (2007), pages 3 to 4, <http://www.ocg.gov.jm/ocg/view/annual-reports>

²²⁷ See, for example, the OCG's Annual Report (2008), pages 12 to 13, <http://www.ocg.gov.jm/ocg/view/annual-reports>

²²⁸ See, for example, the Saturday editions of the Jamaica Gleaner newspaper.

²²⁹ See OCG Annual Report (2011), page 4, <http://www.ocg.gov.jm/ocg/view/annual-reports>

- (e) Initiatives to develop and to publish, on the OCG's official website, regularly updated and freely accessible electronic databases of all GOJ contracts that are awarded above a specified value threshold;

Another major success of the OCG's QCA Report Regime is that it has facilitated the ability of the OCG, effective as at 2007, to publish on its website, in a freely accessible and down-loadable Microsoft Excel spreadsheet, the formatted particulars of all GOJ contract awards that have been captured by the QCA Regime since May 2006.²³⁰

The fact that the referenced Government contract award particulars can now be viewed and scrutinized, free of cost, by anyone, on the OCG's official website, speaks volumes to the unprecedented levels of transparency, and thus probity and accountability, which the Regime has now imposed upon the Jamaica public sector procurement and contract award processes.

- (f) Initiatives to require GOJ public bodies to provide, to the OCG, on a regular basis, electronic particulars of their licensing activities and to publish same, on the OCG's official website, in updated and freely accessible data-bases.

To facilitate its monitoring and investigation of the GOJ's licensing activities, the OCG, in 2009, successfully developed a comprehensive on-line database portal.²³¹

The database, which is the only one of its kind in the country, contains continuously updated information about the country's 200 public bodies, and the more than 600 different classifications of Prescribed Licences that are routinely issued by 75 of them. Prior to this, the OCG was unable to comprehensively or efficiently discharge its license monitoring mandate.

The following are extracts from the OCG's November 30, 2009 Media Release²³², in which the completion and implementation of the initiative were announced:

"The Database, which was designed as a central electronic repository for the storage of information on Government of Jamaica Public Body Prescribed Licences, will be utilized by the OCG in its soon to be commenced systematic monitoring of the licensing activities of the country's Public Bodies.

Government entities and members of the public and media fraternity, who are interested in obtaining information and guidance on Government licensing processes and requirements, will be allowed free and unlimited access to the new OCG Database.

The Database, which is located on the OCG's official website at www.ocg.gov.jm, is currently available for use. Searches of the system are easily executed by selecting, from a drop down list, either the name of a listed Public Body or the name of a specified Prescribed Licence, or both.

²³⁰ Ibid.

²³¹ OCG Annual Report (2009), pages 6 to 7, <http://www.ocg.gov.jm/ocg/view/annual-reports>

²³² See OCG Media Release – 'OCG Launches Groundbreaking Internet Information Database Portal Covering Over 600 Prescribed Government Licences', <http://www.ocg.gov.jm/ocg/view/press-releases>

The successful development of the Database by the OCG's Inspectorate and Information Technology personnel is a groundbreaking one for the OCG. It marks the first time in the 26 year existence of the OCG that deliberate and decisive steps have been taken by the organization to position itself to monitor the licensing activities of Public Bodies and, in so doing, to effectively discharge one of its principal but outstanding mandates under the Contractor General Act.

In commenting upon the launch of the OCG Database, which is called "PLID" or Prescribed Licence Information Database, Contractor General, Greg Christie lauded the unprecedented efforts of his staff.

"The in-house design and development of this unique facility, within pre-existing budgetary and resource allocations, speaks in definitive terms to the unparalleled competence and commitment of the OCG's staff. It represents another major milestone in the realization of the OCG's strategic objectives to not only push the limits of the OCG's productivity and efficiency levels, but to be held accountable to the People and Taxpayers of Jamaica for the effective delivery of the organization's statutory mandates".

The OCG's Prescribed Licence Information Database (PLID) has its genesis in a formal Requisition of the Contractor General, dated May 7, 2009. At that time, 195 Public Bodies were required to submit full particulars of their licensing processes and requirements to the OCG. The requisitioned information, together with other pertinent data that was retrieved by the OCG from the Internet, was, over a 5-month period, painstakingly analyzed, collated and then inputted into the PLID to form the system's Database.

Now that the OCG's PLID has been formally launched, every Public Body will be required to verify, update and maintain, on an ongoing basis, the accuracy of the information which is contained in the Database. Formal notification of the development and launch of the OCG's PLID, to all relevant Public Bodies and to several State officials, inclusive of all Ministers of Government and Parliamentarians, is currently being undertaken by way of letter, dated November 27, 2009, from the Contractor General.²³³

- (g) Initiatives to identify and expunge fraud and corruption from the government contractor registration process and to have delinquent contractors de-registered in accordance with applicable NCC rules; and to make the requisite referrals to the JCF in keeping with the provisions of the Voluntary Declarations Act and the Perjury Act.

The OCG's efforts, in the foregoing regard, began in earnest in 2009. The CG's remarks on the subject, as are outlined in the Introductory Section of the OCG's 2010 Annual Report²³⁴, are instructive. In part, they read as follows:

"In April 2009, the OCG uncovered attempts by unscrupulous contractor applicants and other persons to corrupt the National Contracts Commission (NCC) Government contractor registration process. The matter was promptly made public by me, via the issue of an official OCG Media Release which was dated May 6, 2009. The Release was issued after the police had conducted preliminary investigations and immediately after clearance was received by me, from them, to proceed with my public statement.

²³³ Ibid.

²³⁴ OCG Annual Report (2010), pages 50 to 55, <http://www.ocg.gov.jm/ocg/view/annual-reports>

To qualify to bid on Government contracts, a prospective contractor must first secure registration with the NCC as a works, goods or services contractor, after filing the appropriate application with the OCG. Existing registered NCC contractors must also seek re-registration with the NCC every year.

Once an application for registration is filed with the OCG, the OCG, on behalf of the NCC, undertakes a due-diligence evaluation of the application form and verifies the contractor's particulars in accordance with the NCC's prescribed procedures.

This, in turn, forms the basis for the classification, grading and registration of the contractor by the NCC. A contractor is classified or graded depending upon its resources, experience and competence levels. If the NCC's contractor registration or re-registration process is in any way corrupted or compromised, contractors could potentially receive Government contract awards for which they are not qualified, competent or adequately resourced to execute.

This, in turn, could result in additional costs being borne by the tax-payer arising from poor or defective work on construction projects, costs and time over-runs on works contracts, or the supply of goods or services which do not meet contract specifications.

In late April 2009, a semi-completed contractor re-registration application form was received by the OCG for preliminary due-diligence evaluation and processing, prior to submission to the NCC. Included among the application supporting documents, was what appeared to be a forged sworn Voluntary Declaration which had purportedly been executed before a Justice of the Peace by the contractor, attesting to the truth of the particulars which were embodied in the application form.

Preliminary investigations, which were carried out by the OCG, found that the application had been allegedly prepared and submitted, on behalf of the contractor, by a former long-serving member of the OCG staff, for a fee of \$10,000. The former OCG staff-member was asked by me to resign from the OCG in April, 2008, on suspicion of her involvement in corrupt activities. The allegations, at the time, were reported, in writing, by me to the Police High Command.

The OCG has, since April 23, 2009, intercepted several other contractor registration and re-registration application forms which appeared to be irregular or contain misleading, forged or fraudulent information. Many of the applications seemed to have been completed by the same person and/or attested to before the same Justice of the Peace.

In many instances, interviews were conducted by the OCG with representatives of the implicated contractors and statements were taken. In all cases, the OCG has handed over the affected contractor application forms and files to the Fraud Squad in consequence of which the applications will not be processed by the NCC.

Section 15 of the NCC's Works Contractor Application Form provides as follows: "IF THE INFORMATION PROVIDED BY THE APPLICANT ON WHICH EVALUATION AND AWARD(S) WERE BASED IS FOUND TO BE ERRONEOUS THEN THE CONTRACTOR(S) SHALL NOT BE REGISTERED, OR IF ALREADY REGISTERED, THE REGISTRATION WILL BE REVOKED."

Since its calling in of the Fraud Squad in April, 2009, the OCG has taken several decisive and deliberate steps in its continuing effort to root out the scourge of corruption from its midst and from the Government contractor registration process. These have included:

(1) The re-organization of the staffing structure of the OCG's Technical Services Department (TSD), the interim revision of the critical operating and process functions of the Department, and the re-assignment of the said functions to new staff members.

(2) The conduct of an exhaustive and comprehensive evaluation of the OCG's TSD functions and processes to re-assess its strengths and weaknesses and to develop recommendations for the revamping of the said processes – all in an effort to enhance efficiency and effectiveness in the processes, whilst insulating same from criminal acts of corruption and impropriety. The Report was completed and handed over to the NCC.

(3) The handing over of suspicious information, together with tainted contractor files, to the Fraud Squad.

(4) The implementation of more stringent security measures to protect the OCG's official documentation and information from unlawful use or disclosure, inclusive of the re-organization and re-staffing of the OCG's Registry.

(5) The formal issue of Anti-Corruption and Associated Disciplinary Warnings to all existing OCG staff members and the erection of no less than six (6) laminated Anti-Corruption Warning and Prosecution Signs throughout the public areas of the OCG's offices.

The referenced heightened anti-corruption mechanisms and procedures which were implemented by the OCG, did in fact bear fruit as several other irregular, forged and fraudulent contractor re-registration applications have been identified and pulled from the system during the year.

Some of the irregularities which have been identified by the OCG, and particularly those which were associated with works contractors' applications, are indicative of the magnitude of fraud and corruption that has permeated Government contracting in Jamaica. They include:

(1) Forged contractor re-registration applications, supporting documentation and certification;

(2) Falsified information regarding the human, physical, financial and technical resources of contractors;

(3) Falsified information about construction projects which contractors allege that they have executed;

(4) Irregular and forged Voluntary Declarations attesting to the veracity of application forms; and

(5) Contractor representatives who are unable to accurately verbalize to the OCG the information which is stated on the application forms which they themselves have submitted to the OCG".

In furtherance of the OCG's efforts to clean up the Government's Contractor Registration system, the Technical Services Division (TSD) of the OCG, upon my instructions, in September 2010, implemented a 100% Zero Tolerance compliance audit of all applications for registration and re-registration for all Grades 1 to 4 Works contractors that are submitted to the NCC.

The exercise was structured to secure the detailed verification of all of the information that is entered upon the contractor application forms, particularly as it relates to information that is represented about the human, financial and technical resources of the applicant.

The OCG's implementation of its 100% due diligence initiative resulted in delays in the NCC contractor registration and re-registration processes that were not unexpected. This, in turn, led to a heightened displeasure amongst contractors who, not surprisingly, complained of the varying inconveniences which they were facing.

The delays also prompted the intervention of the Hon. Prime Minister, who convened a meeting with himself, the Chair of the NCC, the President of the Jamaica Master Builders Association, the Senior Director of the OCG, and me, on November 17, 2010.

The need for additional staff within the OCG's TSD had been previously communicated to the authorities so that the delays that were anticipated from the OCG's heightened scrutiny of the Works contractors' application forms would have been minimized. These requests, however, were ignored.

At the meeting with the Hon. Prime Minister, a further request was made by me for three (3) additional personnel, but all to naught. The OCG was, however, not prepared to compromise the need to obliterate the pervasive corrupt and unscrupulous elements that it had identified in the Government Contractor Registration Process merely to preserve the pre-existing 4 week NCC contractor application registration time frame. This position was firmly, but respectfully, communicated by me to the Hon. Prime Minister."²³⁵

By mid-2012, more than 80 works contractors had been removed from the NCC's list of registered contractors, and referred to the police, on account of the sworn but false material representations that they had made in their contractor registration or re-registration applications to the NCC.

Even as at 2010, the unrelenting and bold steps that the OCG had initiated and prosecuted to eradicate corruption from the GOJ's Contractor Registration Process, had resulted in a significant reduction in the false, misleading and fraudulent information that was previously being presented in the works contractor application forms that were being submitted to the NCC.

The CG's remarks, in the OCG's 2010 Annual Report, as to the posture of the OCG towards the issue, should be noted:

"Corrupt and unscrupulous contractor applicants are now thinking twice about 'testing' the integrity of the OCG's 100% Zero Tolerance due-diligence system, and that is precisely how it should be. The OCG's Zero-Tolerance approach to fraud, in any shape or form, will not be relaxed at any time, as the OCG continues on its mission to diligently impose and to uphold the foundation principles of integrity, accountability, transparency, competition and value for money in the Government of Jamaica Procurement and Contract Award Processes."²³⁶

²³⁵ Ibid.

²³⁶ Ibid.

In so far as the consequential and persisting delays in the NCC's contractor registration and re-registration time-frames were concerned, the CG's remarks in the OCG's 2010 Annual Report are, again, also instructive.

*"The OCG would, once again, respectfully call upon the powers that be to do the right thing by providing no more than three (3) additional members of staff to the OCG's Technical Services Department – this, as opposed to doing what is, in essence, tantamount to forcing the OCG to turn a blind eye to corruption by relaxing its scrutiny of the referenced works contractors' registration and re-registration application forms."*²³⁷

In closing, reference must, however, be made to an astounding development that took place in May 2014.

On May 14, Transport and Works Minister, Dr. Omar Davies, announced that some 84 of the referenced delisted works contractors had been cleared by the Cabinet and by the Fraud Squad to re-apply for registration as GOJ approved contractors.²³⁸

The Minister reportedly said that a waiting period of 5 years was felt to be unjust and unfair. The Minister also reportedly said that following a meeting with the incumbent CG, the Chair of the NCC and the Commissioner of Police, it was agreed that the conclusion that there was 'fraud' in the GOJ's contractor registration process was 'excessive'.

"Whilst there may have been errors in the registration process, these in the view of the investigating officers, could not be elevated to a charge of fraud," the Minister reportedly said.²³⁹

In his response on Twitter, which was carried extensively in the media, the author expressed bewilderment at the turn of events.²⁴⁰ The following is an extract of the relevant comments which were taken from the May 2014 edition of NIA's Media Review:

"In explaining his consternation, he (Greg Christie, the former Contractor General) said that all of the contractors had sworn to the truth of false material statements, under the Voluntary Declarations Act, in order to win lucrative GOJ works contracts.

He pointed out that the NCC's works application form had provided that: "If the information provided by the applicant on which evaluation and contract awards is found to be erroneous, then the contractor shall not be registered or, if already registered, the registration will be revoked", and that all the contractor applicants had signed to the truth of their statements before a Justice of the Peace, on the pain of criminal prosecution.

The former CG said that in all instances of OCG referrals to the Police, the contractor applicants had made materially false statements on their application forms. No applicant was delisted, or referred to the Police, before he was given an opportunity to be heard in a formal, documented interview, he added.

²³⁷ Ibid.

²³⁸ See Jamaica Gleaner Article – 'Cabinet Clears Barred Contractors To Reapply For Government Projects', May 14, 2014, <http://jamaica-gleaner.com/latest/article.php?id=52888>

²³⁹ Ibid.

²⁴⁰ See, for example, Jamaica Gleaner Article – 'Christie maintains that delisted contractors provided wrong data', May 19, 2014, <http://jamaica-gleaner.com/latest/article.php?id=52960>

Christie also reminded the public that Section 8 of the Jamaica Perjury Act renders false material Voluntary Declarations, such as those that had been made by the contractor applicants, a criminal offence punishable by a fine and/or a maximum term of 2 years in prison at hard labour.

Christie, who then said "how could all of the contractors be 'cleared' in such glaring circumstances is inexplicable and beyond me", directed readers to pages 50 to 55 of the OCG's 2010 Annual Report at <http://www.ocg.gov.jm/ocg/view/annual-reports> to understand the "gravity of the situation that is currently faced by Jamaica and the OCG" as a result of the problem."

- (h) Recommendations to stream-line the process for the registration and re-registration of GOJ contractors.

These recommendations, which were made by the OCG to the NCC, are referenced in the preceding section – section (g). One of the relevant extracts reads thus:

"The conduct of an exhaustive and comprehensive evaluation of the OCG's TSD functions and processes to re-assess its strengths and weaknesses and to develop recommendations for the revamping of the said processes – all in an effort to enhance efficiency and effectiveness in the processes, whilst insulating same from criminal acts of corruption and impropriety. The Report was completed and handed over to the NCC."

- (i) Recommendations to speed up the contractor registration process whilst maintaining its integrity.

The referenced recommendations, which have been repeatedly made, essentially sought the GOJ's approval for the OCG to hire 3 additional members of staff for its Technical Services Department. The recommendations have been alluded to in section (g) above. As at the time that the author had demitted office on November 30 2012, the said recommendations had not borne fruit.

- (j) Recommendations for GOJ accounting officers to take a more proactive and aggressive role in developing, implementing and enforcing effective risk management systems, checks and balances and other appropriate management systems, in an effort to mitigate against any possibility of deviations from the GPPH.

This recommendation, which was repeatedly made by the OCG, was a 'general and high-level' recommendation that was directed primarily to the Cabinet, to the country's accounting officers, including its permanent secretaries, as well as to the GOJ's principal accountable officers.

- (k) Recommendations to ensure that appointees to the board of directors of public bodies are made fully aware of their responsibilities and obligations under relevant legislation.

This recommendation, which was repeatedly made by the OCG, over the years, was a 'general and high-level' recommendation that was directed primarily to the Cabinet, to the country's accounting officers, including its permanent secretaries, as well as to the GOJ's principal accountable officers.

In recent years, the recommendation has become a standard recommendation in the several OCG Investigation Reports in which there are findings that public officers have failed to discharge their fiduciary responsibilities as members of the board of directors of GOJ statutory companies.²⁴¹

- (l) Recommendations to the NCC and GOJ's accounting officers to monitor and to evaluate the performance of goods, services and works contractors in an effort to improve contractor performance and to develop a credible basis for sanctioning, delisting or de-barring poor or non-performing contractors.

Evidence of the author's early and repeated, but futile efforts, in the foregoing regard, and particularly as they relate to works contractors, are documented in the OCG's 2008 Annual Report at page 12.²⁴²

The relevant extract from that report reads as follows:

"Another significant source of concern for the OCG is the continuing problem that is posed by the unsatisfactory performance of a number of contractors who are registered in the Works categories of the NCC's Register of Contractors, but who, notwithstanding, continue to benefit from Government contract awards.

Closely aligned to this problem, is the associated issue of the award of Government contracts to contractors who are not registered with the NCC. This practice continues to be a pervasive one which is undermining the credibility and strength of the Public Sector procurement system.

In the circumstances, and in view of the increasingly voiced dissatisfaction with the performance of a number of works contractors from a number of stakeholders, I must, again, strongly encourage the NCC to embark upon a comprehensive evaluation of the performance of Government contractors.

Based upon this evaluation, the NCC can then proceed to take the requisite steps to commence removing, from its Register, those contractors who consistently fail to perform their contracts in a cost effective, efficient and timely manner and, with the actionable support of the Minister of Justice and the Legislature, design the imposition of appropriate sanctions to aid in effectively addressing the issue.

Furthermore, serious consideration should be given to the oft-repeated recommendation of the OCG that the Permanent Secretaries Group is well positioned to provide significant assistance to the NCC in the foregoing regard. I am obliged to repeat, immediately hereunder, comments that I had made in the OCG's 2007 Annual Report regarding this very issue.

"In collaboration with the NCC, a uniform approach for monitoring the performance of works contractors should be developed, agreed upon and implemented. Once this is done, every Public Sector Contracting Agency should then be required to systematically record key data about the performance of contractors on their projects.

²⁴¹ See the 'Recommendations' section of relevant OCG Special Investigation Reports, <http://www.ocg.gov.jm/ocg/view/investigation-reports>

²⁴² See OCG Annual Report (2008), page 12, <http://www.ocg.gov.jm/ocg/view/annual-reports>

*The data must then be routinely submitted, through the portfolio Permanent Secretary, to the NCC for entry into a NCC/OCG database. The incoming data could then be assessed and reliably utilized by the NCC whenever it is called upon to review a works contractor's application for the renewal of its annual registration.*²⁴³

The matter was also the subject of extensive comments by the CG in his 2010 Annual Report to Parliament.²⁴⁴ In closing his remarks, the CG made the following observations and recommendations:

"Once again, and in closing, I am, therefore, obliged to call upon the Government to urgently take the requisite steps to formally institutionalize the 'blacklisting' of under-performing Government contractors. This is a best practice of the World Bank and other major Development Banks world-wide who continuously strive to ensure that the developmental projects which they finance are administered and executed at the most optimum cost-effective and cost-efficient levels possible.

*If accepted, this Recommendation, I strongly believe, will dramatically increase the levels of efficiency and effective performance of Government contractors in Jamaica, particularly those who are recipients of contracts in the Construction Sector.*²⁴⁵

- (m) Initiatives and recommendations made to the Cabinet and to the GOJ's accounting officers to reduce cost and time over-runs, during the procurement and implementation phases of GOJ works contracts.

Every single OCG annual report since 2006 has documented the OCG's concerns and recommendations about this matter, as well its initiatives to assess the problem. The relevant particulars are too numerous and extensive to reproduce in this paper. Some of them are outlined in the referenced annual reports at the pages that are indicated in the footnote.²⁴⁶

- (n) Initiatives to provide timely and expedited responses to GOJ public bodies and GOJ accounting and accountable officers to queries regarding the proper interpretation of the GPPH as regards specific procurements.

Among the internal procedures that were developed by the author in the foregoing regard, is the tracking and logging of all incoming correspondence and enquires; the directing of same within minutes of receipt to the CG; the CG's immediate review and dissemination of same to a designated OCG officer for response or for the execution of an agreed corrective action, within a specified time-frame; and follow-up by the CG and/or his Assistant to ensure timely and effective execution.

- (o) Initiatives to ensure that accounting officers are made aware of all communications, regarding procurement-related issues, that the OCG may have with a public body which falls within the accountable officer's portfolio.

²⁴³ Ibid.

²⁴⁴ See OCG Annual Report (2010), pages 45 to 47, <http://www.ocg.gov.jm/ocg/view/annual-reports>

²⁴⁵ Ibid.

²⁴⁶ See, for example OCG Annual Report (2006), pages 28 to 30; OCG Annual Report (2007), pages 4 to 5, pages 25 to 26, and pages 29 to 30; OCG Annual Report (2008), page 11 and pages 25 to 27; OCG Annual Report (2009), pages 29 to 41; OCG Annual Report (2010), pages 57 to 68; OCG Annual Report (2011), pages 99 to 109; OCG Annual Report (2012), pages 10 to 11 and pages 24 to 30; <http://www.ocg.gov.jm/ocg/view/annual-reports>

Essentially, the internal procedure that was developed by the author, in the foregoing regard, was the mandatory requirement for all outgoing OCG correspondence to any of the GOJ's ~200 public bodies to be copied, in writing, to the permanent secretary and the chief accountable officer of the public body in question.

While the OCG is free to make recommendations to the GOJ and, in fact, is expressly authorized to do so after completing an investigation²⁴⁷, the GOJ is, however, in no way obliged to accept them or even to consider them.

By contrast, we have seen where in Sierra Leone, the Anti-Corruption Commission can issue corrective instructions to public bodies and, similarly, in Trinidad and Tobago, under its draft procurement law, the Office of the Procurement Regulator can issue directions to public bodies to ensure compliance with the law.²⁴⁸

While a number of improvements have been made to the GOJ's procurement system, they have, however, for the most part, been carried out in a disjointed and sometimes isolated manner and not as a part of a comprehensive review of the entire procurement system. It is also worthy of note that many of the remedial recommendations that have been put forward by the OCG have not been implemented by the relevant authorities.

Consequently, and as was previously mentioned in Section 5.3 of this paper, the GOJ's procurement system, inclusive of the GPPH, the procurement legislative regime, and the anti-corruption regulatory regime, is deficient, inefficient and inadequate in several respects.

²⁴⁷ Supra. Note 30. Section 20 (1) of the CGA.

²⁴⁸ Supra. Notes 102 to 105.

8.3 IDB consultant's report: public procurement in Jamaica

Perhaps, a step in the right direction has now been founded in what appears to be a fairly comprehensive IDB-sponsored assessment of the Jamaica procurement system that was undertaken by Mr. John Brooks of the Anjo Global Consulting Limited of Ottawa, Canada, between June and July 2012.²⁴⁹

The report, which is dated November 22, 2014, identifies, in detail, what the consultant views as the shortcomings in the GOJ's procurement system. The report also outlines its several findings and considered recommendations for improving the system and moving forward. Many of the report's findings are consistent with the OCG's observations regarding the areas of the system in which remedial work is required.

Most importantly is that included among the report's acknowledgments is the fact that the GOJ is presently engaged in the process of adopting the UNCITRAL 2011 'Model Law on Procurement'.²⁵⁰

It is also instructive to note that a common thread which runs throughout the IDB's recommendations is that "care should be taken that (the recommended) changes do not detract from the credible oversight role of the Office of the Contractor General in the procurement process"²⁵¹, and that "in all of this, a clear objective should be maintained of not weakening the required role of the OCG in its oversight function".²⁵²

According to the consultant, if the report's recommendations are adopted, "the ultimate result for Jamaica will be public procurement that attains a world-class standard".²⁵³

8.4 IDB consultant's report: general findings

Outlined, below, is a lightly edited extract of the 'general findings' section of the report. The extract is taken from pages 15 to 17 of the report.

"Summary of Findings

Public procurement in Jamaica is in transition, triggered by a combination of a commendable 'pursuit of excellence', recognition of the negative impact of procurement delays and the degree of public profile that procurement has achieved through the efforts of the Office of the Contractor General (OCG).

The GOJ is already moving to address a number of the areas where this Assessment has identified opportunities for growth and improvement. Some areas for example: set asides for micro, small and medium enterprises (MSME), redefining the roles of NCC, Ministry of Finance (MOF) and OCG (separation of the OCG from the NCC), have been on GOJ's agenda for a number of years with little or no action. In an effort to ensure that the GOJ procurement environment meets international standards, with reduced delays and improved efficiency, remedial steps must be accelerated. Key among planned changes should be those leading to legislative change (enactment of the Procurement Act, related Regulations and resulting changes to the standard operating procedures – the GPPH). With respect to the issues that were to be reviewed, this report finds the following:

²⁴⁹ Supra. Note 83.

²⁵⁰ See discussion in Section 5.3 and Note 81.

²⁵¹ Supra. Note 83. Page 8.

²⁵² Ibid. Page 46.

²⁵³ Ibid. Executive Summary, Page 8.

Procurement Process

The procurement process is slow. It is not well planned and progress is not closely monitored. Some 30-40% of contracts are awarded on or close to schedule but about 30-45% take too long. Some 10-15% of contracts are excessively delayed. While the systems of GOJ generate some aspects of procurement data, they are by no means complete and easy to use.

Management of the Contractor Registration Process

The contractor registration/re-registration process is not efficient and effective. The time taken by the GOJ to process contractors for works and related services has in many instances taken a number of months longer than the 4-6 week target time. The process of pre-assessing contractors' capabilities and registering them by level of capacity and capability does not appear to substantially reduce performance problems in the execution of awarded contracts.

GPPH

The current Handbook contains the key descriptions of procedures and processes that are to be used to undertake and support procurement in GOJ. There are a number of improvements that have been identified (under this Assessment) which should be made to the GPPH in such areas as: direction on effective contract award processes; details of procedures to be used; and, to correct inconsistencies, some of which are major, between the GPPH and the Standard Bidding Documents (SBDs).

GOJ's SBDs

The SBDs are aligned with international standards. However, there are a few inconsistencies. Those SBDs for works contracts are not used by the GOJ in preference to other international and national standards. There are inconsistencies between the SBDs, the 'guides' and the GPPH.

GOJ'S Provisions for the Handling of Unsolicited Proposals (UPs)

The opportunity to receive and assess UPs should be retained but the process should be modified and standardized. This will ensure that UPs are handled in a manner to provide transparency, openness and value for money.

GOJ'S Insurance Purchases

A detailed study of the GOJ's approach to purchasing insurance is needed to determine the optimum level of self-insurance and the degree of consolidation of purchasing with the objective of increasing value for money. Under a revised procurement model, alternatives for actuarial advice can be explored.

Process for the GOJ to Deal with Cross-Debarment

The SBDs of the multilateral banks adequately convey the notification to bidders regarding their possible ineligibility under the banks' reciprocal cross-barring agreements. The GOJ's staff has access to listings of debarred suppliers. Currently the GOJ does not have policies of reciprocal barring for purchases with GOJ funding.

Draft of GOJ'S New Procurement Legislation

The current GOJ draft follows the UNCITRAL 2011 'Model Law on Procurement' and responds to the GOJ's specific needs, including the support of the roles of the NCC and the MOF in the procurement process. With further shaping and incorporating additional improvements by GOJ, it will form the basis for sound international standard public procurement."

8.5 IDB consultant's report: detailed findings, conclusions and recommendations – selected extracts

Outlined, below, are lightly edited selected extracts from the 'detailed findings' section of the report. These extracts are taken from pages 18 to 45 of the report.

"Legislative and Regulatory Framework

Currently, the GOJ does not have specific legislation addressing public procurement. Relevant provisions are combined with the OCG's Regulations (2008), and further enhanced with the GPPH and related SBDs and the Public Sector Procurement Policy (2010). In summary, the current procurement 'documentation', although relatively complete, is diverse and in addition lacks clarity, with inconsistencies between the various documents; continues the operational role of the OCG (via the NCC) in the procurement process, and does not address some of the new international developments for public procurement.

Institutional Framework and Management Capacity

There are changes planned for the procurement organizational framework – the key aspect being the separation of the OCG and the NCC, the role assigned to the Development Bank of Jamaica as the PE for PPPs, the plan to create centralized service units, including for procurement and the refocus of public procurement policy with the MOF.

The role, capacity and profile of the MOF, as the GOJ's procurement regulatory body and to lead the overall plan for procurement reforms, require urgent attention. The MOF is currently understaffed, does not have the depth of contracting expertise and the profile to fully take on the role. This opinion was formed based on the interactions between the Consultant and the MOF for this Assessment and from discussions with PEs.

Some of the work needed under this pillar includes examining in greater detail of each of the steps in the contract approval process, including: establishing time and other key performance indicators (KPIs) for each; reconsidering the levels of contract approval authority at each level for various types of contracts; introducing the concept of negative resolution for contract awards; and implementing the requirement for procurement plans together with monitoring and reporting; and, improved project budgeting.

While the systems of the GOJ generate some aspects of procurement data, these systems are by no means complete and easy to use.

Procurement Operations and Market Practices

While some procurement related training is offered at the Management Institute for National Development (MIND), a 'purchase specific' training needs analysis for staff (directly and indirectly involved in procurement) should be conducted and a capacity building program should be developed. A career stream for procurement staff should be created and professional qualifications, e.g. the Chartered Institute of Purchasing and Supply (CIPS).

Studies should be conducted to determine opportunities for consolidated purchases and/or use of framework agreements.

Open dialogue with the supply community on the way forward for the contractor registration process should be undertaken immediately. The MSME policy framework should also be finalized in order to facilitate public procurement participation of this sector of the supply community. Contract administration and management procedures should be examined and conflict avoidance and resolution techniques should be refined. Collection and use of procurement information/statistics, introduction of a contractor performance management program and information storage and safe protection are other areas that should be reviewed. Also, the process for the open and transparent handling of Unsolicited Proposals should be established.

Transparency and Integrity of the Procurement System -

The GOJ has a very robust and unique procurement oversight structure with the presence of the OCG in addition to the traditional oversight of the Auditor General. In addition, the award of contracts is published on the OCG's website. However, improvements are recommended in transparency, specifically in: the timing and process of advising unsuccessful bidders and the public at large of the results of bids; the procedures and media for advertising bid opportunities; actions that have been taken to resolve bidder complaints; and, the resolution of findings of corruption.

Procurement Approval Process

The evidence resulting from a review of some 20 programs, projects and PEs, including those projects funded by the IDB, in addition to the feedback from the interviews conducted to gather information for this report, clearly substantiates the view that the public procurement process in GOJ faces challenges which has impacted its efficiency and effectiveness.

Background: In the years 2010 and 2011, the GOJ processed in excess of 23,000 contracts with a value greater than \$JMD 275K; the projected number for 2012 will be in the same range. The total value of 2010-11 contracts is estimated to be \$JMD 75-80 billion. Approximately 1,000 (or 4.3%) of the 23,000 contracts (and a few contract amendments) required NCC or Cabinet approval. However, while a small percentage by volume, the estimate by value would be 75%.

Discussion: The metric used to measure the effectiveness of the contract award process is the time from bid opening to contract award. This encompasses (i) the time to evaluate the bids; (ii) prepare documentation to obtain the concurrence of the relevant approval authority and; (iii) once having obtained the approval, to award the contract.

The factors that can positively and negatively affect the time required for these steps are shown in the following table:

STAGES	POSITIVE	NEGATIVE
Evaluate bids	<ul style="list-style-type: none"> • Well planned program with adequate time allowed for all steps/good time management • High quality bids • Bids in line with estimate • Limited discussions with bidder(s) • Adequate bids • Adequate evaluation and assessment criteria • Adequate number and skilled GOJ staff/consultants 	<ul style="list-style-type: none"> • No planning/time management • Poor quality bids due to poor spec by GOJ and/or inexperienced/busy supply community • Lengthy discussions with bidder(s) • High volume of bids • Insufficient bids • Bids higher than estimate • Insufficient/untrained staff/consultants
Seek approval to award contract	<ul style="list-style-type: none"> • Well prepared submission • Knowledgeable reviewers • Reviewers available, as req'd • Submission accepted first time • MOF funding concurrence • Expeditious routing and handling through various review and approval levels • Policy concurrence for award • Successful bidder registered? 	<ul style="list-style-type: none"> • Poor quality submission • Reviewers lack knowledge of the project/purchase • Unavailability of reviewers • Submission 'recycles' • MOF holds pending funding availability • Each level delays by a few days/weeks • Held awaiting GOJ policy decision
Contract award	<ul style="list-style-type: none"> • Limited clarification/discussion with contractor 	<ul style="list-style-type: none"> • Additional discussion/clarification with bidder <p>Bidder delays acceptance or attempts To negotiate further/rejects contracts</p>
Monitoring and Evaluation of award process	<ul style="list-style-type: none"> • Good planning and regular reporting of progress • Bottlenecks quickly resolved • Key performance indicators (norms) established 	<ul style="list-style-type: none"> • No/poor planning • Monitoring poor and inadequate reporting • Bottlenecks go un-noticed until 'crisis' arrives

The above table attempts to capture all the issues that were identified during the analysis of the projects and related contracts. In addition, data was used from the OCG's 2010 report resulting in the following categorization of procurement:

- Systemic – Positive – purchases that move effectively through the system in 2-4 months (60-120 days) – some 30-40% of contracts are in this category.
- Systemic – Negative - relatively simple purchases that proceed slowly through the stages and require some 5-7 months (210 days) for approval – some 30-45% of contracts are in this category.

- **Non-systemic – Negative** – these are the exceptions and delays can range up to 12 months or more – some 10-15% of contracts are in this category; the greater majority are construction or works related.

The number of approval levels that a contract must go through adds time generally to the award. In principle, the GOJ has three approval levels:

- **Head of PE - PE Procurement Committee** - contracts up to \$JMD 15 million (\$US 170K approx.). In public bodies there is an extra approval level, the Board.
- **National Contract Commission – Sector Committees:** above \$JMD 15 million– up to \$JMD 40 million (\$US 452K approx.).
- **Cabinet – Cabinet Infrastructure Committee:** above \$JMD 40 million

Each level has (sub) committees looking into the details and advising the approval authority accordingly. The contracting process of GOJ, from bid opening to contract award, is very similar to those operated by many countries where procurement is decentralized.

The Head of the PE (termed here HOPE) is accountable for procurement (funds budgeted, compliance with GOJ's policies, procedures, etc.). The HOPE has limited authority when using more restrictive MOPs (e.g. Direct/sole source or limited) for high value purchases. Prior approval is required from the NCC.

The GOJ's Auditor General conducts a sampling of post award audits; the OCG conducts a more focused post review. In 2010, the OCG reviewed 972 contracts of a total of 11,771 (excluding contracts \$JMD 0-275K) and published a very thorough report on the findings. The OCG also undertakes 'real time' reviews and may perform other reviews when the OCG considers aspects of particular contracts require investigation.

Contracts requiring Cabinet approval took longer overall to award, partly due to the value and complexity. Some were delayed by Cabinet/MOF for a considerable time (in some instances 4-6 months) – the reasons were varied but in some instances related to delays in getting on Cabinet agenda, but more usually involved policy/budget issues, as opposed to tardiness in the approval process.

Conclusions and Recommendations

There is a high degree of dissatisfaction with the 'bureaucratic' chain from the time of bid opening to the time of contract award. The following proposals have been developed to reduce the effort and would be consistent with GOJ's introduction of a culture of Results-Based Management to further empower staff to innovate. Judicious selection should be made to limit additional risks. In addition, greater awareness needs to be focused in the GOJ on the impact of lengthy delays between opening bids and awarding the contracts.

(a) Reduce the volume of contracts requiring multiple approvals

- Establish approval levels related to risk rather than value. At this time the approval level is determined by the value – regardless of the type of purchase. In many countries the approval level is relative to the risk. Goods generally being the least risk-prone have approval values set higher than, for example, consulting services.
- Increase the thresholds' values – this recommendation should be considered in the short term in order to reduce the number of contracts going forward to NCC and Cabinet review. Currently, the value threshold for NCC review is \$JMD 15 million and Cabinet review is \$JMD 40 million.

In 2012, some 150-200 contracts will require Cabinet approval. The number of contracts being submitted to Cabinet could be reduced and the Cabinet can instead focus on over-viewing the procurement process via the Ministerial management of the line Ministry/PE, the annual work planning, budgeting and procurement planning processes, as well as regular reports of the Auditor General and the CG.

(b) Reduce delays at each level of review

- Establish clear targets for the time permitted for review by each level with 'deemed' approval (negative resolution) where dates are not met. These key performance indicators should be developed, looking to those who know best how to shorten their part of the cycle (those directly involved), and once developed, be held accountable.
- Participants in the review cycle should be trained to conduct their work more effectively and not delay the process with spurious questions. Tighter control by the Chair of such committees should be exercised to ensure that members are well prepared and add value to the process.
- Service level standards/targets should be agreed with staff and incorporated in personnel performance reviews; data to monitor from procurement reports.
- Conduct some aspects of the approval process concurrently rather than consecutively. For example, the role of the MOF in the approval process is twofold (i) to ensure that the funding for the contract is available and (ii) to conduct a due diligence of policy compliance. The latter could be done as part of the NCC sector committee review where a policy specialist should participate and the former, could be done when the submission goes to NCC where a MOF finance person participates.
- When there is a high volume of activities, committees such as the NCC and the Cabinet should meet as frequently as required to clear the backlog – under no circumstances should a submission wait more than 5 days to be reviewed. In addition, urgent submissions could be handled by teleconferences and/or concurrent routing to members for sign off.

(c) Improve the quality of bid solicitations and evaluation

- In a number of interviews both with GOJ staff and the supply community representative, examples were provided of poor quality specifications (some prepared by external consultants) that, when issued to bidders, generate a large volume of questions/requests for clarifications. In some instances, the bid closing dates had to be extended to permit bidders time to absorb the responses from GOJ.
- Procurement planning is generally well exercised on DP-funded projects. However, the same is not true of GOJ funded activities. Each MDA should develop an annual procurement plan – drawing where necessary from multiyear program plans, operating requirements, etc. These plans should be well constructed and effort should be taken to make realistic estimates for all activities – and, most importantly, show scheduled and actual dates. Periodic reporting against the plans should be the norm for both DP and GOJ funded purchases.
- Using the data from the annual procurement plans, create General and specific Procurement Notices that are published at the start of the fiscal year. Bidders can prepare themselves for the ITB/tender call well in advance and thus do not need the same amount of time to bid.

- The Handbook should be expanded to cover in more detail the procedures, format and content for submissions to NCC and Cabinet and thus reduce the recycle time. In addition, assistance by the NCC Executive Director and/or NCC Sector committees, as recommend below can be sought.
- The ability of the NCC sector committees could be better used to assist the PEs, especially those unfamiliar with the evaluation/submission process, to be more involved in preparing the submissions for NCC and, where required, for Cabinet.
- To optimize use of scarce resources and ensure consistency would be to adopt a similar approach to that used in Guyana. A body of evaluators (skilled in the various types of purchases made) has been developed that conduct evaluations for all departments, ministries, etc. The results of their evaluations are submitted to the Guyanese equivalent of NCC.
- Units such as the Ministry of Works and Transport that have substantial infrastructure expertise could become the PE for another ministry where infrastructure is to be bought but skills do not exist.
- The preparation of submissions for Cabinet review will, for some PEs, be rare occurrences and, therefore, a challenge. In addition to the inclusion of guidelines in the GPPH (refer above) the MOF (or the Executive Director of NCC) could offer a service to PEs to assist in the drafting to reduce the level of effort/time to do this including the provision of templates.
- The range of procurement skills and other technical skills in GOJ's MDAs varies. Consequently, these impact the success or failure of not only the bid and award phase, but also the contract execution phase. To some degree, the DP-funded work, mainly executed by PIUs, are staffed with qualified persons, many of whom may be compensated outside the civil service salary norms. However, there are still problems in getting bids, failure to perform/deliver on schedule, etc. Focused capacity-building in procurement administration (including training) to improve the contract award process must be a priority for all GOJ PEs' procurement staff.

(d) Plan and monitor the procurement process more effectively

- Delays in awarding contracts must be taken more seriously by the GOJ. There are a range of possible negative outcomes including: increase of costs where work moves to another wage cycle (for construction); unavailability of DP funding and/or incurring DPs' commitment fees on undisbursed loan balances; best value bidders who are unprepared to extend the validity of their bids; and, the loss of use/benefits planned by the PE from the purchase. For example, the late construction of a school can impact the learning cycle of many students. Therefore, it is imperative that delays be given a much higher profile. Delays beyond agreed schedules/targets should be reported by PEs to the OCG, the NCC and MOF. While the delays have been noted in the OCG's 2010 report, the reasons for, or suggested remedial action to be taken to prevent re-occurrence, is not described. The AG's report of 2010 is silent on the matter of these delays impacting negatively on project evaluation."

8.6 IDB consultant's report: overall conclusions and recommendations

Outlined, below, is a lightly edited extract from the 'conclusions/recommendations' section of the report. The extracts are taken from pages 46 to 48 of the report.

"In general, the Government of Jamaica's (GOJ) public procurement system, in comparison with similar jurisdictions, has shown improvement over the past few years and is considered to be approaching international standards. However, based on the findings described in this report, the Jamaican system faces challenges in harmonization/synchronizing its various pieces of legislation, manuals and tools, processes and players. These challenges are not un-common in a system under reform and modernization and they are surmountable.

The results of this Assessment relate the specific issues of the TORs (and later added items) with those under consideration by GOJ. Most are interrelated and should form the basis of an overall resourced and scheduled plan developed by GOJ with the clear objective of moving GOJ's public procurement to fully world class system with all its attendant benefits, controls and transparency and efficiencies.

Immediate focus should be placed on the activities to speed up the contract award process. Similarly, urgent would be to establish a GOJ team to work with the Jamaican construction industry to develop a more effective approach to the contractor registration process. Practically all other aspects noted in this Assessment will flow from revised legislation and reorganizations and reassignments of responsibilities. However, these actions will also require careful attention to build the capacity of all the parties involved, especially the NCC and MOF to fully support their new mandates. **In all of this, a clear objective should be maintained of not weakening the required role of the OCG in its oversight function.**

The following is a summary of recommendations for GOJ consideration:

Procurement Approval Process

- (a) Implement full procurement planning in all PEs for 2013/14 with realistic annual (and where applicable, multi-year) procurement plans;
- (b) Conduct strong M&E against plans; reporting against plans to HOPE and above
- (c) Reduce the volume of contracts/required levels of review by:
 - Conducting studies to determine opportunities for consolidated purchases and/or use of framework agreements
 - Appointing certain PEs to establish procurement tools (framework agreements) to serve the requirements of other of GOJ's PEs
- (d) Identify one or two PEs for handling their own and similar major procurements for other PEs. Thus allowing for the concentration of expertise and knowledge and for the efficient processing of contracts;
- (e) Conduct more detailed examination of 'spend' to determine if there are other trends and other opportunities for improvement including consolidated purchases –framework agreements;
- (f) Increase threshold values of approval authorities; create differential thresholds based on commodity/procurement risk;
- (g) Assign the office of the NCC Executive Director the responsibility to work with PE's to assist them in making contract approval submissions to the NCC;
- (h) Conduct needs analysis and develop a capacity building program for all staff that are directly and indirectly involved in procurement (initial focus on MOF and NCC);
- (i) Contract administration and management procedures should be examined and conflict avoidance and resolution techniques should be refined;
- (j) Provide direction regarding review sequence for DP funded purchases; recommended – GOJ first and then MDB;
- (k) Improve scope, timeliness and availability of centralized procurement data to be used to monitor and analyze procurement activities of all PEs.

Management of the Contractor Registration Process

- (a) Develop joint GOJ-Industry team to resolve issues related to process;
- (b) Expand registration to include Consultants;
- (c) Ensure consistency between prequalification criteria in SBDs and that used for general contractor registration;
- (d) Clarify value threshold where contract specific pre-qualification required.

The Procurement Handbook

- (a) Ensure that the procedures for contract award, publication of award and advising unsuccessful bidders are clearly defined;
- (b) Develop both generic and PE/purchase specific key performance indicators;
- (c) Improve effectiveness of GOJ's bidder/contractor appeals process;
- (d) Publicize annual procurement plans;
- (e) Improve 'user friendliness' of the GPPH;
- (f) Ensure consistency between Handbook and SBDs;
- (g) Address other corrections/clarifications detailed in section 6.2.3;
- (h) Implement a contractor performance management program (CPMP);
- (i) Include guidelines re procedures, content, etc., of submissions to NCC/Cabinet.

GOJ's Standard Bid Documents

- (a) Develop strategy to have GOJ's SBDs used for all purchases including those currently required to use MDBs;
- (b) Development of SBDs with Jamaican supply community input;
- (c) Develop concession type SBDs;
- (d) Review conditions for bidder eligibility;
- (e) Make certification of ethics a condition of bid;
- (f) Eliminate inconsistencies between SBDs and between SBDs and the Handbook;
- (g) Where payments delays due to GOJ fault, GOJ to pay interest;
- (h) Address other corrections/clarifications.

GOJ's Provisions for the Handling of Unsolicited Proposals (UPs)

Maintain the ability to receive and process UPs while implementing a more rigorous and standardized procedure that will ensure transparency, openness, value for money, which will eliminate any concerns of corruption or malfeasance.

Insurance

- (a) Implement the insurance procurement study;
- (b) Revise Volume 4 of the Handbook.

Cross Debarment

- (a) GOJ's PIUs when using MDB funding, to include certification (when seeking contract award approval) that recommended contractors are not currently on the list of contractors debarred by the MDBs;
- (b) GOJ to consider its position on debarring contractors (on MDB debarred list) for purchases using GOJ's funding.

New Procurement Act

- (a) Expedite the update of the Procurement Act and accompanying regulations;
- (b) Finalize the micro, small and medium enterprise (MSME) policy framework to facilitate public procurement participation of this supply community sector;
- (c) Develop legislation/procedures to address for PPPs/concessions;
- (d) PEs' compliance with Procurement Appeals Board's rulings should be mandatory;
- (e) Re-examine fee for services approach to fund NCC;
- (f) Revise Handbook accordingly.

Other Recommendations

- (a) **Ensure that the oversight role of the OCG is not weakened in changes;**
- (b) The capacity of MOF, GOJ's procurement regulatory body, to be built;
- (c) Compare and rationalize the results of this Assessment with other procurement related reports/assessment now in process;
- (d) Expedite implementation of Protected Disclosure Bill (whistleblower legislation);
- (e) A career stream for procurement staff should be created and professional qualifications, e.g. the Chartered Institute of Purchasing and Supply (CIPS) established. Consider findings from the CIPS 2011 report of GOJ's HR procurement capacity/education program to create a GOJ procurement cadre;
- (f) Investigate issues causing cost overruns in construction projects;
- (g) Develop filing protocols for procurement e-documents."

*The author is a Caribbean and British trained lawyer and, currently, the DFID supported Principal Consultant and Advisor to the National Integrity Action of Jamaica. He is a former Contractor General of Jamaica; a former Vice President, Assistant General Counsel and Jamaica Country Corporate Representative for the United States based Kaiser Aluminum and Chemical Corporation – then Jamaica's largest foreign private investor and tax-payer; the founder and former Executive Chairman of Jamaica's largest credit reporting company in the early 90s; and a former 10-year term University of the West Indies Law Director/Lecturer in Corporate, Insurance, Commercial, Criminal and International law. The author served as Jamaica's fourth Contractor General from December 1, 2005 to November 30, 2012, transforming the then 20-year old Independent Parliamentary Commission of the Contractor General into what is now widely regarded as Jamaica's leading and most respected anti-corruption organization. He was consulted by the Parliament of the Republic of Trinidad and Tobago and, separately, by a private sector and civil society group of that country, on the development of the twin-islands' new Procurement Law which was tabled in the Trinidad and Tobago Senate on April 2, 2014. The author has worked, studied and/or resided in 8 Caribbean countries, the United States, Ghana and England.
