



Government of the
Republic of Trinidad and Tobago

**REPORT
OF
THE COMMISSION OF ENQUIRY
INTO THE
CONSTRUCTION SECTOR
TRINIDAD and TOBAGO**

March 2010

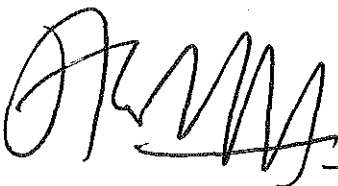
TRINIDAD and TOBAGO

Transmittal of the Report of the Commission of Enquiry
into the Construction Sector in Trinidad and Tobago to
His Excellency Professor George Maxwell Richards,
President and Commander in Chief of the Republic
of Trinidad and Tobago

May it please Your Excellency,

We the undersigned Commissioners, having been appointed under Commissions given on 9 September 2008, 10 December 2008, 20 and 21 May 2009, 14 September 2009, 17 November 2009 and 16 March 2010, to enquire into the Construction Sector in Trinidad and Tobago and to make such observations and recommendations arising out of our deliberations as the Commissioners may deem appropriate, have the honour to submit herewith to Your Excellency our Report.

Dated 29 March 2010



Professor John Uff

Chairman



Desmond Thornhill

Commissioner

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INTO THE CONSTRUCTION SECTOR
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EXECUTIVE SUMMARY

1. The mandate of the Commission is to enquire into particular aspects of the Construction Sector in Trinidad & Tobago, including the practices and methods of UDeCOTT, and to make recommendations and observations (in summary) to promote (a) value for money, (b) high standards of workmanship, (c) free and fair competition and (d) Integrity and transparency. By successive additions, the mandate of the Commission has been expanded to include (e) contractual issues and (f) performance issues in relation to the Cleaver Heights Development Project. This Executive Summary addresses the principal issues dealt with in the Report.

Procurement practices generally: Issue (i)

2. Procurement practices in the public construction sector concern the operation of a number of legal entities which undertake public construction projects on behalf of the Government of Trinidad & Tobago and which have been set up in different ways. These entities are variously referred to as “special purpose companies” or more simply “Government agencies”. They all have in common the objective of freeing them from the constraints which otherwise apply to the undertaking of works or services by the Government by virtue of the Central Tenders Board legislation, which is universally perceived as imposing unnecessary constraints and bureaucracy, leading to delay and inefficiency. While the Central Tenders Board remains in operation as a safety net, its provisions are now very largely circumvented by the Government agencies. The most

prominent of these, dealing with urban development, is UDeCOTT, whose practices and methods of operation are considered separately.

3. The common legal structure which has been adopted for most of the Government agencies is that of a private limited company whose shares are held by the corporation sole. Each agency thus operates in accordance with company legislation through a Board of Directors and Secretary. The activities of the companies are broadly defined and include a wide range of commercial activities. The principal function of each company is, however, to undertake projects on behalf of specific Government ministries pursuant to a contract or arrangement under which the company is paid a fee for what is typically described as “project management”. Through these means (and others) the companies acquire capital with which they operate commercially, employing appropriate staff for the commissions which they undertake.

4. Particular companies which have been the subject of the Enquiry include the National Insurance Property Development Company (NIPDEC), the Housing Development Corporation (HDC), Estate Management and Business Development Company (EMBD), the Education Facilities Company Ltd (the EFCL) and the Rural Development Company of Trinidad & Tobago (RDeCOTT). Most of these have been established only since 2002. NIPDEC, however, has a much longer history, going back to the 1970s; and HDC, while established as a statutory corporation in 2005, replaced the former National Housing Authority.

5. The Commission has examined the procurement practices of these and other Government agencies, particularly UDeCOTT. One notable feature is that each of the agencies operates its own procurement practices and tender rules, which can be seen to differ, sometimes in important respects. No good reason has been advanced for such diversity. While there may be reasons for differences to exist, there ought to be a presumption that rules and procedures of all Government agency companies should follow the same pattern unless good cause exists for adopting different rules. Particular areas in which uniformity would be of advantage include:
- (a) The circumstances in which either open tendering or selective and pre-qualified tendering should be adopted;
 - (b) The circumstances in which sole selective tendering is permissible;
 - (c) Procedures and criteria for assessment of tenders and making recommendations for award.
6. In 2005 the Ministry of Finance issued a standard procurement procedure for State enterprise bodies which was intended to apply to all State Agencies. While steps were taken to promulgate this document with a view to its general adoption, the new procedure was adopted by some agencies and not others. There can be no doubt that a universally applicable standard procurement procedure would benefit the whole public construction industry, including its principal client, the Government. We recommend that the rules should be revised in the light of this report and further attempts made to secure its universal acceptance.

7. There is, in relation to UDeCOTT and potentially in relation to other Government agencies as well, a problem of securing adequate transparency in terms of the applicable procurement rules, particularly dealing with the topics already mentioned. The adoption of a general and universal procedure would greatly aid the achievement of transparency.
8. Another aspect of transparency is the extent to which Government agencies are subject to control and direction of Government or individual ministers. This topic has been examined specifically in relation to UDeCOTT but it applies universally. In regard to a statutory corporation, such as HDC, the statute itself empowers the minister to give instructions. In the interests of good management, as well as transparency, this relationship needs to be clarified and Ministers given an express power to give instructions.
9. Other issues, which concern procurement practices and performance within the public construction sector generally, include broader transparency issues, legal issues (contracts and dispute resolution), management issues, particularly problems of poor performance, and planning and other regulatory issues. These are dealt with later in this summary.

Provisional sums: issue (ii)

10. The use of prime cost sums, provisional sums, nominated suppliers and contractors has been inherited from UK practice, and understandably persists among more senior members of the local construction industry. However, it is also to be noted that current practice in Trinidad & Tobago is both widely varied and has not necessarily kept pace

with developments in UK and other countries with major construction industries. Thus, the use of Prime Cost sums and “nominated” specialist subcontractors chosen by the employer has greatly diminished in the UK, in favour of other practices such as listing of approved companies. This is an advance which is recommended for adoption in Trinidad & Tobago, as is the general acceptance by contractors of full responsibility for the performance of any sub-contractors, whether nominated or not. Provisional sums also continue to be used in Trinidad & Tobago where they are included in contracts to represent incomplete areas of design. This practice is to be deprecated and steps are recommended to create incentives against the use of this practice.

11. The debate on these issues extended to the continued use of Bills of Quantities. It should be recognised that these documents can be used in a variety of ways. Where used, they should not prevent the contract operating as a lump sum contract. Bills of Quantities are also traditionally used for drawing up interim valuations. The alternative use of agreed milestone payments can be simpler and cheaper to operate and should be introduced.

Incomplete designs and variations: Issue (iii)

12. Incomplete designs, design changes, variations, poor supervision and poor management are closely linked to Issue (ii) above and the general subject of management. While some degree of variation to the original work scope can be regarded as inevitable under any substantial construction project, we firmly reject the suggestion (made by NIPDEC) that the letting of contracts with a design known to be incomplete provides any advantage to the employer. Variation should occur only in circumstances unforeseen at the date of entering

into the contract: they should necessarily be rare and a designer who fails to take account of what was reasonably foreseeable at the date of the contract should be held to account for the additional cost of introducing later variation of the work. There should be penalties applying to both designers and contractors for incomplete designs and avoidable variations.

Local v foreign contractors and consultants: Issue (iv)

13. An examination of the comparative performance of local and foreign contractors and consultants gives rise to an initial question of what is meant by a “foreign” contractor or consultant. Does this include overseas contractors operating through local offices or subsidiaries? Is an otherwise local contractor with a registered office abroad to be regarded as local or foreign? The issue must therefore be addressed with caution. It was accepted that the capacity of the local industry, however defined, is limited and that foreign contractors and consultants may have resources and expertise not available locally.

14. If foreign contractors or consultants are to be engaged, it is important that this should not be to the exclusion or detriment of the local industry and that projects undertaken by foreign contractors should include opportunities for training and skill transfers to the local industry. Any comparison between the performance of local and foreign companies is distorted by the fact that foreign contractors have been primarily, if not exclusively, involved in design-build projects, which have generally achieved a much better track record on compliance with time and cost. The comparison also involves consideration of

whether local firms should enjoy a protected sector of the local market, an issue which is considered below in relation to the Government White Paper.

Design-build v Design-tender: Issue (v)

15. The comparison of design-build and traditional design-tender methods similarly involves a comparison for which it is difficult to establish any common base. Some design-build projects in Trinidad & Tobago (notably the International Waterfront Project and the Prime Minister's residence) have been completed on time and budget; while comparable projects carried out on a design-tender basis (the Government Campus Project and Belmont Police Station being two comparable projects) have been the subject of major delay and cost overrun. It is the case that design-build necessarily involves fewer interfaces and therefore potentially fewer disputes. It also seems that design-tender projects often end up with the client bearing the consequences of delay and additional cost, with none of the parties being held to account.

16. Upon examination, however, it is clear that the design-build projects which have found favour in Trinidad to date have involved a particular model of the design-build method which has proved successful when coupled with the undoubted expertise of the foreign contractors involved. What cannot be concluded from the material placed before the Commission is that design-build can be adopted overnight as a means of escaping from the problems of the design-tender method. Thus, while the Commission accepts that the local construction industry should be encouraged to participate in design-build projects, there are many reforms which need to be introduced within the design-tender procedure.

Only when these reforms have been implemented can a proper informed comparison take place. At present it can be said that design-build and design-tender can each have advantages in particular situations.

White Paper on procurement

17. The Government of Trinidad & Tobago introduced a White Paper on proposed legislative reform in the public construction sector in 2005. There is a lively and continuing debate between proponents of the reforms and those, including now the Government, who consider that other and preferable means are available to achieve the laudable objectives of the White Paper, particularly in the achievement of greater transparency. The concerns over the proposed Regulator System embodied in the White Paper are understandable. However, if it is the decision of the Government not to implement these proposals, there should be established some equally effective form of review through the Courts, to be available in appropriate cases. Indeed it is somewhat ironic, in the context of this Enquiry and the Court actions that it has engendered, that UDeCOTT should continue to stand behind their own immunity from judicial review. A relevant question is whether, in regard to UDeCOTT in particular, the degree of oversight which presently exists provides adequate accountability and transparency.

Belmont Police Station

18. In addition to the general enquiry into cost over-runs, delays and defects which is dealt with below, the Commission was invited to examine the Belmont Police Station. This was put forward as a prime example of a relatively simple building, undertaken by

NIPDEC with local designers and contractors and using the design-tender method, in which the delay and cost over-run was such as to call into question the continued use of design-tender or even the competence of the local industry. The Commission was able to undertake its examination with contributions from the designers, the contractor and NIPDEC as the project manager.

19. The project overran in both time and cost to an extent that was unusual for a building involving relatively basic construction and finishes. In the course of the investigation, the Contractor, the Designer and NIPDEC all sought to blame others, including the Client. The root cause of the delay and cost overrun was a design error which should have been detected at an early stage, but was not notified until the job was well under way. There was a series of variations requested by the Client, including the very late addition of air conditioning, and a plethora of management errors in which NIPDEC itself had a part. At the end of the day, no party was held responsible for the poor outcome of the project. The overall conclusion is that such projects can be performed efficiently only if all parties comply with their contractual obligations and additionally show a degree of professionalism that was conspicuously lacking at Belmont.

Cost over-runs, delays and defects: Issue (vi)

20. Many parties contributed material to the enquiry on the reasons for and effect of cost overruns, delays and defective workmanship. Material was provided by the Education Facilities Company Ltd (EFCL), by the Estate Management and Business Development Co. (EMBD), by bodies concerned with housing projects in Trinidad & Tobago, by

NIPDEC and by UDeCOTT. For the most part the Commission received information only from the project promoter. In the case of NIPDEC, however, the Scarborough Hospital Project was addressed also on behalf of the original Contractor, NHIC; and in the case of UDeCOTT their projects were the subject of a number of contributions.

21. EFCL provided information on 20 school projects. Overall cost increases have not exceeded 10%, while delays have amounted on average to 25% of the Contract Period indicating delay to be the greater problem. Among the reasons put forward are design changes and under-measurement in Bills of Quantity, for which the professional Designers should take responsibility; and non-performance by Contractors, both local and foreign, which was partly attributed to non-availability of labour.

22. Data provided by EMBD related first to residential development. Of recent contracts which have been completed by the original Contractor (14 of 19), the average delay amounted to over 30% of the original Contract Period, the predominant cause of delay being given as "inclement weather". EMBD also provided information about agricultural development projects which, whilst strictly outside the terms of reference of the Enquiry, showed the same pattern of delays and causes, to which can be added shortages of material, equipment and labour and variations and access problems. There are said to be no cost overruns.

23. With regard to housing projects in Trinidad, two projects with particular problems were examined. Beverley Hills was a UDeCOTT project which was handed over to HDC

when already in substantial delay and cost overrun. The project was unusual in being located in an area of high crime which had a major effect on the Contractor's ability to make progress. The original Contractor withdrew from the site by consent in 2008. Work is ongoing by the replacement Contractor. Current indications are that delay will extend to four times the original Contract Period and cost will overrun by 100%. While the project is atypical, it raises questions as to the value of undertaking public housing projects under such conditions. The second project was at Real Spring, Valsayn, where the land in question had been sold by the Government at a discounted price to the National Union of Government and Federated Workers (to build subsidised housing for its members). The Union then decided to re-sell the land to UDeCOTT for a housing development at a higher, but still discounted, price. Dr. Rowley had, unsuccessfully, attempted to obtain information as to how the land came to be re-sold in this manner. UDeCOTT subsequently developed a housing estate which was subject to very substantial delays which were attributed to manpower shortages, delays by utilities and shortage of materials.

24. The Commissioners visited and received submissions on two housing projects in Tobago. The project at Blenheim was for 114 houses of which it had been possible to construct only 61 as a result, apparently, of the failure of planners to consider the steep topography of the site. Nevertheless, the cost of the houses actually built had escalated to the point that the total cost was close to the original quoted cost of 114 houses. The site at Roxborough had no such problems but nevertheless the project experienced cost increases of some 40% and delay which more than doubled the construction period. Both

projects had in common serious delays by utility providers (WASA and T&TEC) which, even after the substantial construction delay, left the houses still uninhabitable. Another common feature of the Tobago projects was that building work in Tobago is said to attract a premium of 30% due to difficulties of securing material and labour. It is noted that, contrary to what might be expected, there is no organised system for storage and distribution of construction materials in Tobago.

25. In addition to these housing projects, the attention of the Commission was drawn to a Report commissioned by UDeCOTT in 2005 on six housing projects then under construction. The Report, by CH2M HILL Lockwood Greene, is dated May 2006 and presents a comprehensive professional appraisal of the projects. The report is critical of the performance of all parties involved, including UDeCOTT. In addition, the Commission has made a more detailed appraisal of the housing project at Cleaver Heights. The Commission's findings are summarised below with conclusions as to cost overruns, delays and defective workmanship.

26. For the Scarborough Hospital Project, NIPDEC was appointed Project Manager but with overall control being taken by a Steering Committee and team of officials. The Project was terminated after some two years and then remained dormant for the next three years until a design-build completion contract was let in June 2008 to a Chinese contractor. The original termination was the result of serious disputes between the management team, including NIPDEC, and the contractor. This remains in issue as a result of ongoing arbitration proceedings. The eventual outcome, however, will be a very substantial cost

overrun, in excess of 100%, and more than four years delay for which the Project Management team must bear a major share of responsibility.

27. NIPDEC provided a summary of grounds of delay and cost overrun in respect of a large number of their other projects. These amounted generally to failure by contractors to perform and by consultants to provide adequate and timely design and information. There has been no challenge to this information, but it is to be noted that NIPDEC's account of delays and cost overruns on both the Belmont Police Station and Scarborough Hospital have been seriously challenged by other parties involved, leading to the conclusion that there had been failures of management to which NIPDEC itself had contributed. Issues of management are considered further below.

Practices and methods of UDeCOTT: Issue (vi)

28. Turning specifically to UDeCOTT, this company was set up following a report issued in 1993. The report recommended the formation of a statutory corporation, but it was decided, instead, to form a private limited company wholly owned by the Minister of Finance as Corporation Sole. Mr. Calder Hart was a Director from the start, became Chairman in 2002 and Executive Chairman (combining of the role of Chief Executive Officer) in September 2006. The Commission has seen a number of "*project management*" contracts entered into between UDeCOTT and various ministries under which, in return for management services, UDeCOTT is paid a fee of between 2.5% and 4.5% of the Project cost. In addition to project management UDeCOTT undertakes development projects such as the International Waterfront Project. UDeCOTT now has

substantial assets and is able to raise finance on a commercial basis to fund the projects which it undertakes on behalf of the Government.

29. With regard to procurement practices, UDeCOTT adopted a set of rules in 1995 which were revised in 1998. When the Ministry of Finance procedures were issued in June 2005 it was the intention of the Ministry that these would apply to UDeCOTT and all other Government agency companies. However, whilst some companies adopted the 2005 procedures, others (including UDeCOTT) did not and UDeCOTT continued, to the knowledge of the Government, to use its 1998 rules. There remained doubt as to whether the Government's intention was that the 2005 rules should replace rules which had already been approved. In these circumstances the Commission is unable to conclude, in the absence of a specific directive from the Government, that UDeCOTT was wrong to continue using its existing rules.
30. A particular issue arose as to whether and to what extent UDeCOTT was accountable to Ministers. The Commission has concluded that, while Ministers had the right to give instructions with regard to UDeCOTT's performance under any particular project agreement, instructions as to the manner in which UDeCOTT implemented its procurement rules raises more complex issues and the Commission is not persuaded that, without specific authority, Ministers are entitled so to instruct UDeCOTT. This is in contrast to the position of the Housing Development Corporation where the statute expressly empowered Ministers to give instructions. Introduction of a similar provision should be considered in the case of UDeCOTT and other Government agency companies.

31. It is evident that Mr. Calder Hart, from 2002 onwards and before acquiring executive authority, exercised considerable influence over the affairs of UDeCOTT. From September 2006 Mr. Calder Hart has exercised a dominant role in the company. This has included personal involvement in the appointment of all senior staff, which has engendered a considerable degree of personal loyalty and an almost complete absence of dissent on any issue. This may be contrasted with evidence as to disagreement amongst Board members in 2003. From 2005 onwards there has been no evidence of any disagreement with or dissent from any action proposed or taken by Mr. Calder Hart. From this point at the latest Mr. Calder Hart became the *alter ego* of UDeCOTT and was so regarded by the general public of Trinidad & Tobago, notwithstanding that he became Executive Chairman only in late 2006.
32. UDeCOTT through Mr. Calder Hart adopted a confrontational attitude to those who have taken issue with its methods and practices, particularly the JCC by its current President Mr. Winston Riley. Mr. Calder Hart had a similar fraught relationship with Dr. Keith Rowley, former Minister with responsibility for UDeCOTT, with whom he had particular dealings in 2003 up to Dr. Rowley's removal from office in 2008. There were, from these and other sources, numerous complaints about UDeCOTT's methods and practices the most significant being:
- (i) Excessive and unfair uses of sole selective tendering powers contrary to free and fair competition and transparency.

- (ii) Misuse or manipulation of tender and tender review procedures leading to the inappropriate and potentially corrupt award of contracts.
33. With regard to UDeCOTT's performance as Project Manager on behalf of Government, two sources of investigation have been made available to the Commission. First, in the report by Lockwood Green, a detailed review of the performance by UDeCOTT (as well as other participants) in six housing projects in 2005-2006 has revealed a degree of poor organisation and administration. While this report was over two years old, indications are that most of the criticisms remain valid.
34. The second source of investigation is in two reports prepared by the Commission's appointed expert Mr. Gerry McCaffrey who has raised serious issues concerning financial administration of the Brian Lara Project which are nothing short of scandalous. No proper explanation has been given as to the unwarranted treatment of the contractor, HKL or for the patent lack of proper control and accounting on this project. Furthermore, such events could not have occurred without the knowledge of senior professional staff and members of the Board all of whom should have been aware of the level of irregularity which has been permitted.
35. In the reference above to the debate on the White Paper the question is raised whether the existing procedures involving the Public Accounts Committee, the Central Audit Unit, Ministers and the Cabinet as well as Parliament itself represent sufficient oversight. The

events just recounted demonstrate clearly to the Commission that such oversight has been seriously inadequate.

Five UDeCOTT projects

36. In order to examine further the practices and methods of UDeCOTT, the Commission examined five significant and current UDeCOTT Projects undertaken between 2003 and 2009: the C&E building and the LA Tower (both part of the Government Campus Project), the Academy of Performing Arts, the International Waterfront Project and the Brian Lara Stadium Project. The C&E building was effectively the first major project undertaken by UDeCOTT commencing in October 2002. The first round of tendering, which concluded in August 2003 was, by general consent, flawed in a number of respects. In the course of the first round of tenders a number of factual disputes arose particularly one between Mr. Calder Hart and Dr. Rowley who was then the Line Minister. Dr. Rowley confirmed in evidence that no actual corruption was alleged and we accept Mr. Hart's explanation that mistakes had occurred in an "*attempt to correct the system on the run*". It appears the second round of tendering in 2004 was much more closely controlled and went off without apparent controversy. Ironically, however, Dr. Rowley became embroiled with a secret investigation conducted by the Integrity Commission between 2004 and 2006, apparently after a tip off concerning his role in the tender process. This resulted in the subsequent striking down of the investigation which has rebounded on the Integrity Commission itself.

37. The Ministry of Legal Affairs Tower is the third major building within the Government Campus Plaza. The tendering process commenced in late 2004. The six tenderers included a company called CH Development and Construction Limited (“CH”) which was a recently formed subsidiary of a substantial Malaysian construction company Sunway Construction Bhd (“SunCon”). Initially, the UDeCOTT Board approved the pre-qualification of SunCon but resolved that in the case of a subsidiary company, a Parent Company Guarantee must be provided. CH not SunCon tendered for and, although only the third lowest tenderer, was selected for the contract. A letter of award was sent by UDeCOTT addressed both to SunCon and CH, requesting signature and return. The letter sent by UDeCOTT was received on a fax machine which has been identified as belonging to Mr. Calder Hart, and was passed on to SunCon from the same machine.
38. Subsequently UDeCOTT re-issued the letter of award to CH alone, which had now changed its name to Sunway Construction Caribbean Limited. The Parent Company, SunCon, wrote a letter at the request of UDeCOTT which clearly did not constitute any proper guarantee of the performance of the renamed subsidiary company. Various breaches of UDeCOTT’s tender rules have been identified on behalf of JCC. However, the primary matters of concern arising from the award of the MLA Contract to the renamed CH company are that (i) no explanation has been given as to why UDeCOTT failed to require a proper Parent Company Guarantee, in disregard of its own earlier resolution; and (ii) no proper explanation has been given for the initial letter of award being received on and being sent on from the fax machine of Mr. Calder Hart.

39. Evidence was subsequently given to the effect that two of the Directors of CH and SunCon were related to the Malaysian-born wife of Mr. Calder Hart. This evidence is denied on behalf of Mr. Calder Hart who has previously given sworn testimony to the contrary. The Commission, not being a court of law, and not having the procedures available to a court of law in relation to such a serious matter, has declined to seek to resolve this issue or to make a finding, but records the evidence which has been presented.
40. The Academy of Performing Arts comprises two iconic buildings, the Southern Academy being in San Fernando and the Northern Academy now forming a striking feature on the southern side of Queen's Park Savannah, Port of Spain. The project is controversial in being funded by an inter-Governmental loan with the Government of China in the sum of US \$100m, both buildings being constructed pursuant to a single design-build contract with the Shanghai Construction Group. Genivar was appointed Project Manager. Both buildings have been subject to some delays; and claims for additional payment are anticipated but have not yet materialised. The Northern Academy was opened in November 2009, in time for the Commonwealth Heads of Government Meeting.
41. The International Waterfront Project, which was also project managed by Genivar, was let after a limited design competition to the French company Bouygues International. The project was initially for one office block and an hotel for which the appointed operator is Hyatt. The project was enlarged to include a second identical tower block and

the fit-out and furnishing of the office blocks. The project overall has been completed substantially to time and budget and is generally seen as reflecting credit on all parties involved and on the design-build procedure adopted.

42. The Brian Lara Academy Project, by contrast, has been commissioned as a series of separate packages with design work proceeding in parallel with construction, the packages being let on a different bases. The project was initiated in 2004 with the objective of achieving completion by early 2007 in time for the ICC Cricket World Cup Tournament. UDeCOTT appointed Turner Construction International through their local subsidiary TAL as Project Managers. TAL employed international architects and engineers as sub-consultants for the design of the Stadium, which was intended to be of world-class status.

43. Early contracts were let on an intended “fast track” basis for earthworks, piling, the pitch and the Stadium. By early 2006, however, a number of major problems had begun to emerge. Difficulties were encountered in obtaining bids for the remaining work packages. Revised cost estimates indicated that the project was now running some 50% over budget. UDeCOTT was in dispute with TAL and the sub-consultants. Most important, however, was that time was rapidly running out to achieve the objective of completion by early 2007. Between August and September 2006 UDeCOTT, together with TAL, took a bold decision to award a contract for the whole of the remaining works to HKL at a “guaranteed not to exceed” price of \$379m with a handover date of February 2007. A similar proposal had been submitted in May 2006 but was not then brought to a

conclusion and the HKL proposal was accepted only on 2 October 2006 on the terms of HKL's bid letter dated 22 August 2006.

44. A formal contract was subsequently placed, but it is clear in retrospect that the decision to award the contract to HKL was deeply flawed in that (i) the ICC had already announced, as a result of the delays, that the World Cup event would not take place at the Stadium; (ii) significant parts of the design were incomplete making it virtually impossible that the work could be completed either on time or within the guaranteed price; (iii) UDeCOTT accepted terms proposed by HKL which were (at least as interpreted by UDeCOTT) seriously disadvantageous to the Government and unreasonably favourable to HKL.
45. As the work proceeded, the original completion date disappeared without trace. Progress on the project deteriorated and on occasions virtually ceased. UDeCOTT, for reasons that remain unexplained, commenced and persisted in making advanced payments to HKL which greatly exceeded the value of work performed or materials procured. Partial repayments were effected by deduction from payment certificates in favour of HKL. However, detailed investigation by experts appointed to assist the Commission, Acutus, established serious inconsistencies in UDeCOTT's records both of sums paid and repaid.
46. As a result partly of disputes with TAL and their designers, the steel canopy structure, which has now been substantially erected, is grossly overdesigned and has in turn given rise to constructional problems. A much simpler and cost effective design could and should have been adopted. TAL took issue with UDeCOTT's treatment of HKL,

particularly the sums being advanced to them. TAL also advised that the HKL contract should be terminated. UDeCOTT rejected TAL's advice and they became sidelined and subsequently replaced by Genivar. The project is now at a virtual standstill with neither Genivar nor UDeCOTT apparently able to find an effective solution. UDeCOTT's own independent expert, Arun Buch has described the project as a "fiasco". It represents a major failure of management on the part of UDeCOTT.

Time and Cost Overruns on UDeCOTT projects

47. Information has been reviewed on eight projects managed by UDeCOTT including those above. On the credit side, the Prime Minister's residence and the International Waterfront project have substantially been completed to time and budget with no information on defects. The Performing Arts Academies have each been subject to substantial delays of some months. Additional costs are anticipated but no information is available as to claims, nor as to any defects. The Northern Academy in particular has now been completed to a high standard. All these projects were carried on the basis of design-build.

48. The Chancery Lane complex in San Fernando was also a design-build contract undertaken by a local "international" contractor. The project has been successfully completed but with increased cost of some 40%. A major part of the increase, however, is attributed to owner variations and the cost increase against the original work-scope is around 17%. This represents a favourable cost outcome in comparison to other successful projects.

49. UDeCOTT's design-build projects should be compared with design-tender projects, the largest of which has been the Government Campus Project. The first of the packages within this complex was the Customs & Excise building which, after an aborted initial tender process, was awarded to NHIC with TAL acting as Project Managers for the whole project. The C&E building was subject to very substantial delays, well in excess of two years, effectively doubling the contract period. Cost increases, however, were of a lower order, being approximately 13%. Overall the whole project has been subject to delays in excess of two years but with cost increases of approximately 11%.
50. A controversial aspect of the delay was the fact that the C&E building contractor effectively controlled access to other parts of the project. This was a management error which resulted in NHIC having to be "bought off" as part of a settlement deal. Overall, none of the Contractors, including NHIC, has been held to account for any part of the huge delay which has occurred. This appears to be typical of other projects in Trinidad & Tobago. Also of note is that TAL has been kept in post while having been removed from the Brian Lara Project.
51. Finally, two projects were reviewed which represent a serious downside of UDeCOTT's performance both in terms of time, cost and quality of work. The Brian Lara Project has suffered massive delays. Instead of achieving completion in early 2007 as promised, the project is now drifting out of control with no predictable completion date. Costs have likewise escalated out of control and are now predicted to exceed \$700m as against the

initial budget of \$272m. The final cost of completion, in whatever form is chosen, cannot be predicted at the present time.

52. The other project which has run into serious problems of time and cost is the modest project for a new financial complex in Tobago. There was nothing controversial about the project, which required no more than elementary management skills. The project was planned as a refurbishment and reconstruction of an existing building. Only after piling was already well under way was it discovered that the original building would have to be demolished and reconstructed. No explanation was given for the failure to discover the true state of the existing building. However, having decided upon its demolition, the opportunity was taken to redesign and enlarge the building, which has necessarily resulted in a substantial cost increase to over three-fold. However, instead of terminating the earlier contract and re-tendering the work, the additional cost has been negotiated with the Contractor in place. It is clear that the original contract should have been terminated and the extra cost determined by competitive bidding. Thus, while substantial delay and increased cost were inevitable, a large part of both the delay and additional cost is directly attributable to poor management of the project.

Cleaver Heights

53. These issues were added to the Terms of Reference and required an examination, first of the contract process, including the tendering, the award and subsequent valuation of the works; and secondly, issues of delay, cost overrun and defects, including planning and regulatory matters. With regard to the procurement and award of the Contract, this

occurred shortly before the transition from the National Housing Authority to the new statutory Housing Development Corporation. There was uncertainty as to the applicable procurement procedure, particularly as to whether it was intended that the Developer should also finance the construction work. The contract eventually placed in May 2005 did not require NHIC to provide finance. No issue was raised at the time and it was only in the course of the Enquiry that it was first suggested that this was contrary to earlier Government policy. However, the Commissioners are satisfied that there was no intention that the Developer should provide finance and no contract had ever been placed on this basis by the National Housing Corporation.

54. A more serious anomaly, which appears to have led to the decision to extend the Commission's Terms of Reference, was that the contract sum was overstated by some \$10m. The source of that error has been traced to the National Housing Authority, and the failure to detect it remains a matter of great surprise. There is, however, no doubt that the error was detected during the course of drawing up valuations for the work in progress. There was then a deliberate attempt by employees of NHIC to manipulate the figures included in such valuations, which might have resulted in the incorrect figure being paid out. Even when the error became known to HDC there was some bureaucratic obstacle which prevented the figures being corrected. The errors were not, as they should have been, corrected by formal notice to the Board. However, no additional moneys have been paid out as a result either of the original error or the subsequent manipulation.

55. In the course of the investigation into the Cleaver Heights project, other anomalies came to light. NHA did not, as their rules required, draw up a formal contract but relied instead on an exchange of correspondence. This was a comparatively minor breach, particularly against the background that many hundreds of other housing contracts are said to have been carried out without a formal contract: this was indeed a rule more honoured in the breach. Much more serious, however, was the complete failure of the contract, or the antecedent tender process, to deal with the question of land tenure. Not only is this fundamental to the transfer of title to individual dwellings, but the lack of title meant that HDC, by 2009, had paid out well over \$100m for the housing and infrastructure works without possessing any security. This was a gross oversight by any standards and calls for urgent action to rectify the position on this and any other projects where the same applies.
56. With regard to planning and other statutory approvals, the process had been started in due time by the developer, but became stalled and was never followed through to a conclusion. There was an assumption that all would be regularised retrospectively. There was also a substantial change to the lay-out of the site which should have been, but was not, approved in advance. Major delays resulted from the need to deal with utilities particularly WASA and T&TEC, both of which services were to be provided at the cost of HDC. This included extensive provision for sewerage of the site and the need to install electrical services in underground ducts.

57. With regard to defects, while there were numerous individual complaints about the dwellings, there was no indication that these would not be attended to as part of the contractor's maintenance obligations; and it is to be borne in mind that the dwellings were intended to be low cost. More serious was the complaint that the site itself, where excavated, had not been provided with appropriate protection by planting or other means. This was clearly excluded from NHIC's contract and the fault in not dealing with it lies with HDC.
58. Overall, there was a delay in excess of two years, although a number of the dwellings were already occupied. There is no indication that HDC will seek to hold the contractor to account and it appears to be accepted that some extension of time would be merited together with payment of additional costs. Part of the delay resulted from variations which, with other factors, has led to an increase in the contract price of some 17%. Overall this contract exhibited many of the problems and failings already documented in relation to other housing projects and was typified by a general expectation that, despite clear breaches of established procedure, there would be no holding to account.

General Issues

59. The Enquiry has examined some general issues pertaining to the public construction industry arising out of the particular matters investigated. First the Commission received a number of submissions dealing with transparency issues. It is accepted that corruption is a problem of serious proportions in Trinidad & Tobago and that the principle of transparency is an important means of combating corruption, to which the construction

industry is particularly prone. The Government White Paper of 2005 proposes important counter-measures: the decision of the Government not to implement the White Paper carries with it an implicit obligation to put equally effective means in place to prevent corruption.

Contracts and disputes

60. The first requirement for any construction project is a clear and enforceable contract which covers all aspects of the project. Fundamental to this is the choice of standard form. While the numbers of such forms in circulation is, fortunately, limited, there is a need for greater standardisation. There is no reason why one or more bespoke forms of contract should not be produced for Trinidad & Tobago, based on published standard forms, and incorporating such amendments and special conditions as are considered beneficial. Such issues should be debated across the whole industry. In the absence of other forum, the Cabinet Construction Sector Oversight Committee should pursue this task.

61. Contracts, coupled with the general law, also regulate the resolution of disputes. In this regard, the construction industry has need of procedures capable of quickly and economically disposing of actual or potential disputes. While adjudication has made considerable inroads in a number of countries, its introduction in Trinidad would require first a quick and reliable means of enforcement through the Court system. We do not believe that such a system yet exists. More formal disputes generally go to arbitration. In this case there is a need for a modern arbitration law which respects party autonomy and provides for finality of awards with only very limited access to challenge. The

modernisation of arbitration law and dispute resolution generally may be seen as part of the development of Port of Spain as a commercial and financial centre for the Caribbean, which would bring many benefits to Trinidad & Tobago.

Holding to account

62. We have observed, in the context of contractual issues as well as regulatory matters that there exists a culture of non-enforcement which appears to operate on a mutual basis. Contractors seem reluctant to issue proceedings for payments overdue or to enforce claims and employers in turn refrain from enforcing time obligations which are routinely not complied with. In regard to delay issues, the point was demonstrated by the fact that no witness or representative appearing at the enquiry was able to quote any case in which a contractor had actually been required to pay or had been debited with liquidated damages. In the wider field there was a tacit acceptance that regulatory approvals, particularly as to planning, were rarely given in a final form before the work was performed, this coupled with an expectation that such approval would be forthcoming retrospectively.
63. At the same time we had the impression that one contractor who made a habit of enforcing contractual rights, if necessary by formal proceedings, was regarded as being “confrontational”. Such an attitude does not sit well with the careful drawing up of commercial agreements; nor with competitive tending, which is carried out on the basis that contracts will be enforced. It is also inconsistent with the clear duty of directors of companies and public bodies to enforce the contracts they negotiate and enter into. If there is a desire to promote the timely and proper performance of public sector contracts,

this will only be achieved by holding parties to account for any breaches of contracts freely entered into; as well as enforcement of legal duties in regard to regulatory matters. Enforcement must also be assured through efficient and timely processes of courts and other tribunals.

Project management

64. Given the numbers of “project management” assignments undertaken by UDeCOTT, NIPDEC and other State agencies, as well as a number of private companies, it is relevant to examine what service is intended and what is delivered. It seems there is no clear definition of what is meant by project management, or of what it is intended to include. More fundamental, it does not appear that the actual role carried out by UDeCOTT or NIPDEC can properly be described as “project management” at all. Their function appears to concentrate on setting up projects including, where appropriate, the arrangement of finance. They oversee the placing of contracts, often including the provision of project management services by others. Where UDeCOTT or NIPDEC have undertaken a significant management role, there have on occasions, been serious problems (the same may apply to other State agencies). Conversely, where management has been left to professional project managers the result has usually been much more satisfactory.

65. There is a need to re-define the role that State agencies perform. There is no reason why they should not be paid a commercially agreed fee for the services they do perform. What is unacceptable is that they should take on a contractual role for which they have no

aptitude or track record. Our conclusion is that State agencies should not purport to take on project management tasks and should re-define the services they do intend to provide.

Regulatory matters

66. With regard to regulatory matters and utilities, it has already been noted that non-compliance with procedure requirements is almost universal, consistent with the laissez-faire attitude already referred to. To achieve better levels of compliance will require additional resources to be put into the regulatory authorities. Subject to this, however, there are models which can be adopted from other jurisdictions to promote much higher levels of compliance. With regard to utilities, they seem to operate as a law unto themselves, frequently being the cause of delays including housing estates built at great expense which remain uninhabitable because of the inability to provide basic services. This aspect should figure high in any list of priorities to improve the delivery of construction services.

Value for Money

67. This requires that corruption at all levels should be avoided; and that construction projects should be planned and executed in an appropriate and efficient manner so that only a proper price is paid for the works. With regard to the avoidance of corruption we have examined a number of projects undertaken by different Government agencies, although this has concentrated on the activities of UDeCOTT. In a number of instances issues have arisen which, while no actual corruption has been established, may indicate the existence of corruption or potential corruption. Not least of these is a suspicion (in the absence of firm evidence) that on several and possibly many occasions influence has

been brought to bear on decisions as to the placing of contracts. This may be indicative of a cultural factor which will be difficult to change. However, it should be stated that the procedures and practices leading to the award of contracts by public bodies should be transparent and fair beyond question, otherwise the tax payer does not get value for money.

68. With regard to the efficiency of performance of construction projects, a number of projects have been identified which, in terms of output cost have achieved value for money, most of these being placed on a version of the design-build method. However, other projects placed on a design-tender basis have similarly achieved good value for money. At the same time, a number of projects have been examined which have obviously failed in management terms. While such projects will fall far short of achieving value for money, the proper management of a failure, once identified, remains important. In a number of projects it has become clear that, in the interests of value for money, the contract should be terminated, yet no such action has been taken.
69. The key to achieving value for money is good management, both by contractors and on behalf of the employer. Value for money also involves building up and enhancing the skills of the local industry so as to be better placed to apply their skills. Where foreign contractors are brought in, there is a need to ensure that value is also added to the skills of local practitioners.

70. The need for holding parties to account where projects run into delay has been stated already. There remains an assumption that in public sector contracting the Government will pay or will extract no penalty for delay or other breaches by contractors, designers and other professionals. This attitude needs to be changed fundamentally. Forms of contract which have been in use for many years lay down detailed provisions as to responsibility for delay. Enforcement is in the hands of managers on behalf of the employer. Just as contractors should be paid sums properly due pursuant to the Contract, so they should account for the cost of delay in respect of which they are culpable. All parties need to be held to account in the interests of value for money for the tax payer.

High Standards of Workmanship

71. While some of the recent high profile projects which have achieved high standards have been carried out by foreign contractors, we have not found any pattern of higher standards being achieved by foreign contractors as compared to local contractors or workers. There is no doubt that the local workforce can produce high standards given appropriate supervision and management. In some cases, notably low cost public housing, the need is not for the highest standards but for reasonable and cost effective standards. In this area there are concerns as to the standards of workmanship and finish. However, in general we believe that appropriate standards are achievable and are usually achieved both by local contractors and foreign contractors.

Free and Fair Competition

72. While this is a laudable objective, it means, in the eyes of some at least, the provision of a quota or subsidy in favour of local contractors and consultants as against foreign competition. This was proposed in the White Paper but is no longer accepted by Government. The question whether and when foreign contractors should be brought in and on what term is a matter which should be judged, not simply in terms of immediate cost, but in a wider context of maintaining and enhancing the local industry in the long term interest. While we would not support any general subsidy or quota, there may well be economic justification for protecting new and relatively immature industries within Trinidad & Tobago.

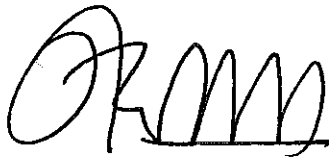
Integrity and Transparency

73. We commend the advice and recommendations of the Transparency Institute and of Transparency International which was generously provided to the Enquiry. Integrity and public service should be an absolute requirement and this applies to directors and senior officials of UDeCOTT and other Government agencies. UDeCOTT and its directors and officials appear to have created a level of public suspicion by various actions, the majority of which may be blameless. Nevertheless, they indicate that UDeCOTT and other Government agencies should in the future ensure that their actions are such as to generate a much higher level of public confidence in their integrity.

We confirm the Executive Summary above, the Report which follows
and the Recommendations at Section 36 of the Report

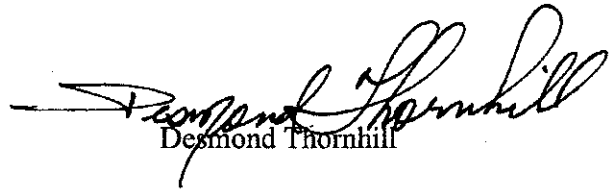
Dated this 29 day of March 2010

Port of Spain, Trinidad



Prof John Uff CBE QC

Chairman



Desmond Thornhill

Commissioner



Judith Gonzalez

Secretary to the Commission

Acknowledgements

The Commissioners would like to express their appreciation of the support and assistance they have received from the following persons during the course of the Enquiry. First, Ms. Judith Gonzalez took over as Secretary before the first working sessions of the Enquiry and has remained the focal point for receipt and dissemination of the many submissions and documents provided to us. She ensured that all parties to the Enquiry, as well as the Commissioners, were provided with the appropriate documents at all times and, in doing so, managed a large team at the Winsure Building engaged in copying and binding documents throughout the 9 weeks of hearing. We are grateful for her good humour and efficiency and for her steadfast confidence in times of crisis. She was assisted by the list of persons set out at Annex 2 to whom we also extend our thanks and appreciation.

We have been ably and efficiently served by our appointed Counsel, led by Seenath Jairam SC who provided timely advice and legal services throughout the Enquiry, ably assisted by Junior Counsel, Garvin Simonette, Ian Roach and Kerwyn Garcia, instructed by Mrs. Marvo Harper and Mrs. Doril Ann Lamont of M K Harper & Co, Attorneys. For the smooth administration of the Enquiry we express our thanks to Mr. Hamid O'Brien; and for preparing accurate and timely transcription of the proceedings we are grateful to Ms. Kathleen Mohammed and her team

We thank all the parties who participated in the Enquiry, many of whom instructed attorneys at their own expense. They have allowed us to gain a wide appreciation of the matters upon which we were to enquire. Lastly, we thank the press and media who provided wide coverage to the Enquiry and thereby helped to generate the level of interest which has motivated people to come forward with their contributions.

We trust that our Report fairly and properly reflects the material which has been presented to us and that the conclusions and recommendations of the Report will be of assistance to the Public Construction Sector of the Construction Industry in Trinidad & Tobago in years to come.

List of Annexes

- Annex 1 Commissions issued by H E the President (para 1.5)
- Annex 2 List of persons appointed to assist the Commissioners (para 1.6)
- Annex 3 List of parties and their representatives (para 1.7)
- Annex 4 Procedural Orders issued by the Commission (para 1.7)
- Annex 5 List of submissions and statements received by the Secretariat (para 1.8)
- Annex 6 List of persons giving sworn evidence to the Commission (para 2.6)
- Annex 7 List of persons taking part in “round table” sessions (para 2.7)
- Annex 8 Documents concerning Salmon letters (para 2.18).
- Annex 9 Discussion paper on Issue (ii): use of Provisional sums etc (para 4.1)
- Annex 10 Discussion paper on Issue (iii): incomplete designs etc (para 5.1)
- Annex 11 Discussion paper on Issue (vi): local v foreign contractors etc (para 6.1)
- Annex 12 Discussion paper on Issue (v): design-build etc (para 7.1)
- Annex 13 List of UDeCOTT board members from 1993 to date¹ (para 12.4)
- Annex 14 EFCL summary² of cost overruns and delays to school projects (para 18.1)
- Annex 15 Financial account for Government Campus Project³ (para 23.17)

¹ See 1st Statement of N Rampaul

² Submitted 25 March 2009.

³ UDeCOTT’s presentation on GCP PK6, MLA Tower, Annex 13.

List of acronyms

APETT	Association of Professional Engineers of Trinidad & Tobago
BIR	Board of Inland Revenue
CEC	Certificate of Environmental Clearance
C&E	Customs & Excise
CTB	Central Tenders Board
ECCE	Early Childhood Care & Education (Centre)
EFCL	Education Facilities Company Limited
EMA	Environment Management Authority
EMBD	Estate Management & Business Development Company Limited
EPSDCL	East Port of Spain Development Company Limited
GCP	Government Campus Plaza
GORTT	Government of the Republic of Trinidad & Tobago
HDC	Housing Development Corporation
HKL	Hafeez Karamath Limited
IQS	Institute of Quantity Surveyors
ISTT	the Institute of Surveyors of Trinidad & Tobago
JCC	Joint Consultative Council (of the Construction Industry)
MLA	Ministry of Legal Affairs
MOF	Ministry of Finance
MSD	Ministry of Social Development
NHA	National Housing Authority
NHIC	NH International (Caribbean) Limited
NIPDEC	National Insurance Property Development Company Limited
NMTSC	National Maintenance, Training & Security Company
PAL	Planning Associates Limited

RDeCOTT	Rural Development Company of Trinidad & Tobago
SWMCL	Solid Waste Management Company Limited
TTCA	Trinidad & Tobago Contractors Association
TTIA	Trinidad & Tobago Institute of Architects
TTSP	Trinidad & Tobago Society of Planners
T&TEC	Trinidad & Tobago Electricity Commission
UDeCOTT	Urban Development Corporation of Trinidad & Tobago
WASA	Water and Sewage Authority

**REPORT OF THE ENQUIRY INTO THE
PUBLIC CONSTRUCTION SECTOR,
TRINIDAD and TOBAGO**

By the Commissioners

Professor John Uff CBE QC (Civil Engineer and Barrister)

Desmond Thornhill (former Perm Sec, Ministry of National Security)

Kenneth Sirju (Registered Civil and Structural Engineer)

Israel Khan SC (resigned 11 August 2009)

Secretary to the Commission

Mrs Ida Eversley (resigned 1 December 2008)

Ms Judith Gonzales, Attorney at Law

ENQUIRY INTO THE CONSTRUCTION SECTOR, TRINIDAD and TOBAGO

PART I THE PUBLIC CONSTRUCTION SECTOR

1. The Enquiry

1.1. By Commission dated 9 September, 2008, His Excellency Professor George Maxwell Richards, President of the Republic of Trinidad & Tobago, acting on the advice of the Cabinet pursuant to section 2 of the Commissions of Enquiry Act, Chap 19:01, appointed Commissioners to enquire into the construction sector in Trinidad and Tobago. The four Commissioners so appointed are Kenneth Sirju Esq., a Civil and Structural Engineer, Desmond H. Thornhill Esq, former Permanent Secretary Ministry of National Security, Israel B. Khan, Esq, Senior Counsel and Professor John Uff CBE QC as Chairman. The Commission directed that a quorum should consist of two (2) Commissioners.

1.2. The Terms of Reference of the Commission are to enquire into:

- (i) The procurement practices in the public construction sector;
- (ii) The effect of the use of provisional sums, prime cost sums, nominated suppliers and nominated contractors in construction contracts in the public sector;
- (iii) The effect of incomplete designs, design changes, variations, poor supervision and poor management on the cost and delivery of construction projects in the public sector;
- (iv) The performance of local and foreign contractors and consultants on public sector projects;
- (v) The effectiveness of the turnkey approach, also called the design and build approach, for the delivery of public sector construction projects as compared to the traditional design and tender approach;
- (vi) The reasons for and the effect of cost overruns, delays and defective workmanship in public sector construction projects.
- (vii) The existence of price gouging and profiteering in the public construction sector; and

(viii) The procurement practices and methods of operation of Urban Development Corporation of Trinidad and Tobago Limited (UDeCOTT).

1.3. The Commission is required to make recommendations and observations to ensure that:

- (i) With respect to public sector construction projects and the procurement practices and methods of operation of UDeCOTT, tax payers get value for money;
- (ii) The delivery of projects and the highest standards of workmanship are achieved and maintained;
- (iii) There is free and fair competition, full participation and access for all citizens in the public procurement process; and
- (iv) Integrity and transparency in the public procurement practice are assured.

1.4. By Commission dated 10 December, 2008, the Terms of Reference were altered to include issues concerning Cleaver Heights Development Project as follows:

- (i) The procedures, practices and procurement processes employed by the Trinidad and Tobago Housing Development Corporation in the award of the contract to NH International (Caribbean) Ltd to develop the land and infrastructure and to build 408 houses at Cleaver Heights Development Project (“the Cleaver Heights Development Project”);
- (ii) Whether the procedures, practices and procurement processes employed in the award of the Cleaver Heights Development Project were in compliance with the tender rules and/or other rules, regulations, procedures, practices and processes of the Trinidad and Tobago Housing Development Corporation and consistent with the procedures, practices and procurement processes employed in the award of similar types of contract;
- (iii) The nature and consequence of the contractual arrangements;
- (iv) Whether the Cleaver Heights Development Project was a fixed price contract and if so, what was the contract price;
- (v) Whether there was a variance between the negotiated price and the contract price and if so, the reasons for/or the circumstances which caused and/or contributed to such variance; and

(vi) The circumstances which resulted in a variance in the costs incurred in the execution of the Cleaver Heights Development Project as evidenced in Valuation Report No. 38 for the period ending August 2008.

1.5. By Commission dated 21 May 2009, the Terms of Reference were further altered to include additional issues concerning the Cleaver Heights Development Project as follows:

- (1) Whether the procurement process for, and commencement and/or execution of, the Cleaver Heights Development Project was in accordance with the statutory and regulatory requirements and/or approvals applicable to the Cleaver Heights Development Project and/or projects of a similar nature;
- (2) The consequences and/or implications of the findings at (1) above;
- (3) Whether any specific agency, entity, body and/or contractor can be identified as responsible for the consequences and/or implications at (2) above;
- (4) Whether the Cleaver Heights Development Project was implemented in accordance with Cabinet approved guidelines for joint venture projects;
- (5) The consequences and/or implications of the result of the findings at (4).

Further that the terms of reference in paragraphs 1(i) through 1(vii) and paragraphs 2(ii) through to 2(iv) of the Terms of Reference dated 9th September 2008, apply to the Cleaver Heights Development Project. Copies of the Commissions are contained in **Annex 1**.

1.6. The Enquiry was directed to be held in public, subject to the Commissioners being entitled to sit in private or to exclude particular persons for the preservation of order, for the due conduct of the Enquiry or for any other reason. Mrs Ida Eversley was appointed Secretary to the Commission. In November 2008 Mrs. Eversley resigned through ill health and by Instrument of appointment dated 28th November, 2008, Ms. Judith Gonzalez who continued as Secretary to the conclusion of the Enquiry. The Attorney General acting on behalf of His Excellency The President appointed a team of counsel to the Enquiry, led by Mr S Jairam SC. A full list of persons appointed to assist the Commissioners is set out at **Annex 2**.

- 1.7. Meetings with the Secretariat took place on 9 and 10 September 2008, as a result of which letters were sent to potentially interested parties and advertisements were placed in local newspapers soliciting expressions of interest. Interested parties responded and provided written submissions and documents to the Secretariat. A full list of parties who took part in the Enquiry and their representatives appears at **Annex 3**. A further meeting with the Secretariat was held on 8 December and a procedural meeting with all interested parties on 9 December 2008. On 10 December 2008, a public meeting was held at which the Chairman of the Commissioners announced decisions on a number of matters which had been addressed by the parties, including the future timetable for the Enquiry and the order in which the Terms of Reference would be dealt with. Procedural Orders for the Enquiry were issued on 9 January 2009 and appear as **Annex 4**. Particular orders and directions were issued from time to time during the course of the Enquiry, including orders for disclosure of documents.
- 1.8. Numerous submissions, statements of evidence and documents were received by the Secretariat from December 2008 and continuing throughout and following the Enquiry hearings. A list of all the submissions and statements received by the Secretariat is set out in **Annex 5**.
- 1.9. Public hearings of the Enquiry took place between 12 January and 22 May 2009, spread over three sessions. A fourth public hearing was to take place between 7 and 11 September, 2009, to deal primarily with the issues arising from the second extension to the Terms of Reference. For reasons set out below that hearing was cancelled shortly before 7 September and those issues were dealt with at a final hearing from 7 to 10 December 2009.
- 1.10. The Commissioners announced before the start of the hearings that, in addition to hearing evidence and submissions, they would be examining specific projects in relation to which particular issues had been raised, and generally in relation to time and cost over-runs. The list of projects was modified after discussions with the parties the final list being:
- (i) Belmont Police Station
 - (ii) Government Campus Plaza (GCP), Customs & Excise (C&E) Building

- (iii) GCP, Ministry of Legal Affairs (MLA) Tower
- (iv) GCP, Board of Inland Revenue (BIR) Tower, Ministry of Social Development Building and the Multi-Storey Car Park.
- (v) National Academy for the Performing Arts (North and South)
- (vi) Brian Lara Cricket Academy.
- (vii) Prime Minister's Residence.
- (viii) International Waterfront Project.
- (ix) Chancery Lane Complex Project.
- (x) The Secondary Schools Programme.
- (xi) Housing projects: Trinidad
 - (a) Beverly Hills Apartments.
 - (b) Real Spring Housing Development.
- (xii) Housing projects: Tobago
 - (a) Blenheim Land Development.
 - (b) Roxborough Land Development.
- (xiii) Other Tobago Projects:
 - (a) Scarborough Hospital.
 - (b) Scarborough Financial Complex
- (xiv) In addition, the Commission examined other projects referred to in the following submissions:
 - (a) NIPDEC submission dated 5 January 2009.
 - (b) Housing Development Corporation submissions dated 6 January 2009.
 - (c) Estate Management & Business Development Co submissions dated 13 March 2009.
 - (d) Ministry of Education, Secondary Schools Programme, submission dated 16 February 2009.
 - (e) Education Facilities Company, Early Childhood Care Facilities.

1.11. The Commissioners visited and inspected the following projects:

- (i) National Academy for the Performing Arts (North) (14 January 2009).
- (ii) Brian Lara Stadium (20 January 2009).
- (iii) Olera Heights Housing Project (20 January 2009).
- (iv) National Academy for the Performing Arts (South) (20 January 2009).
- (v) International Waterfront Project (30 January 2009).

- (vi) Scarborough Hospital, Tobago (2 February 2009).
- (vii) Blenheim Land Development, Tobago (2 February 2009).
- (viii) Scarborough Financial Complex, Tobago (3 February 2009).
- (ix) Roxborough Land Development, Tobago (3 February 2009).
- (x) Government Campus Plaza, Customs & Excise Building, BIR Tower, Central Plaza and MLA Tower (25 March 2009).
- (xi) Cleaver Heights Development Project (21 May 2009)

1.12. On or about 4 September 2009 it was made known to the Commissioners that none of the three Commissions dated 9 September 2008, 10 December 2008, and 21 May 2009, had been gazetted as required by section 16 of the Commissions of Enquiry Act and that in consequence the Commission was not properly constituted. For this reason the hearing fixed to commence on 7 September was cancelled.

1.13. Subsequently a Bill was introduced into the Trinidad and Tobago Parliament to provide for the retrospective validation of proceedings and immunity from proceedings. The Commission of Enquiry (Validation and Immunity from Proceedings) Bill 2009 was passed by Parliament and assented on 3 November 2009 as Act No 13 of 2009, thereby validating the proceedings which had taken place to that date.

1.14. On 4 November 2009 the Secretary to the Commission gave notice to all parties that the Commissioners intended to hold further hearings of the Enquiry commencing on 7 December. Those hearing took place from 7 to 10 December 2009, at the end of which the oral hearings of the Enquiry were formally closed. Further written submissions were received up to 17 March 2010.

2. The Enquiry Hearings

2.1. At the procedural meeting on 9 December 2008, the intended programme of hearings was confirmed. It was further announced that the first hearing of the Enquiry would commence with issues (i) Procurement practices in the public construction sector, and

issue (viii). The procurement practices and methods of operation of UDeCOTT. It was stated that the Commissioners would issue directions during the first hearing with a view to dealing with all or most of the issues within the Terms of Reference during the first hearing, but with matters not so dealt with being stood over to a second hearing.

- 2.2. The hearings of the Enquiry took place at the Winsure Building, Richmond Street, Port of Spain. The first hearing commenced on 12 January and continued to 6 February 2009. The second hearing was conducted from 23 March to 7 April 2009. The third and intended final hearing commenced on 11 May and (with an interruption of two days) continued to 22 May 2009. At the conclusion of the third hearing, directions were given for service of further written submissions, to be provided on or before 31 July 2009. On the penultimate day of the third hearing the Commissioners were informed of the further extension to their Terms of Reference and directions were given for a fourth hearing commencing on 7 September 2009. For reasons set out in paragraph 1.12 above the hearing on 7 September was cancelled and the final hearing of the Enquiry took place from 7 to 10 December 2009.
- 2.3. By letters to the Secretariat and in further oral submissions delivered on 9 December 2008, Attorneys and Counsel for UDeCOTT sought rulings that all evidence and contentions critical of UDeCOTT should be served and that UDeCOTT should have a reasonable opportunity to consider the same before they were required to respond in the Enquiry. The Commissioners were unable to accede to this application, primarily because the Enquiry was necessarily an ongoing process, so that the Commissioners could not anticipate what further material would be presented to the Enquiry. The Commissioners accepted, however, that those parties who had filed statements and submissions before the commencement of the hearings should present their evidence and submissions before UDeCOTT was required to present its witnesses. Furthermore, the Commissioners accepted that UDeCOTT should be given a reasonable opportunity to respond to any further criticism arising during the course of the Enquiry.
- 2.4. For the first hearing it was therefore directed that parties who were critical of the operations of UDeCOTT should present their cases first and that UDeCOTT would

then be invited to present its case in response. Accordingly, at the first hearing, short opening statements were received from all parties, concluding with UDeCOTT and its executive chairman Mr Calder Hart (who was separately represented). Evidence was then presented in the following order:

- (i) Winston Riley, President of the Joint Consultative Counsel for the Construction Industry (JCC).
- (ii) Afra Raymond, of Raymond & Pierre Limited, President-elect of the Institute of Surveyors of TT and journalist.
- (iii) Mikey Augustine Joseph, President TT Contractors' Association.
- (iv) Bernard Sylvester, Acting Permanent Secretary Ministry of Finance, for the Attorney General.
- (v) Dr. Keith Rowley, Member of Parliament for Diego Martin West.

2.5. UDeCOTT was then invited to call its witnesses. UDeCOTT called Ms Neelanda Rampaul, Chief Operating Officer, followed by Mr. John Calder Hart, Chairman and Chief Executive Officer.

2.6. Other witnesses called by the parties or the Commission subsequent to the foregoing witnesses were the following:

- (i) Hafeez Karamath, Chairman, Hafeez Karamath Limited (HKL).
- (ii) Martin Daly SC, President, Law Association of Trinidad and Tobago, appearing in personal capacity.
- (iii) Mrs Christine Sahadeo, former Senator and former Minister, Ministry of Finance.
- (iv) John Mair, former UDeCOTT Board Member.
- (v) Derek Outridge, Quantity Surveyor, Managing Director of QES & Associates Limited (QES).
- (vi) Winston Agard, former CEO of UDeCOTT.
- (vii) Jack Shenker Vice President Genivar Trinidad & Tobago.
- (viii) Christopher Pilgrim, former UDeCOTT senior engineer.
- (ix) Ian Telfer, former chief construction engineer UDeCOTT.
- (x) Hayden Paul, chief construction engineer, UDeCOTT.
- (xi) Winston Chin Fong, senior manager, UDeCOTT.
- (xii) Emil Elias, Chairman, NH International (Caribbean) Limited.

- (xiii) Ricardo O'Brien, former CEO UDeCOTT.
- (xiv) Safiya Noel, Chief accountant, UDeCOTT.
- (xv) Colm Imbert, Minister of Works and Transport
- (xvi) Carl Khan, formerly married to Mrs Calder Hart.

A list of all persons giving sworn evidence to the Commission appears at **Annex 6**.

2.7. Other persons who appeared at the Enquiry to address specific issues were invited to make their presentations in the form of "round table" exchanges. Such material was received by the Commissioners as expertise and was presented unsworn, either as a written statement or as oral testimony. A list of these persons who participated in these sessions appears at **Annex 7**.

2.8. In December 2008, on the recommendation of the Commission, the Office of the Prime Minister appointed the firm Acutus of Glasgow, Scotland, to prepare reports on time and cost over-runs on nominated projects, for the purpose of issue (vi) (reasons for and the effect of cost overruns, delays and defective workmanship). Acutus, represented by Mr Gerry McCaffrey FICE, visited Trinidad between 15 and 22 January 2009 and conducted meetings with UDeCOTT and with the Housing Development Corporation (HDC), each of which subsequently provided further documents and information to Mr McCaffrey. The projects examined by Acutus were:

- (i) National Academy of the Performing Arts (North).
- (ii) International Waterfront Project.
- (iii) Brian Lara Cricket Academy.
- (iv) Cleaver Heights Development Project.

Acutus provided draft reports which were circulated to the parties on about 2 February and an Interim report which was circulated on 23 February, 2009. Acutus subsequently provided a final report dated 29 April 2009, limited to the issue of advanced payments and repayments on the Brian Lara Cricket Academy Project.

2.9. Other expert reports were produced by the parties in the Enquiry. Some experts made presentations to the Commissioners and others did not. The Commissioners have, in regard to each expert (including Acutus), attached such weight to the reports (and oral

presentation, if any) as they deem to be appropriate, having regard also to the addresses of the parties.

- 2.10. The Enquiry hearings were conducted in public, with both public access being provided to the oral proceedings and live television coverage. Documents provided to the Commission, including the daily transcript, were made available for public access via the Commission's web-site at www.constructionenquiry.gov.tt, which also carried a live viewing facility. The proceedings were also reported extensively in several newspapers.
- 2.11. On 11 May 2009, the first day of the intended final hearing, the Commissioners were informally notified by their counsel that UDeCOTT and Mr. Calder Hart intended that day to apply to the High Court in Port of Spain for leave to apply for Judicial Review, including substantive and interim relief, the latter including orders prohibiting the Commissioners from proceeding with any further hearings of the Commission of Enquiry. No prior notice of such intended application had been given to the Commissioners or to any other party to the Enquiry. The Enquiry proceeded on 11 May but during the afternoon session the Commissioners were informed that the Hon. Mr. Justice Stollmeyer had ordered a stay of proceedings in the Enquiry and that the application had been adjourned to 12 May 2009. The Enquiry proceedings were then adjourned until further order of the Court.
- 2.12. There were two such applications for Judicial Review. The first application concerned whether attorneys appearing before Commissions of Enquiry were entitled to absolute privilege. On 13 May 2009 the first application came before the Hon. Madam Justice Pemberton at San Fernando, where an order was made by consent, which was unopposed by Counsel for the Commissioners. The order stated as follows:
- That Attorneys at law appearing before Commissions of Enquiry duly appointed under the Commissions of Enquiry Act Chap. 19:01 of the Laws of the Republic of Trinidad and Tobago are entitled to all privileges and immunities to which Attorneys at law appearing before the Supreme Court of Judicature of Trinidad and Tobago are entitled.*

2.13. The second application for Judicial Review concerned whether the Salmon letter served on UDeCOTT by the Commission on 30 April 2009 complied with the right to reasonable notice of allegations adverse to UDeCOTT which the Commissioners were minded to consider. The second application was adjourned to 18 May on which date the claim for interim relief was settled by consent in the following terms:

- (i) *That UDeCOTT is not expected to respond to the Salmon letter dated April 30 2009 at all.*
- (ii) *UDeCOTT shall proceed to make its oral closing submissions without reference to the Salmon letter.*
- (iii) *Upon completion of UDeCOTT's oral closing submissions, the Commissioners shall issue to UDeCOTT a Salmon letter on or before June 8 2009.*
- (iv) *UDeCOTT shall thereafter be at liberty to submit written submissions in relation to any issues raised in such letter, such written Submissions to be submitted to the Commissioners on or before July 31 2009.*

2.14. The hearings of the Enquiry duly resumed on Thursday 14 May 2009, after having lost two days of hearing. The Commissioners announced that they would seek to make up the lost time and accordingly extended the hearing hours and directed that the hearing continue for a full day on Saturday 16 May 2009.

2.15. The Enquiry having been brought to a halt at the suit of two of the parties being investigated, the grounds of the application need to be set out. The first application concerned whether counsel appearing in the Enquiry were entitled to absolute or only qualified privilege. This issue had been raised during the second round of hearings on 3 April 2009, prior to an intended application by Mr. Goddard QC on behalf of UDeCOTT. The Commissioners had been provided with a note of the application which included accusations of serious misconduct against another party to the Enquiry without particulars thereof being given. The Commissioners were concerned that such an accusation should be made in public and accordingly, after taking advice from counsel to the Enquiry, the Chairman warned Mr. Goddard that advice received

was that he was not protected by privilege. It was made clear that the Commissioners themselves could not and would not give any decision on whether or not privilege existed.

2.16. Counsel for UDeCOTT and Mr Calder Hart contended that the Enquiry could not be properly conducted unless they were confident of having the protection of privilege and for that reason the Enquiry could not be allowed to proceed until the matter was clarified. Given that the matter arose on 3 April, on the last day of the second hearing, it was open to the Claimants (and any other party in the Enquiry) to apply to the Court to resolve the issue at any time prior to the advertised start of the third hearing, on 11 May. The Applicants gave no explanation of why they chose to make their application to the Court, without prior notice to the Commissioners, on 11 May, with the inevitable result that the Enquiry was brought to a halt. The matter was settled by agreement and without any legal contest. It could have been so disposed of at any earlier date.

2.17. The second application was by UDeCOTT alone and concerned the adequacy of the Salmon letter, setting out possible grounds of criticism, served on 30 April 2009. This had been the subject of correspondence between the Commission and lawyers for UDeCOTT prior to the commencement of the third hearing. The Commissioners considered that the original Salmon letter was in a form appropriate to this particular Enquiry and complied with the undertaking given by the Chairman on the first day of the Enquiry hearings when it was stated:

What the Commissioners do undertake is that after the conclusion of the evidence and submissions, before any party is called on to make a final submission defending its position against accusations that have been made in the Enquiry, a concise statement of the accusations which the Commissioners intend to consider will be delivered to each affected party or their representative in accordance with the guidelines established by the distinguished English judge Lord Salmon and known to lawyers as "the Salmon Principles."¹

¹ Transcript 12 January 2009, p 11

- 2.18. In accordance with the consent Order of the Court, the Commission provided a further Salmon letter dated 8 June 2009. However, UDeCOTT persisted in challenging the adequacy of the letter and stated that the application for Judicial Review would be pursued. A hearing was to take place in October 2009, but the date was vacated by consent on 20 October 2009. In a further attempt to compromise the application, the Commission offered, by letter dated 30 October 2009, to provide a copy of the accusations potentially adverse to UDeCOTT by way of enhancement of the Salmon letter of 8 June. Such enhanced letter was delivered to UDeCOTT's attorneys on 13 January 2010. **Annex 8** contains copies of the three Salmon letters served on UDeCOTT dated 30 April 2009, 8 June 2009 and 13 January 2010, together with a note of the principles governing the law and practice of Salmon Letters and accompanying letter to UDeCOTT's attorneys dated 25 September 2009.
- 2.19. Despite continuing to assert that the Commission should provide further particulars of the potential allegations against it, UDeCOTT, on 1 March 2010, voluntarily served a final submission addressing the issues set forth in the letter of 13 January 2010. It was contended that, in respect of certain issues, UDeCOTT was unable to appreciate the matters being alleged and therefore unable to deliver a full response. On 2 March 2010 the Secretariat of the Commission stated that the Commissioners would review the final submission and notify UDeCOTT of any matters of criticism which, in their view, had not been dealt with fully as a result of UDeCOTT's inability to appreciate the matters being alleged, and would provide further information to allow UDeCOTT to deal fully with any such accusation. On 8 March 2010 the Commission wrote to UDeCOTT listing three matters which it was considered had not been fully dealt with and providing further information in respect of those matters. The Commission requested UDeCOTT to provide its final observations in respect of these matters, which UDeCOTT did by further submissions served on 16 March 2010.
- 2.20. On 24 July 2009, Attorneys acting for UDeCOTT wrote to the Commission making accusations of bias against Mr Khan, Mr Sirju and Professor Uff and requesting that all the Commissioners should recuse themselves. The matter relied on by UDeCOTT as having precipitated such action was a television interview given by Mr Israel Khan on 24 June 2009, of which none of the other Commissioners had any knowledge. No specific accusations were made concerning Mr Thornhill. Mr Khan, Mr Sirju and

Professor Uff each responded to the accusations by letter. Subsequently, on 11 August 2009, Mr Khan announced that he had decided to recuse himself and thereafter took no further part in the Enquiry.

- 2.21. With regard to the Chairman Professor Uff, it was alleged that his conducting of the Enquiry, in a number of specific instances, created the impression of bias against UDeCOTT. These allegations were all denied by Prof Uff. With regard to Mr Sirju, UDeCOTT alleged that his company, KS&P Ltd had provided services to other companies and organisations in the Public Construction Sector and in particular had an “on-going” relationship with Mr Emile Elias, the proprietor of NHIC. These allegations were likewise denied by Mr Sirju.
- 2.22. Subsequently it emerged that KS&P Ltd, had provided design services for the Cleaver Heights Development Project, which fell within the Terms of Reference as altered on 10 December 2008, and again on 21 May 2009. KS&P Ltd had no involvement in contractual matters concerning Cleaver Heights and Mr Sirju accordingly had no reason to withdraw from the hearing into issues contained in the commission dated 9 December 2008, which took place in May 2009. However, after seeking the advice of Counsel to the Commission, it was decided that Mr Sirju should take no further part in any hearing or deliberation of the Commission on issues concerning Cleaver Heights, and the parties were so informed on 1 September, 2009.
- 2.23. On 18 September 2009 UDeCOTT issued further proceedings² for Judicial Review against the remaining Commissioners, Prof Uff, Mr Sirju and Mr Thornhill, alleging *inter alia*, apparent bias, including the allegations contained in the letter of 24 July 2009. On 2 October 2009 UDeCOTT obtained Orders for interim relief by which the Commissioners were enjoined from continuing with the Enquiry or from carrying out any further work in preparing the Report. On 9 October 2009 the Court made further Orders by which the Commissioners were no longer enjoined from proceeding with the Enquiry or the Report but undertook to give UDeCOTT 28 day’s notice should they decide to proceed with any further hearing of the Enquiry or to publish any part of their Report. As noted in section 1 above, such notice was given on 4 November

² CV 2009-3394

2009 and the Enquiry hearings were concluded at a hearing from 7 to 10 December 2009.

- 2.24. In the light of UDeCOTT's continuing allegations against Mr Sirju, which involved alleged conflicts of interest in relation to a number of the issues in the Enquiry, it was decided that Mr Sirju could not take part in the preparation of the Report or the deliberations of the Commission, which took place from September 2009. Accordingly this Report has been drawn up by Prof Uff and Mr Thornhill only. Prof Uff and Mr Thornhill wish to record their appreciation of the work done by Mr Sirju for the Enquiry, their complete confidence in his impartiality and integrity and their regret that his reputation has been unjustly impugned.
- 2.25. UDeCOTT's application for Judicial Review against the remaining Commissioners, Mr Sirju, Mr Thornhill and Prof Uff was heard by The Hon Madam Justice Deane-Armorer in Port of Spain between 18 and 26 January 2010. Judgment was given on 5 March 2010 dismissing the accusations of apparent bias. The Learned Judge held that the remaining Commissioners (Professor Uff and Mr. Thornhill) constituted a quorum under the Terms of Reference and that "*there is no reason why they should not proceed to complete and to submit the report of the Commission of Enquiry to his Excellency*". In the judgement, the accusations against Mr. Sirju alleging actual or potential conflicts of interest were also dismissed by the Learned Judge.
- 2.26. This report now proceeds to consider the issues set out in the Terms of Reference, which will be addressed initially in the order set out in the original Terms of Reference dated 9 September, 2008. Cleaver Heights issues are addressed separately at the end, along with certain general issues which emerged during the course of the Enquiry.

3. Issue (i) Procurement practices in the Public Construction Sector

3.1. Procurement in the public construction sector in Trinidad and Tobago is substantially in the hands of a number of “special purpose companies” which, in different areas of the public sector, undertake procurement on behalf of the Government of the Republic of Trinidad and Tobago (GORTT). It is appropriate to set out the events which have led to the setting up of these companies. The key to understanding the purpose of these companies is the Central Tenders Board (CTB), which was originally established by statute in 1961, subsequently amended in 1979 and further amended in 1991. The CTB Act applies, with exceptions, to all Government Ministries and Departments and to many other corporations and bodies including the Tobago House of Assembly. Pursuant to section 4(1) of the CTB Act, the Board is the *sole and exclusive authority* for tendering for the supply of articles or the undertaking of works or services for carrying out the functions of Government or any statutory bodies. As described in the statement of Bernard Sylvester³, the CTB Act was perceived to be responsible for delays and cost overruns first by reason of bureaucratic delays in the tendering process and thereafter by reason of the CTB having no further responsibility for the design stage at which critical decisions involving public expenditure are taken. In addition, the CTB had no responsibility for the monitoring of project implementation. The more recent course of public procurement thus traces various means by which the application of the CTB Act has been circumvented.

3.2. The CTB Act has been amended, adding a new section 20A, to empower the Government to act in its own behalf (without going through the CTB) in the procurement of works and services where:

- (i) under an agreement for co-operation between GORTT and the Government of a foreign State, the foreign State designates a wholly owned or controlled company to undertake works or services (Act No 36 of 1979);
- (ii) articles, works or services are to be supplied by a company wholly owned or controlled by a foreign state (Act No 36 of 1979);
- (iii) in cases of emergency or natural disaster (Act No 22 of 1987);
- (iv) the Government enters into a contract with the National Insurance Property Development Company Limited (NIPDEC) or a company wholly owned by

³ Dated 9 January 2009

the State for the supply of articles or the undertaking of works and services (Act No 3 of 1993).

3.3. NIPDEC is currently one of the primary public procurement agencies and, as appears later in this Report, has taken on a number of major projects acting both as procurement agency and as Project Manager (a term which is considered later in more detail). NIPDEC, as its name indicates, is a wholly owned subsidiary of the National Insurance Board of Trinidad and Tobago, established by statute in 1971. NIPDEC was incorporated in July 1977 as a private limited liability company. The objects of the newly formed company included undertaking construction, maintenance and furnishing of buildings to be leased or sold, particularly houses and flats for middle and lower income groups of the community. Through these activities NIPDEC acquired expertise in construction projects and became involved in other government construction projects from the 1970s, with its portfolio of activities continuing to expand during the 1980s and 1990s⁴, despite the formal amendment to the CTB Act being made only in 1993. More recently NIPDEC has undertaken the upgrade of the Eric Williams Medical Sciences Complex, the upgrade of the Port of Spain General Hospital, the upgrade of the San Fernando General Hospital, the rehabilitation centre for socially displaced persons at Piparo Estate, construction of police stations in Mayaro, Gasparillo, Toco, Belmont and Tunapuna, construction of community centres at Beetham Gardens, Morvant, Maracas Bay, Thicke Village and Preysal, the Mayaro indoor multi-purpose sport facility and the St. James youth centre. NIPDEC is the employer and project manager for the Scarborough Hospital project, Tobago and for a number of housing projects in Trinidad and Tobago.

3.4. The reference in section 20A of the amended CTB Act to a *company wholly owned by the State for the supply of articles or the undertaking of works and services* predicated the creation, from 1993, of other such companies, which were to become known as *special purpose companies*.⁵ Accordingly, in early 1993, a Committee was appointed to make recommendations for the establishment of a new special purpose company to be called the Urban Development Corporation of Trinidad and Tobago (UDeCOTT). Details of the creation and subsequent operations of UDeCOTT are set

⁴ Submission of NIPDEC 5 January 2009, p.1-3; Statement of Bernard Sylvester, para. 18-34.

⁵ also referred to as *State Enterprise Companies* or simply *Government Agencies*

out in a later section of this Report. UDeCOTT began to be involved in large-scale projects from 2002.

- 3.5. Another state agency which has undertaken substantial developments on behalf of the Government is the National Housing Authority (NHA) which carried out the programme of social housing development throughout Trinidad and Tobago for the Ministry of Planning, Housing and the Environment. In 2005 the NHA was replaced by a new statutory body called the Housing Development Corporation (HDC) which acquired the assets, rights and obligations of the NHA, including responsibility for a number of projects which are considered later in this report. It is to be noted that at the date authority to proceed with the Cleaver Heights Development Project was given, in April 2005, the National Housing Authority⁶ was still in being and reporting to the Minister of Housing, Dr. Rowley.
- 3.6. The Estate Management and Business Development Company Limited (EMBD) was formed in August 2002, to provide project management and development services in the public and private sectors related to industrial development, both in residential and agricultural infrastructure. The Tender Rules employed by EMBD include, significantly, a requirement that all contracts over \$5m are to be subject to the approval of the Minister of Finance⁷. Invitations to tender may be public or limited to selected pre-qualified tenderers⁸. Services may be procured without tender where there is a limitation of sources of supply or performance⁹. EMBD maintain a list of pre-qualified and approved consultants and contractors. Over the past 5 years EMBD has undertaken 21 residential infrastructure developments including two major projects (La Romaine and Picton III) each being approximately 50% complete to date. EMBD provided information on time and cost overruns which are summarised in Section 19 below.
- 3.7. Two further special purpose state owned companies undertaking construction work were set up in 2005. One is the Education Facilities Company Ltd (EFCL) whose mandate includes design, construction, maintenance, equipping and outfitting of

⁶ Appendix 35 to statement of Dr. Keith Rowley 9 March 2009.

⁷ Rule 5

⁸ Rule 6

⁹ Rule 28

community educational facilities. The facilities include Early Childhood Care Education (ECCE) Centres, primary schools, secondary schools and education district offices in Trinidad. The current work programme of EFCL comprises 601 ECCEs, 40 primary schools, 74 secondary schools and 7 district offices. As at January 2009, 7 primary schools were at various stages of construction including one completed (Icacos Government Primary School); and 13 Secondary Schools were under construction including one completed (Chaguanas North Secondary School). Of the ECCE Centres, 20 have been completed to date, another 4 are under construction and a further 50 are in the course of award.

3.8. The second company set up in 2005, is the Rural Development Company of Trinidad and Tobago (RDeCOTT), whose constitution mirrors that of UDeCOTT. RDeCOTT was established in May 2005 with a mandate of project managing the development and upgrading of infrastructure, utilities and community facilities in rural communities under the line Ministry initially of the Ministry of Planning and Development and thereafter the Ministry of Local Government.

3.9. With regard to procurement practices, NIPDEC uses the design-tender approach and has its own tender rules and regulations¹⁰. NIPDEC may be required to follow other rules, for example, those of the Inter-American Development Bank (IDB) for projects funded by other agencies such as the IDB. NIPDEC uses four modes of tendering for public construction: (i) pre-qualification (ii) one envelope system (iii) the two-envelope system and (iv) expressions of interest. In addition, there is a selective tender process and a sole selective tender process which are used in special cases where time is critical. The procurement process is said to be designed, through the tender rules, to achieve transparency and fairness. The tenders committee may invite tenderers and other interested persons to attend the opening of tenders¹¹. Guidelines are given for the consideration of tenders.¹²

3.10. In June 2005 the Ministry of Finance (MOF) issued a document entitled "*Standard Procurement Procedure for the Acquisition of Goods, Services to be provided and*

¹⁰ Annex A to submission dated 5 January 2009

¹¹ Tender Rule 21(4)

¹² Tender Rule 22.

*works to be undertaken and for the disposal of unserviceable items in state enterprise/statutory bodies*¹³. This document stated that the procedures were to apply to all state agencies (other than those falling under the purview of the CTB Ordinance) for the procurement of goods and services or the undertaking of works of a recurrent and capital nature, and that the procedures were to be placed before the Board of Directors to be approved¹⁴. The MOF Standard Procurement Procedure comprises a framework for drawing up of rules and procedures by state agencies. EFCL was in the process of being established and accordingly drew up its procurement rules following the MOF framework. The EFCL rules were approved by the Board on 24 October 2005¹⁵.

3.11. The MOF document¹⁶ and the EFCL Rules¹⁷ permit either open invitation to tender or invitation limited to selected or pre-qualified companies. Furthermore, while the MOF Procedures permit an award without following the tender procedures in cases of emergency¹⁸, in the EFCL rules this power is enlarged significantly to include circumstances:

- (a) Where there is a limitation of source of supply or goods comprise part of a system already in use by the Company.
- (b) Where Bid Prices received are significantly in excess of the in-house estimate.
- (c) Where no responsive bids have been received.
- (d) Where only one contractor is capable or available.
- (e) Where a consultancy service is a special assignment.
- (f) In cases of emergency.
- (g) Where it is expedient to conclude an arrangement with a preferred supplier.

Provided that the written approval of the Chairman of the Board or the Tender Committee is required prior to giving effect to (b), (c) or (g).

3.12. The EFCL Rules and Procedures were forwarded to the Ministry of Finance on 21 November 2005, and have been operated, with a number of amendments, since that date. The EFCL state that in keeping with the principle of transparency, bids are

¹³ Appendix 1 to Statement of Mrs. Christine Sahadeo dated 29 January 2009.

¹⁴ Clause 1(ii), (iii).

¹⁵ The Rules are included in EFCL Submission dated 15 January 2009, Vol. 6 of 6, Appendix 6.

¹⁶ Clause 19.02(i)

¹⁷ Clause 19(3).

¹⁸ Clause 6.01

opened publicly and a record of bids and decisions kept. Furthermore, EFCL generally communicates in writing to all unsuccessful bidders offering an oral debriefing.

- 3.13. EFCL provide details in their submission¹⁹ of the tender process and procurement arrangements for each of the 40 primary schools and 74 secondary schools for which contracts have been placed to date (details in respect of ECCEs are referred to further below). EFCL's procurement procedures for both contractors and consultants include a mixture of local competitive bidding and international competitive bidding with post-qualification. Subsequently, pre-qualification exercises were conducted and separate registers of contractors established for primary and for secondary schools with invitations to tender being sent to firms which satisfied the criteria and were placed on the relevant registers. EFCL state that professional services are generally outsourced, typically to architects, service engineers, civil and structural engineers, project managers and quantity surveyors, in addition to contractors. In keeping with Cabinet directives EFCL outsources some of its maintenance work to other executing agencies, that is to NIPDEC, National Maintenance, Training & Security Company (NMTSC) and Solid Waste Management Company Ltd (SWMCoL).
- 3.14. Rural Development Company (RDeCOTT) operates under internally developed rules having, in 2005, decided to adopt the rules and procedures of the National Gas Company as its tender rules. RDeCOTT provided a written submission to the Commission²⁰ which states that later in 2005 it was provided with standard procurement rules published by the Ministry of Finance, in common with EFCL and UDeCOTT. Relevant to the issues considered later in relation to UDeCOTT, RDeCOTT stated that (unlike EFCL) they understood the new procurement rules to be guidelines, not intended to replace the company's existing rules. Subsequently in September 2008 the RDeCOTT Board approved revision to the procurement rules and procedures to reflect the organisational structure of RDeCOTT and to set new authority limits for managers, the Chief Executive Officer and Tenders Committee²¹.

¹⁹ 15 January 2009

²⁰ Dated 1 May 2009.

²¹ See submissions of AG Transcript 19 May 2009 p.90-91.

- 3.15. UDeCOTT on 23 April, 2009 submitted formal questions to Bernard Sylvester²² regarding tendering practices and procedures used by other special purpose companies. The response, filed on 19 May 2009, revealed that of eight such Companies²³ only UDeCOTT had received written approval from the MOF in respect of its own tender procurement rules. It was confirmed that MOF had not, prior to the promulgation of its 2005 standard procedures, issued any other standard procedures to special purpose companies. Further, the MOF was unable to confirm that the 2005 standard procedures had received Cabinet approval.
- 3.16. The general topic of special purpose companies requires reference to the evidence presented by Mr. Martin Daly, a distinguished lawyer, Senior Counsel, former Judge, former Senator and member of various boards: in particular former Chairman of Trinidad and Tobago Television, a State Enterprise Company. Mr. Daly contacted the Commission on 19 January 2009, and subsequently gave evidence on 4 February 2009 as a private individual and commentator on current events. Mr. Daly was particularly motivated by the assertion in submissions on behalf of UDeCOTT, that the company was not accountable to Ministers of Government. This aspect of Mr. Daly's evidence is referred to later in relation specifically to UDeCOTT. Mr. Daly, however, gave evidence touching on the wider topic of the position of State Enterprise Companies in relation to Ministers and the Government generally.
- 3.17. Mr. Daly referred to an article published in the Trinidad Express, Sunday 11 August 2002, commenting on the relationship between Ministers and "State Enterprise" bodies, including a number of such bodies not concerned with construction issues. In his view Ministers in fact controlled events by conveying informal messages to the Chairman or other Board Members or Manager which would usually be followed. This arrangement allowed Ministers and the Government to claim that they were not running the organisation and, in the event something went wrong, the Company or its Chairman would take responsibility not the Minister. The Companies provided employment for substantial numbers of people and placed contracts and provided

²² Permanent Secretary (ag) Ministry of Finance

²³ Petroleum Company of Trinidad and Tobago Ltd, National Gas Company of Trinidad and Tobago Ltd, Lake Asphalt of Trinidad and Tobago (1978) Ltd, Education Facilities Company Ltd, Evolving Technologies & Enterprise Development Company Ltd, Rural Development Company of Trinidad & Tobago, Rum Distillers of Trinidad and Tobago Ltd and Urban Development Corporation of Trinidad & Tobago.

other benefits which could be seen as political favours to be withheld or threatened to be withheld as a means of exerting control. In his oral evidence Mr. Daly stated that matters had not changed, in his view, since 2002. He also enlarged on what was meant by “manipulation” which he described as *giving directions or strong messages or hints, usually through the chairman, as to what the Line Minister, or indeed some other minister, may want done*²⁴. Thus, while there may be legal arguments to the effect that a State Enterprise Company was not bound to comply with directions of the Line Minister, on fundamental matters or matters of policy the State Enterprise and its management would obey the Line Minister, in Mr. Daly’s view. His article also questioned whether various businesses should be under the control of State Enterprise bodies or whether they should be under the direct control of Government. That question, however, falls beyond our Terms of Reference.

3.18. Opinions on the problems with current procurement practices in the Public Construction Sector are put forward by the Joint Consultative Council (JCC) in the second statement of the President, Mr Winston Riley²⁵; and further views are put forward by the Trinidad and Tobago Contractors Association in the statement of its President, Mr Mikey Joseph²⁶. Mr. Riley offers comments on procurement practices generally by reference to the following:

- (1) The 2005 White Paper – this is dealt with separately below.
- (2) A paper authored by Mr. Riley entitled “Politics of Procurement Part II”²⁷.
- (3) A further paper authored by Mr. Riley on Government-to-Government Arrangements²⁸.
- (4) The Ballah report on Government-to-Government Arrangements²⁹.
- (5) A paper entitled “Governance Issues in State Controlled Enterprises” by Senator the Hon. Mariano Browne³⁰.
- (6) The Commission of Enquiry Report on the Piarco Airport Enquiry.

²⁴ 4 February 2009 p113/114

²⁵ Dated 8 January 2009

²⁶ Dated 8 January 2009

²⁷ WR40

²⁸ WR41

²⁹ WR42

³⁰ WR43

With regard to the Piarco report, this is an unpublished document and, while Mr. Riley invites the Commissioners to request a copy from the President the Commissioners take the view that it is not for them to take into account unpublished material.

3.19. Mr. Riley's paper "The Politics of Procurement Part II" reviews the recent history of urban development in TT and its effect on the construction industry and its institution within the country. After reviewing the 2005 White Paper (part of which was based on Mr Riley's earlier work) it is suggested that the reluctance of the government to bring forward legislation is based on the misguided notion that the proposals will slow the pace of infrastructure development. Mr. Riley's review continues by warning of the dangers of handing over projects to foreign contractors, which is said to bring few benefits and much detriment to the local industry.

3.20. The Ballah Report, dated March 1982, reviewed the programme of government-to-government arrangements and made recommendations effectively to curtail the use of such arrangements, making them subject to various safeguards to ensure effective competition and the securing of benefits for local consultants and contractors. Various recommendations are made in respect of topics which remain on the agenda of the present Enquiry, from which it can be concluded that little, if any, progress was in fact achieved³¹. The report also recommends urgent review of the operations of the Central Tenders Board which had already been the subject of the 1979 amendment to the CTB Act. The main focus of the report, however, is on the operation of government-to-government arrangement, where it is concluded that direct involvement of foreign governments does not produce the benefits expected. It is to be noted that the present operation of government-to-government arrangement (for example involving the National Academy of Performing Arts) is structured in a materially different way from that reviewed in the Ballah Report.

3.21. The final paper cited by Mr. Riley was delivered by Minister Browne at the Caribbean Public Procurement Law and Practice Conference in March 2008. The paper emphasises the central importance of the procurement regime which has been the

³¹ These include the recommendation that (3) bids should be invited only on the basis of adequate pre-planning and complete design and (10) consultants and contractors should be paid promptly.

subject of piecemeal attempts at reform leading to a proliferation of parallel procuring agencies. Deficiencies in the present procurement framework dictate the need for reform based on best procurement practices. It is to be noted that at this time the White Paper still enjoyed government support which, however, is no longer the case.

3.22. Mr. Riley in his second witness statement draws attention to various initiatives supportive of small and medium enterprises including initiatives in the US and European communities. In these terms almost all consulting firms in Trinidad and Tobago are small businesses and most construction firms are in the small and medium category and ought to benefit from setting aside of quotas of available funding.

3.23. Mr. Riley emphasises that the concept of sustainability, as generally accepted, includes the issues of value for money, entire life cycle, environmental aspects and social aspects expressed as social return on investment. Mr. Riley also expresses concerns about planning issues on behalf of the TT Society of Planners (TTSP) as members of JCC. They express concern that insufficient attention is paid to particular issues at pre-planning stage and that mega- projects being undertaken in Port of Spain have major effects which have been given insufficient attention. Further, projects being implemented on behalf of the state are said to contravene Town and Country Planning legislation in failing to secure prior permission of the relevant minister. The issues which receive insufficient attention include:

- (i) Identify community/stakeholder needs and priorities.
- (ii) Population dynamics.
- (iii) Special patterns of development and movement.
- (iv) Environmental social and natural hazard impact assessments.
- (v) Site analysis and selection including carrying capacity.

3.24. The further comments on general procurement practices in the public construction industry are offered by Mikey Joseph, President of the TT Contractor's Association (TTCA). He states in his witness statement³² that the TTCA promotes professionalism, responsible industry growth, transparency, fair business practices, training, efficient dispute resolution and ethical codes of practice. In respect of

³² 8th January 2009

procurement practices in the public construction sector generally, the TTCA adopts the position taken by the JCC and raises further issues. In particular, TTCA complains of projects being sent out to tender with inadequate documentation and insufficient time to submit proper bids. In the case of PK2 (superstructure) for the Brian Lara Academy, TTCA wrote to UDeCOTT on 26 January 2006, with such a complaint. Mr. Joseph concludes from the lack of response from UDeCOTT that the project was “*designed to fail as from the start*”.

- 3.25. TTCA criticises UDeCOTT for failing to accept responsibility for the development of skills and training of nationals in construction and the absence of transfer of technology from the use of foreign contractors. This includes Shanghai Construction Group (SCG) which was awarded the Ministry of Social Development Tower Project after tendering, then followed by the National Academy of Performing Arts without tender and after local architects and consultants had previously been engaged. These issues are dealt with further under issue (iv) of the Terms of Reference (Foreign Contractors).
- 3.26. TTCA also criticises the Education Facilities Management Company Ltd (EFCL) over their practices in regard to the construction of early childhood care and education (ECCE) centres over the past 3 years. Mr. Joseph contends that their procurement practices are inconsistent, involving different procurement strategies and many of the centres being re-tendered as design-build projects in packages without providing information or explanation to contractors who have previously bid. Some of the projects are said to have been offered to foreign contractors in circumstances suggestive of collusion. These matters concern several of the issues dealt with later in this report³³. It is appropriate to deal with the contentions regarding ECCE centres here.
- 3.27. The assertions of TTCA with regard to early childhood centres are responded to in a statement of Paul Taylor, Chief Executive Officer of EFCL³⁴ which challenges all of the assertions. Specially, it is said that EFCL, which is mandated by the Ministry of Education, initially undertook construction of 10 ECCE Centres in 2006 using the

³³ See below under issues (iv) and (v)

³⁴ Statement 3 February 2009.

“two envelope” post-qualification system. Subsequently, a pre-qualification system was put into operation for the next ECCE Centres including designated *“small contractors”*. Subsequent batches of ECCE Centres were awarded using both post and pre-qualification systems and the pre-qualification criteria were changed in an attempt to improve performance levels. EFCL accept that a number of projects tendered by local contractors have not been awarded and provide reasons for this, including tenderers failing to satisfy post-qualification criteria or prices being too high. EFCL further accept that approximately one third of these contracts have been re-tendered and awarded to foreign (Chinese) contractors. EFCL deny that unsuccessful tenderers have not received appropriate feedback and explain that their procurement strategy for constructing approximately 150 Centres per year to 2012 includes the use of the design- build method, targeting medium and large contractors and encouraging the formation of joint ventures. EFCL say that their procurement practices are transparent and state that their major challenges have been the performance of contractors and land acquisition issues.

- 3.28. The issue of ECCE Centres was also debated during the round table session on local v foreign contractors³⁵ where Mikey Joseph again referred to 50 Centres being awarded to foreign firms with a reported saving of over \$100 million. He questioned what was the social benefit of such a saving. Minister Imbert responded by confirming that a tender had been received from a Korean contractor in the sum of \$150 million against the second lowest tenderer, a well-known local contractor, whose bid was \$281 million. Earlier centres, based on a standardised design, had been constructed at a cost of around \$2 million each but in 2008 the costs had begun to increase to over \$4 million and in 2009 \$6 million, all tendered by local contractors and for the same basic building. The Government had no alternative but to proceed with the Korean contractor’s bid. Mr. Joseph responded, contending that between 2006 and 2008 there had been 100% inflation in material costs and that the bid of \$150 million had been given by a contractor who knew nothing of Trinidad, based on the employer’s own estimate of costs of \$3 million each.

³⁵ Transcript 23 March p.74

- 3.29. The general question of sole selection of contractors by State Enterprise companies was addressed in UDeCOTT's Final Submissions³⁶ where it is pointed out that the Rules of other State Enterprise Companies in fact provide an even wider range of circumstances for the use of sole selection than would be permissible under UDeCOTT's rules. The other State Enterprise Companies are the National Gas Company,³⁷ the National Quarries Company,³⁸ the National Maintenance Training and Security Company Ltd³⁹ and the Rural Development Corporation.⁴⁰ The Commission accepts that these and other State Enterprise Companies have been set up with such wide discretion in the selection of Contractors. They should, however, be careful not to abuse such powers, which should be exercised having regard to the principles of free and fair competition, as well as transparency.
- 3.30. TTCA criticises the East Port of Spain Development Co. Limited (EPSDCL) whose conditions of contract, after award, have obliged contractors to undertake local services of a questionable and possibly criminal nature⁴¹. These complaints are echoed in the statement of Inch by Inch Construction and Manufacturing Ltd⁴² which, in the context of design changes, relates incidents giving rise to serious threats to life and security, with a catalogue of undertakings not fulfilled and lack of support to the contractor. The incidence of criminal activities on construction projects was also reflected in statements concerning the Beverley Hills Housing Project where there was reported to be a number of fatalities among the contractor's workforce.
- 3.31. TTCA criticises contractual dispute procedures which oblige the contractor to go to Court to get paid, as well as other unreasonable contract conditions. They complain that local contractors are further disadvantaged by being required to provide bonds and other securities as well as suffering retention on work carried out of up to 10%, all of which cause disadvantage to and place additional burdens on local contractors. Both bonds and retention are said to be retained for up to 2 years after the

³⁶ Paragraph 126-129.

³⁷ Clause 4(e)(v).

³⁸ Clause 18.

³⁹ Clause 38.

⁴⁰ Clause 4.5.

⁴¹ Para 31

⁴² Statement of Archpriest Victor Phillip, 11 Feb 2009, para 5 and following

maintenance period without proper grounds. TTCA suggests these amount to unfair practices.

- 3.32. TTCA, as well as individual contractors, complain of late payment to contractors being a common practice with delay extending beyond one calendar year. Payments are delayed even after contractors have provided advance payment bonds. In other cases architects and quantity surveyors have failed to value and certify work done with no proper explanation. Contractors complain of being penalised for seeking to enforce payments through not being granted extensions of time and being threatened with deduction of liquidated damages.
- 3.33. TTCA supports licensing or registration of contractors to work in particular areas of construction – a practice which is applied to some degree in North America but, significantly, not in the UK (with the exception of some very limited areas of work⁴³).
- 3.34. The special purpose companies which carry out construction projects, including NIPDEC and UDeCOTT, undertake not only the arrangement and placement of contracts for the work, but also an overseeing function during the course of the project which is generally labelled “project management”. The role is variously described and is in some cases to be found reduced to contract terms, whether in the form of a Memorandum of Understanding or formal agreement⁴⁴. Such documents usually make express reference to “Project Management” and similar expressions, but invariably without any or any full description of what is assumed to be embraced by this ubiquitous expression. An analysis of Project Management sources will quickly reveal that management can embrace many different activities concerned with a construction project, other than the physical supply of work or materials.
- 3.35. Further questions arise as to the project management role of special purpose companies when it is noted that independent firms are often appointed in addition, to act as “Project Managers”. Whilst we accept that special purpose companies do undertake, in particular cases, a positive role in setting up projects and overseeing

⁴³ Including work on nuclear plants and reservoirs.

⁴⁴ See second statement of Neelanda Rampaul, Exhibits 54 and 55 and see also formal agreement between NIPDEC and GORTT in relation to the Scarborough Hospital Project.

the tendering and award of the contract, the continuing management role in relation to the performance of the work requires more examination. There may be an underlying assumption that special purpose companies, including UDeCOTT, are undertaking the management of major projects, when a closer examination will reveal that this role is not in fact being undertaken by them. This issue is examined further in Part V of this Report.⁴⁵

- 3.36. There is clearly a need for a forum in which dialogue between the Government and promoters of construction work and those who perform the work can take place. It is to be expected that such dialogue would deal with many of the matters which are the subject of this Enquiry. Such a forum can be seen in other jurisdictions, for example, the Joint Contracts Tribunal in the UK, which produces the JCT Standard Building contract. In Trinidad and Tobago the natural forum might be seen as the JCC. However, in contrast to the JCT, the JCC has no Government or employer representatives. Nor is there any equivalent in Trinidad and Tobago to the Construction Industry Council⁴⁶ and its constituent bodies, set up after the Latham Report, which includes prominent representation of employers and promoters of construction.
- 3.37. The only body in Trinidad and Tobago containing broad representation across the construction industry appears to be the Construction Sector Oversight Committee, set up by the Cabinet to consider appropriate forms of contract. This committee includes representation from all the professional bodies, including the JCC, contractors and manufacturers, the Chamber of Industry and Commerce, the State Enterprise Companies and Cabinet Ministers with construction portfolios. As part of its business, the committee was tasked to consider which of the existing contract forms was appropriate for general use in Trinidad and Tobago. The committee has recommended that the FIDIC 1999 suite of contracts should be used for infrastructure work and the JCT 2005 suite for building work. Mr. Riley pointed out that some time earlier the Attorney General had given instructions for development of a Standard Form of Contract for the whole industry. This was to be based on the FIDIC Form with additional conditions. The Quantity Surveyors, however, proposed use of

⁴⁵ See Section 30

⁴⁶ See www.cic.org.uk

the JCT Form so that the Construction Sector Oversight Committee recommended both forms⁴⁷. Although the Enquiry was not provided with minutes of any committee meetings, Minister Imbert confirmed⁴⁸ that the Cabinet had approved the use of these two suites of contracts.

- 3.38. Finally, in this general review of procurement issues, the procurement practices as applied in practice in Trinidad and Tobago will be examined in detail through one of the projects which the Commissioners have been requested to review: Belmont Police Station. This was dealt with on 5 February 2009, as a round table presentation. The documentation and exchanges are summarised in Section 10 of this Report.

Initial Conclusions

- 3.39. This section has examined a range of issues which have arisen from the documents and submissions received. It has been noted that procurement in the Public Construction Sector is currently dominated by a number of special purpose companies or government agencies which have grown up as a consequence of perceived problems created by the Central Tenders Board laws. What needs to be borne in mind is that most of the companies now operating are new to the field. Only NIPDEC has any material track record from earlier than 2002. While other countries may have their own models, Trinidad & Tobago must find its own feet in this new field. In particular, it should not be assumed that the right formula can be found without trial and, necessarily, error. Most importantly, staff must be trained and must acquire expertise and confidence in their new roles.
- 3.40. With this background in mind, it can be seen that the material presented to the Enquiry has revealed many matters deserving of further consideration. First, there are a number of issues concerning applicable tender rules. The Commissioners entertain no doubt that the principles of transparency require that it should be clear beyond doubt what rules are applicable in any tender situation and further that those rules should be readily available, clear and seen to be applied in a fair and proper manner. The existence of several different sets of rules and uncertainties over the extent of

⁴⁷ discussion 29/30 Jan on Design-Build

⁴⁸ Transcript 3 April p.42

their application has created an unfortunate situation which needs urgently to be addressed. The particular position regarding the tender rules applicable to UDeCOTT will be considered later in this Report.

- 3.41. Issues have been raised as to the extent to which UDeCOTT and other State Enterprise Companies are subject to control by Government, either formally or informally. The issue is not new and is reflected in other countries through the different ways in which the State utilises the expertise of the private sector to deliver its essential services. For example in the UK many services traditionally delivered by central or local government are now delivered through privatised companies subject to Regulation⁴⁹, which effectively dictates the extent to which government can intervene and direct activities of the company. It would be misplaced to view the relationship between GOTT and its various Agency companies as any less complex or as being susceptible to any simple answer. The issue is raised in particular in relation to UDeCOTT and will be dealt with more fully in a later section of this Report.
- 3.42. Having briefly reviewed the activities of a number of Government Agencies concerned with construction, it is evident that material differences exist in their rules and practices. There is no apparent reason why such differences should exist in organisations which have little or no history or tradition. There is no merit in different bodies having different rules without good reason to justify the differences. The standardisation of procurement regimes for both State Enterprise and other Government construction projects was supported by Minister Imbert in the context of alternatives to the White paper proposals⁵⁰. While the Ministry of Finance procurement rules may be seen as an attempt to impose such uniformity, it is equally clear that this initiative was either not pursued with enough vigour or lacked the support necessary to achieve uniformity. While it is not the remit of this Commission to make general recommendations for all Government Agencies, the general lack of uniformity is bound to reflect on the position of UDeCOTT which, as will be seen, adheres to its own rules and procedures.

⁴⁹ UK Utilities which subject to such regulation include water, railways, energy and telecommunications.

⁵⁰ Closing Submissions of Attorney General, para 13(e) and para 22, and see para 9.19 below

- 3.43. A number of issues are identified in relation to the engagement of foreign contractors. The issues include their relative levels of performance as against local contractors, the question of developing skill and technology transfer to the local industry and the question whether local contractors and consultants require protection through some form of quota. Each of these issues will be considered further under Terms of Reference Issue (iv) and (vi) below. Likewise, issues in regard to the adequacy of tender documentation are considered under Terms of Reference Issue (iii).
- 3.44. This section has reviewed a number of contributions concerning Early Childhood Care and Education (ECCE) centres where submissions were received from contractors, from the Education Facilities Management Company and from Minister Imbert. The topic involves Terms of Reference Issue (iv) and (v) which are dealt with further below. This topic also raises in a direct form the balance which needs to be drawn between the requirements of economy and seeking to provide facilities for the community within the Government's budget, while at the same time providing a fair deal for local contractors and consultants. It is the task of EFCL to make the decisions necessary to resolve these dilemmas. In doing so, EFCL must seek to apply fair and appropriate procedures, and also act with openness and transparency. This includes giving proper reasons to tenderers why their tenders are rejected, particularly when this results in an award to a foreign contractor. Such decisions are bound to cause dissatisfaction to some parties, but the giving of proper reasons will enable unsuccessful tenderers to improve their bids for other projects. Transparency operates to the advantage of all parties.
- 3.45. The complaints noted from a number of sources concerning criminal activity and serious threats to life and security are to be taken with utmost seriousness. Contractors who are prepared to undertake work in such arduous conditions are, without doubt, entitled to the fullest levels of support from all available quarters.
- 3.46. Complaints of late payment and other unreasonable financial conditions faced by local contractors appear to be endemic. This can be seen as part of a culture of non-

adherence to the agreed contract terms. The Commissioners believe this issue merits separate consideration in a later section of this report.⁵¹

- 3.47. With regard to licensing or registration of contractors, the Commissioners note that there is no uniform pattern and that different countries apply different rules with notable inconsistencies. The Commissioners note that licensing of contractors is relatively rare in the UK and in practice limited to activities involving potentially serious physical risk. The Commissioners believe this to be an issue which requires wide consultation and is ultimately a matter for Government action through legislation.
- 3.48. The role of Project Manager appears to be one of the common factors running through the activities of State Enterprise Companies. It will be seen later that the Project Management role of certain companies, notably UDeCOTT and NIPDEC needs to be critically reviewed. The Commissioners believe this is an important topic which requires separate consideration in a later section of this Report⁵².
- 3.49. Finally, the lack of an appropriate forum for consideration of issues of mutual interest between opposed parties within the Trinidad and Tobago construction industry is noted. Some of the issues which have arisen during the Enquiry, for example the proliferation of different forms of contract, can be seen to result from such lack of dialogue. In the Commissioners' view, the range of different procedures and documentation seen in the construction industry dictates that such dialogue should take place on a regular and sustained basis with the objective of finding common solutions acceptable to all sides of the industry. While the Government has played its part through setting up the Construction Sector Oversight Committee, the Commissioners believe that a body organised by the construction industry itself and on which the Government and all the relevant Government agency companies (including UDeCOTT and NIPDEC) are represented should be the way forward.

⁵¹ See section 29

⁵² See section 30

4. **Issue (ii) Use of provisional sums, prime cost sums, nominated suppliers and nominated contractors.**

- 4.1. The Commission issued a discussion paper on this issue which is included as **Annex 9**. Written submissions were received from NIPDEC and from the Institute of Surveyors of Trinidad and Tobago (ISTT). NIPDEC recommended that the use of provisional sums should be limited and recommended other contingency measures where such sums are included. With respect to prime costs sums, these are commonly employed where specialist (nominated) sub-contractors are to be engaged by the main contractor covering items such as plumbing, electrical and air conditioning (AC) installations. NIPDEC recommended replacement of PC sums by provisional sums designated for use in respect of specialist sub-contractors, and for main contractors to be encouraged to price such items. NIPDEC also recommended the inclusion of a list of proposed sub-contractors, similar to that currently used in UK under the JCT Forms of Contract. It was noted, however, that use of design and build would also eliminate the delay and additional costs involved in nomination.
- 4.2. The ISTT noted that requests for additional funding from Government Departments can result in delays, which can be avoided by the use of provisional sums to cover the unexpected. The prime costs sums intended for nominated sub-contractors allow the use of specialists selected by the employer: the use of a list of approved sub-contractors will limit the extent of control by the employer/architect. The ISTT expressed the view that it was logical that the contractor should take full responsibility for nominated sub-contractors.
- 4.3. Issue (ii) was debated in oral session on 3 April 2009, in the form of a round table exchange between the following persons: Lallan Samaroo (NIPDEC), Michael Samms and Alan Cochran (both of IQS) and Colm Imbert, Minister of Works and Transport. The discussion was led by NIPDEC who suggested that provisional and PC sums tended to increase the overall project cost and delivery time. Provisional sums could be avoided by allowing sufficient time for the design process. As regards specialist sub-contractors, NIPDEC would be content to explore the use of named sub-contractors.

- 4.4. The ISTT pointed out that prime costs sums did not indicate work which was un-designed but were intended to facilitate the use of specialist sub-contractors. Likewise provisional sums are inserted to cover uncertainties where delay would result if Government approval had to be sought for extra money. PC sums typically amounted to 35% to 40% of the contract value, and usually represent mechanical and electrical work. Such work was, however, both designed and measured. Confusion may arise in the use of terms since the FIDIC Contracts used in Trinidad and Tobago do not include prime cost sums and employ provisional sums for the purpose of nomination. With regard to named sub-contractors, the system has already had successful use in Trinidad and Tobago. The ISTT also argue for use of provisional quantities in cases where the design was uncertain.
- 4.5. The oral debate covered the question whether Bills of Quantity were necessary at all. The ISTT was concerned that requiring contractors to prepare Bills of Quantity would be equivalent to a design and build regime and would deprive the employer of valuable cost data.
- 4.6. Minister Imbert, in response to the discussion, drew attention to research from Nigeria which had revealed an average cost over-run on prime cost sums of 41%; but where the main contractor was encouraged to execute prime cost work himself, the cost variance was significantly lower. Minister Imbert also quoted figures for projects in Trinidad and Tobago where, for the Ministry of Health, prime cost sums had averaged 52% of the contract sum, plus 4% for provisional sums. The Minister also pointed to examples of non-specialist items (such as external works) being inappropriately designated as prime cost work. Other projects were cited where provisional sums amounted to 25% or 30% of the contract sum, and represented undesigned elements of the work. In these cases the Project Manager should be questioning the designer as to the reason for such levels of uncertainty. The Government was concerned about costs escalating substantially above budget. Where prime costs sums were included, main contractors and designers tended to blame problems on sub-contractors. The Government would like to see a lower threshold for provisional sums of 5%. It should be added that it was suggested, in a different context, that Provisional sums provided a useful cushion against unforeseen cost increases, which could be met out

of the provisional sum without incurring the delay usually involved in waiting for approvals.⁵³

Initial conclusions

- 4.7. Having reviewed the submissions it is appropriate to observe that there is a surprisingly wide variation of practices which exist in Trinidad & Tobago, even within the limited area of the public construction sector. The desirability of establishing some degree of uniformity within the industry is obvious enough: clients, whether public or private, would benefit from the use of procedures and documentation which are predictable and well known to those who are to administer projects. The industry will indeed only benefit from training programmes, for example on use of standard forms of contract, if the relevant forms are in widespread or at least common usage. These conclusions are likely to apply to other issues yet to be considered in this Report. Having said this, it may be noted that there have been similar calls for more standardised procedures in the UK on a number of occasions, most of which have led to the opposite result, i.e., greater proliferation⁵⁴. The path to achieving uniformity is not likely to be an easy one.
- 4.8. It is also to be observed that, in the use of provisional and prime cost sums as well as nominated suppliers and sub-contractors, and other issues as well, Trinidad and Tobago has lagged significantly behind developments in other countries. This is not necessarily a bad thing and allows the opportunity to identify those developments which have been brought in elsewhere which have resulted in real benefit as opposed to mere changes of fashion.
- 4.9. The debate on issue (ii) has clearly established a wide diversity of practices as well as opinions as to the way forward. Taking note of the views put forward, we are firmly of the view that the use of provisional and prime cost sums should be both reduced and standardised; that the use of nominated sub-contractors and suppliers pursuant to provisional or prime cost sums should not be encouraged; and that, as a matter of

⁵³ Allan Cochrane of ISTT, Transcript 30 Jan p 78-81

⁵⁴ See for example in the UK the Banwell Report of 1964, *The Placing and Management of Contracts for Building and Civil Engineering Works*; and the Latham Report of 1994: *Construction the Team, Joint Review of Procurement and Contractual Arrangements in the UK Construction Industry*.

common practice, main contractors should be required or encouraged themselves to quote for the relevant items of work.

4.10. We would add that provisional or prime cost sums designated for nomination should only be used in the case of specialist items of work and that appropriate ceilings should be established for the proportion of the contract value which these sums should represent. We note and commend the practice of providing both designs and measurement of items covered by provisional prime cost sums. With regard to the selection of specialist sub-contractors or suppliers we strongly support the use of “*listed*” specialists and the avoidance, so far as possible, of selection or nomination by or on behalf of the Employer. In any event, we are convinced that main contractors must accept, and be seen to accept, full responsibility for the performance of their sub-contractors, whether nominated or not. Uncertainties which were inherent in the former UK system of nomination are to be avoided. The result should be that disputes between a main contractor and its subcontractors, whether nominated, listed or domestic are irrelevant to the employer, who should have the right to enforce the main contract without regard to who has performed the work. While we were not made aware of any such problems, we should add that where a nominated or listed sub-contractor carries out design work, care should be taken to ensure that the employer has a clear right of action in respect of any deficiency in the design. That right of action may be against the main contractor, the sub-contractor or both⁵⁵.

4.11. We are aware that it is a common practice to proceed to contract with the design known to be incomplete and with the missing parts of the design (which necessarily cannot be costed), represented by provisional sums. Professionals then receive a full scale fee on the work eventually instructed, and contractors are entitled to treat the work as a variation. In consequence, neither has any incentive to avoid the practice. In fact the reverse is the case, in that both appear to be rewarded at the expense of the Client. We suggest that there should be an incentive to both to avoid the use of provisional sums save in exceptional and unavoidable circumstances. Such an incentive might take the form of a reduction of the fee payable to professionals and a

⁵⁵ The main contractor should be made liable under the main contract and the sub-contractor by appropriate form of warranty

limitation of the sum payable to Contractors for work carried out pursuant to a Provisional Sum.

4.12. With regard to the use of Bills of Quantities, it should be noted that bills may have a number of different functions. These can be summarised as:

- (a) A list of items of work to be carried out for the purpose of providing a lump-sum price.
- (b) A list of quantities which may be subject to review by re-measurement, leading to additional payment.
- (c) A description of the items of work which may be reviewed against standard rules of measurement, leading to additional payment .
- (d) A list of items and quantities to be used for interim measurement and payment.
- (e) A schedule of rates to be used for valuing variations

4.13. In the case of (b) and (c) the effect is to transfer the risk of uncertainty from the Contractor to the Employer, who must necessarily pay for the consequences of any change. Experience in other jurisdictions has shown that contracts can be let as a true "*lump sum*" with no changes to the sum payable other than in the case of variations introduced by the Employer. Furthermore, interim payments based on measurement are often inefficient and costly in professional time and can usually be replaced by agreed milestone payments. While these issues remain controversial, we believe that this is the direction which the construction industry in Trinidad and Tobago should take in terms of the gradual phasing out of ancillary usages of Bills of Quantities, necessarily through the use of appropriate conditions of contract.

4.14. We do not consider there to be any case for requiring tenderers to produce their own Bills of Quantity, save in relation to design-build projects which are considered later in this Report. In respect of design-build arrangements, part of the design process should include the drawing up of comprehensive and accurate Bills of Quantities for which the contractor should take responsibility by accepting the consequences of any errors of measurement or description by reference to the other contract documents (drawings and specification). Thereafter we suggest that, in many cases, there is no reason why the contract should not then operate as a true lump sum contract, the Bill of Quantities being used solely as a Schedule of Rates for the valuation of variations.

5. Issue (iii) Incomplete designs, design changes, variations, poor supervision and poor management

- 5.1. The Commission issued a discussion paper on this issue which is included as **Annex 10**. Written Submissions were received from NIPDEC, Peter Morris (Project Management Group Ltd), and from Inch by Inch Construction and Manufacturing Ltd.
- 5.2. NIPDEC's written submission stated that, while design should be complete, practically this was not always the most efficient or workable approach. NIPDEC's approach has been to ensure that all critical elements of the works are detailed to an extent necessary for practical construction and to use provisional sums for elements not designed at the time of tender. NIPDEC accepts that this can result in delay. Design changes and variations have been critical causes of delay and increased costs, typically resulting from poor designs, client changes or unforeseen conditions. NIPDEC accepts that poor supervision has been a key issue in the execution of projects with a higher level of supervision being required for local than for foreign contractors. While poor management has been an issue in the past NIPDEC considers that projects are now better resourced and managed.
- 5.3. Peter Morris has been involved in many projects over the past thirty years as a private quantity surveyor and was specifically involved in the New Scarborough Hospital, which is dealt with further below⁵⁶. His written note stated that the problems were rather more deep seated. He gives examples of the overall design concept being flawed from the outset such that major variations were required, with problems being exacerbated by the non-availability of competent experienced Project Managers. Persons appointed as Project Manager in some cases did not play any active role and did not supervise other consultants. Many Government projects suffered from inadequate or inaccurate soils investigations leading to design changes. Designs were not reviewed and, where such a review was carried out, the recommendations were not implemented. Design and supervisory consultants themselves required supervision which Government executing agencies did not provide.

⁵⁶ Section 22

- 5.4. The written submission of Inch by Inch Construction and Manufacturing Ltd addressed the difficult conditions under which the company had been required to work, particularly in high crime areas. The submission contended that supervision and control on behalf of Government agencies were insensitive and inadequate and that payments due under the contract were neither certified nor paid when due.
- 5.5. Issue (iii) was debated in oral session on 2 April 2009 in the form of a round table exchange between Peter Morris (Quantity Surveyor), Lallan Samaroo (NIPDEC) and Colm Imbert, Minister of Works and Transport. Peter Morris noted that on Government projects, while the supervisory consultants tend to be different from the designers, there was often no independent financial consultant. There should be a proper Project Manager able to take decisions when necessary, but this was often not the case. The Engineer or Architect under the Conditions of Contract was being required to act as the Employer's representative; and where his decision was challenged, Dispute Adjudication Boards were not being appointed.
- 5.6. NIPDEC expressed general agreement with Mr. Morris but argued that design changes could be beneficial in leading to delivery of a better project. It was accepted that there were instances of incomplete design or failure of supervision and, while penalty clauses were included in contracts, there was a culture of lack of accountability in Trinidad and Tobago and few instances where penalties were imposed. Conflicts existed between Designer, Supervisor and Contractor which dictated serious consideration being given to the Design-Build model. NIPDEC has also sought to fix design fees so as to give an incentive to the Designer to achieve early completion.
- 5.7. Minister Imbert gave examples of design errors, including failure to carry out any site investigation, the provision of invalid information and poor design; all were compounded by use of inappropriate forms of contract. From the Government's point of view, variation orders and claims meant escalating cost and delay. The Minister therefore agreed with Mr. Morris that consultants in Trinidad and Tobago needed to improve their service. Poor design and management benefited only Contractors and encouraged the pursuit of claims. The Government needed guidance on how to deal with errant consultants, who appeared not to be subject to any sanction. Where

Contractors claimed for extras, this usually resulted in escalation of consultants fees so that everybody benefited except the public. The practice of using different consultants for design and for supervision was a recommendation for projects financed by the Inter-American Development Bank (IDB). The Minister did not, however, support this practice and preferred that the same consultants undertake design and supervision. Where separate consultants were used for supervision, they would be reluctant to introduce major changes to the design, where this was necessary.

- 5.8. Mr. Morris stated that Project Managers on Government projects in Trinidad and Tobago were usually construction managers and not Project Managers in the true sense. Every project should have a Project Manager whose responsibility was to finish the job on time and within budget; and it was essential that such Project Managers should have authority to take the decisions needed. This included ensuring that the Engineer and Architect did their job. Minister Imbert agreed that true project managers were needed and noted that significant numbers of Trinidad and Tobago professionals were now seeking project management qualifications. Mr Morris and the Minister agreed on the importance of establishing a collaborative approach rather than relying on penalties. NIPDEC also agreed and added that problems of incomplete design could be minimised by fixing design fees and conducting design reviews.

Initial conclusions

- 5.9. The commissioners noted a degree of overlap between this issue and issue (ii), both referring to contracts being let with the design known to be incomplete. We firmly reject NIPDEC's suggestion that this can be an advantage in allowing for "second thoughts" by designer or employer. Those who deal with public funds have a duty, we suggest, to avoid circumstances in which the cost of a project is avoidably increased; and we can think of no good reason why designers should not produce a design which is complete in every necessary respect. If contracts are being let before designers have had time to complete the design work, the timing of projects needs to be reviewed.

5.10. However, we suspect that the real reason for the state of affairs described to us, is that sloppy practices have been allowed to develop and to persist without any party taking action against those at fault. As NIPDEC frankly admitted, there is a culture of lack of accountability in Trinidad and Tobago. We are aware of short-comings in the handling of construction cases both in the Courts and in other dispute resolution processes, which are addressed later in this Report. However, given the culture against which construction projects are carried out, it is even more important that available contract mechanisms should be enforced. We have suggested under issue (ii) that there should be incentives to avoid excessive provisional sums⁵⁷. The same approach is even more appropriate in the case of incomplete designs. There should be incentives applying both to designers and contractors to promote the achievement of designs which are complete. The incentive might consist, in the case of designers, of a sliding scale of fees providing a bonus upon completion of the design, which bonus will be lost if the design is not complete at tender stage; and in the case of contractors, a provision limiting the amount of additional payment to be made for items of work not fully designed at tender stage. It goes without saying that such provisions should be applied in accordance with whatever is agreed between the parties.

5.11. With regard to poor management, we gained the impression as the Enquiry proceeded, that this was one of the fundamental problems of the Trinidad and Tobago construction industry, to which no solution has been suggested. We encountered many instances in which, in our view, the core of the problem was that parties had taken on management roles which they were either incapable of fulfilling, or which they had no intention of fulfilling, often because there were other parties considered to be more appropriate to fulfil the role of manager. The issue is of cardinal importance and is considered separately in Section 30 of this report.

⁵⁷ Para 4.11

6. Issue (iv) Performance of local and foreign contractors and consultants on public sector projects.

- 6.1. The Commission issued a discussion paper on this issue which is included as **Annex 11**. Written Submissions were received from the Trinidad and Tobago Contractor's Association (TTCA), the Association of Professional Engineers of Trinidad and Tobago (APETT) and from NIPDEC. TTCA asserts that the Government has stated publicly that the local construction industry was unable to meet GORTT's demand for rapid development of mega projects in a timely and cost effective manner. However, foreign contractors generally have not delivered projects within time and budget and their presence has impacted negatively on the local construction industry and caused unemployment. TTCA assert that the local construction industry has also suffered from a closed door policy operated by many state agencies including UDeCOTT.
- 6.2. UDeCOTT's first presentation to the commission included: D List of contracts awarded over \$20m, which has been re-analysed in the TTCA's submission⁵⁸. TTCA first observes that the designation of local and foreign contractors is misleading: Times Construction and Sunway Construction Caribbean Limited (whose management, workers and resources are from Asia) are listed as local contractors while NH International (Caribbean) Limited (whose management, workers and resources are situated in Trinidad & Tobago) is listed as foreign. TTCA points out that many of the projected completion dates for projects being undertaken by foreign contractors are grossly inaccurate and have been subject to substantial delays, some in excess of 2 years. While it remained difficult to provide any reliable comparative analysis, the Government Campus Plaza has both foreign and local contractors, each of which has been subject to extensive time overruns. TTCA contend that foreign contractors have also incurred substantial cost overruns such that there is no firm evidence that their performance is better than that of local contractors.
- 6.3. TTCA emphasises the importance of the local construction industry: Government figures show that for the year 2008 construction and quarries contributed \$14.3bn at current prices or 9.4% to GDP⁵⁹ and represented 18.9% of the employed labour force.

⁵⁸ Appendix 2

⁵⁹ Appendices 6 and 7: source Central Statistical Office GOTT. At constant prices or real terms this equates to \$7.3Bn or 7.8% of GDP

By contrast, while the petroleum industry in Trinidad and Tobago is dominated by multi-national corporations, they have a well established commitment to achieve both local content and technology transfer⁶⁰. The TTCA argues that the same approach is needed for the construction sector. It is also pointed out that major projects undertaken with no significant involvement of local professionals will give rise to future problems for long term maintenance.

- 6.4. APETT support the TTCA submission and say that the Government has engaged in vilifying and denigrating local construction professionals, thus eroding public confidence and undermining the quality of training of local engineers. APETT points out that local engineering consultancies are largely dependent on public sector expenditure and that UDeCOTT is by far the largest state agency in this regard. In the absence of any legal framework regulating the placing of consultancy work, UDeCOTT is the key factor in development of local engineering capability. Trinidad and Tobago has no mandatory building code and only guidelines governing sanitation and land use. Local professionals have been largely responsible for the built environment of Trinidad and Tobago up to recent times, and the local construction sector still has great potential to develop both local capabilities and expertise outside Trinidad and Tobago. While it is accepted that locals have underperformed, the same is true of foreign professionals as shown by a number of well-publicised examples⁶¹.
- 6.5. NIPDEC in its written submissions pointed out that local consultants typically lack specialist experience and knowledge, which can be provided by foreign consultants, albeit at greater cost. There needs to be greater self-regulation among local consultants. NIPDEC acknowledges that local contractors have good general construction experience but have limited specialty experience in areas such as health. It is suggested that local contractors perform less efficiently and with more conflict. NIPDEC, however, encourages the employment of local firms as sub-contractors.
- 6.6. Issue (iii) was debated in oral session on the first day of the second hearing, 23 March 2009, in the form of a round table exchange between the following persons: Mikey

⁶⁰ Appendices 8 and 9 and see Trinidad and Tobago Energy Sector, local content and local participation policy framework.

⁶¹ Particularly Scarborough Hospital.

Joseph of TTCA, Rubadiri Victor of the TT Artists' Federation, Colm Imbert, Minister of Works and Transport, Winston Riley of the JCC, Patrick Caesar of NIPDEC, Mr Calder Hart of UDeCOTT and Gary Turton, President of the TT Institute of Architects (TTIA).

- 6.7. Mr. Joseph for TTCA reiterated the points concerning what was to be regarded as a "Local contractor" and pointed out that the definition employed by the Energy Sector was:

"A company that is majority owned where its management resides in Trinidad and Tobago."

Applying this definition, companies such as Carillion and other locally registered firms from Asia would not be regarded as local contractors. Mr. Joseph suggested that the Government of Trinidad and Tobago had a responsibility to provide for its own citizens in the development of the local construction sector. The local sector needed protection, which had been the approach of many other countries during their development stage. This was an essential part of Vision 20/20.

- 6.8. Measurement of comparative performance was difficult because of the number of variables, including situations in which the client's requirements were poor and procurement methods inadequate. There was little factual information to demonstrate what had gone wrong on the project where local firms were criticised. There was a history of time and cost overruns on all projects, whether by foreign or local contractors, suggesting that the problem may be with the agency responsible for those projects – in most cases UDeCOTT. The comparison being undertaken was also limited to the public construction sector and further limited to building projects, where different considerations might apply to civil engineering; and in the energy sector local contractors had achieved notable success in the design and construction of energy platforms – in this case as a result of a different Government policy. Reference was made to the 50 ECCE centres awarded to a foreign firm. Mr. Joseph questioned what social benefit would arise from the announced saving of \$100 million. Like different procurement methods, there was no right answer, and each had its own rightful place taking into account the development programme, fiscal benefits and the social impact on society.

- 6.9. Mr. Victor of the Artists' Federation pointed out that some \$5 billion worth of building projects were being constructed where there were problems with lack of substantive local briefs and a consistent policy of non-consultation with local stakeholders who had concern about design flaws, particularly in the Academy of the Performing Arts. The Federation had not been consulted over the decision to build the Academy in 2003. There had been a local architect who was aware of local needs, but he was removed when the project was let to foreign contractors.
- 6.10. Minister Imbert expressed disagreement with both presentations. A proper in depth analysis of performance of local versus foreign contractors would reveal a different picture from that portrayed by TTCA. Where foreign contractors ran into problems, the common feature was not the project manager but the design-tender model. Delay and cost overruns were attributable to incomplete designs, inadequate designs, unrealistic provisional sums and unsuitable nominated sub-contractors, as addressed in previous issues. Thus, foreign contractors working with local consultants were likely to incur delay and additional costs; while design-build projects by foreign contractors and consultants, such as the Prime Minister's residence and the Waterfront Project, were completed on time and budget. The Social Development/Ministry of Education Tower, conversely, was being constructed by a foreign contractor with local consultants on a design-tender basis. Here there have been a large number of requests for information and change orders. A local contractor would have faced the same issues with respect to incomplete design and non-performance by nominated sub-contractors.
- 6.11. Thus, on the Government Campus Plaza, the issue was not that the projects were being managed by the same client (UDeCOTT) but that each project was let on a design-tender basis, each with the same recurring problems. Only in the case of design-build could disputes between contractor and consultant be avoided. Thus, the Minister's conclusion was that the problem cannot be characterised simply as local versus foreign: the problem is the methodology. Where a contractor took responsibility for design and construction, problems were minimised; but there was no instance of local contractors and consultants combining to tender for design & build projects. The Minister also illustrated his points by reference to the Interchange Project on the Churchill Roosevelt Highway and the Uriah Butler Highway. Local

contractors were not prepared to bid and only one foreign bid was received. Mr. Joseph stated that local contractors did not bid because the project required expertise unavailable locally, and potential local bidders were unable to source foreign partners. Mr. Joseph attributed this inability to the limited tender period which was not extended. Mr. Winston Riley of JCC added that local contractors were deterred because the original design for the Interchange was in structural steel which was outside the experience of local contractors.

6.12. Mr. Caesar for NIPDEC endorsed the comments of the Minister with regard to consultants and incomplete designs, while acknowledging that part of the reason may be the tight schedule for production of designs and tendering. There was also a problem with identifying local contractors with sufficient resources, whether managerial or labour resources, the latter being a particular problem in Tobago. Mr. Samaroo continued, stating NIPDEC employed local contractors for their road Enhancement Programme. For the Health Sector Programme, conversely, there were few local contractors or consultants with capability, so that foreign consultants in particular and some foreign contractors were selected. NIPDEC also supported licensing of construction trades for Trinidad & Tobago.

6.13. Mr. Calder Hart, in response to APETT, stated that UDeCOTT initially worked exclusively with local consultants and contractors but became aware that there would be capacity issues. Foreign contractors were employed in the expectation that this would lead to partnering arrangements and technology transfer. On the Waterfront Project, around 80% of the workforce of 1300 were local workers. In terms of numbers of construction workers, there were over 113,000 people employed in the local construction sector, whereas the Chinese workforce on the Academy of the Performing Arts amounted to less than 700. The project had the aim of achieving a local content of 25%. When these projects were let, the local construction market was operating at full capacity and there were labour shortages, which rendered the issue of training academic. Mr. Calder Hart supported the Minister's view on the need for foreign input, but saw this as a transitional strategy leading to local contractors participating in design-build and developing stronger project management skills than at present. Mr. Hart stated that both the Waterfront Project and the Prime Minister's residence and diplomatic centre had been completed on time and budget. Additional

cost had been incurred on the Prime Minister's residence, but this was for additional works. With regard to quality, there were issues on the Ministry of Education/Social Development Tower involving local architects and designers and involving foreign contractors for the curtain walling, where delay had resulted from the need to certify the materials.

- 6.14. One of the major challenges had been to move the financing of Government development programmes from a state driven model to a private sector driven model, in order to tackle problems of late payment. The Government traditionally financed its development programme as part of expenditure. A move towards private financing would allow improvement of cash-flow and encourage better achievement of time and quality targets. On the Waterfront Project the contractor was involved in training local workers, particularly tower crane operators. UDeCOTT was working with foreign firms to increase local content and to encourage joint ventures.
- 6.15. In response to the Chairman's question, the Minister stated that, while the Central Tenders Board had a percentage for local content, there was no minimum quota for other projects. Mr. Riley pointed out that some local trades such as plumbing were subject to licensing and therefore had to be carried out by local tradesmen, although a foreign contractor could simply employ one local licensed tradesman to work with its own workforce. Mr. Riley commented that to achieve a particular level of local content, MOUs were insufficient and there should be a system for points to be awarded to tenderers for local content and developing local skills. The local content needed to be handled at the design stage, for example to ensure that sizes are within the capacity of the local industry.
- 6.16. In general discussion it was agreed that there was a problem with the adequacy of soils investigations and with identifying responsibility for wrong or inadequate soils data, which was a common cause of delay and additional cost.
- 6.17. Mr. Gary Turton, President of the TTIA expressed concern that the Commission was overlooking the fact that local architects had been responsible for many successful projects. Architects and Engineers are registered in Trinidad and Tobago so that foreign architects and engineers could not simply set up practice. There was nothing,

however, to prevent buildings being constructed in Trinidad and Tobago to designs furnished by foreign architects and engineers. The practice of the International Union of Architects is for foreign architects in a host country to engage in a joint venture relationship with a local firm, which facilitated technology transfer.

Initial conclusions

- 6.18. In the Commissioners' view no convincing comparison has yet been presented from which reliable conclusions can be drawn as to the relative performance of local and foreign contractors or consultants. The Commissioners readily accept that some foreign contractors and some foreign consultants have levels of expertise which is unmatched by the local industry. However, the Commissioners also accept that some local contractors and some local consultants have high skill levels in certain areas which compare favourably with foreign contractors and consultants.
- 6.19. Minister Imbert himself expressed the opinion that where projects ran into difficulties, the common feature of those projects was the use of the design-tender model rather than whether the parties involved were local or foreign. This is borne out by the evidence that delay and cost overruns attributable to incomplete and inadequate designs, inadequate site investigation data and general poor management practices can occur on any project using the design-tender model.
- 6.20. It is clear, however, that there are areas in which the local construction industry does not presently have the capacity or ability, without assistance from foreign firms, to undertake certain types of projects which Government policy presently demands. These include projects requiring complex structural steelwork, such as the Churchill-Roosevelt inter-change project. Such projects can be undertaken by local firms in collaboration with foreign firms with requisite capacity and expertise. The local industry also presently appears unable or unwilling to undertake substantial design-build projects. This is considered in the next following section of this report. It is clear that design-build requires co-operation between contractors, designers and other professionals which is presently lacking within the local industry. There is no reason to conclude, however, that if design-build is to play a significant and continuing role in construction projects in Trinidad and Tobago, the local industry would be unable to adapt to its requirements.

6.21. The Government must guard against the possibilities of the local industry facing unfair competition through foreign firms being able to offer inducements not available to local firms, such as soft loans. There must also be a level playing field, for example, by ensuring that foreign tenders are based on minimum wage rates. While this is a standard tender requirement, it appears that contractual arrangements are not always honoured.⁶² It seems clear that the construction market in Trinidad and Tobago should be open to both domestic and foreign operators. The question is whether local firms should be afforded protection, as considered in the discussion on the White Paper below. As pointed out forcefully by representatives of the local industry, the placing of one or more major projects in the hands of foreign contractors or consultants engages many different issues. These include the short-term social consequences of bringing in foreign workers and the long-term effects on the local construction industry, both positive and negative. We were not made aware of any systematic policy or practice being employed when making decisions about the use of foreign contractors and consultants. It is sufficient at this stage to say that we are firmly of the view that such policy or practice should exist and should be both transparent and open to review.

7. Issue (v) Effectiveness of turnkey or design and build, compared to traditional design and tender.

7.1. The Commissioners issued a discussion paper on this issue which is included as **Annex 12** Written Submissions were received from The Hon Colm Imbert, Minister of Works and Transport, Jack Bynoe, president of the Trinidad & Tobago Institute of Architects (TTIA), NIPDEC⁶³, the JCC, Arun Buch & Associates Ltd and the Institute of Surveyors of Trinidad and Tobago (ISTT).

⁶² Report of protest by Chinese workers, Trinidad Guardian 25 August 2009

⁶³ two papers, dated 5 January and 4 February 2009

- 7.2. The Commissioners' discussion paper pointed out that the Employer must provide a clear design brief and must accept that the Contractor need only achieve minimum compliance with that brief. The tender process usually included a design competition which could result in wasted effort. There were advantages in terms of cost and time to the Employer and work could commence at an earlier stage in the design cycle. The Employer, however, could not maintain control over the design, as in the case of traditional design-tender, and design-build was more likely to produce quality issues.
- 7.3. Minister Imbert, in his written submission, took issue with points made both by the Commissioners and in the written statement of Mr. Bynoe. In particular, Minister Imbert disagreed that design and build delivery systems could lead to the substitution of inferior or cheaper materials. The quality of design-build projects has been good, as demonstrated by the International Waterfront project, including the Hyatt Regency Hotel. He also took issue that design-build resulted in waste of time and effort by Consultants and Contractors. That view was out of tune with economic realities and there were many examples of architects and contractors being willing to enter design competitions. Minister Imbert accepted that much depended on the quality of the user brief, which could be tied to published standards and industry norms, and the terms of the design-build contract. The quality of design-build projects in Trinidad and Tobago compared favourably to design-tender projects. The Government was of the view that the advantages of design-build far outweighed those of the traditional design-tender approach, particularly in having a single source of responsibility and the avoidance of a "*blame game*" between contractor and consultant.
- 7.4. Jack Bynoe on behalf of the TTIA was opposed to the use of design and build as currently used by UDeCOTT and other Government entities as being a waste of Consultants' time and an unwise use of resources. The TTIA proposed, for the more efficient use of design-build, the use of an Owner's Consultant to bridge the gap between Owner and designers. Mr. Bynoe agreed with the written submissions of the JCC which were presented by Mr. Riley⁶⁴. Mr. Riley quoted from the work of Professor John B. Miller of MIT⁶⁵ who stated that design-build was *not* inherently preferable to other delivery systems and that there was no delivery method that is

⁶⁴ Riley second witness statement paragraphs 35-41.

⁶⁵ Principles of Public and Private Infrastructure delivery.

uniquely and consistently best for all infrastructure projects. While design and build is said to account for some 35% of non-residential construction in the USA, procuring agencies were required to demonstrate that the method had clear advantages⁶⁶. There were several different approaches to design and build, most of which had not yet been tried in Trinidad and Tobago. Each approach would require the development of procurement rules.

7.5. Arun Buch, in a comparative paper addressing all procurement systems, noted that while design and build may provide an answer to the reported ills of time and cost overruns, it can run into difficulties in a number of situations and requires astute evaluation of tenders. UDeCOTT's method of "full open design-build" may not be the ideal approach: if it were clients the world over would be using it. Mr. Buch produced a list of disadvantages of this approach and proposed a modified design-build arrangement with use of a designer commissioned to examine and evaluate alternative concepts. The report goes on to discuss alternative ways in which design and build may be successfully implemented to produce high quality projects.

7.6. The ISTT noted that, while no single factor can guarantee the success of design-build, one of the most important factors was the organisational framework of the construction project. While design-build was seen to be successful in the USA, the system there has been in operation for some 40 years and the ISTT suggested that the introduction of design build in Trinidad and Tobago should similarly be a long-term aim. ISTT accepted the potential advantages of single point responsibility, the integration of design and construction and of quality competition. They emphasised, however, that design-build required a change of environment and attitude. The success of design-build also depended on the nature of the project and required precise definition of the Employer's Requirements, for which a design consultant might be required. It is also to be borne in mind that design-build is championed by powerful vested interests.

7.7. NIPDEC, in their first submission,⁶⁷ state that they have not used design-build, but offer the comment that their failures, in some cases, to deliver projects within quality,

⁶⁶ Design Build Procurement Act, Illinois.

⁶⁷ Dated 5 January 2009

schedule and cost requirements does warrant review of delivery methods. NIPDEC accept that failures have occurred due to inadequate in-house expertise, poor site selection, poor design, deficient contract documentation and deficient project and construction management by both local and foreign consultants. In their second paper on Issue (v)⁶⁸ NIPDEC comment on the Commissioners' Discussion Paper. They agree that qualified design personnel should participate in the preparation of the design brief and that the Employer must undertake preliminary engineering to provide clarity in the brief. It is noted that design competition is not always desirable. NIPDEC disagreed that design-build was more likely to generate quality issues or that inspection requirements may be relaxed. NIPDEC thus saw many advantages in design-build and believe that adequate protection exists within the Contract framework to achieve successful delivery.

- 7.8. Issue (v) was dealt with orally by submissions taken in the form of a round-table exchange, which took place on 29 and 30 January 2009 and was conducted between the following persons: Minister Imbert, Vaughan Lezama (APETT), Jack Bynoe (TTIA), Mikey Joseph, president of the TTCA, Mr Arun Buch (Consulting Engineer), Alan Cochran (IQS), Winston Riley (JCC), Professor Winston Suite (formerly of UWI) and Wendy Ali (NIPDEC).
- 7.9. Minister Imbert explained the Government's preference for design-build as providing a way out of the problems of time and cost overruns and of disputes about delay, quality issues, design errors and liability in general which have occurred on many projects. Design-build provided a single point of responsibility. The success of the system was demonstrated by the International Waterfront Development Project and the Prime Minister's Residence and Diplomatic Centre, also the Performing Arts Academy. The Construction Sector Institutions, both contractors and consultants, had mounted tremendous opposition, based on preserving the status quo. The three projects had each used the 1999 FIDIC Conditions of Contract for Plant and Design and Build. An alternative was the 2005 JCT Design and Build Form of Contract. The three major design-build projects in Trinidad had all been undertaken by foreign contractors. In contrast, a number of high profile design-tender projects undertaken

⁶⁸ Dated 4 February 2009.

by local contractors had ended up in serious delay and with major disputes. On the Churchill Roosevelt-Highway Interchange Project, the Contract had been switched to design-build and has been successfully completed. The Government was anxious that the local construction industry should embrace design-build, but there was much resistance.

7.10. Minister Imbert referred to Government statistics showing that between 2002 and 2008 the unemployment rate had dropped from 10.4% to 5.3% and the number of persons employed had risen from 525,100 in 2002 to 588,400 in 2008. The vast majority of additional employment occurred in the construction sector. The Government had had difficulty in getting bids from local contractors indicating that they were working near capacity and there were no more construction workers left to hire. Use of design-build has not therefore resulted in unemployment: the opposite was the case. Minister Imbert described UDeCOTT as the major agent of change for design-build and the instrument of the Government⁶⁹. The Government was, however, willing to work with the local industry to deal with perceived problems with respect to design-build. There were clear criteria that can be used to establish the best bid.

7.11. Mr. Riley said that the JCC had no position on the issue of delivery systems, which had been under discussion for some time. Design-build needed to be analysed with respect to conflicts, quality control and design problems. No single delivery system was appropriate in all circumstances and it was not necessarily the case that design-build was the lowest cost. Mr. Riley said that no contract should be awarded without a priced and competitive tender. No design-build projects should be tendered without detailed owner requirements and performance specifications, and with the design completed at least up to design development stage. The largest area of disputes on design-build was where the owner's requirements are not properly defined. Design-build proposals should be judged on life-cycle costs, not just capital costs. Furthermore, most design-build projects in Trinidad and Tobago had not finished on time or within budget.

⁶⁹30 January Transcript page 20.

- 7.12. Arun Buch commented on the incidence of disputes at the Government Campus project. This had been let to four different contractors, each of whom had blamed the others for delays with the result the client ended up paying. With regard to design-build, Mr. Buch had been involved in four successful projects. However, the model generally adopted, including that for the Waterfront Project, was not open design-build tender. This would run the risk that the lowest bidder would be the one paying least regard to quality control, which involved more cost. Achieving the best product required establishment of tender rules which allocated points to design quality as well as price. The rules could provide for unsuccessful bidders to be reimbursed for their design costs.
- 7.13. Jack Bynoe of TTIA expressed opposition to the design-build system. When the Government embarked on major construction programmes they tended to reject the local construction industry in favour of foreign contractors and consultants. The local industry had a good track record in constructing projects such as schools. The Government had unrealistic expectations of local architects. He gave examples of an irrational approach to the design-build bid process by which four primary schools in different locations were put out for firm price bid by the Education Facilities Company Ltd (EFCL), with no available soils information. Ten bids had been requested involving architects, engineers, quantity surveyors and contractors, where 9 of the bids were to be rejected.
- 7.14. Professor Suite offered the view that the study of comparative procurement system led to the conclusion that each system had advantages and each had disadvantages. Historically, none of the systems had more disputes than others; and in Trinidad and Tobago there had been disputes in the private sector where the public sector was not involved. Where the state was involved in contracting, there was a conspicuous absence of expertise such that the state was unable to control the incidence of disputes. The most appropriate procurement system depended on the capacity of the client on a particular project.
- 7.15. Mr. Joseph stated that the Contractors' Association Members were currently divided on the issue of design and build. He did not believe design and build would add to the value of development of the industry, but should take its place with other procedures

and systems. There was a need to be cautious because of the possibility of corruption. There were unscrupulous practices in the contracting sector: the industry has problems with architecture, engineering and with the contracting departments which needed to be examined holistically. There were a large number of contractors listed in Trinidad and Tobago with no track record and there was a need for competence to be established. The problem with inadequately specified work was that (as Arun Buch stated) the tenderer with the least experience will tender lowest, and the tenderer with more experience will be rejected.

7.16. Mr Cochran of ISTT noted that the design and build system has been developed in the US and UK over many years. There was a very wide range of different types of design-build. The fact that there were single point responsibility for the client would not prevent disputes within the contractor's organisation, as in the case of Wembley Stadium. The essential requirement was to have a good definition of the Employer's Requirements and this required skills which were not present in Trinidad and Tobago at the moment and which required a great deal of training of those commissioning construction on behalf of the Government before proper requirements could be accurately written. There also need to be proper rules governing the selection process, which were not presently in place. There was a wide range of opinions within the surveyors' organisation. There would be far more work for quantity surveyors using design-build. But there was opposition to design-build and much development was required. A client advisor was needed and many other changes were required to make design-build the sensible and efficient way forward.

7.17. There were exchanges between Mr Buch and Minister Imbert regarding the comparative cost of office accommodation in projects using design-build against design-tender. Mr Buch's analysis led to a cost of under \$1500 per sq ft for the Government Campus Project, which was below the cost of the Waterfront Project. Minister Imbert conversely quoted a cost of \$1,451 per sq. ft. for the Waterfront Project against present costs of \$1,546 for the Government Campus Plaza, which was still subject to substantial increase.

7.18. Minister Imbert gave an example of a local design-build project that had not worked well. The project was at Coconut Grove, Mayaro where the developer was Bynoe

Rowe Wiltshire Partnership. The project scope was the construction of 84 single family housing units. The original completion date was February 2004. Only 50% of the project had been handed over by 2007 and the remainder was only recently completed. This was a local consortium undertaking design-build which was plagued by disputes, non-conformance with construction drawings and incomplete designs. Mr. Bynoe responded by pointing out that neither the contractor nor the developer had been paid by UDeCOTT. The project was handed over to HDC who had taken no action for the past 2 years. Coconut Grove was a sole selective project so that the designer was guaranteed payment for his design work.

- 7.19. The Enquiry heard from Mr. Rubadiri Victor of the Artists Coalition of Trinidad and Tobago who addressed the Academy of the Performing Arts and other cultural projects with costs of around \$4Bn over the past 4 to 5 years. The concern of the Artists Coalition is that NAPA could not function as a Performing Arts Centre at present because the stage was not appropriately constructed to facilitate dance or theatre production. The concern was that public money was being used for a purpose which was not going to be achieved. Minister Imbert responded by agreeing that the facility should be tailored to accommodate the aspirations and requirements of the end user and this would need to be addressed⁷⁰. The Performing Arts Academy was not a performing arts centre but a training institution. It was not designed as a concert hall. The University of Trinidad and Tobago (UTT) has responsibility for administration of the facility as a training institution.

Initial conclusions

- 7.20. The Commissioners accept that Design-Build has much to commend it in Trinidad and Tobago. However, as pointed out by several parties, there is no single system of procurement which should be preferred in all circumstances. It is to be noted that Design-Build has been developed over many years in the USA, UK and elsewhere, where other systems have co-existed and continue to be used successfully. Furthermore, in any country, including Trinidad and Tobago, any new system needs time to become bedded into the local industry, requiring that professionals should

⁷⁰ Transcript 30 January 2009 p.63.

learn new skills, contractors should discover the economics of working with the new system, and both should learn to work together and to accept new levels of risk.

7.21. One matter which is clear to the Commissioners is that Design-Build is not to be seen as a convenient means of escaping the well-documented problems of Design-Tender. Those problems, in the view of the Commissioners, stem from a range of management issues generally indicative of poor performance by many parties. It should not be supposed that Design-Build projects can be successfully carried out with similar levels of poor performance. Indeed, the Commissioners are of the view that the undoubted success of some high-profile Design-Build projects has been dependent on high levels of performance from all parties involved.

7.22. It was generally recognised that there are a number of ways in which Design-Build can be applied, ranging from full open design competition to a negotiated tender on a design for which the contractor takes over responsibility. There was little discussion on which particular form of Design-Build was most suitable for adoption in Trinidad and Tobago and this should clearly be the subject of future debate. This should be aided by analysis of projects completed so far in Trinidad and Tobago, and of responsibilities including that of developing the design up to completion. On the basis of the present debate, the Commissioners were of the view that a full open design competition is unlikely to be justifiable. The preferred system is likely to involve tendering on the basis of a preferred design which is completed up to a minimum level, and which is then to be priced competitively. The Commissioners endorse the proposal of Mr Riley, which had general support, that there should be provided to tenderers in all cases a detailed statement of Owner Requirements and a detailed Performance Specification. There was also general support for the need for employers to retain the services of a design consultant who could either produce or oversee the production of the appropriate tender documents and advise on the acceptability of contractors' proposals.

8. Issue (vii) Price gouging and profiteering in the public construction sector.

- 8.1. The Enquiry received no written submission on this issue, although a number of references were made during round-table sessions on other issues. Minister Imbert referred to over-pricing by local contractors bidding for Early Childhood Care and Education Centres⁷¹; but that was put forward as a reason for turning to a foreign contractor and, whether or not the local bids were inflated, no money passed as a result.
- 8.2. Price gouging is understood to refer to a situation in which a contractor or supplier who has contracted to buy goods or materials at a low price then takes advantage of a rise in the market price to make an un-earned profit. This is likely to apply in the case of commodities such as steel, cement or aggregate, but it can apply equally to any other goods or materials. There is a perception that such “price gouging” is unfair, unethical and should not be allowed to occur.
- 8.3. It may be that this perception is fuelled by what happens in the reverse situation when the price rise is borne by the contractor and (in accordance with standard practice) there is no fluctuations clause to mitigate the effect of the price rise. In this situation, as we have seen a number of times, the contractor generally receives some measure of compensation where the Employer accepts responsibility for part of the delay which has given rise to the price inflation⁷².
- 8.4. In all such situations it is the Employer, including the State Agencies, which controls the terms of the contracts being placed. It is the contract terms which offer the opportunity to make provision for the consequences of price inflation in respect of goods and materials as well as rises in other items, such as wages and taxes. A “fluctuations” clause allows the contractor to recover defined inflationary price increases and therefore requires that he should not include for any such increases in his price. While this is unusual, there is no reason why a fluctuations clause should not also provide for price reductions occurring after the fixing of the contract price. However, as has been seen, the present policy of the State Agencies is against the inclusion of any such provisions.

⁷¹ Closing Submissions of Attorney General, Section F

⁷² See report on Cleaver Heights, para 26.33 to 26.36

8.5. The conclusion, in the absence of debate in the Enquiry, is that price gouging, if assumed to be a bad thing, should be controlled by appropriate contract clauses to regulate what the contractor is entitled to recover and what is to be regarded as his risk. However, the effect of any such provisions will be dependent on the terms of the contract being properly applied and enforced. It is to be noted that, in some respects at least, there is a notable reluctance to enforce contract terms as they stand⁷³.

9. The White Paper

- 9.1. Government published a White Paper in 2005 containing extensive proposals for legislative reform of procurement practices in the Public Construction Sector. The White Paper is intimately bound up with the issues being considered in the Enquiry and deserves careful review. The issue was raised in the Enquiry by the JCC in the first statement of Winston Riley⁷⁴ and responded to, inter alia, in the presentation filed by UDeCOTT prior to the first hearing of the Enquiry⁷⁵.
- 9.2. The White Paper was the product of the Committee for Reform of the Public Sector Procurement Regime, set up by the Cabinet in 2002 as a result substantially of the initiative of the JCC. The committee comprised senior civil servants from Trinidad and Tobago and representatives of the TT Manufacturers Association, the TT Chamber of Industry and Commerce, the TT Transparency Institute and the JCC. The Committee addressed many of the issues with which the Commission is now concerned. A Green Paper was published for public comment and subsequently a White Paper which was laid before Parliament in 2005. No action has been taken or is currently proposed towards implementing the proposals of the White Paper.
- 9.3. The White Paper reviews the history of and perceived shortcomings in the current procurement system. It sets out proposals for a major re-organisation of the public procurement system to include both the prior design stage, the procurement of bids

⁷³ Refer to section 29 in particular

⁷⁴ Dated 8 December 2008, Paras 33 - 41

⁷⁵ Dated 15 December, Paras 83 to 92

and the subsequent implementation stage. The proposals include a new framework applying objective standards and adopting current best practice, based on the principles of value for money, transparency and accountability. The reforms are seen as necessary to achieve the quality of governance predicated by vision 2020. Significantly, the White Paper proposes the guarantee of a substantial market share to local business, to develop and promote domestic industry.

- 9.4. The White Paper proposes a new legal and institutional framework involving replacement of the Central Tenders Board Ordinance and its subsidiary legislation with a re-engineered procurement system. This is to be overseen by a Regulator, accountable to Parliament and with a mandate of ensuring an efficient and relevant procurement system that conforms to the operating principles, objectives and guidelines established. The role of the Regulator is said to be based on an existing model in Jamaica⁷⁶.
- 9.5. The JCT supports the aims of the White Paper and expresses concern at its continuing non-implementation. UDeCOTT, conversely, is opposed to the proposals and points out that it and other special purpose companies were not represented on the Procurement Reform Committee. UDeCOTT asserts that the support and objectives of the local construction industry are essentially protectionist. While UDeCOTT supports the principles of value for money, transparency and accountability, these principles are already reflected in UDeCOTT's own tendering procedures. The proposals of the White Paper are therefore seen as unnecessary. UDeCOTT opposes a universal public procurement regime which, it says, would lack flexibility. UDeCOTT therefore disagrees with the premise that a new framework should apply to all public procurement. UDeCOTT bases its opposition to the White Paper on what it sees as the shortcomings and limited capability of the local construction industry, which make it inappropriate that there should be any guaranteed market share. UDeCOTT also suggests that it is unlikely that any individual will be found with the necessary political and commercial independence to carry out the role of Regulator envisaged by the White Paper.

⁷⁶ Jamaica Contractor General Acts 1983-1999 and see <http://www.ocg.gov.jm/ocg/index.php>

- 9.6. Issues concerning the White Paper were dealt with in oral session by way of a round-table exchange. This took place on the second day of the second hearing, 24 March 2009 and was conducted between the following persons: Minister Colm Imbert, Ms Carla Herbert (former member of the Reform Committee), Winston Riley (JCC), Victor Hart (Transparency Institute) and Mr Calder Hart (UDeCOTT).
- 9.7. Minister Imbert explained that, while the White Paper had been adopted as Government Policy in 2005, there had since been feedback from a number of industries, stakeholders and practitioners, and from the State Enterprise Sector which had not been represented on the Committee. As a result the Government had now concluded that the regime proposed by the White Paper was simply unworkable. The objectives remain laudable and the Government accepted the need to regularise the system of public procurement, but the proposals of the White Paper were now seen as unrealistic. The proposals would deprive the Government of control over the implementation of development projects. The Government now propose to strengthen the public sector procurement regime by standardising tender rules, tender criteria and tender evaluation procedures, if necessary by way of legislation. A party who complained of being treated unfairly should be able to seek redress through the Courts, rather than through the proposed Independent Regulator.
- 9.8. Ms. Herbert pointed out that although the State Enterprise Companies were not directly represented on the Committee, they had been involved in dialogue and representations were made by them to the Committee. The rationale for an overarching regulator, as proposed, was consistent with current best practice of separating the Executive from intrusion into details of public expenditure. The Regulator was not designed to be interventionist but to monitor procurement and to provide a means for resolving issues. Mr. Imbert pointed out that the complaint mechanism under the White Paper⁷⁷ empowered the Regulator to investigate and arbitrate, whereas in the Government's view parties should be left to their rights before the Courts. There was a general discussion on the right of an aggrieved party to challenge decisions under the present regime, where UDeCOTT and other State Enterprise Companies may not

⁷⁷ Para. 6.71

be subject to Judicial Review proceedings⁷⁸. However, the challenge mechanism proposed under the White Paper would allow the Regulator to review the decision itself and not merely to apply the principles of Judicial Review. In Minister Imbert's view this would defeat the objective of the State Enterprise Bodies. The Regulator, who was not an elected person, would have more power than the Government.

- 9.9. Mr. Victor Hart stated that the Transparency Institute has always supported greater oversight in the construction sector. If the powers of the Regulator were seen as excessive, this should not lead to rejection of the White Paper as a whole. Ms. Herbert stated that the White Paper was principally concerned with public expenditure where accountability, value for money and transparency were critical. UDeCOTT was spending public money and ought to be accountable. Ms. Herbert, supported by Mr. Riley, argued in favour of the provisions for community involvement in assessing the need for a proposed project, where the Government's policy may benefit from community input at the design stage. This was not to be seen as obstructing but providing inputs at critical points in the procurement process.
- 9.10. Minister Imbert said the White Paper would involve Committees sitting in judgment on the Government's development programme and having the power, through the independently appointed Regulator, to determine whether projects should proceed or not, necessarily involving substantial delay. The question whether contracts were being awarded to the right persons would also be subject to scrutiny by the Regulator. This would render the Government incapable of regulating a national development programme. The Government itself was capable of managing a procurement system in a transparent, fair and equitable manner. The proposal for outside regulation was at odds with the democratic system
- 9.11. Mr. Riley responded by pointing out that the review process was advisory only. Under the present system there was no review at all of the economic benefit of projects being undertaken by UDeCOTT. The Review Committee was carefully structured to provide a balance between Civil Society and Stakeholders. Mr. Victor Hart drew attention to what he contended to be lack of transparency by the

⁷⁸ NH International v UDeCOTT but see also the dissenting judgment of Sharma JA.

Government in relation to the Rapid Rail Project. Under the White Paper Proposals the matter would come before the Advisory Committee to consider the need for the Project. Minister Imbert pointed out that he had made a lengthy statement in Parliament and subsequently a broadcast address. There had been coverage in newspapers regarding the need for the Project. This had been one of the most transparent procurement exercises ever carried out, notwithstanding which, under the White Paper, the Advisory Council would continue discussing the Project, probably for years. The Project had been studied for the last 20 years.

9.12. Mr. Joseph on behalf of the Contractors' Association gave the Paper full support, while accepting there could be some amendment. There was a need for legislation such as this. Mr. Calder Hart agreed that the objectives of the White Paper were laudable and commendable. However, UDeCOTT was committed to reduce bureaucracy and introduce a more commercial approach that would ensure things were done in a more timely manner. The need for Parliamentary oversight should not be diminished but UDeCOTT had that degree of oversight, through the Public Accounts Committee, the Central Audit Unit or the Ministers themselves. Every activity of UDeCOTT had Cabinet approval and there was accountability through the Parliamentary process. The need to standardise and to create a basic framework was accepted. The Government was trying to put facilities in place for the benefit of citizens of Trinidad and Tobago. It was unclear how the proposals of the White Paper, by the creation of a larger and more complex apparatus, would enhance this process.

9.13. Mr. Riley commented that the proposals of the White Paper would allow each organisation to be responsible from beginning to end of its process, subject to satisfying conditions of transparency, accountability and value for money. Mr. Victor Hart commented that while consultations presently took place, there was not a culture of consultation in Trinidad and Tobago and the Government did not encourage it. The consultations which UDeCOTT undertook arose from the negative reactions of those who felt adversely affected by Projects. The Transparency Institute encouraged a culture of consultation, to avoid adversarial situations developing.

- 9.14. Minister Imbert concluded by characterising the White Paper as promoting the creation of an over-arching bureaucracy with quasi judicial machinery of doubtful competence that would adjudicate on all projects in Trinidad and Tobago, advised by civil society and not by Government. This supreme adjudicator would have the power to stop a process, overturn a contract or prevent an award. The Cabinet had decided in July 2008 that the White Paper should be revisited and that the way forward was through the establishment of standardised rules. The Government recognised that there was a need for a framework and for a system of standardised procurement rules.
- 9.15. In a late additional submission⁷⁹ on behalf of the TT Transparency Institute, Mr. Victor Hart addressed the issues which TTTI thought should survive from the review of the White Paper. He emphasised the need for legislation which should cover all agencies spending public money, as well as the establishment of an appropriate Regularity System. The Regulator proposed by the White Paper would be independent of the Executive, in the same way as the Auditor General. In answer to Minister Imbert's view that this would involve loss of control by Government, TTTI was of the view that this would not happen and that the function of the Regulator would be to ensure that the procurement process was carried out in accordance with policies and guidelines approved by Parliament.

Initial conclusions

- 9.16. The Commissioners recognise that the decision whether to implement the White Paper, and if so to what extent, is for the Government. The White Paper had the support of Government in 2005 but since that date there has been no move to implement the proposals and the Government's present intention, as expressed through Minister Imbert, is that there will be a much more limited review of procurement rules.
- 9.17. One of the major objectives of the White Paper proposals was to achieve greater transparency through the involvement of "civil society" in the review process. The debate in the Enquiry, including contributions under other issues, left us in no doubt of the demand for greater transparency both in the procurement process and in the

⁷⁹ Dated 29 October 2009.

antecedent consideration of whether a project requiring large sums of public money should proceed and if so in what form. Recognising the need for the Government to govern, it was evident that organised user groups, such as the Artists' Coalition, had not been adequately consulted on decisions regarding the Academy of Performing Arts, an omission which Minister Imbert recognised. To the extent the solution embodied in the White Paper is not to be implemented, other safeguards need to be introduced to ensure that relevant views can be expressed at the appropriate time and taken into account before decisions are made.

9.18. The question whether a review system in parallel to the courts should be implemented is again for the Government. We share the apprehension of those who foresaw difficulties both in setting up the Regulator system and in operating it without subverting the power of Government to make decisions and without causing serious delay to projects. If the Government's decision is to adhere to the present system of challenge through the courts, we believe that it is also incumbent on the Government to see that the system is effective. This should include review of the controversial decision in N H International (Caribbean) v UDeCOTT⁸⁰, where a majority of the Court of Appeal held UDeCOTT not to be subject to Judicial Review. The issues are well-known and have been addressed on many public occasions. We add only that it is unusual that a body responsible for decisions involving very large sums of public money not to be open to challenge on the usual grounds of Judicial Review, bearing in mind their limited area of application⁸¹. It should be recalled that other bodies in the State Enterprise system, such as the Housing Development Corporation would appear to be open to such review, without apparently being overburdened with challenges. Were UDeCOTT to be open to Judicial Review, it is to be expected that a proportion of challenges, at least, would be disposed of summarily at the stage of application for leave. If a contested case led to a decision being set aside on proper grounds, it would be even more difficult to argue that the delay was unjustified.

9.19. If the recommendations of the White Paper are not to be implemented, and other measures are to be considered in their place, it must be borne in mind that the problems of the Public Construction Sector which gave birth to the White Paper

⁸⁰ NH International (Caribbean) Ltd v UDeCOTT and Hafeez Karamath Limited Civ. App. No. 95 of 2005

⁸¹ principally that of irrationality or acting outside the range of decisions open to a reasonable body.

remain. Many of the problems are the subject of this Report and it may be that the Report has brought to light problems of which the Government was previously unaware. However, the Government has put forward alternative proposals which we generally indorse, including the standardisation of procurement regimes.⁸² It is obviously right that Government Agencies, including UDeCOTT should be consulted and their views taken into account in deciding which measures should be taken forward. In this regard it has been noted that UDeCOTT considers that sufficient oversight and accountability already exists through the Public Accounts Committee, the Central Audit Unit, through Ministers themselves as well as through Cabinet and through the Parliamentary process. To assess whether this theoretical degree of oversight is effective in achieving adequate accountability of UDeCOTT will be one of the objectives of this Report.

10. Belmont Police Station

- 10.1. This was one of the projects selected for analysis in relation to a number of issues and which was cited by Minister Imbert as an example of failure of the design-tender system. It is thus put forward as illustrating the need for change in the Public Construction Sector. Extensive documentation was submitted by the parties involved, particularly NIPDEC. The issues were dealt with on 5 February 2009 by round table presentations between Michael Bynoe, of Bynoe Rowe, the architect, Orr Liyanage of Civstruct, the contractor, and Wendy Ali with Margarita Hospedales of NIPDEC.

- 10.2. Belmont was one of fourteen new Police Stations commissioned by the Ministry of National Security in 2005 to be project managed by NIPDEC, although it now appears they constructed only five and the remainder were handed over to UDeCOTT. Before NIPDEC took over Belmont, the Ministry had already appointed Bynoe Rowe as architects for six stations including Belmont. NIPDEC advised that it was not provided with a user brief. The project had a budget of \$13 million and a time estimate of 40 weeks (10 months). Four tenders were received, the lowest being from Civstruct at \$11.8 million with a completion time of 10 months. The Contract was let

⁸² Closing Submissions of Attorney General paras 13 and 22, and see para 3.42 above

in September 2005 on the FIDIC Short Form. The final outturn cost was \$15.75 million and, of most concern, the time for completion was 28 months. Of the cost overrun, variations account for \$2.27 million of which 62% represent client requests and 38% design changes. NIPDEC identified the problems encountered as incomplete design, variations, management issues and contractor problems including shortage of manpower and materials, poor scheduling and bad weather.

- 10.3. The Architect blamed increased scope including the road link, a retaining wall, paving to a yard, a security wall, enclosed staircase and late addition of AC; also weather, lack of labour and materials, lack of co-ordination between the Main Contractor and Nominated Sub-Contractors, delay by the TT Electricity Commission (T&TEC) and a large tree on the site. The Contractor had been paid additional preliminaries for a substantial part of the delay. The Architect also pointed out savings of \$740,000 and states that some delay was caused by their sub-consultants for civil and electrical work.
- 10.4. The Contractor claimed that the delay and additional cost arose from: setting out problems, additional excavation (BOQ exceeded by 100%), changes to sub-structure, changes to roof beams and columns, roof frame, blockwork, stairs, tiling and external works; also scheduling and manpower shortages.
- 10.5. There was a surprising dispute about responsibility for Nominated Sub-Contractors who had been selected by NIPDEC. The Contract does include a special provision for the nomination with a right of reasonable objection, but no other protection for the Contractor, who nevertheless considered that he was not responsible for the lack of performance by Nominated Sub-Contractors. It appears that no negotiation has ever taken place between the professional groups as to the contract wording dealing with nomination, and it is indeed surprising to find such a debate, which is out of step with modern international practice.
- 10.6. It seems clear that there were omissions and deficiencies in the design drawings and it is irrelevant for the Architect to blame his sub-consultants for whom he is, of course, fully responsible. It appears the sub-consultants operated largely independently,

visiting the site at separate times from the Architect with no one fully in control of design co-ordination.

- 10.7. A major problem occurred with the levels of the ring beam where it appears the structural designer had misunderstood the design intent. The error was pointed out by the Contractor and action was taken before concrete was placed. The contractor had, however, decided to erect the shuttering when he must have been aware at least that a potential problem existed. While the problem was clearly one of design, NIPDEC consider the Contractor used the error to justify a two month delay which could have been substantially reduced. It does not appear that NIPDEC itself played any part in detecting or resolving the problem, although it accepted the role of Project Manager.
- 10.8. Another problem was the very late addition of Air Conditioning, apparently at the request of the client i.e. Ministry and Police Officials. No explanation was offered as to the original design choice and whether such authorities had been consulted when the original design decision was made. Such a variation at such a late stage indicates a major lack of control and discipline on the Employer's side and has led to problems which are wholly avoidable.
- 10.9. The position of the Government is that this is a classic example of design-tender leading to additional cost and time overruns which could have been avoided using design-build. The Contractor's organisation is not against Design-Build in principle but says it should be used selectively. NIPDEC would support the use of Design-Build, while the Contractor had no experience and points to the need for a much longer and different tender procedure. In relation to this particular project, the design inherited by NIPDEC was already at an advanced stage and could well have been offered on a design-build basis, with the Contractor to provide only details and outstanding design.
- 10.10. In view of the Commissioners this was a good example of a project which could have benefited from the design-build approach, particularly given the multiple projects and the possibility of using standardised designs and procedures. In the present case it is notable that a significant number of separate entities were engaged, often with no clear lines of communication or responsibility. This includes NIPDEC itself whose

role, apart from acting as a Commissioning Agent, was unclear to the Commissioners. It did not appear that NIPDEC played any significant co-ordinating role and may well have been duplicating management which should have been provided by the Architect and the Contractor. A significant amount of the delay and additional cost, however, is directly referable to the Employer and it remains surprising that the end user should be permitted to insist on a major variation with apparent disregard of its effect on time and cost. Overall, this project demonstrated some of the worst aspects of the design-tender procedure.

Initial conclusions

- 10.11. In the view of the Commissioners, this project demonstrates the effect of design errors which should not have occurred and which were magnified by failure of any party to resolve them in a timely manner, including NIPDEC. The contract structure placed no management responsibility on the contractor and allowed him to use the delay to generate additional entitlement to payment, while seemingly avoiding responsibility for delay which would otherwise have been to his account. While it is possible to create a contractual duty on the contractor to take responsibility for patent design errors, such a duty would be difficult to apply in practice and would add to the potential areas of dispute. The real alternative is to place such projects on a design-build basis which necessarily places design choices, where not specified in the Employer's Requirements, in the hands of the contractor.
- 10.12. It would be quite wrong, however, to conclude that all the problems encountered on the Belmont Police Station project would be resolved by a decision to place such projects on Design-Build. To take the example of the late addition of Air Conditioning, the Employer retains the right to add such requirements under Design-Build and would, in these circumstances, simply end up paying for the consequences of the late decision in terms of additional cost and delay. However the project is to be structured, a disciplined approach to procurement is needed which was conspicuously absent at Belmont.
- 10.13. It should be added that NIPDEC did not appear to play any role in resolving the emerging problems on the project. The fact that they were appointed as project manager may indeed have created an expectation that they would assist in matters

such as resolving disputes. If that was the expectation, however, it was misplaced. This was not an isolated example of such non-performance⁸³ nor was it limited to NIPDEC. The general question of non-performance of management functions is addressed in a later section.

10.14. Thus we conclude that the Belmont project represented a combination of the problems discussed elsewhere in this report. No party emerged with credit. It demonstrated a number of situations which should be avoided in future. The overall conclusion is that such projects can be performed efficiently only if all parties perform in accordance with their contracts and additionally show a degree of professionalism conspicuously lacking at Belmont.

⁸³ refer to Scarborough Hospital project, section 22

**REPORT OF THE ENQUIRY INTO THE
PUBLIC CONSTRUCTION SECTOR,
TRINIDAD and TOBAGO**

By the Commissioners

Professor John Uff CBE QC (Civil Engineer and Barrister)

Desmond Thornhill (former Perm Sec, Ministry of National Security)

Kenneth Sirju (Registered Civil and Structural Engineer)

Israel Khan SC (resigned 11 August 2009)

Secretary to the Commission

Mrs Ida Eversley (resigned 1 December 2008)

Ms Judith Gonzales, Attorney at Law

PART II UDECOTT

11. Introduction

11.1. While this Enquiry is addressed to the Public Construction Sector, the public perception is that it is an enquiry into the operation of UDeCOTT with other issues conveniently added into the Terms of Reference. There is little doubt that the desire of the public to have the results of the Commission's investigations is focussed on UDeCOTT rather than the more anodyne issues of construction practice dealt with so far.

11.2. The Commissioners propose to deal with issues concerning UDeCOTT first by reviewing material concerning its procurement practices and methods of operation, as required by the terms of reference. We then review five current projects, all of which are controversial in some degree. Later, in Part III of the Report, we review issues of cost over-run, delay and defects for eight UDeCOTT projects, including the five already considered. Finally, in Parts V and VI of the Report we consider UDeCOTT's position in the context of broader issues.

12. Issue (viii) Procurement practices and methods of operation of UDeCOTT

12.1. This issue lies at the heart of the Enquiry and will be addressed in its two component parts, dealing first with procurement practices and rules, followed by methods of operation. This will be followed, in later sections, by a more detailed account of a number of significant and current projects which may be seen as part of the public concern which led to the setting up of this Enquiry. Issues of cost over-run, delay and defects in relation to UDeCOTT projects are dealt with in Part III of this Report. This section commences with a brief account of the creation of UDeCOTT.

12.2. In section 3 above an account is given of the early attempts to circumvent the effects of the Central Tenders Board through the creation of State owned "*special purpose companies*". In 1993 the Government set up a Committee to make recommendations for the creation of an entity specifically to undertake urban development in Trinidad

and Tobago. The report of that committee, chaired by Mr. Kenneth Snaggs, has been referred to as the “Snaggs Report”. Membership of the Committee, which reported on 1 June 1993, included Mr. John Mair (Attorney at Law), Mr. Desmond Thornhill (then Director of Budgets, Ministry of Finance), Mr. Calder Hart (then General Manager, Home Mortgage Bank) and Mrs. Victoria Mendez-Charles (then Director, Town & Country Planning Division). The Report concurs with the general view:

“despite the evidence of a few sporadic examples of urban development projects, that the existing institutional framework did not facilitate the implementation of urban development on a systematic and continuing basis, and that this deficiency could best be met by creation of a specialised agency with the mandate and the specific responsibility for implementation.”⁸⁴

12.3. The Report goes on to recommend that UDeCOTT be structured along commercial lines and be permitted to build up reserves to fund development on a continuous, self-sustaining basis; and that its mission statement should include redevelopment of the physical fabric of designated areas by the implementation, either directly as agent or as promoter of development projects, in accordance with environmentally sound and commercially viable principles⁸⁵. The Report makes detailed recommendations as to the structure and operation of UDeCOTT and recommends that it be established as a body corporate by Act of Parliament⁸⁶. The Report also recommended that the management structure should include as Executive Directors, the Managing Director and Finance Manager of UDeCOTT in addition to five non-executive members (including Chairman and Deputy Chairman) and other ex-officio members⁸⁷.

12.4. The Report of the Committee was accepted in principle. However, in place of the proposed statutory framework, it was decided to launch UDeCOTT simply as a private limited company, directly under the Companies Ordinance, whose shares were to be wholly owned by the Minister of Finance as Corporation Sole. As described in his statement⁸⁸, John Mair incorporated the company and some members of the Committee became the first Directors. Kenneth Snaggs became the first Chairman

⁸⁴ Para. 2.2.5.

⁸⁵ Paras. 229, 2.2.11.

⁸⁶ Para. 2.3.2.1.

⁸⁷ Para. 2.3.3.

⁸⁸ Dated 21 January 2009

and Messrs. Calder Hart, Krishna Bahadoorsingh, Wayne Maugham and Mr. Mair became the members of the first Board. The initial activities of UDeCOTT were limited. The value of construction work undertaken in the period 1995 to 1998 was approximately \$3 million and this grew in the period 1999 to 2003 to \$154 million. From 2002, however, the Government decided to embark on a major development in central Port of Spain to be known as the Government Campus Plaza. UDeCOTT had been appointed to manage the project in 1999 and had placed consultancy contracts. Mr. Calder Hart was appointed as the new Chairman in January 2002, Dr. Bahadorsingh was appointed Deputy Chairman and Mr. Mair himself returned to the Board. Thus, from 2002, UDeCOTT joined NIPDEC in undertaking procurement and management of public construction projects. A full list of UDeCOTT board members from 1993 to date is set out in **Annex 13**⁸⁹.

- 12.5. Mr. Calder Hart gave some further evidence about the choice of an appropriate model for the new body, explaining that, while a statutory model was considered by the original Committee, there had been other models considered including the Jamaica Urban Development Corporation which in his opinion was the closest model to UDeCOTT⁹⁰. In its closing submissions to the Commission⁹¹, UDeCOTT also drew attention to other similar bodies including the London Dockland Development Authority and the New York Urban Development Corporation. Each of these bodies is vested with much wider powers than UDeCOTT with regard to matters such as planning and building standards regulation. It has not been suggested that the recommendations of the Commission should include widening of UDeCOTT's powers. However, the comparison with authorities operating in other jurisdictions did serve to draw attention to the necessary limitations imposed by the decision to designate UDeCOTT as a private limited company. This might be compared, within Trinidad and Tobago, to the Housing Development Corporation which was re-formed (from the National Housing Authority) by statute⁹² and now includes powers to make regulations prescribing appropriate standards for construction of houses⁹³. The statutory Corporation is required to prepare a corporate plan and to submit an annual

⁸⁹ See 1st Statement of N Rampaul

⁹⁰ Transcr 28 Jan, p230

⁹¹ Transcript 20 May p 16-22

⁹² Housing Development Corporation Act 2005

⁹³ Housing Development Corporation Act 2005 Section 43(1)(a).

report to the Minister⁹⁴. Furthermore, while UDeCOTT considers itself not directly accountable to Ministers⁹⁵, the HDC Act specifically empowers the Minister to give to the Board “*directions ... to be followed in the performance of its functions or the exercise of its powers under this Act*”⁹⁶.

12.6. With regard to the UDeCOTT’s assets, the company was floated with initial assets of \$1million. Thereafter UDeCOTT has operated commercially, charging a management fee for its services of between 2½% and 4½% of project cost, depending on the nature of the project.⁹⁷ In addition the Government has donated land and other assets to enable UDeCOTT to operate as a developer, making substantial profits through numerous commercial transactions. UDeCOTT produced copies of accounts showing current net assets of approximately \$4.2Bn. Dr. Rowley⁹⁸, however, commented that UDeCOTT’s earnings were “*minuscule*” and described the assets as a “*relocation of public funds largely coming from the consolidated fund or some development programme*”. It remains the case that UDeCOTT’s assets are public assets, owned by the State.

12.7. Since 2003 there is no doubt that UDeCOTT has grown in commercial importance and in the scope of projects undertaken. UDeCOTT in its Final Submission identifies itself as “*Cabinet’s developer of choice*” and notes that the value of projects currently under construction (2010) for which UDeCOTT is responsible is now in excess of \$6.2 billion. As a result of its commercial success UDeCOTT is able to arrange both short term and long term financing, the latter based on property leases and rental receipts. UDeCOTT currently employs approximately 100 staff.

UDeCOTT procurement practices

12.8. For UDeCOTT’s procurement procedures, a set of Procedures for the Procurement of Articles, Works and Services was issued in 1995, shortly after UDeCOTT’s

⁹⁴ Section 17(1), 20(1).

⁹⁵ See below

⁹⁶ Section 12.

⁹⁷ Statement of Safiya Noel 18 March 2009; Second statement Neelanda Rampaul 8 May 2009

⁹⁸ Transcript 22 January p.176

formation, and these were revised in 1998⁹⁹, at a time when UDeCOTT's activities had yet to take off. UDeCOTT continue to use the 1998 Procedures to the present day. In June 2005, the Ministry of Finance (MOF) issued Standard Procurement Procedures for the Acquisition of Goods, Services and Works by State Agencies. The document includes provisions for the composition of a Tenders Committee and provides a detailed procedure for soliciting and processing tenders and the award of contracts. The document provides also that the procedures are to apply to all State Agencies except those falling under the Central Tenders Board Ordinance. The MOF procedures should, therefore, have applied to UDeCOTT. They provided that:

“These procedures shall be placed before the Board of Directors to be approved”¹⁰⁰.

12.9. Despite the terms of the MOF Procedure, it was not, as required, placed before the Board of Directors to be approved¹⁰¹. However Mr. Bernard Sylvester¹⁰², giving evidence on behalf of the Attorney General, stated that the rules did not apply to agencies that did in fact have tender rules which were approved¹⁰³. Mr. Sylvester offered to produce a letter to this effect to the Commission but no such letter has been provided. In his oral evidence Mr. Calder Hart stated that he was aware that the Ministry of Finance had issued a standard procurement procedure but had been told by a Minister that the document did not apply to companies that already had approved tender rules, which included UDeCOTT¹⁰⁴. He identified the Minister as either Christine Sahadeo or Conrad Enill. Both of these persons subsequently denied having made such a statement to Mr. Calder Hart. In particular Mrs. Sahadeo submitted a statement of evidence in which she exhibited documents showing that UDeCOTT and Mr. Calder Hart in particular has attended Government organised seminars dealing *inter alia* with the new standard procurement procedures.

12.10. Mrs Sahadeo was cross-examined by Mr. Solomon on behalf of Mr. Calder Hart. It was not suggested to her that she had in fact made the statement as claimed by Mr.

⁹⁹ Riley Exhibit WR12

¹⁰⁰ para 1(iii)

¹⁰¹ Rampaul Statement 23 January p.31

¹⁰² Permanent Secretary (ag) Ministry of Finance

¹⁰³ Transcript 19 January p 137-138

¹⁰⁴ Transcript 27 January, p 63

Calder Hart¹⁰⁵. However, in the course of cross-examination, Mrs. Sahadeo accepted that it was stated in the documents accompanying the new Procedure that State Agencies were required to abide by it “*unless the State Enterprise has developed its own procedures which have been approved by the Ministry of Finance*”. Although this appeared to be at variance with the requirement that the Procedure be placed before the Board to be approved, Mrs. Sahadeo accepted that the existing rules had been approved by the Ministry of Finance and that UDeCOTT had in fact continued using the existing rules to the Government’s knowledge.

12.11. An important difference between the 1998 Rules and the 2005 MOF Procedure concerns the power to adopt sole selective tendering, an issue of some importance in the context of a number of UDeCOTT projects. Ms Rampaul agreed in oral evidence that the MOF Rules do not provide for procurement of a contractor or consultant on a sole selective basis save in the case of emergency provisions¹⁰⁶. Ms Rampaul drew attention to the 1998 Rules which permit sole selective tendering where there is:

“an ongoing engagement or relationship with the company or because of the special capabilities or knowledge of a similar nature relating to the tender”.

UDeCOTT relied on this provision as authorising the engagement, without competitive tender, of consultants, particularly Genivar, who were engaged on the Waterfront Project, the Brian Lara Stadium and the Academy for Performing Arts. In regard to the latter, Ms. Rampaul considered that the power to employ sole selection applied in any event to Government to Government Agreements, having been authorised by Cabinet Minute.

12.12. It should be noted that other Government Agencies have not been consistent in applying the 2005 MOF Procedures. Thus, while the Education Facilities Company Ltd (EFCL) adopted the new procedures in 2005¹⁰⁷, the Rural Development Company (RDeCOTT) stated that (unlike EFCL) it understood the new procurement rules to be guidelines, not intended to replace the company’s existing rules. RDeCOTT therefore

¹⁰⁵ Transcript 2 April p 6-86

¹⁰⁶ Transcript 23 January p35

¹⁰⁷ See para 3.10 above

adopted its own rules, which were subsequently revised in September 2008 without reference to the MOF rules. UDeCOTT also requested further information from Bernard Sylvester regarding procedures used by other special purpose companies, which revealed that UDeCOTT was the only such company to have received approval from MOF in respect of its own tender procurement rules. Further, MOF was unable to confirm that the 2005 standard procedures had received Cabinet approval¹⁰⁸.

12.13. It appears, therefore, that MOF itself was far from consistent in overseeing the adoption of the 2005 procedures and appeared content to allow some Government Agencies to continue with the use of existing rules. Thus, while it might be said that UDeCOTT was remiss in not seeking to clarify whether the 2005 procedures were intended to be applied to the company, its failure to do so cannot be regarded as culpable in the light of the position of MOF and the terms of the documentation issued with the Rules.

12.14. Assuming that UDeCOTT continued to be bound by its rules as revised in 1998, attention was drawn to a number of instances in which those rules were breached. Ms Rampaul accepted that the Tenders Committee did not, on some occasions, comply with the rules. She stated that if the Committee made a recommendation on tenders, such recommendation would involve only some members of the Board. The view was, therefore, that recommendations would be put forward to the entire Board to consider. Thus, the Board operated as the Tenders Committee in breach of its rules. Ms. Rampaul agreed that there was no reason why the Board could not have been constituted in accordance with its rules but considered this to be a minor infraction.¹⁰⁹

12.15. In addition, it is clearly arguable that the regular employment of one firm (Genivar) as project manager was an abuse of the provision of the 1998 Rules permitting sole selection. This is not to suggest that the choice of Genivar was in any way inappropriate to the tasks to be undertaken. The point is that sole selection should, in keeping with the objectives of free and fair competition as well as transparency, be

¹⁰⁸ See para 3.14-3.15 above

¹⁰⁹ Transcript 23 January p46-52

used only in exceptional circumstances. UDeCOTT in its Final Submission¹¹⁰ robustly defends the use of sole selection particularly in the case of Genivar; and further comments that the services offered by consultants normally represent a relatively small percentage of the costs of each project. Nevertheless, we are concerned that the regular use by UDeCOTT of Genivar's services may give the impression of there being a "special relationship". Genivar points out in response¹¹¹ that their employment on NAPA, the Ministry of Education and Brian Lara was not as UDeCOTT's first choice and came about only after problems had arisen, indicating an appreciation of Genivar's particular areas of expertise. In the case of Brian Lara Genivar came into the project only in June 2008, after major problems had already developed. Their mandate was limited to providing technical and financial evaluation of claims by HKL.¹¹²

Accountability of UDeCOTT

12.16. A material issue with regard to the governance of UDeCOTT arose at an early point in the Enquiry when it was asserted that UDeCOTT was not accountable to Government Ministers and had an overriding duty to act in the best interests of the company. Mr Calder Hart introduced the issue in his first statement as follows:

"Very early in my stewardship a formal opinion on this question was obtained from the Solicitor-General¹¹³.....It confirms the legal independence of UDeCOTT which was also unsuccessfully challenged in the High Court.... in NH International (Caribbean) Limited v. Urban Development Corporation of Trinidad and Tobago Limited and Hafeez Karamath Limited¹¹⁴....."

12.17. The statement then referred to the dispute with Dr Rowley during the C&E tender process¹¹⁵ in the following terms:

¹¹⁰ Paragraph 119-122.

¹¹¹ Letter from Hamel Smith 17 March 2010

¹¹² See section 16 below

¹¹³ Annexure 3 to statement

¹¹⁴ H.C.A. No 3181 of 2004

¹¹⁵ See section 13 below

“Dr. Rowley, whether as line Minister or otherwise, has no authority whatsoever to issue instructions or directives to UDeCOTT, and neither UDeCOTT nor I as its Chairman/CEO, has any duty to obey his injunctions. On the contrary, it would be a direct dereliction of our duties as directors of the company to abdicate our functions in obedience to Dr. Rowley’s demands, or to allow Dr. Rowley to usurp them.”

Mr Calder Hart did, however accept that UDeCOTT was accountable in the following terms:

“... from a practical and commercial point of view UDeCOTT has to account, because UDeCOTT has only one client, the Government of Trinidad and Tobago, through its several MinistriesAnd naturally UDeCOTT is accountable to its clients for the due execution of services it performs on their behalf.”¹¹⁶

12.18. The issue was developed in the evidence of Ms Rampaul as follows:

“My understanding of the matter as put by our attorneys and the Solicitor General, is that a Minister has the freedom to give instructions. He can give instructions. There is nothing that prohibits him from giving it, but there is nothing that compels us from following it. At the end of the day the Board has a duty, an overriding duty, to act in the best interest of the company. So the shareholder may give directions, may direct and may say, I would like you to procure the services of X, Y and Z and I may want you to do it in this form or this fashion. But at the end of the day, the responsibility and decision as to how that is done rests with the company and, in effect, it’s Board who cannot abdicate their duties to any shareholder or director.”¹¹⁷

12.19. However Mr. Sylvester, in his evidence, referred to UDeCOTT acting as *“agents of a particular government ministry in order to implement a particular project”¹¹⁸*. He agreed in his oral evidence that the principal had a right to direct the agent as to the

¹¹⁶ Calder Hart 1st statement 15 January, paras 15 - 21

¹¹⁷ Transcript 23 January p.25

¹¹⁸ Statement para 34

carrying out of services which were the subject matter of the agency. Sylvester continued as follows:

“Q: It has been said in this commission that a state enterprise such as UDeCOTT is under the Companies Act and has no obligation to take instructions from a minister, no legal or constitutional I think they say obligation. Do you agree that?”

A: Respectfully, no sir..... Ministers can intervene in any – well they can intervene or they can direct companies to adjust whatever procedures

Q: It is not the contention of the Ministry of Finance, the Corporation Sole, that state enterprises are the same creature as a private company under the Companies Act is it?

A: No.”¹¹⁹

12.20. Mr. Sylvester also agreed with Mr. Petersen SC that there were differences between public enterprise companies such as UDeCOTT and private companies in that:

- (i) The accounts of a public enterprise company have to be submitted to the Public Accounts (Enterprises) Committee.
- (ii) Directors of a private company under the Companies Act are not required to comply with the provisions of the Integrity in Public Life Act, while UDeCOTT’s directors are so required.
- (iii) State enterprises are subject to “*additional guidelines*” issued to Boards of Directors which are to take precedence over bye laws

Mr. Sylvester also agreed that it was never intended to circumvent UDeCOTT’s accountability to the Corporation Sole and the line minister or to oust their jurisdiction¹²⁰.

12.21. We have, within the limits of the documentation provided, examined the arrangements with different Ministries for which UDeCOTT has carried out projects.

¹¹⁹ Transcript 19 January p 155-156

¹²⁰ Transcript 19 January p.158

The documents examined include general Framework Agreements comprising Memoranda of Understanding between UDeCOTT and the Ministry of National Security (dated 9 February 2008), the Ministry of Works and Transport (22 July 2008) and the Tobago House of Assembly (30 July 2003). In addition, for contracts funded through the Infrastructure Development Fund, UDeCOTT has entered into contracts with government ministries relating to individual projects. UDeCOTT produced such agreements for the Mille Fleurs Building with the Ministry of the Environment (28 July 2000), for Stollmeyer's Castle with the Office of the Prime Minister (March 2006), for the Brian Lara Cricket Stadium with the Ministry of Sport and Youth Affairs (19 December 2005), for a number of ongoing infrastructure development projects (relating to housing projects) with the Tobago House of Assembly (22 December 2008), for the Prime Minister's residence with the Office of the Prime Minister (15 December 2006), for the National Academies for the Performing Arts, with the Ministry of Community Development, Culture and Gender Affairs (5 September 2007) and for the Chaguanas Borough Corporation Administrative Complex with the Ministry of Local Government (30 September 2008)¹²¹.

12.22. The Contracts are in similar but not identical form and provide essentially for the provision of services by UDeCOTT falling under the general description of Project Management. The Agreements contain a number of formal provisions including measures for the resolution of disputes by amicable settlement or arbitration¹²². They are essentially commercial contracts under which UDeCOTT undertake professional duties pursuant to which, as accepted by Mr Calder Hart, the Client (invariably a Government Department) is entitled to give instructions with which UDeCOTT must comply.

12.23. The Commissioners refrain from commenting on the opinion of the Solicitor General. It touches upon the fundamental issue of separation of the interests of the shareholder and the company, a principle deeply embedded in company law. In strict legal terms UDeCOTT may take the stance that the powers of majority shareholder are limited to appointing a new board if differences arise. However, it is equally correct that in its

¹²¹ The Memoranda of Understanding and Contract are appended to the second witness statement of Neelanda Rampaul dated 8 May 2009 as Exhibits NR54 and NR55.

¹²² A similar "project management" Agreement was produced by NIPDEC in relation to the Scarborough Hospital Project, which is referred to further in Section 30 below

agency role UDeCOTT is bound to accept proper instructions from the principal, whether pursuant to the terms of an Agency Agreement or as a matter of law as Mr. Calder Hart accepted. And it is of significance that Mr Sylvester took the view that UDeCOTT was *not* to be equated to a normal company under the Companies Act, and that Ministers *can* intervene in matters concerning the company's procedures.

12.24. It is with respect to procurement procedure, in relation to the C&E building, that Dr. Rowley as the Line Minister sought to take issue with the manner in which UDeCOTT had performed its role, and which led to UDeCOTT challenging the Minister's power to intervene. That issue may involve a potentially complex area of law on which it would be inappropriate to offer comment here. But the reality is that, if Ministers and their Permanent Secretaries take the view that they are empowered to instruct UDeCOTT, they should ensure that UDeCOTT has a board which respects that view. As has been seen in relation to the Housing Development Corporation, the statute expressly empowers the Minister to give directions¹²³. To avoid any doubt, a Minister should similarly be vested with a clear power to direct UDeCOTT. The appropriate means of clarifying or creating such a power is a matter for others.

12.25. Mr. Hart's reference to the unsuccessful High Court challenge against UDeCOTT in respect of the award of a contract relates to an entirely different issue, namely whether UDeCOTT is susceptible to Judicial Review. We are aware that the High Court case, and particularly the dissenting opinion given on the appeal¹²⁴, has been the subject of much discussion. The question whether any form of review proceedings against decisions of UDeCOTT should be available is a matter discussed elsewhere in this report¹²⁵.

UDeCOTT's Methods of Operation

12.26. This issue is necessarily less well defined than the foregoing issue of procurement and may be taken as embracing all the ways in which UDeCOTT operates, many of which have led to criticism by UDeCOTT's critics. It is appropriate to start with the

¹²³ see paragraph 12.5 above.

¹²⁴ NH International v UDeCOTT, CVA, No. 95 of 2005 per Sharma CJ

¹²⁵ See section 9.

Executive Chairman¹²⁶, a man who clearly plays a prominent role in all the activities of UDeCOTT and who has been regarded as one of the most prominent citizens of Trinidad & Tobago.

12.27. Mr. Calder Hart was a director of UDeCOTT from its formation. In 2002 he became Chairman, at the same time as Mr. Winston Agard was appointed CEO. In September 2005 Mr Agard was replaced as CEO by Mr. Ricardo O'Brien. In September 2006 Mr. Calder Hart was appointed Executive Chairman, combining the roles of Chief Executive (replacing Mr O'Brien) and Chairman. We were not told why this change was thought necessary or expedient, but it appears to have had the support if not the direction of Government.

12.28. It was evident to the Commissioners that Mr. Calder Hart was regarded by the public as the personification or the *alter ego* of UDeCOTT. It was clear that no major decisions were made without his knowledge and approval. The appointment of Ms. Rampaul as Chief Operating Officer was handled by Mr Calder Hart himself, with concurrence of the Board. Mr Hart confirmed in his oral evidence¹²⁷ that other senior personnel were also appointed by him and a committee involving Ms. Rampaul:

A. Who appoints the rest of the staff?

Q. The rest of the staff, yes, from Ms. Rampaul downwards?

A. Well, Ms. Rampaul, that would be handled by myself with the concurrence of the Board. Other appointments would happen, in terms of the senior management, with myself and a committee involving Ms. Rampaul. The other staff would be hired obviously by the various department heads.

Q. But in terms of the senior staff, would you say they are all handpicked by you?

A. Well most.....

.....yes, generally in consultation with Ms. Rampaul and depending on where the other people were, for example with construction, we obviously would bring in the Executive Manager of Construction Services.....

¹²⁶ Whose resignation was announced on 6 March 2010, after the bulk of this report had been prepared

¹²⁷ Transcript 28 January p 228

Q. Has there ever been a study of necessary technical staffing levels for the jobs you take on?"

A. We have done some work with a local consultant in terms of constructing the organisation, yes."

12.29. Even from 2002, some years before taking on executive function, it appears that Mr. Calder Hart wielded powers which would be regarded as beyond those of a Chairman, on occasions without prior reference to the Board. Examples are Mr Hart's decision to take legal advice from Deborah Peake¹²⁸ and, following this, the commissioning of a report from QES, both occurring during the Customs & Excise tender process in July 2002. UDeCOTT responded to the foregoing criticism in its Final Submission¹²⁹, pointing out that the Board had tacitly agreed that Mr. Hart could take such executive decisions¹³⁰ and that the detailed instruction to QES came from Mr. Agard not Mr. Hart. Nevertheless, it is to be noted that Mr. Hart's written evidence asserts that:

- (i) *"I sought legal advice from Ms. Deborah Peake, attorney at law. I asked Ms. Peake to address the following specific issues..."*
- (ii) *"I decided the best thing to do would be to send all the tenders received for review by an external consultant."¹³¹*

While Mr. Hart's actions were, tacitly, if not expressly, adopted by the Board, the Commissioners remain of the view that Mr. Hart, even from 2002, was exercising powers beyond his then status, as also observed by others.

12.30. The possibility of excessive power being vested in a single person did not pass without comment. The following examples all make the same point :

- (i) A memorandum from Mr. John Mair dated 12 August 2003 complaining of the Chairman seeking to override or pre-empt the Board¹³².

¹²⁸Transcript 28 Jan p 179)

¹²⁹ Paragraph 161-171.

¹³⁰ Evidence of John Mair, Transcript 5 February 2009 P53-54.

¹³¹ Statement dated 15 January 2009, paragraphs 41, 47.

¹³² WR16

- (ii) A complaint about procedures seen as creating an all-powerful Chairman of the Board¹³³.
- (iii) Mrs Christine Sahadeo in her oral evidence said that it was “*much preferred that you have separation and an Executive Chairman is something about which [that] the corporate world has its concerns. But generally it is preferred to have a separate Chairman as opposed to a Managing Director*”.¹³⁴

12.31. In addition, it was to be observed that staff within UDeCOTT generally spoke with one voice. No note of dissent was to be heard, even when actions were being taken on behalf of UDeCOTT which should have raised questions as to their propriety or even legality. Examples of this are contained in the following sections of this Report, particularly in relation to the contracts for the Ministry of Legal Affairs Tower (section 14) and the Brian Lara Stadium (section 16). In regard to the latter, the position of Turner Alpha is also of some note. When they, as the appointed FIDIC Engineer, raised serious concerns about the way claims from the contractor were being dealt with, and about sums of money being advanced with little evidence of progress, instead of investigating and answering their concerns, Turner Alpha was marginalised and replaced. Their functions were, in part, taken over by Genivar, who are not recorded as having followed up the matters on which TAL had expressed strong dissent.

12.32. UDeCOTT responded to the above criticism in its Final Submission¹³⁵ pointing out that Mr. Outridge had testified as to disagreement at a Board Meeting in 2003. Since 2003, however, the Commissioners were not made aware of any dissent particularly in regard to the two projects mentioned and the worrying decision effectively to ignore the advice and then the protests of TAL. UDeCOTT complains that it is unclear what aspect of management is criticised; and that the allegation itself is unparticularised. These comments, however, miss the point. All the relevant events appear to have been dealt with by the Executive Chairman and a small number of senior employees with no evidence as to the involvement of the Board, who must have been aware of the

¹³³ meeting of Public Accounts (Enterprises) Committee 13 July 2006 (Riley para. 74).

¹³⁴ Transcript 2 April 2009 p 73

¹³⁵ See paragraph 339 to 341.

worrying events which were taking place. We are in no doubt that, throughout the whole period material to our Enquiry, the main driving force behind UDeCOTT and its activities has been Mr. Calder Hart.

12.33. The next following paragraphs deal with criticism of UDeCOTT made through the Joint Consultative Council for the Construction Industry (JCC). Before setting this out, it is to be noted that Mr. Calder Hart and therefore UDeCOTT clearly held the JCC in low regard: nothing else could explain the sustained attack on its President Mr. Winston Riley by Mr. Solomon in his cross-examination, nor the gratuitously denigrating description of Mr. Riley and the JCC as “*self trumpeting*”.¹³⁶ All this was consistent with Mr Hart’s own description of the JCC in his first statement as a

*“small coterie of merchant contractors and consultants whose methodologies and levels of competence are often outmoded”*¹³⁷ and of its leadership as being “*disgruntled and frustrated*”¹³⁸.

This theme was continued in the final Closing Submissions on behalf of Mr. Calder Hart¹³⁹ where Mr. Riley was accused of being the mouthpiece of “*the real power behind the throne, Mr. Emile Elias*”, who is also described as the “*eminence gris*” behind the protestations of Dr. Rowley and Mr. Riley. It is further observed that the Commission’s invitation to interested parties to contribute to the Enquiry had “*failed totally to tempt the real captain of the local construction industry out of hiding, Mr. Emile Elias*”. UDeCOTT also, when offered the opportunity to distance itself from the bombast, chose instead to add to it, accusing Mr Riley of being “*risk averse, backward- looking, anti innovation and ultimately concerned with self-interest rather than the National interest*”¹⁴⁰.

12.34. This surprising level of hyperbole is helpful at least in making clear the extent of ill-feeling and mutual distrust which exists within the local construction industry tied in, as it appears, both to political and financial interests. It is relevant for the Commission

¹³⁶ Mr. Riley bore the cross-examination with dignity, even to the extent of responding positively when asked if there was any reason why UDeCOTT could not be admitted as a member of JCC.

¹³⁷ Statement 15 01 09 para 14

¹³⁸ Statement 15 01 09, para 13

¹³⁹ Dated 24 February 2009.

¹⁴⁰ UDeCOTT final submissions served 16 March 2010

to recognise (to the extent it was not previously aware) the polarisation which exists between those who might be regarded as the rival “*captains of the local construction industry*”, including Mr. Calder Hart himself. The Commission has no hesitation in setting on one side all such generalised and gratuitously damaging accusations and concentrating on the credible assertions relating to the matters which need to be considered. The Commission does so, however, against the background of the considerable mistrust that exists between many of the principal characters involved.

Specific Criticism of UDeCOTT

12.35. As stated above, a number of specific matters critical of the operation and management of UDeCOTT were raised in the Enquiry by Mr Winston Riley on behalf of the JCC. Mr. Riley’s complaints were as follows:

- (i) UDeCOTT failed to act in a transparent manner, both in failing to provide copies of its guidelines and procedures and in providing proof that such guidelines and procedures had been followed. By way of example the TTCA over a period of time up to 2005 submitted numerous requests for a copy of UDeCOTT’s Procurement Rules, eventually submitting a request for production of the documents under the Freedom of Information Act. UDeCOTT provided the documents but subject to payment of a fee and a requirement to obtain permission for any reproduction, distribution or dissemination of the rules and procedures¹⁴¹.
- (ii) Attention was drawn to a letter dated 13 November 2006 from the then Minister of Planning and Development, the Hon. Camille R. Robinson-Regis expressing dissatisfaction and disappointment at UDeCOTT’s delay in providing information in response to questions posed to Ministers in Parliament¹⁴².
- (iii) UDeCOTT has awarded several major consultancy contracts without any tendering process. Most of the large consultancy contracts are said to have been awarded to Genivar.
- (iv) The procurement process for the completion contract for the Prime Minister’s residence was based on sole source tendering.

¹⁴¹ UDeCOTT letter 6 June 2005, WR11. The procedures are at WR12.

¹⁴² In WR13.

- (v) UDeCOTT refused or failed to agree to introduce fluctuation clauses into contracts at a time of unprecedented material price inflation.
- (vi) UDeCOTT introduced massive changes to standard clauses in the FIDIC Form of Contract without appropriate consultation.
- (vii) UDeCOTT permitted the introduction of a further bidder after close of the prequalification process for the Chaguanas Administrative Headquarters contract, the additional bidder being Times Construction Company¹⁴³.

12.36. These contentions are responded to in the first witness statement of Neelanda Rampaul¹⁴⁴. In some limited respects the complaint and response disclose a mutual lack of understanding, such that little is to be gained by a detailed recitation of claims and responses. However, it is to be noted that while complaint (i) is formally denied, it is accepted that the tender rules were provided pursuant to the Freedom of Information request. This gives rise to the question why UDeCOTT's tender rules should not have been freely available on a website or the like, and why it should ever have been necessary to serve a statutory request for something which should plainly, in the view of the Commissioners, have been in the public domain. With regard to issue (ii), the Commissioners are aware that there is perceived to be a "*political*" dimension to UDeCOTT's activities which has given rise to a perception that some members of the government are "*for*" and others "*against*" UDeCOTT¹⁴⁵. In these circumstances the Commissioners prefer to avoid entering into what may be a political matter.

12.37. As regards (iii), Ms. Rampaul accepted that many of the contracts awarded to consultants are done on a sole selective basis, which was said to be in accordance with UDeCOTT's procurement rules, in particular Clause 22.02, examples being the appointment of Turner and HOK for the Brian Lara Stadium. It is also pointed out that Mr. Riley's own company, Planning Associates Limited ("PAL") was awarded consultancy contracts on a sole selective basis.¹⁴⁶ UDeCOTT's procurement rules are considered below. As to (iv), the procurement process for the Prime Minister's

¹⁴³ See letter 20 December 2005, WR28.

¹⁴⁴ 14 January 2009, paragraph 85-108.

¹⁴⁵ Refer particularly to the role of Minister Rowley in Section 13 below.

¹⁴⁶ See para 12.39 below

residence is dealt with later in this Report¹⁴⁷. With regard to (v) and (vi), UDeCOTT has indicated its willingness to consider fluctuation clauses on a case by case basis; and with regard to amendments generally, UDeCOTT has to interact with all players in the construction sector, including Ministries to ensure efficient delivery of projects and value for money.

12.38. No response to (vii) is offered by Ms. Rampaul but all the above complaints are dealt with in UDeCOTT's Final Submission¹⁴⁸. With regard to (vii) UDeCOTT state that Times Construction Limited was a pre-qualified tenderer and was one of 7 contractors invited to tender on 18 August 2005. Following an evaluation process the contract was awarded to Times Construction Limited following a decision of the Board on 30 January 2006. The JCC allegation is therefore denied. It should be said that none of the foregoing allegations involve serious impropriety. At worst they amount to a heavy handed approach which was, on many occasions, insensitive to reasonable demands from those whose livelihood depended on decisions made by UDeCOTT. With regard to the "*massive changes to standard clauses*" UDeCOTT points out in its Final Submission¹⁴⁹ that the amendments were "*entirely mundane*", which appears to be the case, at least from the examples quoted by UDeCOTT. Nevertheless any amendment to Conditions of Contract may carry important consequences and the Commissioners will recommend the production of an agreed standard form for Trinidad and Tobago, to which all relevant parties need to contribute.

12.39. As noted, UDeCOTT was critical of the performance of Mr. Riley's firm, PAL, and commissioned a report by CH2M HILL Lockwood Greene, of Dallas, Texas (Lockwood Greene), dated May 2006 which was exhibited to the statement of Ms. Rampaul¹⁵⁰. The investigation commenced in April 2005 and reported on six housing projects in which PAL had been appointed Engineer (Green Street, Eldorado, Champs Fleurs, Lady Young, Canaan Road and "A River Runs Through It"). The projects, for which work had commenced in 2004 or 2005, were each investigated through documentary search, interviews and inspection. The Report records serious criticism of PAL on numerous grounds including: late certification and obtaining of statutory

¹⁴⁷ See further Section 23 below.

¹⁴⁸ See paragraphs 300 to 315.

¹⁴⁹ See paragraphs 404 to 406.

¹⁵⁰ NR26.

approvals; geotechnical and site issues; deficient bills of quantities; unapproved cost variances; delay in design documents and in responding to contractor's questions; and delay in resolving issues and other matters which had led to "*a performance history that is distressing*". Mr. Riley took serious issue with the report, which had been referred to in Parliament, and filed a response which was sent to the Speaker. These matters were not pursued further in the Enquiry, but we noted that the matters of criticism were not untypical of issues observed in housing and other projects which have been examined in the course of the Enquiry.

12.40. The report identified some common features of the six projects examined as follows:

- (i) Extraordinary statutory approval durations: approvals by the planning authorities and WASA considerably exceeded those encountered in other jurisdictions thereby increasing costs and creating an unfriendly regulatory environment.
- (ii) Change in statutory requirements: WASA changed their requirements as to connection to local area sewer systems, requiring redesign work and re-approval.
- (iii) Construction commenced before site issues were resolved: this related to land title, boundaries, access, statutory approvals and utilities, causing considerable delay and increased costs.
- (iv) Commodity price increases: although not allowable under the contract, contractors were generally allowed to recover price increases on the ground of delay partially attributed to the employer and the engineer.
- (v) Size of projects: all the projects have seen significant cost overruns due to site and utility issues. However, larger projects may suffer lower increases per living unit through the ability to distribute costs over a larger number of units.
- (vi) Termination of contracts: three out of the six contracts were terminated by UDeCOTT for lack of performance and termination of a fourth contract was considered. This inevitably led to delays.
- (vii) Difficult sites: two at least of the sites had difficulties which were not fully appreciated by designers.
- (viii) Safety: two sites require further attention to ensure compliance with safety requirements.

- (ix) Schedules: smaller projects had very aggressive schedules which were probably unachievable. No process was in place to review schedules and implement recovery plans.

Again we note that these matters were not untypical of issues observed in housing and other projects examined in the course of the Enquiry.

12.41. Of particular relevance to this section of the Report, however, is the strident criticism contained in the Lockwood Greene Report of UDeCOTT's own performance. This was significant in being almost the only source of comment on UDeCOTT's performance dealing with matters of technical proficiency. Lockwood Greene's criticisms can be summarised as follows:

- (i) Fragmented management: it is reported that management groups – finance, legal and engineering – appear to be standalone entities without significant integration and with no glue holding them together in an integrated project management team. There does not appear to be an internal group whose task it is to manage projects in their entirety.
- (ii) No centralised filing system: various management groups appear to maintain project files pertaining only to their functions. UDeCOTT is said to be aware of the issue and working to put a better system in place.
- (iii) Insufficient project staff: only one field engineer was assigned to four projects, that engineer also having duties on other projects. Further, a single Chief Construction Engineer had responsibility for all UDeCOTT projects.
- (iv) Lack of project control tools: there was lack of cost forecast reports, schedule deviation reports and overdue RFI logs, also change order recap reports.
- (v) Late payment to contractors: this was the most significant criticism directed towards UDeCOTT. Lack of cashflow resulted in considerable delay to projects. PAL themselves were often late in certifying, but additional delay occurred within UDeCOTT once certificates were issued.
- (vi) No full-time UDeCOTT presence on site: while Clerks of Works were UDeCOTT employees, PAL insisted they were supervised by and reported to the PAL Project Manager leading to unreliable recording of events.
- (vii) Lack of follow-up on issues: numerous issues were allowed to languish. The Chief Engineer initiated action but issues were not resolved.

- (viii) Failure to control the engineer: while UDeCOTT expressed dissatisfaction with the performance of PAL, in many cases the contract provisions were not enforced, nor were issues referred to higher management levels.

12.42. The Commissioners followed up some of these issues with witnesses. Mr. Calder Hart was asked questions at the end of his evidence when he stated as follows:

- (i) UDeCOTT had gone through a challenging period getting itself up to capacity from 2002 onwards.
- (ii) UDeCOTT had recruited younger people and its skill set is going up, aided by a graduate trainee programme.
- (iii) UDeCOTT brought in a lot of foreign help early on to try and achieve world class standards.
- (iv) UDeCOTT is keen to improve both itself and the entire TT construction industry.
- (v) There is a turnover of staff but this applies in the industry as a whole. The construction sector has been breaking at its seams over the last five years.¹⁵¹

12.43. Additional information concerning UDeCOTT's internal management was contained in the reports of Mr. McCaffrey, who spent several days working with UDeCOTT staff in January 2009 and subsequently exchanged many communications with individual staff members in investigating financial details of the Brian Lara project.¹⁵² Mr McCaffrey noted in his Interim Report that, while UDeCOTT had been provided with a list of materials to be made available some days prior to the meeting, none of the material had been marshalled in advance. While the list of materials requested was comprehensive Mr McCaffrey commented:

"It is apparent to me that UDeCOTT's filing and document control cannot possibly be described as good."

In relation to the identification and analysis of delay issues relating to the Brian Lara Stadium, he commented that:

¹⁵¹ Transcript 28 January p 229-231

¹⁵² As to which see section 16 below

“Neither party, it appears, has developed even a rudimentary delay analysis. The production of an as-built programme is one of the fundamental requirements.”¹⁵³

12.44. In relation to payment issues at Brian Lara, Mr. McCaffrey expressed the view that:

“The files are so poorly organised that tracking such issues with any confidence could not be carried out The degree of disarray within those files has led to an extensive examination of the content and many questions cannot be answered at the moment.....”

UDeCOTT’s administration and recording of the payment process is, without doubt, appalling. That alone contributes to fuelling controversy, even if no controversial actings exist.”¹⁵⁴

12.45. Mr. McCaffrey produced a final report dated April 2009 limited to payment issues on the Brian Lara Stadium. It should be recorded that while Mr. McCaffrey had intended to return to Trinidad to continue his investigation, arrangements for his further visit were cancelled at short notice in late February 2009.¹⁵⁵ Mr. McCaffrey continued to correspond with UDeCOTT personnel but this ceased on or around 3 March 2009¹⁵⁶. The Commission was given no explanation for this truncating of Mr McCaffrey’s investigations. However, at the request of the Commissioners, Mr. McCaffrey completed a Supplementary Report on payment issues at the Brian Lara Stadium,¹⁵⁷ which contained the following further observations as to UDeCOTT’s records and organisation:

- (i) Of 79 Certificates issued for advance payments, 39 were wrong in relation to the sum for payment of advance payment, 60 were wrong in relation to the amount of advance payment made to date and only 4 out of 79 correctly recorded the advance payment and the amount of repayment.¹⁵⁸

¹⁵³ Report dated 20 February 2009, para. 5.3.5.

¹⁵⁴ Report 20 February 2009, para. 4.5.2 to 4.4.5

¹⁵⁵ Apparently through the office of the Prime Minister, through which Mr. McCaffrey had been engaged.

¹⁵⁶ Apparently as a result of an email sent by Richard Freeman, former Chief Legal Officer of UDeCOTT to the persons formerly dealing with Mr. McCaffrey stating *“Please be advised that unless you are instructed otherwise no further information is to (be) sent to Mr. McCaffrey.”*

¹⁵⁷ See further Section 16 below.

¹⁵⁸ Para. 2.1.3.

- (ii) UDeCOTT's contemporaneous reporting of advance payment is materially wrong (i.e. under-reported) by tens of millions of TT\$ for the vast majority of the duration of the project.¹⁵⁹
- (iii) UDeCOTT decided to back-fit Payment Certificates in February 2008. Those back-fitted Certificates also materially under-reported the amount of advance payments made. All the back-fitted Certificates have been endorsed by at least two signatories and in some cases three.¹⁶⁰

12.46. The above observations, concerning UDeCOTT's methods of operation are responded to in detail in UDeCOTT's Closing Submissions¹⁶¹. With regard to the Lockwood Greene observations, it is stated that UDeCOTT has made significant efforts to improve its management procedures; the lack of centralised filing system has been addressed; additional project staff have been employed; new procedures and software tools have been provided; additional site engineers have been engaged; and generally UDeCOTT has adopted the recommendations of Lockwood Greene. With regard to the "*most significant criticism of late payment*", it is said that this resulted from long-standing inefficiencies in the public service and was not unique to UDeCOTT. A recently introduced automated accounting system should lead to improvement. In addition, UDeCOTT has embarked on a comprehensive review of procedures and operations to improve delivery.

12.47. With regard to criticisms put forward by Mr. MacCaffrey, UDeCOTT state that it was impossible to provide all the material requested in due time. With regard to the lack of programme analysis, this was the responsibility of the Project Manager, TAL; and the criticism of filing for the Brian Lara Project was challenged by Mr. Pilgrim and Ms. Noel. Further criticism of the accounting system on Brian Lara are dealt with in a later section of this Report¹⁶².

12.48. While many of the observations above are specific to a particular project, they are nevertheless indicative of an accounting system which is seriously deficient to an extent that should not be tolerated in any commercial organisation, let alone one

¹⁵⁹ Para. 2.5.1.

¹⁶⁰ Para. 2.5.2 – 2.5.4.

¹⁶¹ See paragraphs 316 to 364.

¹⁶² Section 16.

handling public funds. The deficiencies identified by Mr. McCaffrey are potentially scandalous and UDeCOTT Management at all levels must be held to account for these deficiencies¹⁶³.

Initial Conclusions

12.49. The first eight years of UDeCOTT's existence (1994-2002) represented a period of relatively low activity and absence of controversy. From 2002 onwards, however, UDeCOTT has been continually and increasingly in the public eye as the government's chosen agency for the promotion of development through Urban Construction Projects. Their functions can be split into two elements: the setting up of projects on behalf of government departments in fulfilment of government development decisions; and the subsequent management of those projects towards completion. Only the first of these elements has been considered here: UDeCOTT's management function is reviewed in relation to specific projects in the following sections and more generally Part V of this Report.

12.50. UDeCOTT's procurement role involves commissioning of design services followed by solicitation of tenders for construction (or design and construction) of projects selected by the Government, the analysis of tenders and, crucially, the drawing up and placement of contracts for such projects. As appears briefly in this section and in more detail in later sections, the analysis and decisions concerning the placement of contracts have proved most controversial. It has to be recognised that the decision to award contracts to particular companies carries with it very considerable financial implications and inevitably gives rise (particularly in Trinidad & Tobago) to a suspicion of improper or corrupt influence. It is precisely in order to allay such suspicion that UDeCOTT procurement functions (and that of other government agencies as well) should be conducted in as transparent a manner as possible, including clear and demonstrable compliance with applicable procurement rules.

12.51. We have noted above the lively debate which took place regarding which procurement rules should have been applicable to UDeCOTT. It must be accepted that the Ministry of Finance, which issued new rules in 2005 apparently intended to

¹⁶³ UDeCOTT also challenged the standing of Mr McCaffrey's reports in the Enquiry. This is dealt with in section 16 below

cover UDeCOTT, was not consistent in overseeing their adoption by numerous government agencies to which the new rules might have applied. We do not regard UDeCOTT's failure to change their existing rules as culpable. Nevertheless, it is imperative that the Government and the Ministry of Finance should themselves decide whether the 2005 rules should be adopted by UDeCOTT and, if so, take steps to ensure that they are so adopted.

12.52. It is noted that various infringements of the 1998 rules by UDeCOTT have been identified. In view of the Commissioners, however, the significant areas in which possible breach or abuse of the procurement rules must be considered are the following:

- (i) Excessive and unfair use of sole selective tendering powers leading to breach of obligations as to free and fair competition as well as transparency¹⁶⁴.
- (ii) Misuse or manipulation of tender and tender- review procedures leading to the inappropriate and potentially corrupt award of contracts. This observation applies particularly in the case of the awards in respect of the Ministry of Legal Affairs Tower and the Brian Lara Stadium, each of which is considered later in this Report (Sections 14 and 16 respectively).

12.53. We have reviewed extensive presentations concerning UDeCOTT's accountability or lack thereof. It is an inevitable consequence of the decision to create UDeCOTT as a private limited company that powers of control available in respect of statutory bodies are not directly available. Despite this, it is surprising that any such dispute should arise between a Government ministry and a Government owned company. Given the economic importance of UDeCOTT there is clearly a case for reverting to the original proposal contained in the 1993 Snaggs Report and re-creating UDeCOTT as a statutory corporation with appropriate ministerial powers. However, short of that, there should be no difficulty in principle in creating more appropriate procedures which UDeCOTT is required to follow.

12.54. We have reviewed above a number of complaints, primarily from the JCC, as to what amounts to mal-administration by UDeCOTT. We have also reviewed serious

¹⁶⁴ See paragraph 12.15 above.

concerns arising from an internal review of UDeCOTT's performance by consultants called in by UDeCOTT, Lockwood Greene, together with observations presented to the Commission by Mr. McCaffrey resulting from his detailed investigation into a number of projects, but concentrating on the financial aspect of the Brian Lara Project. While the matters disclosed by Lockwood Greene may amount to no more than incompetent organisation and administration, the internal organisation within UDeCOTT which has dealt with financial administration for the Brian Lara Project has given rise to serious alarm, the deficiencies identified by Mr. McCaffrey being nothing short of scandalous. This raises the equally serious question as to how such a state of affairs can have been permitted to arise. We consider in more detail in Section 16 the financial aspects of the Brian Lara Project where it is noted that Turner Alpha, the original Project Managers, sought to raise alarm bells, which UDeCOTT have ignored and have succeeded in marginalising. What still requires explanation is how such events could have occurred given the number of senior professional staff employed by UDeCOTT, in addition to the members of the Board, all of whom should have been aware of the level of irregularity which was being permitted.

12.55. We have noted above the apparent absence of any note of criticism or dissent within the UDeCOTT staff and the dominant influence of the Executive Chairman, Mr. Calder Hart. To the extent the failure of senior staff and directors to raise any voice in opposition to the level of financial irregularity found on the Brian Lara Project amounts to loyalty, such loyalty is clearly misplaced. We consider in the concluding section of this Report, and in the light of further and detailed consideration of specific projects, appropriate recommendations to improve UDeCOTT's future performance.

12.56. It is noted that, while the Snaggs Report recommended two Executive Directors, along with a conventional Chairman, the current structure of the Board is without Executive Directors, other than the Executive Chairman. As well as concentrating power in the hands of one individual, the combining of the post of Chairman and Chief Executive is contrary to the OECD Guidelines on Corporate Governments of State Owned Enterprises¹⁶⁵. UDeCOTT in its Final Submissions¹⁶⁶ point out that Trinidad is not a member of OECD and the Principles are not widely followed.

¹⁶⁵ See p9 of OECD Guidelines and see Closing Submissions of Dr. Keith Rowley 31 July 2009, paras 23 to 26.

¹⁶⁶ See paragraphs 350 to 358.

UDeCOTT also state that current members of the UDeCOTT Board have “*considerable executive experience*”. While this may be so, none of the Non-Executive Directors (whatever their executive experience) can have a detailed knowledge of the projects being undertaken by UDeCOTT, nor do any of them appear to have construction experience. While executive staff may be invited to attend meetings, they have no authority. The proof of this particular pudding is in the surprising lack of action by the Board in relation to irregularities which will be seen in projects reviewed in the next following sections.

12.57. Finally, it is appropriate to revert to the consideration (conducted as a round table discussion) in section 9 of the Government White Paper proposing legislative reforms (which no longer enjoy Government support). At paragraph 9.12 the issue of oversight is considered and the contribution of UDeCOTT (through Mr Calder Hart) is noted. UDeCOTT considers that it has sufficient oversight through the Public Accounts Committee, the Central Audit Unit, through Ministers themselves as well as through Cabinet and through the Parliamentary process. Having regard to the observations above, and the more detailed analysis of projects in the next following sections, it is clear that the oversight referred to by Mr Calder Hart has been seriously ineffective in responding to the deficiencies identified so far in this report.

13. C&E Building

13.1. The Customs & Excise project was the first element of the new Government campus project and the first major project to be undertaken by UDeCOTT. This was to be a 10 storey building of some 190,000 sq. ft. The project was to be let on the design-tender method using local consultants as architect, QS and consulting engineers (structural and M&E). Bids were invited in October 2002, on an open tender basis. The closing date for tenders was extended on a number of occasions eventually to 11th March 2003. The response was reported to be good and an Evaluation Committee was

set up¹⁶⁷ to consider tenders and provide recommendations on the basis of the Instructions for Tender, which reflected the pre-qualification criteria set out in the UDeCOTT Procurement Procedures.¹⁶⁸ Dr. Rowley's statement¹⁶⁹ asserts that at some point in late April 2003 he began to receive reports from a variety of sources, including the Board, of serious bickering within the Board and allegations of favouritism, manipulation and conflicts of interest; also of one-man domination and questionable conduct on the part of the Chairman. When cross-examined he was reluctant to name his sources but said that he was being told by people who claimed to be in the know as to what was going on. In part the information came from an innocuous comment by Mr. Madan Ramnarine, which caused Dr. Rowley to speak to John Mair.

- 13.2. Of the eight tenders received, the lowest was from Hafeez Karamath Ltd (HKL). HKL was interviewed by the Evaluation Committee on 1st May 2003, which resulted in a complaint as to the manner of their treatment. The third report of the Evaluation Committee dated 12th May 2003, which evaluated HKL's tender, recorded failure on three grounds namely: management and organisation, personnel and equipment, and financial capacity. On a date between 13 and 15 May, while Dr Rowley was in St Kitts at a meeting of the Caribbean Development Bank, Mr. Calder Hart said (and Dr Rowley denied) that he was telephoned by Dr Rowley¹⁷⁰ who advised that the HKL group was in financial difficulties. The Evaluation Committee's report was considered at a meeting of the Tenders Committee of the Board on 22nd May 2003¹⁷¹ when Mr. Le Hunte proposed that the three grounds of rejection could easily be overcome and in the result the Tenders Committee resolved to award the contract to HKL. Mr John Mair, a Director and member of the Tenders committee went along with the decision but expressed concern that HKL had been accepted as financially sound and said that he mentioned this concern to Dr Rowley.¹⁷² It was subsequently alleged that Mr. Le

¹⁶⁷ comprising Marsha Farfan and Ian Telfer (UDeCOTT) Ronald Rampersad (external accountant) and Stephen Mendes.

¹⁶⁸ Para 5.03

¹⁶⁹ Para 20

¹⁷⁰ Note that there was an issue as to whether Dr Rowley was in St Kitts on 13 14 and 15 which was resolved by reference to the Gazette which showed that from 12 May Dr Rowley's ministerial duties were transferred

¹⁷¹ Exh JMI to Statement of John Mair

¹⁷² Statement para 34-36

Hunte had a conflict in that he was a Director of a bank which was owed substantial sums by HKL.

- 13.3. The decision of the Tenders Committee had to be ratified by the full Board. Mr Calder Hart decided, additionally, to take legal advice on the tender evaluation process and consulted Mrs Deborah Peake. Her advice given on 9 June 2003, which was disclosed voluntarily by UDeCOTT, was to the effect that all of the tenderers should have been evaluated at the same time rather than individually as had been done, and that the evaluation process was accordingly flawed. In the result, Mr Calder Hart on the same day instructed the Evaluation Committee to evaluate the next five lowest bids.
- 13.4. On 17th June 2003 Dr. Rowley wrote to Mr Calder Hart asking to be advised on progress of the evaluation exercise and as to when the award would be expected. Since the reports of April it appeared that Dr. Rowley had formed the view that UDeCOTT was *“vigorously attempting to violate its own published tender requirements in an effort to make an award to Hafeez Karamath, a contractor which did not meet several of the requirements set out by UDeCOTT itself in its Invitation to Tender documents”*. Dr. Rowley said that he was given to understand that the Evaluation Committee had prepared a report unfavourable to HKL and that attempts were being made to by-pass the Evaluation Committee¹⁷³. Dr. Rowley accordingly summoned Mr Calder Hart to a meeting at the Ministry of Planning and Development, also attended by the Vice Chairman, Dr. Bahadoorsingh and Victoria Mendes-Charles, Permanent Secretary. Mrs Mendes-Charles had prepared a report at Dr Rowley’s request which Mr. Mair thought to be of very low quality.
- 13.5. Dr. Rowley said that he raised with UDeCOTT all the disturbing allegations that were being levelled against it including allegations of wrong doing. Mr Calder Hart’s version is that Dr. Rowley simply expressed general concerns that any evaluation process by UDeCOTT should be able to withstand a level of public scrutiny, a position with which UDeCOTT had no disagreement. Dr. Rowley said that he raised with Mr Calder Hart the fact that one member of the Board (Mr. Le Hunte) was a

¹⁷³ Rowley Statement para 20-22

Senior Executive of the Bank which was owed substantial sums by HKL Group. There was also an issue as to when the conversation between Dr Rowley and Mr Calder Hart occurred, but they agree the meeting and conversation did take place.

- 13.6. At the conclusion of the meeting Dr. Rowley escorted the party out. Both agreed that at this point Mr. Calder Hart asked to speak to the Minister privately and on doing so, proposed that the Minister should meet Mr. Karamath. Dr. Rowley stated that he considered this suggestion to be improper and refused. Mr Calder Hart agreed that Dr. Rowley declined to meet Mr Karamath but rejected any suggestion that the meeting was for some corrupt purpose as being absurd. Mr Calder Hart pointed out that Dr. Rowley showed hostility towards Mr. Karamath, but had waited four years before making these accusations. Dr. Rowley agreed that he only disclosed the matter in August 2007.
- 13.7. One of the issues which had been considered both by the Evaluation Committee and the Tenders Committee was whether HKL, which had been in business for under five years but was part of a larger group, could pass the tender requirements by relying on the experience and financial standing of the group. On 3 July 2003 Mr. Calder Hart decided to instruct QES¹⁷⁴ to undertake what he described as a “*proper evaluation*” and submit a report to the Tenders Committee. This decision, as well as the earlier decision to take advice from Mrs Peak, was made by Mr. Calder Hart himself, notwithstanding that his position was then Chairman and not CEO¹⁷⁵. The decision to instruct QES was reported to the Board on July 4, 2003.
- 13.8. Mr. Outridge of QES, who was to undertake the further evaluation, said in evidence¹⁷⁶ that he had been told by Mr. Hart that there were those inside UDeCOTT who, he felt, wished to manipulate the award of the contract. Mr. Hart, it appeared, had failed to do anything about his concern. In further cross-examination, however,¹⁷⁷ Mr. Outridge accepted that what Mr. Hart had probably said was that “*the suggestion had been made to him*” there were those who wished to manipulate the award of the contract. The Commission was urged, in the final submissions on behalf of Mr.

¹⁷⁴ A QS firm which was instructed on the Government Campus project

¹⁷⁵ Transcript 28 January p81 and see para 12.29

¹⁷⁶ Transcript 6 February 2009, p11.

¹⁷⁷ Transcript 3 April 2009, p86-87.

Calder Hart to conclude that there was no evidence that Mr. Hart himself held the view that there were persons within UDeCOTT who were attempting to manipulate the award but was aware that such a suggestion was made by others. We accept on the balance of probabilities that this was the case: certainly there were others, outside UDeCOTT, who believed there were attempts to manipulate the award of the contract.

13.9. Mr. Outridge explained in evidence¹⁷⁸ that the time available and the state of the documentation had the effect of limiting what he was able to accomplish. He also charged the modest fee of only TT\$10,000 for the work. The QES report was received on 11th July. The report appraised the tenders on a points system and concluded, again, that the contract should be awarded to HKL. This report was forwarded to Deborah Peake to advise on whether all tenderers were being treated fairly. Her further advice, given by letter dated 15 July 2003, was to the effect that the evaluation of HKL's tender was flawed because QES had wrongly taken account of the track record and financial capability of both HKL and the parent company HKCL. This was an issue which was soon to re-emerge¹⁷⁹ in relation to the award of the contract for the Ministry of Legal Affairs tower.¹⁷⁹

13.10. A further letter was written by Mr. Outridge bearing the date 14 July 2003 which noted that all the tenders contained discrepancies and that, because over 120 days elapsed, the tender prices were no longer valid. QES therefore recommended the project should be re-tendered. Dr. Rowley drew attention to these two documents as "*the mystery of the two QES reports*". During July 2003 Dr. Rowley received further reports about the tender process which he interpreted as indicating continuing tension in the UDeCOTT Board. Dr Rowley stated that he also received information that John Mair, a member of the Board, was upset about the way UDeCOTT's business was being conducted and had decided to resign from the Board.¹⁸⁰ Mr. Mair was also of the view that QES was acting unprofessionally. Dr. Rowley directed his Permanent Secretary to communicate with UDeCOTT to obtain all the relevant documents. The Permanent Secretary's note supported the view that QES was acting improperly. Mr. Mair's version of events differed from that of Dr. Rowley. He denied having any

¹⁷⁸ Transcript 6 February p6

¹⁷⁹ See section 14 below

¹⁸⁰ Dr Rowley Statement para 45, which Mr Mair says overstated his strength of feeling

intention to resign over the conduct of the tender process. Mr. Mair, however, agreed that he considered QES to be acting unprofessionally and continued so to assert in his oral evidence where he stated expressly that he considered Mr. Outridge to be biased¹⁸¹. Dr. Rowley requested a meeting with the entire UDeCOTT Board which took place on 25th July. Mr. Calder Hart's recollection of the meeting is that the Minister stated that HKL had been recommended contrary to his instruction. Mr. Calder Hart was of the view that the Minister had no right to dictate to the Board. UDeCOTT did, however, agree to carry out a final evaluation of tenders within two weeks and forward this to the Tenders Committee.

13.11. The second report from QES, in the form of a letter dated 14th July 2003, was not shown to Dr. Rowley at the meeting on 25th July. Mr. Calder Hart denied that he had suppressed the report but agreed that the earlier report of 11th July was discussed at the meeting and was criticised by the Minister's Private Secretary. He further agreed that he brought neither the opinion of Counsel on the tendering process nor the second QES report to the meeting.

13.12. Mr Calder Hart's oral version of the events¹⁸² was that after the meeting with the Board, when the Minister had given his opinion on the QES report and on allegations he had been hearing, he requested to see Mr Calder Hart. At this (private) meeting Dr Rowley stated that there were allegations of a corrupt relationship between Calder Hart and Karamath. Mr Calder Hart said that he demanded that the Minister phone the person that he suspected the information had come from. The Minister emphasised that he was not saying the information was true, but was concerned that the accusations were being made. It was at this point, according to Mr Calder Hart, that he suggested that the Minister should meet Mr Karamath. Mr Calder Hart emphasised that this had nothing to do with the tender but with the allegation of misconduct against him. Subsequently in cross-examination by Mr. Peterson, Mr. Calder Hart accepted that this version of events was not in his written statement and was consequently suggested to be untrue¹⁸³.

¹⁸¹ Transcript 6 Feb p55 and following

¹⁸² Transcript 28 January p 98

¹⁸³ Transcript 28 January p 99

13.13. Dr. Rowley then had an audience with the Prime Minister who was told that Dr. Rowley intended to write a firm letter to Mr. Calder Hart and that he proposed to spell out the procedures to be followed. He noted that the Prime Minister appeared nonchalant. Dr. Rowley commented to the Prime Minister that he viewed Calder Hart's resistance to his intervention and guidance as unacceptable and potentially facilitating a corrupt award.

13.14. Dr. Rowley wrote to Mr. Calder Hart on 5th August 2003¹⁸⁴ stating that the process and procedures being pursued by UDeCOTT were faulty and there was evidence that the tender process had been or was being manipulated. The letter set out guidance on the steps to be taken which included "*discontinue the current process and prepare to invite new bids*" from pre-qualified contractors only.

13.15. Following this, on 12th August 2003, John Mair called for an immediate Board Meeting as a result of his concern regarding the QES report. The meeting took place on 19 August¹⁸⁵ and also had available a list of criticisms of QES identified by the Permanent Secretary, which included the following:

- (i) QES utilised additional assessment criteria which were not identified in the Tender Documents (Current Asset Ratio and Workload Calculation)
- (ii) In respect of the financial and track record requirements, QES took into account information relating to the parent companies of both tenderers No 7 (HKL) and No 8 (NHIC);
- (iii) HKL was awarded 3 points for construction methodology even though no such methodology had been submitted.

Mr. Calder Hart considered this final criticism unfounded as HKL had submitted a construction methodology, which had been noted in earlier tender reports.

13.16. At the Meeting it was accepted that some things had not been dealt with properly in the report. On the proposal of Mr. Mair it was resolved that QES should not be hired for any new projects. The Board decided to quash the process and to start a new tender process. Mr. Calder Hart agreed in evidence that QES was in fact still working

¹⁸⁴ Calder Hart Exh 5

¹⁸⁵ Calder Hart Exh 16

on the Government Campus project but stated that this was not a new project¹⁸⁶. For reasons that remained unexplained, Mr. Calder Hart never produced a copy of the second QES report dated 14 July, either before or at the Board meeting of 19 August 2003. Mr. Mair stated that the first he knew of the report was when he saw it attached to Dr Rowley's statement.

13.17. Mr. Calder Hart wrote to Dr. Rowley on 27th August 2003¹⁸⁷ in reply to the Minister's letter of 5th August expressing disappointment with the suggestion that the tender process was being manipulated and blaming the mistakes that had been made on "*my attempt to correct the system on the run so to speak*". The letter concluded by stating that UDeCOTT "*is also standardising its tender procedures*".

13.18. The re-tendering process carried out in 2004 resulted in an award to H N International (Caribbean) Ltd (NHIC), owned by Mr. Emile Elias. Dr. Rowley accepted in oral evidence that Elias was a friend who had contributed financially to his unsuccessful campaign in 1996 to become leader of the PNM. At the end of his evidence Dr. Rowley confirmed that he was not alleging that any actual corruption had taken place.¹⁸⁸

13.19. Particulars of the Contract as finally awarded to NHIC were provided in a written presentation of UDeCOTT. Fresh tenders were invited on 5 January 2004 from four contractors, each of whom had tendered in the first round and were therefore pre-qualified. This time NHIC was the lowest tenderer by a margin of only some \$400,000. No details of the tender evaluation were provided other than that the analysis was performed by UDeCOTT and its newly appointed QS consultants, Michael Samms & Associates. For the second round of tendering, UDeCOTT had the advantage of having previously assessed the capabilities of the four tenderers, whose compliance with Tender Rules was assured. It was not reported whether Hafeez Karamath Limited had been disqualified on financial grounds in accordance with the earlier advice of Mrs. Peak.

¹⁸⁶ Transcript 28 January p 199

¹⁸⁷ Rowley Exh KR13

¹⁸⁸ Transcript 22 January p.178

13.20. The original contract completion date was March 2006. The work was performed concurrently with other projects within the Government campus and became subject to major delays such that the work remained incomplete as at March 2009 when inspected by the Commissioners. It is reported that the original Contract Price has increased by approximately 13% although as at September 2008 only some 90% of the adjusted Contract Price had been paid to NHIC. Further details of the time and cost overruns are set forth in Section 23 below.

Involvement of the Integrity commission

13.21. Sometime in 2004 (or earlier) the Integrity Commission was “*tipped off*” by an individual (who has not been named) about the alleged irregularities in the final award of the Customs & Excise Tower Contract to NHI. For reasons which are not clear, the Integrity Commission decided to investigate the matter in secret and gave no notice to Dr. Rowley, who was apparently the main or only subject of the tip-off. The accusations in relation to the C&E building against Dr. Rowley were that:

- (a) he had influenced, procured or directed the decisions to quash the recommendations that the C&E Contract be awarded to HKL.
- (b) he had influenced or procured the award of the Contract for C&E to NHI.
- (c) and that he had received benefits for these actions¹⁸⁹.

The Integrity Commission appointed the Canadian Forensic Accountant, Mr. Bashir Rahemtulla in October 2004. In pursuit of his investigations, Mr. Rahemtulla carried out interviews inter alia with UDeCOTT and Mr. John Mair.

13.22. While this Enquiry was proceeding in secret, a further public Commission of Enquiry was established by HE The President on 5 March 2005. The Enquiry was precipitated by allegations made in Parliament concerning the illegal removal of materials from the Scarborough Hospital site. The Terms of Reference of the Commission were to enquire into:

- (i) Allegations concerning the removal of materials etc., by NHI from the Scarborough Hospital Site to a private development site called Landdate of which the owner was the wife of Dr. Rowley, Mrs Clark-Rowley.

¹⁸⁹ Rowley statement, para. 79-85

- (ii) The procurement processes and award of all Contracts to NHI and Warner Construction.

13.23. The enquiry was carried out with speed and the Report of the Commissioners published on 18 August 2005.¹⁹⁰ The Commission considered evidence by the Rev. Barrington Thomas, a man with seven convictions, who was plainly not believed by the Commissioners. His evidence was that Dr Rowley had boasted that he had given the C&E Contract to NHI, in return for which the Landdate Project would be carried out for free. Other potential and relevant witnesses failed to appear, having left the jurisdiction. The Commission rejected the allegations against Dr. Rowley on the balance of the evidence, but found it necessary to criticise his behaviour.¹⁹¹

13.24. While the Landdate Enquiry was on-going, Dr Rowley remained in ignorance of the C&E Enquiry, which continued its proceedings in secret. The Report of that Enquiry (which had been underway for some 2 years) was sent to the Director of Public Prosecutions in August 2006. It appears that the Report found the conduct of Dr. Rowley to be such as to justify consideration of criminal proceedings. The matter only came to Dr Rowley's notice in December 2006, when it appeared in the Press.

13.25. Dr. Rowley promptly applied to the Court and on 27 April 2007 obtained orders (with the consent of the Integrity Commission) that:

- (i) The decision to make and publish the Report was illegal and *ultra vires* and that the Report itself was null and void.
- (ii) That the failure of the Integrity Commission to give Dr. Rowley notice or allow him to be heard was *ultra vires* and in breach of natural justice.

The Court duly quashed the Report and ordered the Integrity Commission to give Dr. Rowley the opportunity to be heard.¹⁹² The Commission subsequently found there to be no basis to suspect that Dr. Rowley had acted improperly and sent him a letter of exoneration dated 1 February 2008¹⁹³.

¹⁹⁰ NR23

¹⁹¹ Para 25-30

¹⁹² Rowley statement, para. 82

¹⁹³ Appendix 17 to Rowley Statement

13.26. It is appropriate here to refer to yet another strand in the saga of the investigations following the C&E tenders. In the course of the hearing before the Court, evidence was given by Mr. Bashir Rahemtulla to the effect that during his (secret) investigation at UDeCOTT, he was provided with files which in his opinion had been culled. This was revealed by Mr. Riley.¹⁹⁴ Mr. Rahemtulla's evidence¹⁹⁵ was as follows:

“Whilst UDeCOTT did make some of its files accessible to me, I noted that several of these files appeared to have been culled and that certain information was not present. UDeCOTT also denied me access to some documents, such as certain Board Minutes, on the basis that UDeCOTT's legal officer was of the view that they were unrelated to this matter.”

13.27. Mr. Riley presented this as evidence of UDeCOTT's general lack of transparency. Ms. Rampual responded to these accusations and made the following points:

- (a) UDeCOTT had co-operated with the Integrity Commission over the Landdate Enquiry in August 2006.
- (b) Between August 2006 and September 2007 UDeCOTT met the Commission's Investigators on numerous occasions and provided them with files and information.
- (c) On no occasion were culled files provided nor was any concern expressed at the time to UDeCOTT that proper access was not being granted to UDeCOTT's material.

13.28. Ms. Rampual said that she first saw articles reporting the evidence of Mr. Rahemtulla on 27 September 2007, his evidence having been given in the High Court on 26 September 2007. Ms. Rampual wrote to the Integrity Commission on 28 September¹⁹⁶. She continued to deny that any culled files were provided or that UDeCOTT did not co-operate with the Commission. UDeCOTT points out in its Final Submissions¹⁹⁷ that the Integrity Commission did not accede to a request to

¹⁹⁴ Para 78 of 1st statement

¹⁹⁵ para. 8

¹⁹⁶ NR24

¹⁹⁷ See paragraphs 395 to 397.

compel disclosure of UDeCOTT's documents, with the inference that the Integrity Commission was satisfied that UDeCOTT had provided all relevant documents.

Initial Conclusions

13.29. It is appropriate at this point to review the long saga of the C&E Building, which commenced in October 2002 and effectively represented the entry of UDeCOTT into large scale development projects. The tendering process extended to January 2004; the construction of the building, which should have taken 26 months, is still ongoing (after more than 5 years); and the repercussions arising from the abortive tender process in 2002/3, as well as the accusations and recriminations involving Dr. Rowley, Mr. Calder Hart and many other individuals, remain a topic of hot debate in Trinidad. We seek to draw conclusions relevant to procurement issues in the Public Construction Sector at the end of this report. At this stage, however, it is appropriate to reflect on the extraordinary and unfolding saga presented at the Enquiry, much of which had been in circulation in some form for months or years beforehand.

13.30. It is to be observed that the analysis of the first round of tenders was plainly flawed in a number of ways. It was technically flawed for the reasons set out in two advices tendered by Mrs. Deborah Peak at the request of Mr. Calder Hart. However, it was also flawed in more fundamental respects in that the various reviews carried out produced patently inconsistent conclusions. While Dr. Rowley confirmed that no actual corruption had taken place, there was evidence suggesting that particular individuals involved in the process might be subject to certain pre-dispositions as to where the project was to be awarded. It may be that in a small country, where so many people are required to hold significant appointments, this is inevitable. If so, this points to the clear need to establish rigorously objective standards and rules to be followed when assessing tenders.

13.31. In terms of the detail, it is surprising that the tender evaluation process should have proceeded, on two occasions, before advice was taken on what turned out to be fundamental legal issues which undermined much of the work that had already been carried out. The correctness of Mrs. Peak's advice has not been questioned. Plainly it should have been taken earlier, on both occasions. UDeCOTT, in its Final

Submissions, stated that there was no good reason to seek legal advice at any earlier stage.¹⁹⁸ However, the Commissioners consider that the advice, which was plainly relevant to the tender evaluation process, should have been taken earlier. Further, while the Commissioners refrain from expressing any view on the serious differences between Mr. Outridge and Mr. Mair, we believe that the decision to instruct QES, in an attempt to break the log jam, was, in retrospect, mistaken; and the fact that Mr. Outridge produced a second report which was not disclosed by Mr. Calder Hart when it clearly should have been, simply creates unnecessary suspicion.

13.32. UDeCOTT responded to both the foregoing points of criticism in its Final Submission¹⁹⁹ contending that the decision to instruct QES was sensible and reasonable. The difficulty was that, as noted above, QES was instructed late and in circumstances where their review was bound to be somewhat superficial; and given the acceptance that the tender process was "*flawed from the beginning*"²⁰⁰, the exercise was never going to resolve the differences which had emerged. With regard to Mr. Hart's non-disclosure of the second report, while UDeCOTT seeks to explain it as involving no impropriety, the Commissioners remain of the view that the selective use of such a document is bound to engender suspicion, not just in the minds of those predisposed to find questionable motives.

13.33. With regard to Dr. Rowley, it is not within the remit of the Commissioners to comment on the ways in which Government Ministers conduct their business. Nor do we feel called upon to do more than simply record the different versions of meetings and conversations, which differed more in their supposed implications than in the facts asserted. A matter which was central to the dealings between Dr. Rowley and Mr. Calder Hart was whether, as Dr. Rowley believed, the Minister was entitled to instruct UDeCOTT or whether, as Mr. Calder Hart believed, UDeCOTT could regard itself as a private company to be run by its Board as they saw fit. The issue is more fully analysed elsewhere in this report²⁰¹. It is clear that a Minister may instruct UDeCOTT as its agent for a particular project, whether pursuant to a written contract or not. However, to instruct UDeCOTT on the manner in which it performs its

¹⁹⁸ Paragraph 178.

¹⁹⁹ paragraph 180-188.

²⁰⁰ Minutes of Board Meeting 19 August 2003: CH17.

²⁰¹ Para 12.16

procurement function involves more complex legal issues on which we decline to comment. There is clearly a case for clarifying the power of Ministers to avoid disputes of this sort in the future.

- 13.34. Having concluded that a number of individual mistakes were made which led to the decision to abort the first round of tendering in August 2003, we can accept the summary put forward by Mr. Calder Hart in his letter of 27 August 2003 to Dr Rowley, that the mistakes had occurred in an “*attempt to correct the system on the run so to speak*”. The question will remain what lessons Mr. Calder Hart and UDeCOTT drew from these experiences.
- 13.35. As noted above, the second round of tendering appears to have passed off with no drama and with little evidence of the “*standardised*” tender procedure referred to in Mr. Calder Hart’s letter. It appears to be the case that from 2004 onwards UDeCOTT sought to keep the process of tendering and tender evaluation under more close control so as to avoid a repeat of the C&E experience, including the use of pre-qualification of tendering companies. Whatever the motivation it remains vital that UDeCOTT’s tender rules as well as their application should achieve a minimum level of transparency, and should demonstrate to the construction industry in Trinidad & Tobago and the public at large that the tender process is fundamentally fair and properly administered.
- 13.36. The Codicil to this drama, represented by the parallel references to the Integrity Commission and the eventual striking down of the secret investigation of Dr. Rowley’s part in the C&E Building award, is regrettable and has rebounded disastrously on the Integrity Commission itself. No doubt there are lessons to be learnt here but they are not matters for this Enquiry.

14. **MLA Tower and Sunway**

- 14.1. The Legal Affairs (“LA”) Tower is the third major building within the Government Campus Plaza (GCP) which comprises 9 packages, including 4 tower blocks. These were the Customs & Excise (C&E) building (PK1), the Board of Inland Revenue (“BIR”) tower (PK3), the Ministry of Legal Affairs (MLA) tower (PK6) and the Ministry of Social Development (MSD) building (PK9). The Project also included a substantial multi-storey car park (PK2) situated on the opposite side of Richmond Street and linked both above and below street level by pedestrian and service access (the Mechanical Plant serving all the buildings is also situated within the multi-storey car park). The designation of the remaining packages is set out in Section 23 below.
- 14.2. The GCP was intended to be constructed as a series of sequenced and inter-related projects with common professional teams but separate contractors and contracts for the nine packages. The common professional team comprised Design Collaborative Limited as Architects, Turner Alpha Limited (TAL) as Project Manager and UDeCOTT as Developer and Project Manager. As already noted, the C&E Building was the first to be tendered. The decision to abort the first round of tendering in August 2003 eventually led to a delay of over 12 months, with the Construction Contract eventually being signed in June 2004, with a retrospective contract start date of 17 May 2004 and a completion period of 22 months. Once the initial problems with the tender and evaluation procedures had been overcome, the rest of the GCP Project followed in sequence, the commencement dates and completion periods for the major elements being as follows:

		<u>Start</u>	<u>Contract Period</u>
C&E Building	PK1	17.5.04	22m
M-S Car Park	PK2	07.6.04	19m
BIR Tower	PK3	03.12.04	27m
MLA Tower	PK6	23.5.05	27m
MSD Building	PK9	28.11.05	22m

- 14.3. The GCP, albeit still incomplete at the date of this Report, is now a familiar feature of the Port of Spain skyline and adds considerable variety and interest to it. The C&E

building (PK1) and the MSD building (PK9) are each of 10 storeys and rectangular in plan, with their longer axes parallel to Richmond Street. The BIR Tower (PK3) and the MLA Tower (PK6) are of very similar design, each of 23 storeys and located at opposite ends of the site. Between the four buildings is an open Plaza providing access and various leisure facilities, including a large LED screen.

- 14.4. Thus, after placing the contract for the C&E Building the remaining elements of the Project proved relatively uncontroversial, save for overall questions of delay and additional cost, which are dealt with in Section 23 below; and save for the decision to award the Contract for the MLA Tower to Sunway Construction Limited, which is now the subject of this section.

Tendering for MLA tower

- 14.5. The bidding process for the MLA Tower, which led to an award of the contract to Sunway Caribbean Ltd (formerly CH Development & Construction Ltd) involved two separate but potentially related areas of concern. First UDeCOTT's tender rules appear to have been breached so as to favour CH Development & Construction Ltd (CH Development) in a number of ways, with no proper explanation other than the fact that CH Development was a subsidiary of a substantial foreign company²⁰². Secondly, it is suggested that a relationship existed between Mr Calder Hart and the promoters of CH Development, a relationship which was not reported to the UDeCOTT Board and is denied by Mr Calder Hart, but upon which contrary evidence has been presented to the Commission.
- 14.6. CH Development & Construction Pte Ltd (CH Development) was incorporated in Trinidad on 19 October 2004, as a wholly owned Trinidad subsidiary of an established Malaysian multi-national construction company, Sunway Construction Sdn Bhd (Suncon). On 25 October, 6 days later, the company wrote to UDeCOTT seeking pre-qualification for the LA Tower²⁰³. The letter was signed by two directors, Leong Choong Chee and David Ng Chin Poh and bore the address and contact details of the new company including the fax number 868-624 8239. On 5 November 2004

²⁰² Transcript 27 Jan p 116

²⁰³ NR 38 p.852

Turner Construction International LLC (Turner), the appointed Project Manager, recommended pre-qualification of Suncon²⁰⁴ (the parent company) and on the same day a note was prepared for the Board recommending that six companies be invited to tender for the MLA Tower, including Suncon²⁰⁵. Pre-qualification was approved by the Board on 8 November 2004. The Board also directed that where foreign firms incorporate subsidiary companies within Trinidad and Tobago and the subsidiary enters into a contract with UDeCOTT “*care must be taken to ensure that the parent company is contractually responsible for the performance of all the duties and obligations of the Joint Venture or subsidiary company*”.²⁰⁶

14.7. On 31 January 2005 CH Development (not Suncon) submitted a tender to UDeCOTT along with five other tenderers. The six tenders were reviewed in a tender evaluation report prepared by Mr. Derek Outridge of QES²⁰⁷. The tenders submitted were as follows:

(1)	Hafeez Karamath Ltd (HKL)	\$301,801,885
(2)	Johnston International Ltd (JIL)	\$346,207,130
(3)	CH Development & Construction Ltd	\$368,888,000
(4)	Kier/Kee Chanona Joint Venture	\$381,417,123
(5)	Carillion (Caribbean) Ltd	\$383,295,000
(6)	NH International (Caribbean) Ltd	\$408,544,332

14.8. The Report²⁰⁸ states that all six tenderers “*complied substantially with the requirements of the tender instructions*” although three tenderers did not submit their INS, BIR and VAT certificates. The Report recommended exclusion of the three highest tenders as being un-competitively priced. Of the three lowest tenders, HKL was said to be very low when compared to the prices of other tenders. JIL is also said to be low but competitive. HKL was said to have a “*considerable*” current workload. JIL’s workload was said to be “*not tremendous*”, however if they were to be awarded the Chancery Lane Development, their ability to undertake the present

²⁰⁴NR p.855

²⁰⁵NR p.854

²⁰⁶NR pg 858 par 03/04

²⁰⁷ Notwithstanding the resolution of the Board in August 2004 that QES should no longer be employed following their work on the C&E building.

²⁰⁸ NRP 904.

Contract was questioned.²⁰⁹ In respect of CH Development, it was noted that they have “no current workload in Trinidad and Tobago”.

14.9. The UDeCOTT Board at its meeting on 5 April 2005 “agreed with the recommendation of the Tender Evaluation Committee that a contract be awarded to CH Development and Construction Ltd (SUNWAY)” for the construction of the MLA tower and on 6 April UDeCOTT sought approval for the award from the Permanent Secretary, Ministry of Finance²¹⁰. This designation of the company was potentially misleading as the Board of UDeCOTT had earlier been quite clear about the distinction between a foreign parent and a local subsidiary company²¹¹. CH Development and Suncon remained distinct companies. In fact prior to the recommendation of the Tender Evaluation Committee, UDeCOTT had requested Suncon to provide a letter of undertaking “to support and finance CH Development under the contract for the MLA tower, should it be awarded to CH Development.” This is recorded in a document dated 4 March 2005 from Suncon setting out an extract of the Directors’ resolution of the same date as follows:

“That authority be and is hereby given to any director(s) to sign the letter of undertaking and all other relevant documents drawn in connection therewith, for and on behalf of the company [Suncon] AND THAT if necessary, the company’s common seal be affixed unto any relevant documents drawn pertaining thereto in accordance with the provisions of the company’s articles of association”.

14.10. Pursuant to this resolution Suncon, on 7 March 2005 issued a letter addressed to UDeCOTT headed “Letter of Undertaking” stating:

“As requested by UDeCOTT and for the tender of CH Development & Construction Ltd being considered, we Sunway Construction Sdn Bhd...undertake to support and finance CH Development & Construction Ltd of the undertaking under the contract for “the proposed construction and completion of the Ministry of Legal Affairs Tower for the Urban Development

²⁰⁹ JIL were awarded the Chancery Lane Contract on 8 June 2005.

²¹⁰ NR pg 975.

²¹¹ See para 14.6 above

Corporation of Trinidad & Tobago, Port of Spain, Trinidad” should CH Development & Construction Ltd be awarded the contract.”

14.11. On 28 April 2005 a letter was sent by UDeCOTT addressed to Sunway Construction Berhad (Suncon) and CH Development & Construction Ltd stating that “*Your tender dated January 31 2005 has been accepted.*” It concludes “*Please sign the attached copy of this letter to confirm your agreement with its contents*”. The letter is signed by Winston Agard, Chief Executive Officer, and is countersigned by Mr. Poon Kon Hoo “*for and on behalf of CH Development & Construction Ltd*”. There are various copies of this document in the files which appear to show that the letter, at some point countersigned on behalf of CH Development & Construction Ltd, was faxed from UDeCOTT and faxed back to them on 29 April 2005. One copy of the letter clearly shows one of the fax numbers as 868-624 8239 against which is the name CALDER HART²¹².

14.12. The sequence of events disclosed by the fax documents themselves have been analysed on a number of occasions. In Closing Oral Submissions²¹³ Counsel for UDeCOTT quoted and adopted an analysis which had been published in the Press²¹⁴. The same analysis was adopted in UDeCOTT’s written submissions²¹⁵ and earlier in final Submissions on behalf of Mr. Calder Hart. The analysed sequence of events was as follows:

- (i) The UDeCOTT Letter of offer addressed to Sunway Construction and CH Development & Construction was sent by UDeCOTT to Mr. Hart’s personal fax number (624 8239) at 10:02 on 29 April 2005.
- (ii) The same letter was sent from Mr. Hart’s personal fax number to a Sunway fax number (632 6825) at 11:59 on 29 April 2005.
- (iii) The letter (at some point signed on behalf of CH Development & Construction) was sent from the Sunway fax to UDeCOTT at 12:06 on 29 April 2005.

²¹² Calder Hart Ex 23.

²¹³ Transcript 21 May page?

²¹⁴ Newsday, Saturday April 25 2009, article by Andre Bago.

²¹⁵ See paragraph 282.

14.13. On 16 June 2005, a letter was sent to UDeCOTT for the attention of Mr. Calder Hart, by Mr. Poon Kon Hoo, a director of a new company called Sunway Construction Caribbean Ltd. The letter states:

“Further to our meeting 15 June 2005 we would like to seek your consideration and approval to address the above [letter of award – MLA Project] to Sunway Construction Caribbean Ltd, formerly CH Development & Construction Ltd, a wholly owned subsidiary of Sunway Construction SDN BHD.”

The letter goes on to state that a joint appointment to Suncon and its subsidiary company would give rise to tax issues for the parent company in Malaysia. It is then stated that Sunway Construction Sdn Bhd *“has issued a letter to confirm that SCSB will undertake full support for SCCL in all aspects for this project”*. It is to be noted that the “letter of support” referred to and other similar expressions of intent from Suncon did not materialise into any recognisable form of guarantee by which Suncon bound itself to be *“contractually responsible for the performance of all the duties and obligations of the Joint Venture or subsidiary company”* as had been expressly required by the Board at the meeting on 8 November 2004.

14.14. Finally, by letter of 22 June 2005 UDeCOTT wrote to Sunway Construction Caribbean Ltd advising (in terms similar to the earlier award letter of 28 April 2005) that *“Your tender has been accepted”* for the MLA tower. Again the letter requested counter-signature to confirm agreement. The letter appears to be countersigned by Mr. Poon Kon Hoo (who also countersigned the letter of 28 April). Sunway Construction Caribbean Ltd was shown as having a different address and fax number to CH Development. In a subsequent letter 26 May 2008²¹⁶ Mr. Poon Kon Hoo wrote to Mr. Calder Hart to clarify that the former directors of CH Development & Construction Ltd, Messrs. Leong Choon Chee, Ng Chin Poh and Lee Hup Ming had all resigned, and that the current directors of Sunway Construction (Caribbean) Ltd were Messrs. Kwan Foh Kwai and Poon Kon Hoo.

²¹⁶ NR p 983.

14.15. The involvement of Mr. Calder Hart in the foregoing transactions seems clear. Yet it should be recalled that at the relevant time (and up to September 2005) the CEO was Winston Agard who was succeeded by Ricardo O'Brien up to September 2006. Throughout this period Mr. Calder Hart was the (non-executive) Chairman. Mr. Calder Hart's direct involvement with tenderers, in his capacity as Chairman, is unusual to say the least. Mr. Agard, at the request of the Commission, made a statutory declaration dated 9 June 2009. He confirmed that, as CEO, he was unaware of the application of CH Development & Construction for pre-qualification in October 2004. The declaration states:

"I am of the opinion that had the award of contract to CH Development been wrong in law because the subsidiary was a separate legal entity, this would have been pointed out by the legal department of UDeCOTT. My understanding was that the evaluation committee and the board of UDeCOTT were of the view that they were treating essentially with Sunway and not its subsidiary since it was obvious to all that the subsidiary company was newly registered in Trinidad and Tobago and did not have a track record".

"I did not know who the directors were of CH Development nor was I aware of a relationship between Mr. Hart and CH Developments' directors. To my knowledge Mr. Hart never declared such relationship to the Board."

It is true, as pointed out by UDeCOTT in their final submissions²¹⁷ that this evidence was uncontested, largely because it was submitted after the close of hearings dealing with the MLA Tower. But whatever Mr. Agard's opinion, it is perfectly clear that CH Development and Sunway were, in fact and in law, separate companies, a point that was clearly appreciated by the Board on 8 November 2004²¹⁸.

²¹⁷ Paragraph 267

²¹⁸ See paragraph 14.6 above.

14.16. Counsel for the JCC, in final submissions to the Commission²¹⁹ contended that, in the award of the MLA Tower contract to Sunway Caribbean Ltd, UDeCOTT had breached its own tender rules in the following respects:

- (i) In 2004 when CH Construction applied to UDeCOTT for pre-qualification, shortly before invitations to tender, CH Construction was without any assets²²⁰.
- (ii) On 10 November 2004 when it received an invitation from UDeCOTT to tender for the Ministry of Legal Affairs Tower²²¹ CH Construction had no VAT Certificate, no NIB Certificate and no PAYE File Number, each of which was required. The lack of a VAT Certificate in particular had, in other cases, caused the rejection of tenders²²².
- (iii) In awarding the contract UDeCOTT wrongly took into account the financial strength of Sunway Malaysia²²³ and ignored the fact that CH Construction was not pre-qualified²²⁴.
- (iv) CH Construction could not have satisfied the pre-qualification criteria set by UDeCOTT and therefore could not have been in a position to properly obtain a contract²²⁵.
- (v) UDeCOTT failed to obtain a parent company guarantee from Sunway Malaysia, notwithstanding that CH Construction had no assets.

14.17. Counsel for the JCC further contended that the award of the MLA Tower contract to Sunway Caribbean Ltd demonstrated that Mr. Calder Hart had an ongoing relationship with CH Construction which had not been revealed to the UDeCOTT Board. The matters relied on are the following:

- (i) The letter dated 25 October 2004 from CH Construction to UDeCOTT which lists Mr. Hart's fax number²²⁶.

²¹⁹ Transcript 18 May 2009

²²⁰ Letter dated 25 October 2004 at Exhibit NR 38 (p 852-853) to First Witness Statement of Neelanda Rampaul; Transcript 27 January 2009 p139

²²¹ Exhibit NR 38 to the First Statement of Neelanda Rampaul (p 862)

²²² Exhibit NR 32 to the First Statement of Neelanda Rampaul (p 801) and Exhibit NR 38 (p 905); Transcript 27 January 2009 p156

²²³ Transcript 27 January 2009, p 107 -117

²²⁴ Exhibit MR 38 to First Witness Statement of Neelanda Rampaul (p 981- 982)

²²⁵ Transcript 28 January 2009 p 117

²²⁶ Exhibits to N Rampaul statement, p 852

- (ii) Mr. Hart's explanation that this was due to an error²²⁷, was implausible because the tender was submitted 3 months after the first letter was sent.²²⁸
- (iii) It is unlikely that such an error could have gone unnoticed for 3 months; faxes to CH Construction would have been arriving at Mr. Hart's home.
- (iv) No evidence has been given to suggest that Mr. Hart ever wrote to CH Construction to ask for an explanation.
- (v) It appears that the letter of acceptance to CH Development was sent from UDeCOTT to Mr. Hart's home fax number and sent on from Mr. Hart's home fax number to Sunway.

14.18. Mr Calder Hart was cross-examined in relation to the above matters, when he gave the following evidence. With regard to the identity of the companies, he stated that UDeCOTT did not see Sunway and CH Developments as separate legal entities²²⁹. Mr Calder Hart drew a distinction between the tender process and the pre-qualification exercise²³⁰. It was suggested that, despite advice of Mrs Deborah Peake, UDeCOTT had deliberately and openly, within months of the C&E experience, confused the identities of Sunway and CH Construction. Mr Calder Hart's response was:

"Well, in my view, that deals with an award where the issue of the financial capability of the company is at question. Because of the fact that they have had to use—I think Mr. Fitzpatrick related to two, well three items that it had been failed on; and if you look at those three elements, those are areas, when you are going to award a contract to a tenderer, you'd have to ensure, obviously, that they are capable of delivering and executing the project. So, from the standpoint of the pre-qualification exercise, pre-qualification is there to determine that, in fact, all those resources are going to be available to whatever project you intend to tender on.

Mr. Chairman: But it still follows that from the advice you received, that you've got to consider them as separate companies?

²²⁷ Mr. Hart's Second Witness Statement dated 8 May 2009, para 43

²²⁸ Annexure 20 to the First Witness Statement of Mr. Hart

²²⁹ Transcript 27 January, p.107, 109

²³⁰ Transcript 27 January, p.118

Mr. Hart: Well we didn't consider them as separate companies because what we saw ourselves as doing was approving Suncon²³¹."

14.19. With regard to the form of undertaking which had been offered by Suncon, Mr Calder Hart was asked whether he had taken legal advice. His response was:

"Q The Board did not seek any legal advice as to whether this document had the effect that they wanted?"

A. It would not appear so.²³²"

CH did give the 10% performance bond required under the contract terms, in the sum of US\$5,855,600, but no other parent company guarantee was offered. This was in clear breach of the requirement of the UDeCOTT Board as determined at the meeting on 8 November 2004.

14.20. Mr Calder Hart sought to justify the employment of Sunway Caribbean Ltd by pointing out that this resulted in a *"building going up, and the fact is that Sunway emerged as the top performing contractor on the Government Campus"* although he added *"I didn't say the end justifies the means"*. He explained further that *"the Board at all times felt it was dealing with Sunway"²³³*.

14.21. UDeCOTT responded further in its final submissions²³⁴ arguing that it is quite usual for foreign companies to set up local subsidiaries and for the track record of the parent to be relied on. Other tenderers had failed to submit appropriate documentation yet had been included in the external evaluation by QES. With regard to the failure to obtain a Parent Company Guarantee, UDeCOTT relied on the *"Letter of Undertaking"* from Suncon dated 7 March and other expressions of support; and on the Performance Bond in the sum of US\$5.8 million²³⁵. UDeCOTT thus submitted that *"all reasonable steps were taken to obtain the necessary security from Sunway Malaysia for the performance of CH Construction's obligations"*.

²³¹ Transcript 27 January p 116

²³² Transcript 27 January p 144

²³³ 27 January p.136, 146

²³⁴ See paragraphs 262 to 276.

²³⁵ UDeCOTT Final Submissions paragraphs 277 to 279.

14.22. With regard to the standing of CH Development, the Commissioners remain of the clear view that UDECOTT cannot have been unaware that it was dealing with a subsidiary company with no track record; and that the parent company had given no enforceable guarantee of its performance. UDeCOTT thus seriously and knowingly breached its own Board resolution. Commercial obligations are not satisfied by taking “*all reasonable steps*” but by being performed. By continuing to contest the incontestable, UDeCOTT does itself no service in the public eye.

Further evidence

14.23. The allegation that the award of the MLA Tower Contract to Sunway Caribbean Limited was motivated by an ongoing relationship between Mr. Calder-Hart and the Company was a matter known to be in the public domain, but in regard to which the only evidence presented to the Commission was that summarised above. Mr. Calder-Hart in his two statements took the opportunity to place on record his denial of any such connection. His first statement²³⁶ states:

“I take this opportunity to categorically refute and condemn as false and mischievous any allegations that I have any family connections with Sunway or CH Development & Construction Ltd.”

His second statement²³⁷ further states as follows:

“For my part I reassert that neither I nor any member of my family has or ever had any shares or interest in Sunway or in any of its subsidiary companies.”

14.24. At a late stage in the proceedings the Commission was contacted by Mr. Carl Khan who stated that he was the former husband of Mrs. Sherrine Lee Hart, also known by her Malaysian name of Lee Soh Wah, who is the present wife of Mr Calder Hart. Mr. Khan subsequently swore a statutory declaration²³⁸ stating that the above-named

²³⁶ 14 January 2009, para. 70

²³⁷ 8 May 2009, para. 44.

²³⁸ Dated 18 May 2009.

(David) Ng Chin Poh was the brother-in-law of Sherrine Lee Hart; and that (Allan) Lee Hup Ming was the brother of Sherrine Lee Hart. Mr. Khan produced a number of exhibits²³⁹ all evidencing the identity of the said individuals and testifying as to their relationship with Mrs. Lee Hart.

14.25. At the request of Counsel for Mr. Calder-Hart and with the agreement of the Commissioners, the following Notice was posted on the Commission's Website along with the declarations of Mr. Khan:

"The Commissioners advise that Mr. Carl Khan has not yet been cross-examined on his Statutory Declarations and that Counsel for Mr. Calder-Hart has on Mr. Hart's behalf denied the matters stated in the Declarations."

Notwithstanding this Notice, Counsel for Mr. Calder-Hart did not take the opportunity to cross-examine Mr. Khan when this was offered, either at the hearing on May or later. In particular, Attorneys acting for Mr. Calder-Hart, Devesh Maharaj & Associates, were notified on 4 November 2009 that Mr. Carl Khan and also Mr. Winston Agard would be available at the forthcoming hearing between 7 and 9 December 2009 to be cross-examined. By letter dated 12 November 2009 these Attorneys informed the Secretary to the Commission as follows:

"Please be advised that we will not be seeking to cross-examine either of these two witnesses."

Thus, the situation is that Mr. Calder-Hart, through his lawyers, has elected not formally to challenge the evidence of Mr. Khan. While the statement placed on the Website says that "*the matters*" stated in the Declarations are denied, it was accepted that Khan is indeed the former husband of Sherrine Lee Hart.

14.26. The testimony of Mr. Khan is directly contrary to the evidence of Mr. Calder Hart in his two statements, as set out above. The Commission has, in the course of correspondence with Attorneys acting for UDeCOTT and for Mr. Hart stated that they

²³⁹ Additional exhibits were supported by two further Statutory Declarations dated 19 May 2009.

would not be seeking to make a decision as to whether Carl Khan's or Mr. Hart's evidence should be preferred. The Commission stated²⁴⁰:

"... Mr. Hart has given sworn testimony to the Commission of Enquiry which is inconsistent with the testimony of Mr. Khan. The Commissioners are of the view, however, that it would be inappropriate for them to give any decision as to which evidence is to be preferred. Commissioners will be considering what recommendation if any should be made in this regard."

The Commissioners take the view that it is inappropriate for them to decide which evidence is to be preferred because the Enquiry is not a Court of Law and the consequence of such a decision is that one of the two witnesses is likely to have committed the criminal offence of perjury. Therefore, considering the gravity of the matter and the fact that the Commission's findings have no binding effect, the Commissioners take the view that the issue should be dealt with by some other Tribunal. Nevertheless, the Commissioners record the evidence given to the Enquiry, which is taken into account in the recommendations which appear later in this Report.

Initial Conclusions

- 14.27. To begin at the commencement of the tender process, it is notable, but possibly coincidental, that a substantial Malaysian construction company (Suncon) chose to set up a local subsidiary company, CH Development, just before the much-delayed tender process for the MLA tower commenced, the delay following on from the need to repeat the tendering process for the C&E building originally embarked on in October 2002. It would be surprising if the recent experience with HKL and the advice of Mrs. Deborah Peake regarding the distinction between parent companies and subsidiaries was not still fresh in the minds of some at least of the Board members of UDeCOTT. As regards CH Construction, however, it is not a matter of great surprise that they should have written to UDeCOTT seeking pre-qualification for the LA Tower project within days of incorporation, this objective no doubt being the reason for the company being set up.

²⁴⁰ Letter dated 28 July 2009.

- 14.28. What is surprising is that within a further ten days or so Turner recommended the prequalification of Suncon, the parent company, and three days later the Board approved the prequalification of Suncon. It is of some significance that the Board, at the same time, took note of the need to ensure that the parent company would be “*contractually responsible*” for performance of subsidiary companies. This perhaps suggests that the Board was indeed aware that the tender was to be submitted by the subsidiary and not the parent company. In any event, no surprise was expressed when the tender was submitted on 31 January 2005 by CH Development and not Suncon. Although not an issue in relation to the MLA Tower, it is surprising that the six tenders were reviewed by the same Mr. Derek Outridge of QES who had been seriously criticised for his performance in relation to the C&E building tenders, particularly by Mr. Mair who was, however, no longer on the Board at this time.
- 14.29. No evidence was led concerning the Tender Evaluation Report for MLA Tower. It is noteworthy, however, that little weight appears to be given to the fact that the tender of CH Development was some \$67 million higher than the lowest tender, from HKL, and \$22 million higher than that of Johnston International Ltd. The ostensible reason for not awarding the project to Johnston was the possibility that they might be awarded the Chancery Lane Development which, however, was only awarded to them two months *after* the decision of the UDeCOTT Board to accept the recommendation that the MLA Tower be awarded to CH Development. The Commissioners therefore question whether the decision to award the contract to CH Development was justified.
- 14.30. Mr. Agard in his Statutory Declaration of 9 June 2009 states that it was concluded that Johnston did not have the financial capacity to undertake both the MLA Tower and Chancery Lane. Johnston was subsequently awarded the Chancery Lane project. However in the case of HKL, they were being considered for an award for the Ministry of Health building which was not subsequently awarded to them. Mr Agard adds that “*As far as I am aware, HKL and JIL were not rejected contractors*”.
- 14.31. UDeCOTT provided final submissions orally on 20 and 21 May 2009 and in writing on 1 March 2010. UDeCOTT contended that the fast-tracked pre-qualification of CH Development and their selection, despite being only the third lowest bidder, was

justified to secure the entry of a high quality contractor into the jurisdiction. Mr. Hart was not CEO at the time and, it is said, played no part in the selection process. On the evidence of Mr. Hart and Mr. Outridge, it was normal for foreign contractors to operate through a local corporate identity which would have no track record.

14.32. UDeCOTT contested the suggestion that there were no proper reasons for preferring the tender of CH Development to others and suggested that this reflected not only upon UDeCOTT itself but the individual members of the Evaluation Committee, Arun Buch and QES, none of whom have had the suggestion put to them in evidence²⁴¹. In the Commissioners' view, the Enquiry is not to be equated with a Court of Law and it is not accept that such a conclusion must be put to every potential witness involved. The Commissioners consider that the decision to award the contract to CH Development was questionable; but the decision is also to be seen as one of a number of separate events indicative of a determination on the part of the Chairman, Mr. Calder Hart, that the contract was to be awarded to CH Development. That intention must have become apparent to others within UDeCOTT by April 2005, if not much earlier. We have observed elsewhere that Mr. Calder Hart exercised a degree of influence over the staff of UDeCOTT beyond what could be regarded as normal and we have no doubt that this perception spread to any company or firm who had dealings with UDeCOTT. Thus, the Commissioners are of the view that there were insufficient reasons for preferring the tender of CH Development.

14.33. At a date earlier than the Board Meeting on 5 April 2005 there was clearly some form of communication between UDeCOTT representatives and Suncon which resulted in the resolution of the Suncon Board dated 4 March 2005 and the "*letter of undertaking*" dated 7 March 2005, all of which demonstrates that both Suncon and UDeCOTT were perfectly well aware of the different status of the subsidiary company and the need for it to be supported by Suncon. No explanation was offered as to why the letter of award dated 28 April 2005 was addressed to *both* Suncon and CH Development (i.e. the parent and the subsidiary) or why the letter should refer to "your tender" when it was clear the tender had come solely from CH Development. This may have been simply loose drafting; or it may be that both UDeCOTT and

²⁴¹ Final Submissions, paragraphs 189 to 197.

Sunway foresaw that the next step would be the request that the contract be placed solely in the name of the subsidiary company, now renamed (confusingly) Sunway Construction Caribbean Limited. Again, no reason was offered for the change of name nor indeed for why the company was ever called CH Development in the first place. All these matters may have been accidental and inconsequential.

14.34. What is perfectly clear, however, is that when, on 22 June 2005, UDeCOTT reissued their letter of award, now addressed to the renamed Sunway Construction Caribbean Limited, UDeCOTT was dealing with a subsidiary company with no assets or track record whose ability to perform the contract was wholly dependent on the voluntary support of the parent company. While it is understandable that those who had supported the introduction of Suncon and its subsidiary into Trinidad should be confident of such support, it remains inexplicable that the UDeCOTT Board should have so neglected their own resolution of November 2004 and overlooked the clear and obvious requirement for an enforceable parent company guarantee. In this regard, the explanations offered by Mr Calder Hart were nothing to the point. Neither he nor the Board could seriously have thought they were still dealing with the Sunway parent company. The fact that Sunway Construction Caribbean Limited gave a 10% performance bond is irrelevant: this was a contractual obligation which would have applied equally to the parent company. The inescapable conclusion is that the UDeCOTT Board knowingly exposed the public purse to a grave risk of non-performance by the Sunway Subsidiary with no available recourse. The fact that Sunway Construction Caribbean Limited ultimately performed in relation to the Government Campus Plaza in a manner comparable to the other principal contractors engaged there, goes no way to mitigate the seriousness of this unexplained dereliction of duty.

14.35. With regard to the enumerated breaches of the UDeCOTT tender rules pointed out by the JCC, the breaches other than those relating to the financial standing and experience of CH Construction were not unique to the MLA Tower. It appears to be the case that UDeCOTT do not apply their own tender rules evenly and appear to have applied them or dis-applied them as occasion demanded. This is inherently unfair and ought not to occur. Such breaches do not, however, involve the degree of

serious commercial risk involved in the failure to obtain a proper and enforceable guarantee of Suncon's subsidiary company.

14.36. It is clear that a subsidiary company with no assets or experience, whether or not to be subject to a parent company guarantee, cannot comply with UDeCOTT tender rules. There is in fact no commercial reason why a subsidiary such as CH Development should not be pre-qualified on the express understanding that they will be guaranteed and supported by a properly resourced and experienced parent company. This is, however, not presently permitted by the rules and it is again inherently unfair that other contractors in a similar position should have been disqualified on this account. Thus, UDeCOTT's application of its own rules discloses a worrying lack of transparency as well as inconsistency.

14.37. With regard to the suggested relationship between Mr Calder Hart and CH Development/Sunway, the appearance of Mr Calder Hart's fax number on the notepaper, which was no doubt hurriedly printed by CH Development, remains unexplained. While it is possible that this could be a simple error, the surrounding circumstances, particularly the acceptance by UDeCOTT that the award letter was faxed to Mr Calder Hart's fax machine and then faxed on from that machine to Sunway, suggests strongly that there was no such error. Likewise, the fax number remaining on the CH Development notepaper between October 2004 and April or May 2005 with no attempt to have it removed or corrected suggests strongly that Mr Calder Hart cannot have been unaware that his number had been so used.

14.38. Final Submissions were provided on behalf of Mr Calder Hart²⁴² which commented at length on the statutory declarations of Carl Khan pointing out that Mr. Hart was "*a complete stranger to all these claims which, if they took place at all, would have taken place long before Mr. Hart knew or had any relationship with the ex-wife of Mr. Khan*". The submissions make various allegations as to the motive of Mr. Khan in coming forward to give his evidence, suggesting that he "*or more probably his handlers, were desperately attempting to ambush Mr. Hart*" and that "*the principal, if*

²⁴² Submitted 24 February 2010

not sole, intention (was) to bring Mr. Hart's wife into disrepute". With regard to the use of Mr. Hart's personal fax number by CH Development, this is said to be a "*red herring, opportunistically exploited to impute impropriety to the relationship between Mr. Hart and Sunway*". It is suggested that this is a matter to be pursued with Sunway, not Mr. Calder Hart. If Mr. Hart had given permission to use his fax number, this would (although denied) only point to a willingness to facilitate the establishment of CH Development in Trinidad and would have been perfectly justifiable.

14.39. In the view of the Commissioners, the criticism of Mr Khan's motive should have been put to Mr. Khan when attorneys for Mr. Hart had the opportunity to do so. There is no evidence whatsoever that Mr. Khan was motivated by anything other than a desire to place the true facts before the Commission, Mr. Hart having publicly asserted contrary facts with which Mr. Khan disagreed. If Mr. Khan had any motive beyond that of stating what he believed to be the truth, it was not to bring Mr. Hart's wife into disrepute: it is the conduct of Mr. Hart that is in issue here. It is noted, however, that Mr. Hart does not, in the course of his final submission, expressly deny the alleged relationship between Mrs. Hart and the two persons whose names appear as former directors of CH Development. With regard to the observations concerning CH Development the Commissioners find the purported explanation of events of no assistance.

14.40. It is appropriate at this point to summarise the matters of criticism of UDeCOTT and Mr Calder Hart which, in the view of the Commissioners, remain without satisfactory answer:

- (i) No proper explanation was given for the Letter of Award of 28 April 2005 being addressed both to Suncon and CH Development & Construction, when the tender had been submitted by CH Development & Construction.
- (ii) No proper explanation was offered as to why the UDeCOTT Board, knowing that Sunway Construction Caribbean Ltd. (formerly CH Development & Construction) failed to require a parent company guarantee and, in doing so, disregarded its own resolution of 8 November 2004.

- (iii) No proper explanation was given as to the basis on which UDeCOTT had made decisions as to either applying or dis-applying their own tender rules regarding VAT Certificate, NIB Certificate and PAYE File No.
- (iv) No proper explanation was given as to why UDeCOTT chose to dis-apply its own tender rules in regard to CH Development & Construction, a company with no assets or track record.
- (v) No satisfactory explanation was given as to how CH Development came to use Mr. Calder Hart's personal fax number and as to how Mr. Calder Hart's personal fax machine came to be used in the signing of the letter of Award.
- (vi) No proper explanation has been given as to why UDeCOTT issued a further Letter of Award on 22 June 2005 solely to Sunway Construction Caribbean Ltd. (formerly CH Development & Construction Ltd.) without ensuring that:
 - (a) Sunway Construction Caribbean Ltd. satisfied the pre-qualification criteria; and
 - (b) The Parent Company gave an enforceable guarantee of their performance.
- (vii) No convincing reason was advanced for preferring the tender of CH Development over the lower tenders from HKL and Johnston International Ltd.

14.41. With regard to the further evidence of Carl Khan set out above, the Commissioners have been placed in a unique position for a non-binding inquisitorial enquiry. We have been presented with two inconsistent and contrary accounts of a matter of high importance, where one of two witnesses who have given sworn evidence cannot be telling the truth, with serious consequences under the criminal law. For reasons set out above, the Commissioners decline to give a decision that may lead to such consequences. We note, however, that Section 7 of the Validating Act passed in November 2009²⁴³ provides that the evidence given by any witness during the proceedings of the Commission:

“May be..... used in any civil or criminal proceedings in any Court.”

²⁴³ Commission of Enquiry (Validation and Immunity from Proceedings) Act No. 13 of 2009.

The evidence noted above is recorded as part of the official proceedings of the Commission and the conflict between the evidence of Mr. Hart and that of Mr. Khan should be resolved by Court proceedings. The Commissioners accordingly include in their Recommendations, that there should be an investigation by an appropriate criminal law Authority into the award of the MLA contract to CH Development, to include the role of Mr Calder Hart and the conduct of the Board in not ensuring that an enforceable guarantee was given by the parent company of CH Development.

- 14.42. While the Commissioners do not intend to give any decision as to the conflict of evidence, it should be stated that a material part of Mr. Khan's declaration is not challenged and can be accepted as true, namely his former relationship with Sherrine Lee Hart²⁴⁴.

15. National Academies for the Performing Arts and International Waterfront

- 15.1. It is important that these projects are reviewed in the general context of UDeCOTT's performance since they represent (albeit still surrounded by controversy) two projects for which UDeCOTT can justly claim credit. Both projects are striking examples of modern architecture and contribute positively to the emerging new Port of Spain skyline. Issues concerning delay and cost over-run are dealt with section 23 below.

The Academies

- 15.2. There are two Academy projects, known as the North and South Academies. The North Academy of the Performing Arts ("NAPA") is a major construction project of striking design located on the Southern side of the Savannah, Port-of-Spain, in a prominent location which already forms a major feature of the skyline of Port-of-Spain. The design, which is part of the contract package, is clearly influenced by

²⁴⁴ The Commissioners are also aware that further documentary evidence has been made public concerning the alleged relationship between Mr Calder Hart and directors of CH: see Newsday article 4 March 2010. The Commissioners offer no comment on this new material which should, however be considered by any other tribunal in which these issues are pursued.

other iconic structures such as the Sydney Opera House, but is said to be based on the form of a local flower, the Chaconia²⁴⁵. The South Academy of the Performing Arts (“SAPA”) is located in San Fernando. This will be another significant though less iconic building complex. At the time of the Commissioners’ inspections (January 2009) NAPA was at a relatively advanced state of construction whereas SAPA had achieved only the basic elements of its construction, having been held up by the need to construct a major sewer diversion through the site.

- 15.3. Both Academies are being undertaken pursuant to a single design-build contract between UDECOTT and Shanghai Construction Group (General) Company Limited (“SCG”) dated 12 May 2006. The total Contract Price for both Academies is approximately \$630m (TT) inclusive of a design fee of 7%. The costs are further apportioned between NAPA and SAPA in the ratio 70:30. The Contract Sum is payable in accordance with agreed milestones and is funded by an Inter-Governmental Loan Agreement amounting to US\$100m. Mr. Calder Hart confirmed²⁴⁶ that additional funding, if necessary, would be drawn from the Infrastructure Development Fund.
- 15.4. In addition to the principal contract, UDECOTT has entered into supplemental agreements for the following:
- (i) A contract with SCG for construction of public tennis courts and other facilities at King George V Park to replace tennis courts displaced by the NAPA construction works, the Contract Sum being \$17,772,012.
 - (ii) A contract with SCG for construction of a retaining wall at the Northern end of the SAPA site as recommended by Genivar, in the sum of \$8,250,000.
 - (iii) A contract with Trinidad Contractors Limited for sewer diversion work at SAPA in the sum of \$6,352,280 plus a 20% Management Fee payable to SCG.
- 15.5. An issue arising out of the design of NAPA, is the inclusion within the building envelope of a 59 room hotel. Dr. Rowley contended that the hotel element had not been approved by cabinet. In cross-examination²⁴⁷ Dr. Rowley accepted that at least

²⁴⁵ So named after the last Spanish Governor, don Jose Chacon.

²⁴⁶ 28 January, p.178.

²⁴⁷ 21 January, p.38.

from November 2006 proposals for NAPA did include the hotel element and that the hotel was included within the proposal laid before Parliament as part of the budget debate. Dr. Rowley explained that his concern was with oversight or lack of oversight.

- 15.6. Various concerns have been addressed in relation to the Academies. Those relating to the use of a foreign contractor have been reviewed in section 6 above; and those relating to the design, particularly of NAPA, are reviewed in section 7 above. UDeCOTT is criticised for placing the projects with SGC on a sole selective basis. UDeCOTT in its Final Submissions²⁴⁸ reject such criticism on the basis the project was funded by Government-to-Government Agreement which constitutes “*special circumstances*” for the purposes of Clause 6.01(ii) of UDeCOTT’s procurement rules; and in any event the decision to employ SGC was that of the Government. The same criticism and response applies in the case of the Prime Minister’s residence.²⁴⁹ In both cases we accept that the decision to employ SGC cannot be a matter of criticism of UDeCOTT and must be addressed to the Government.
- 15.7. The design of NAPA was the subject of particular criticism by the Artists’ Coalition of Trinidad and Tobago who complained that consultation on the design and intended use of the building had been inadequate. Such considerations are strictly outside the Terms of Reference of the Commission, as are concerns about the proper use of public money. The concerns of the Artists’ Coalition were, however, accepted by Minister Imbert who participated in the debate on issue (v)²⁵⁰. Further criticism of UDeCOTT arising from the take-over of the Colonial Tennis Club is set out in Section 23 below.²⁵¹
- 15.8. SAPA has been delayed some 18 months as a result of the sewer diversion. NAPA was similarly delayed at the outset by inability to obtain full access to the site until existing tennis courts had been relocated. These issues are dealt with more fully under Part III below where issues of potential cost over-run are also reviewed.

²⁴⁸ Paragraph 123-125.

²⁴⁹ See paragraph 23.2

²⁵⁰ See para 7.19

²⁵¹ See para 23.23

International Waterfront Project

- 15.9. This project now forms a striking feature of the Port of Spain skyline and comprises two 26 storey office blocks and the Hyatt International Hotel with a lower profile than the office blocks. Genivar was appointed as Development Manager in about May 2004 in competition with other Consultancies and managed the design-build tender process which culminated in execution of a Contract dated 28 July 2005 with Bouygues Batiment Trinidad & Tobago Construction Co. Ltd. (Bouygues). The original concept was to construct one office block plus the hotel, but during the course of the design process, a second office building was added, of identical design but different orientation. The site on which the works stand was previously occupied by various Port facilities. These included the famous Breakfast Shed, which was reconstructed to the south of the site.
- 15.10. The bidding process involved soliciting expressions of interest from experienced contracting firms in terms of a request for proposals. This was issued to eleven companies and resulted in proposals being received from three companies or consortia:
- (i) Bouygues International (France);
 - (ii) Carillion/Johnson International Consortium;
 - (iii) Hafeez Karamath Ltd (TT with US architects and engineers);

Each of the bidders proposed a different international hotel group as operator/financier of the hotel element. The bids were analysed by Genivar on a points system, on which basis Bouygues emerged as preferred bidder, with Carillion/Johnson as reserve bidder. Final negotiations were conducted with Bouygues alone with the reserve bidder available if agreement was not reached. The Contract was signed with Bouygues at a Contract Amount of \$1,663,579,300 on the basis of the FIDIC Conditions of Contract for Plant and Design-Build (1999 Edition) and subject to particular conditions amending Clauses 1-20 and additional Conditions 21-28. Under Clause 20.6 the provision for arbitration under the ICC Rules was retained but the place of arbitration specified as Miami, Florida.

- 15.11. The project thus comprised the following:
- (a) Hotel, Ballroom, Conference Centre, Car Park;

- (b) Office Building C;
- (c) Office Building D, stand alone Retail Building and external works.

There were negligible variations amounting to less than 1% of the Contract Sum. However, UDeCOTT subsequently entered into two Supplemental Agreements to undertake further work as follows:

- (d) Fitting-Out works for Office Buildings C and D;
- (e) Supply and installation of office furniture for Office Buildings C and D.

But for the additional scope of works (fitting out and office furniture) it is accepted that the Project would have been completed on time and budget. The very low level of variations was noted by Mr. McCaffrey in his first report as "*an exceptionally positive observation*".

15.12. For the construction works, Bouygues produced a comprehensive detailed programme very early in the Project. This was used to control time and additionally 5,000 activities which were costed and used to regulate payments to the Contractor. The Programme also enabled Genivar to control events on site which might have generated delay and claims, being ultimately successful in avoiding both. Genivar undertook a comparative cost analysis to satisfy themselves that the Project represented value for money. This analysis was not ultimately produced to Mr. McCaffery but the costs are said to compare favourably with those applying in the United States.

15.13. Mr. McCaffrey expressed the view that the sound financial standing of Bouygues was a factor in achieving a favourable outturn. He reports that the Project was potentially hampered by Government bureaucracy, particularly regarding permits, approvals and consents. It appears Mr. Shenker of Genivar took a personal hand in steering the Project through such difficulties and there is little doubt that Genivar also proved a decisive element in the success of the Project. UDeCOTT, whose actual "*hands on*" contribution appears to have been minimal, certainly deserved credit for having placed the Project in capable hands.

15.14. Questions were raised as to the extent to which technology and skills transfers were achieved by the Project. We were told that out of the work-force, which peaked at

around 1800, 75% to 80% were local.²⁵² There were also training programmes: the Commissioners were provided with evidence of the training of tower crane operators. We were told that Genivar maintains a significant proportion of local staff. However, we were not told that any of the key management staff were locals and it is questionable whether any relevant skill transfer occurred in relation to the management and performance of a high profile design-build project such as the Waterfront development.

Initial Conclusions

- 15.15. Both the International Waterfront project and the Performing Arts Academies have demonstrated that design-build can be made to work for specific high-profile projects in Trinidad. The questions to be addressed are, how far this is dependent on the particular circumstances of these projects, what role did UDeCOTT play and what lessons are to be learned.
- 15.16. For both the International Waterfront project and the Academies, the appointed contractor/designer was a renowned international company, able to call on substantial resources of finance, skill and experience. There is, as yet, no comparable project procured by design-build in which the contractor/designer was a local company or consortium. These projects are, therefore, one-off projects which demonstrate that international contractors can operate successfully in Trinidad, with the benefit of reforms introduced as a result of the Ballah Report²⁵³. The projects do not yet provide convincing proof of the general merits of the design-build system in Trinidad & Tobago. The key factor in the success of these projects may equally lie in the competence and experience of the particular parties involved.
- 15.17. It is to be noted that Genivar have played a significant, possibly crucial, role in each project in terms of management of the project at significant stages. Their expertise is undoubted as well as their understanding of the role required. The corollary is that UDeCOTT have played a minor role in the management of both projects, being concerned primarily with the financing of the projects. That role is not to be

²⁵² Evidence of Mr Shenker, Transcript 25 March 2009, p156

²⁵³ See para 3.20 above.

understated, but these projects are not to be seen as demonstrating UDeCOTT's project management skills.

15.18. It is also to be noted that UDeCOTT's tender rules, if properly applied, do not permit one firm such as Genivar to dominate the market for project management in the way seen in these two major projects. Thus, while their contributions to both projects have been creditable and possibly crucial, their regular employment by UDeCOTT raises issues of fair competition and openness as well as the obvious need for effective competition.

15.19. What neither the National Academies nor the International Waterfront provides is a model for the adoption of Design-Build by local contractors and consultants in Trinidad & Tobago. This will require a more gradual approach, involving initially more modest projects and taking into account the contributions, opinions and conclusions set forth in section 7 above.

16. Brian Lara Cricket Academy

16.1. The Brian Lara Stadium and its associated facilities were commissioned in 2004 by the Government of the Republic of Trinidad & Tobago (GORTT) in order to provide a high class sporting facility and with the shorter term aim of being available as a venue for the ICC Cricket World Cup Tournament in 2007. For this latter purpose the Stadium had to be completed by 19 February 2007 and in a "*game day ready condition*" by 4 March 2007. Turner Construction International LLC (Turner) of New York had been approached in the early months of 2004 when a meeting took place in Trinidad at Chairman level, between UDeCOTT, Turner and the Ministry of Sport and Youth Affairs with the Prime Minister also in attendance. Turner was subsequently engaged as Project Managers through a local company, Turner Alpha Ltd. For simplicity they are referred to herein as TAL.

16.2. UDeCOTT's commission to carry out the project on behalf of GORTT was formalised by a Standard Form of Contract dated 19 December 2005²⁵⁴. By this date, however, a number of significant events had already occurred in relation to the project, notably:

- (i) In November 2004 it was decided to move the stadium from Marabella to Tarouba which involved further detailed decisions as to the precise location which had a major impact on the earthworks then required.
- (ii) Negotiations between UDeCOTT and TAL, which continued during the latter part of 2004, were formalised in a letter of intent dated 27 October 2005 appointing TAL to carry out design and project management services.
- (iii) For the design work HOK Architects (based in Los Angeles) were appointed as architects and Buro Happold (based in New York) as engineers, both as sub-consultants to TAL.
- (iv) The project was divided into five (and subsequently more) packages which were to be the subject of separate tendering and contracts. The packages are referred to as PK1 etc.

16.3. The planning of the project was based on a "fast track" approach. However, as it transpired, the evolution of the design coupled with attempts to keep the project within budget, proved to be anything but fast track and major problems persisted throughout most of 2006 to the extent that by September, when UDeCOTT had finally put together a full package for the project, the ICC announced that the World Cup would not take place at the Tarouba Stadium. In addition, major problems of design and construction were progressively to appear, resulting in massive further delay.

16.4. The evolution of the project during 2005 and 2006 can be summarised as follows:

- (i) In February 2005 TAL submitted an estimate of cost for the Stadium in the sum of \$272m plus \$54m for fees. The construction costs included \$38m for earthworks. The costs were later to escalate dramatically, such that UDeCOTT contended that, had an accurate indication of cost been given at this stage, the project would have been cancelled or radically altered.

²⁵⁴ Second statement of Neelana Rampaul 8 May 2009 Exh 55

- (ii) PK1 (Earthworks) was offered for tender to five local contractors during April and May 2005. The Package was awarded on 5 July 2005 to Seereeram Bros. (SBL) in the sum of \$57,817,517.²⁵⁵ The final sum due to SBL is currently estimated as \$154,767,863 which UDeCOTT attribute to defects in TAL's design by reason of the omission of important elements and failure to include any technical specification. PK1 was let 3 months late and completed 7 months late.
- (iii) In May 2005 bids were invited for PK2 (Piling). Due to lack of response it was decided to re-tender with a revised packaging strategy combining piling with the structure (formerly PK3). However, UDeCOTT in November 2005 decided to re-tender piling as revised PK2A. This Package was awarded to GWL in December 2005 in the sum of \$23,132,418. PK2A started 7 months late and finished 12 months late at a cost of over \$28m.
- (iv) In November 2005 Invitations to Tender were issued for PK5 (Pitch and Field) which subsequently became PK4. A Contract was awarded in December 2005 to Terra Forma Ltd in the Contract Sum of \$8,278,663.
- (v) In January 2006 tender documents were issued to local and foreign contractors for re-designated PK2 (Building Structure). The Package was to include the canopy roof, but this was subsequently omitted. The Package was awarded to Hafeez Karamath Ltd (HKL) in March 2006 in the Contract Sum of \$166,359,327, although no contract document was signed until September 2006. By March 2006 concern was being expressed as to the ability of HKL to meet the tight schedule required for completion of the Stadium by March 2007. PK2 was to start 10 months late and finish 24 months late at a cost of over \$206m.
- (vi) In March 2006 TAL gave a revised estimate of construction costs of \$417m, explaining that the earlier estimate of \$272m had been based on schematic designs and typical costings.
- (vii) In April 2006 Bid Packages were sent out in respect of PK3 (FF and E Works) and PK3A (MEP and Lighting). Only HKL collected the Tender Documents and it was later decided to re-allocate all the remaining Packages with revised numbers. Thus, in May 2006 tenders were invited for all the remaining

²⁵⁵ UDeCOTT, para. 10, quote the figure as \$52,738,780).

Packages, namely 3 and 5-8 (including roof canopy) from four firms, Sunway, Carillion, HKL and NHI. None of these firms submitted tenders²⁵⁶. HKL, however, submitted a proposal dated 13 May 2006 to carry out the works (including Package 2 already awarded to HKL) for the “guaranteed maximum price” of \$397,750,000 and with a Practical Handover date of 31 December 2006.

- (viii) TAL initially recommended acceptance of HKL’s proposal. In June 2006, however, TAL recommended a different approach by which TAL would itself undertake the balance of the project as Construction Managers with a budget cost for the project of \$542m. TAL say the withdrawal of their earlier recommendation was due to non-performance by HKL on PK2.
- (ix) Between June and September 2006 UDeCOTT and TAL considered a number of alternatives including inviting further quotations from Times Construction, Sunway and Johnston. Only Johnston submitted a bid which was considered inferior to that of HKL, with whom UDeCOTT decided to negotiate further.
- (x) On 17 August 2006 a revised proposal for PK3 and 5-8 was received from HKL in the sum of \$379,750,000, offering partial handover on 19 February and useable completion on 2 March 2007, in accordance with the ICC requirements. This tender was resubmitted on 14 September 2006 including terms as to accelerated payment. Whilst negotiations continued, however, the ICC announced on 21 September, as a result of continuing delays, that the World Cup event would not take place at the Taruba Stadium. UDeCOTT finally issued a letter of intent to HKL dated 2 October 2006. UDeCOTT stated that the Agreement “bought off” the risk of a claim arising from changes to the design of the columns, which had become a potential issue.

16.5. Mikey Joseph, President of the TTCA, complained in his statement of projects being sent out to tender with inadequate documentation and insufficient time to submit proper bids. Specifically in the case of PK2 (superstructure) of the Brian Lara Academy, he noted that TTCA had written to UDeCOTT on 26 January 2006 with such a complaint. Mr. Joseph commented, from the lack of response from UDeCOTT, that the project was “*designed to fail as from the start*”.

²⁵⁶ UDeCOTT submission, para 90 which suggest political conspiracy

- 16.6. The decision to award effectively the bulk of the whole project (with the exception of earthworks, piling and the pitch) to HKL continued to attract controversy, more particularly because by the time the award was made (even as a letter of intent) the original impetus for driving the project forward regardless of obstacles, to comply with the ICC deadlines, had disappeared. Those obstacles were indeed formidable. For whatever reason, the design remained incomplete in important respects. While this might superficially be regarded as good reason for adopting a “guaranteed maximum price”, it should have been obvious to all the professionals (including the engineers and quantity surveyors on UDeCOTT’s staff) that the terms of the proposed contract would not preclude the making of claims which would inevitably punch large holes in any concept of a guaranteed price. If Mr. Calder Hart as Chairman and Mr. O’Brien as CEO were under any illusion about this, their own staff should have disabused them.
- 16.7. So far as the paper trail is concerned, the Award to HKL had to be approved by the Board. In fact HKL’s original quote of 13 May in the sum of \$397,750,000 had been recommended to the Board for acceptance in a Note for Board, undated but subsequently identified as being prepared on 15 May 2006. This recommendation noted that the proposal included a delivery date of 31 December 2006 coupled with acceleration measures to achieve this date.
- 16.8. HKL’s subsequent proposal of 22 August 2006 was conditionally recommended by TAL by letter of 23 August 2006²⁵⁷ in the following terms:

“If it is truly the intent of UDeCOTT to do what it takes to make this stadium game day ready I see no other option than to recommend the HKL proposal with the following provisions ..”

TAL’s proposed conditions for acceptance included the provision of penalties against milestone dates. The conditions were included in UDeCOTT’s letter of acceptance, but with the proposed penalties omitted.

²⁵⁷ NR35.

16.9. For the revised proposal of 14 September 2006 in the sum of \$379,000,000, a further Note for Board was prepared in similar format to the earlier Note but this time including the following recommendation:

“In the light of the recommendation and analysis undertaken by the Project Manager and time constraints with respect to delivery of the stadium to the ICC by 19 February 2007 for the practice games, it is recommended that the Board accepts the proposal at a guaranteed not to exceed price of \$379,000,000 VAT exclusive with a handover date to the ICC as outlined of about 19 February 2007.”

The Note (still undated) is signed by Miss Rampaul (Chief Legal Officer), Ricardo O’Brien (Chief Financial Officer and Chief Executive Officer), Angela Hordatt (Executive Manager Capital Markets), Winston Chin Fong (Chief Construction Engineer) and Gerard Nina (Head of Civil Engineering). The recommendation was “noted” by the Board at its meeting on 29 September 2006²⁵⁸ and by letter of 2 October Miss Rampaul informed HKL that their proposal (identified as that dated 22 August 2006) for Packages 3, 5, 6, 7 and 8 “*has been accepted*”. The letter states:

*“We look forward to executing a contract with your goodselves, however in the interim you are instructed to commence the works as described in your proposal.”*²⁵⁹

16.10. Further light was thrown on the process of negotiation in oral evidence. Given that it was accepted and known that the design was incomplete at the time of the HKL proposal, Mr. Calder Hart was asked how HKL could put in such a proposal.²⁶⁰ He stated that his understanding was that TAL initiated conversations with HKL²⁶¹ and later stated:

²⁵⁸ NR34.

²⁵⁹ NR36.

²⁶⁰ Transcript 27 January p.169.

²⁶¹ Transcript 28 January p.5.

*"I know there were discussions that Turner Alpha, who were the Construction Managers, were having with respect of putting in place a plan that would try and get the stadium ready for ICC."*²⁶²

The HKL quotations make reference to discussions, which Mr. Calder Hart agreed would be discussions between Ricardo O'Brien (UDeCOTT CEO) and Mr. Karamath²⁶³.

16.11. It is clear that there were attempts by UDeCOTT to secure an understanding with HKL with regard to timely performance of the outstanding works and the need to keep within the guarantee price. It seems equally clear that those involved in the discussions had failed to appreciate the effect of the contract terms combined with the incomplete design. They had also overlooked or decided to ignore the fact that, after the ICC announcement on 21 September 2006, there was no longer any deadline to be aimed at as the stadium was no longer in the running for the World Cup events. UDeCOTT's staff and Board, as at 2 October 2006, remained set on pushing ahead with the project despite the potential problems which were soon to become manifest.

16.12. A major issue concerning the award of PK2 and PK3 and 5-8 to HKL is the provisions of advanced payments. Although UDeCOTT's letter of award was issued on 2 October 2006 HKL, in anticipation, issued an advanced payment guarantee dated 15 September 2006²⁶⁴, having already on 14 September invoiced UDeCOTT for the cost of the guarantee in the sum of \$1.59m. Under the FIDIC Contract eventually executed²⁶⁵ HKL were entitled to 10% mobilisation fee amounting to \$37.9m. It appears that UDeCOTT interpreted the "accelerated payment" provision contained in the tender letter of 14 September as entitling HKL to advance payment in respect of materials, which were paid for on receipt of invoice, and in the full amount invoiced with no deduction for retention and no requirement as to custody or storage of the material in question, or even as to its existence.

²⁶² Transcript 28 January, p.8.

²⁶³ Transcript 28 January, p.12.

²⁶⁴ WR50

²⁶⁵ But backdated to 12 December 2006, the date of the earlier contract with HKL for PK2

16.13. The right to receive accelerated payments as set out in the proposal dated 14 September was in the following terms:

- “vi) Accelerated pre-payment for all substantive material and additional preliminaries and mobilisation costs.*
- vii) Accelerated approval and payment on valuations submitted for completed works or material”.*

16.14. These somewhat sparse terms are to be contrasted with the detailed wording of Clause 14.2 of the FIDIC Conditions of Contract for Construction, 1999 Edition, providing for an advance payment for mobilisation. The full text of clause 14.2 contains 37 printed lines of text of which the following is indicative:

“The Employer shall make an advance payment, as an interest free loan for mobilisation, when the Contractor submits a guarantee in accordance with this sub-clause. The total advance payment, the number and timing of instalments (if more than one) and the applicable currencies and proportions, shall be as stated in the Appendix to Tender.

.....

The advance payment shall be repaid through percentage deductions in payment certificates. Unless other percentages are stated in the Appendix to Tender:

- (a) Deductions shall commence in the payment certificate in which the total of all certified interim payments (excluding the advance payment and deductions and repayments of retention) exceeds ten percent (10%) of the accepted contract amount less provisional sums; and*
- (b) Deductions shall be made at the amortisation rate of ¼ (25%) of the amount of each payment certificate (excluding the advance payment and deductions and repayments of retention) in the currencies and proportions of the advance payment, until such time as the advance payment has been repaid”.*

- 16.15. In contrast to the single payment governed by Clause 14.2, the concept of advance payment in respect of “substantive material and additional preliminaries” gives rise to many detailed and important questions such as: (a) what is meant by “substantive”? (b) what is meant by “accelerated” and “pre-payment”? and thus: (c) at what stage is the pre-payment to be made? (d) is it sufficient that the Contractor should merely receive an invoice from the supplier? and how is the invoice to be verified? (e) must the material exist or be in the custody of the supplier at the time of advance payment? (f) what are “additional” preliminaries and how do they differ from ordinary preliminaries? and most vital, (g) when and on what conditions is the advance to be repaid?
- 16.16. It seems obvious that the terms of the proposal letter governing further advanced payments should have been drafted out in detail and agreed, to set out the precise conditions to be complied with by HKL in order to qualify for advance payment, together with provisions as to security of the goods or materials which the payments were to represent and provisions for repayment. No such drafting was carried out. No explanation was offered, nor were we told whether this was even considered by those responsible for drawing up the contract. As a result money was advanced in circumstances which do not appear to have been governed by any ascertainable rules and amounted effectively to very substantial loans to HKL. Such a procedure is quite unique in the experience of the Commissioners. It calls for explanation but none has been offered. UDeCOTT responded to the above criticism in its Final Submissions²⁶⁶ which, however, still failed to offer any credible explanation for the seemingly uncontrolled advanced payments made to HKL.
- 16.17. Even accepting the uncertain and ambiguous conditions governing the right to advanced payments, it is a matter of great surprise that UDeCOTT was unable to produce an accurate, vouched, list of such payments and re-payments through deductions, so as to show the amounts currently outstanding. Evidence as to the sums advanced and repaid was collected by Mr. McCaffrey during his visit to Trinidad. His examination of the UDeCOTT payment files commenced on Saturday 17 January 2009 in company with Mr. Thornhill. Mr. McCaffrey was presented with four files of

²⁶⁶ Paragraph 260

payment certificates and back-up information which he took away for detailed analysis. His conclusion, as presented in his Initial Report²⁶⁷, was that the UDeCOTT's administration and recording of the payment process was "appalling" and required a great deal of detective work to get to the bottom.

16.18. The information in the files provided to Mr. McCaffrey also revealed that payments had been made to HKL on account of claims which TAL did not agree with, and that UDeCOTT and HKL appeared to have ongoing dialogue in relation to payments to which TAL, as the appointed engineer, was not privy. It was accepted by UDeCOTT that HKL had been overpaid for the work carried out. An approximate calculation suggested that the value of work still to be completed greatly exceeded the amount left in the budget to pay HKL. Only if substantial claims (which TAL disputed) were included in the account would any net sum be due to HKL at completion. A detailed analysis of the advance payments made, and repayments by deduction, revealed a difference between the UDeCOTT analysis and the Acutus analysis of either \$10m or \$19m depending on assumptions to be made. The report also exhibited a run of 20 emails exchanged between Mr. McCaffrey and Safiya Noel and Neelanda Rampaul between 7 and 13 February which had been required to elicit the answer to one question, which had been prompted by a suspicion that back-fitting of data was occurring. The exchange, which is referred to further below, also revealed more detail of the payment process.

16.19. The conclusion was that UDeCOTT, surprisingly, had been unable to demonstrate in any clear and verifiable manner, either the amount of advance payments made or the total of repayments. In response, for the second hearing, UDeCOTT produced a statement from their Chief Financial Officer, Safiya Noel who was asked to address a number of specific questions, including how UDeCOTT treated application for advance payments. In her statement Miss Noel described the vouching process employed by UDeCOTT and addressed specific questions raised in the Acutus Report.²⁶⁸ She accepted that errors had been made, being errors which had been discovered by Mr McCaffrey and not by UDeCOTT. Miss Noel subsequently gave oral evidence on 27 March 2009 and was asked further questions arising out of the

²⁶⁷ 20 February 2009

²⁶⁸ The questions are at Attachment 14 of the Acutus Report.

Acutus Report. In the course of her evidence she was referred to Mr. McCaffrey's email No. 12 dated 12 February 2009 (10:14) which stated:

"Dear Safiya

Document Ref. 000838 has been back-fitted to make the payment process look as if it had been complied with. How frequently did this happen? Also look at the dates of the signatures of the signatories on the attached – around the same time as 000838 should have been signed (i.e. they were available at that time). Any comment?"

The answer by email of the same date (at 12:43) was as follows:

"Hi Gerry

I don't think that it is entirely correct to say that the Document Ref. 000838 was back-fitted to make the process look as if it was complied with. The fact is that none of the QS technicians were in office at that time. I was in the office at that time and I can confirm that they were not there. It was late an evening, when some of the staff had already left for the day. However, we had to make a payment to the contractor at that evening so once we got comfort on the amount available for payment, the formal payment certificate was prepared later.

The situation was not common at all. Payment certificates are usually prepared before payment is processed ..."

16.20. In oral examination by the Chairman²⁶⁹ Miss Noel gave the following evidence:

"Q. What was the hurry?

A. Well, the thing is, when a payment certificate come up to Finance and we find—you have this challenge, I mean, across the board. When a payment certificate comes up into Finance, many times whatever transpired before, all the different activities, it going to what project manager, whoever having to do their review and whatever, they take up all the time that is available for payment. When it comes to us, we are hurrying. We are hurrying. I mean, that has happened, I mean, on numerous occasions.

²⁶⁹ Transcript 27 March 2009 p172.

Q. Sorry, my question was why?

A. Why? Because we had to pay the contractor that day. I mean, that's what I know. Why we had to pay him that day I cannot say with certainty, but certainly there was a rush and there was a need for us to pay him on that evening."

16.21. While the above evidence provides answers to the questions raised, it does not by any means explain why UDeCOTT staff had gone to such extraordinary lengths to ensure that HKL was paid as soon as the money became available; why UDeCOTT was seemingly so anxious to make payments substantially beyond the value of work carried out (and in circumstances where the contractor was already in default such that TAL had long since recommended termination); and why UDeCOTT chose to disregard the opinions of the appointed engineer (TAL). In addition, although Miss Noel purported to answer all the outstanding questions raised by Mr. McCaffrey and indeed sought to justify the seemingly anomalous procedures surrounding payment to HKL, the Commissioners were not convinced that a full explanation had been provided.

16.22. Mr. McCaffrey was requested and subsequently produced a supplemental report dealing with advance payments to HKL and repayment²⁷⁰ which concluded, on the basis of extensive further investigation of UDeCOTT's records, that there remained a major uncertainty as to the amount of repayments which had been made to the extent of some \$10m. In the course of the report, Mr. MacCaffrey detected a large number of errors in the Advanced Payment Certificates produced. He identified that back-fitting of data had gone on and that back-fitted certificates had been endorsed by at least two signatories. UDeCOTT was invited during the hearing to respond to the figures presented but has chosen to respond only by way of general comment in its Final Submissions.²⁷¹

16.23. UDeCOTT's response, apart from questioning the standing of Mr. MacCaffrey's report, seeks to suggest that records of advanced payments on certificates were for information only and did not form part of the monthly calculation of payments due.

²⁷⁰ Dated 29 April 2009

²⁷¹ Para 260 (iiA)

The re-issued certificates are said to relate to the decision to separate payments in respect of PK2 and PK3 and 5-8; and it is suggested that Mr. MacCaffrey had not considered at all the separate payment records which formed part of UDeCOTT's accounting system. It is also said that since January 2010 UDeCOTT is operating an automated accounting system. In the opinion of the Commissioners, these responses provide no answer to the serious anomalies which remain after the painstaking analysis carried out by Mr. McCaffrey. However, UDeCOTT on a number of occasions, has sought to challenge the status of Mr. MacCaffrey's reports and contends in its final submissions that neither of his reports constitutes "*evidence*" in the Enquiry. We deal first with UDeCOTT's general challenge to the standing of the MacCaffrey Reports.

16.24. As noted elsewhere, Mr. MacCaffrey was appointed by the Government to assist the Commissioners in investigating cost overruns and delays on a number of projects. The bulk of his time and effort were spent considering the Brian Lara Project. In respect of delays, no programming material was made available, and his report concerning delays was limited to recording opinions which had been conveyed to him. In that regard, the Commission accepted that what Mr McCaffrey was told did not constitute evidence and therefore (as suggested by counsel for Mr Calder Hart) sought to verify the information given to Mr. MacCaffrey with witnesses who gave evidence before the Enquiry²⁷². With regard to cost overruns and other matters of accounting, conversely, the process was entirely based on UDeCOTT's own records and in this respect Mr. McCaffrey's opinion is plainly admissible as expert evidence. Mr. McCaffrey was unable to appear at the Enquiry for reasons noted elsewhere. However, the Commissioners afforded UDeCOTT every opportunity to respond to both reports of Mr. McCaffrey and are satisfied that his reports should stand as material which the Commissions are entitled to take fully into account²⁷³.

16.25. UDeCOTT further sought to question the quality of Mr McCaffrey's reports. After receipt of the Initial Acutus Report UDeCOTT submitted that "*the quality of the report strikes us as exceptionally low. It came as a great disappointment to us that it*

²⁷² See paragraph 23.46 below.

²⁷³ See Commission of Enquiry Procedural Rules, Rule 15 "*the Commission may receive any evidence that it considers to be helpful in fulfilling its mandate whether or not such evidence would be admissible in a Court of Law*".

really doesn't get into the issues at all"²⁷⁴. Having considered the reports, the Commissioners reject any suggestion that either of the MacCaffrey Reports in any respect failed to meet the high standard to be expected from a skilled and experienced professional expert. The Commissioners consider UDeCOTT's un-particularised criticism to be self-serving and not based on any reasoning or proper analysis. The report on payments and repayments on the Brian Lara Project demonstrated serious flaws in UDeCOTT's accounting system which would not have come to light without expert and painstaking research. Had UDeCOTT wished to challenge Mr McCaffrey's expertise the proper course would have been to instruct their own expert, rather than seeking to rely on factual testimony from the very persons whose actions were the subject of criticism.

16.26. It is not the function of the Commission to draw conclusions as to the amount of any sums that may not be properly accounted for. It is the function of the Commission, in examining UDeCOTT's procurement practices and methods of operation, to draw conclusions as to whether their accounting and recording systems are adequate and fit for purpose. It is also the function of the Commission to consider whether proper explanations had been put forward for seemingly anomalous procedures, particularly in terms of the treatment of HKL on the Brian Lara Project. Having examined the financial records, there appears to be no doubt that HKL was treated in a manner materially different from other contractors on this or any other project. It can also be concluded that, if the anomalous treatment of HKL was agreed to in the expectation of receiving an exceptional level of performance on the project, any such expectation must have quickly dissipated from early 2007 onwards.

16.27. The Brian Lara project was also analysed in an expert report served by UDeCOTT and prepared by Arun Buch. Mr. Buch described the project as a "fiasco" and identified what he regarded as major shortcomings in the management and organisation of the project, for which he attributed primary blame to Turner Alpha Ltd (TAL). In particular, Mr Buch commented that the Project Budget prepared by TAL was wholly inadequate and did not correspond to the design as prepared by February 2005. It failed to take adequate account of the cost of steelwork or piling. TAL's

²⁷⁴ Transcript 23 March 2009, p 42

initial Project Implementation Schedule was similarly unrealistic in that critical packages started between 3 and 14 months later than programmed, which made the March 2007 deadline impossible to achieve from the outset.

16.28. Aside from such individual shortcomings, Mr Buch considered the primary cause of time and cost overruns to be conceptual and detailed failures of design, particularly in the Stadium structure, and a general failure to provide information to contractors, both of which were the responsibility of TAL. In part, UDeCOTT's strategy was at fault in using TAL as the Construction Manager who then sub-contracted the design, thereby leading to critical problems of management and responsibility. Mr Buch's Report sets out extensive detail of what are considered to be the major design shortcomings for which TAL is said to be responsible, and of the main drivers of delay and cost overruns²⁷⁵.

16.29. Turner Alpha Ltd itself presented a substantial analysis of the whole Brian Lara project through the evidence of Mark Cytrinowycz, who was Project Manager for both the Brian Lara project and the Government Campus project from 2006. Mr Cytrinowycz stated that TAL repeatedly sought to protect UDeCOTT from spurious claims by the principal contractor, HKL, and from making overpayments to HKL, and sought to ensure that the Project was undertaken according to the terms of the FIDIC Contract. He challenged the Report of Arun Buch, which was said to be based only on information supplied by UDeCOTT, since Mr Buch had no direct involvement in the project. Mr. Buch had not reviewed the Contractor's Payment Certificates or variations or claims, and had not analysed the Contractor's schedule or performance. The contracting strategy involving appointment of TAL as Project Manager had been developed through numerous meetings and was directed and approved by UDeCOTT.

16.30. The major causes of time and cost overruns, in the view of Mr. Cytrinowycz, were incomplete designs, poor performance by HKL and inaction by UDeCOTT. TAL had recommended termination of the HKL Contract for default at the end of 2007, which advice was rejected by UDeCOTT. The steel structure and canopy roofs are constructed to the design of HKL, and not the original design provided by HOK/Buro

²⁷⁵ Independent Expert Statement of Arun Buch, Arun Buch & Associates Ltd, March 2009, Sections 4 and 5.

Happold. As well as being delayed, the steelwork was seriously defective in that over 70% of welds failed when tested independently.

16.31. UDeCOTT failed to pay TAL, despite which TAL continued to carry the costs of designers, consultants and of its own staff for some months. Although TAL was appointed Engineer under the FIDIC Contract, UDeCOTT itself determined the sums to be paid and made payments direct to HKL, ignoring the contract certification process. UDeCOTT further failed to inform TAL of the sums being paid, despite many requests from them. It was TAL who eventually terminated their engagement, but only long after UDeCOTT had adopted a policy of ignoring and side-lining TAL and relying on Genivar, who eventually replaced TAL as the appointed Engineer. As an aside, it may be noted that, despite the removal of TAL from the Brian Lara Project, TAL and Mr. Cytrinowycz continued to operate as Project Manager to UDeCOTT on the Government Campus Project, where they were still in post when that Project was inspected by the Commissioners in March 2009²⁷⁶.

16.32. Arun Buch responded to the statement of Mr. Cytrinowycz pointing out that TAL appeared to be unaware of the obligations of a Project Manager. HKL was given an effectively impossible programme to accomplish and did not know what they were in for when they signed a contract in 2006. It was the responsibility of TAL to ensure that such impractical and impossible contracts were not put out. TAL had failed to assess the buildability of the project, or to carry out value engineering or realistic costing and scheduling in 2005. Mr. Buch comments that TAL also charged excessive fees (over \$60 million). It should have been apparent to TAL in 2005 that the design of the canopy and roof was impossible and impracticable. Whilst HKL might be at fault, TAL was responsible for initiating the problems which HKL inherited²⁷⁷.

16.33. It is necessary to emphasise that the Commission is not charged with deciding any question of legal liability or culpability. In relation to the Brian Lara project, the objective is limited to examining UDeCOTT's procurement practices and methods of

²⁷⁶ In similar manner to Mr Outridge of QES, who continued to be engaged for the GCP despite being sacked from the C&E tender process.

²⁷⁷ Arun Buch Response Statement, 14 May 2009.

operation (TOR issue (viii)) and reporting on the reasons for and the effect of cost over-runs, delays and defective workmanship (issue (vi))²⁷⁸. The Commissioners will therefore review the obvious conflict between the evidence of Mr Buch and that of Mr Cytrinowitz with this objective in mind.

Initial Conclusions

- 16.34. The Brian Lara Project was unusual in generating major problems in terms of time, cost and quality: in most projects two or at least one of these three elements will be satisfactorily controlled, at the expense of the other one or two. In terms of time it was, in retrospect, just possible that the Stadium could have been completed to comply with the ICC deadline given the commencement date of 2004, allowing effectively 3 years for planning, design and construction. However, once major changes to the Project started to occur, time became at a premium. In particular, the decision to move the Stadium to Tarouba in November 2004 was critical, particularly as it gave rise to major earthworks challenges that would not have otherwise been encountered. From this point the remaining period of just over 2 years was always going to be very tight. The progress of the early packages in 2005 can now be seen to have led to a situation where, by early 2006, the ICC deadline was already unattainable.
- 16.35. Certainly as the months of 2006 went by with no effective progress on the main elements of the Project, the possibility of meeting the deadline became increasingly hopeless and a realistic reassessment from about May 2006 onwards should have led to the conclusion that there was no further point in treating the Project as "*fast track*". The whole process of negotiation with HKL from September 2006 onwards, even before the announcement by the ICC on 21 September, had an element of unreality in that it should have been obvious that there was no chance whatever of the Project meeting the ICC deadline. At this stage, if not much earlier, UDeCOTT should have advised GORTT to step back and reappraise the whole Project, rather than rushing headlong into a contract which has proven to be nothing short of a disaster. The progress of the work from October 2006 onwards has become a national disgrace.

²⁷⁸ Section 23

16.36. UDeCOTT has responded to these matters in Final Submissions²⁷⁹. With regard to the award of PK3 and 5-8 it was suggested that UDeCOTT was already committed to the award before the announcement, on 21 September 2006, that the Stadium would not be used for the World Cup. The Commissioners take issue with this analysis, particularly as UDeCOTT itself found it necessary to inform HKL on 2 October that its proposal “*has been accepted*”. However, as already stated, it should have been obvious many weeks or months earlier that there was no realistic chance that HKL could meet the ICC deadline. UDeCOTT accepted that the design was not complete at the date of award but suggested that this was “*unexceptional*” where part of the design responsibility was left with HKL. This comment misses the point: the incomplete design necessarily meant uncertainty and risk of cost overrun, as events were soon to demonstrate. UDeCOTT further accepted that the “*Guaranteed Maximum Price*” Contract was subject to claims by the Contractor (as is the case) which renders the concept of a guaranteed maximum price as meaningless as the promised completion date. UDeCOTT cannot claim to be unaware of these obvious matters.

16.37. UDeCOTT also made a general response that certain matters were not put in cross-examination of witnesses and therefore could not be taken into account. UDeCOTT rely on the Privy Council decision in Mahon v Air New Zealand²⁸⁰ in which the Rules of Natural Justice are set out. The so-called second rule requires:

“that any person represented at the Enquiry who will be adversely affected by the decision to make the finding should not be left in the dark as to the risk of the finding being made and thus deprived of any opportunity to adduce additional material of prohibitive value which, had it been placed before the decision maker, might have deterred him from making the finding even though it cannot be predicted that it would inevitably have had that result”.²⁸¹

Earlier in the same passage it was noted that “*the technical rules of evidence applicable to civil or criminal litigation form no part of the rules of natural justice*”.

²⁷⁹ See paragraph 260.

²⁸⁰ [1984] AC 808.

²⁸¹ Page 821B.

The Commissioners observe that, in the context of the present Enquiry, where material continued to emerge throughout and indeed after the oral hearings, it was neither practicable nor possible for witnesses to be challenged on every point or to have every contrary argument put to them. Furthermore, the hearing in Mahon was a Royal Commission which was required to make “*findings*”, while the present Enquiry is charged only with making “*recommendations*” which have no binding force. And in any event, UDeCOTT was given full opportunity to comment on potential adverse criticism, including the ability to produce new material, which UDeCOTT took up by including such material in its final submission. The Commissioners thus reject the contention that any of the material referred to is not properly before them or that UDeCOTT has not had a full opportunity to respond to it.

16.38. The Commissioners thus conclude that UDeCOTT in its overseeing role must bear a substantial part of the responsibility for what has gone wrong at Brian Lara. We do not suggest that UDeCOTT alone should bear responsibility for the failure of the Project. The performance of several other parties contributed to the poor outcome. However, UDeCOTT must take responsibility for the overall decisions which led to the setting up of the project and for the clear failure to create a contract structure which properly protected the public interest. UDeCOTT sought to pray in aid the “*unique circumstances and pressures*” on the Brian Lara Project. All projects are unique and all are subject to pressures, which it is the function of the developer to overcome.

16.39. Quite apart from the overall aspect of timing, it is questionable whether any further contract should have been awarded to HKL in the light of their performance on the first contract for PK2 (building structure). This had been awarded in March 2006 with a contract period of 6 months; but after 7 months the work was less than 50% complete. No reasonable explanation was given for ignoring the performance of HKL up to this point, and the decision to “roll up” PK2 with all the remaining works into the final contract awarded to HKL provided no justification. It may also be noted that the UDeCOTT standard contract terms at the Brian Lara Stadium required that the Contractor should himself perform not less than 60% of the work directly without

sub-contracting²⁸². When HKL was awarded PK3 and 5-8, UDeCOTT allowed this provision to be removed, so that HKL was free to sub-contract the work with no limitation.

16.40. With regard to cost, it seemed clear that the original estimate given in February 2005 in the sum of \$272m was unrepresentative of the building which subsequently came to be designed and put out to tender. As noted in Section 23 below, the likely overall costs will have escalated some 2½ times. Part of this is accounted for by events and circumstances which were not foreseen at the date of the original estimate; however, a major part of the cost escalation must be attributed to the development of the design of the Stadium. While this was, from the outset, to be designated as “*world class*”, the early decision to bring in internationally renowned designers seems to have been taken as an indication that there would be no constraint on the design. The roof design eventually adopted was needlessly costly, inappropriate and should not have been approved. An additional element of excessive cost arose from the needless overdesign of the steel structure in the absence of proper design information. In retrospect there is no good reason why a much more simple and cost effective design could not have been adopted, similar to that used for the existing stadia at Manny Ramjohn, Larry Gomes and Dwight Yorke Stadium at Bacelot, Tobago. UDeCOTT should have drawn this to the attention of the Government at a time when a review of the design was still feasible.

16.41. As to the quality of the work, this may be seen as giving rise to less serious but nevertheless significant problems, largely concerned with welding and primarily caused the failure to give proper attention to questions of “buildability”. The overdesign of the steel structure gave rise to welding and other detailed constructional issues which should never have been allowed to arise.

16.42. The award of the contracts, the management of those contracts, the payment terms including advanced payments and the conditions guaranteed to the contractor in return for agreement to complete the project at a fixed maximum price demonstrated clearly UDeCOTT’s inability to plan and successfully manage a project of this magnitude

²⁸² PK2 Contract, in particular Condition 4.4.

and complexity to completion. The faith shown by GORTT in placing this project in the hands of UDeCOTT was misplaced: UDeCOTT was out of its depth.

16.43. In addition to all the foregoing is the question of accountability and potential overpayment of HKL which centres on the unprecedented and excessively favourable conditions which UDeCOTT applied to HKL in terms of advance payment. This has revealed serious shortcomings in UDeCOTT's system of accounting and recording which still proved resistant to some weeks of detailed investigation by the Acutus Team. There can be no excuse for UDeCOTT's inability to produce a complete vouched account of all the sums paid and the sums recovered from HKL as advance payments. Aside from the issue of accounting, it has not been possible to identify the terms and conditions upon which advance payments were being made. The terms purportedly relied on, as set out in HKL's quotation of 14 September 2006, are patently ambiguous and uncertain and yet no attempt was made to define the detailed conditions intended to be followed. The apparently uncontrolled system of advance payments to HKL should be properly investigated and a full audit of all such payments and repayments undertaken.

16.44. Finally, throughout the whole period of this Enquiry, work at the Stadium Site has proceeded at a snail's pace, if any progress at all is being made. The question why the Contract had not been terminated received no proper response. TAL advised termination at the end of 2007 and that advice was soundly based. Even at this late stage, termination of HKL's Contract and a full review and audit of the whole Contract should be carefully considered, along with realistic proposals for the completion of the Project. The citizens of Trinidad & Tobago, for whose benefit the project is being undertaken, should at some stage obtain some benefit from it.

PART III: COST OVER-RUN, DELAY AND DEFECTS

17. Introduction: Issue (vi)

- 17.1. The list of projects examined is set out at para 1.10 above. Part III presents a summary of the evidence on various projects and the conclusions to be drawn as to the reasons for and effects of cost over-runs and delays. In addition to the material presented here, the Cleaver Heights Housing Project forms a separate part of our Terms of Reference and involves contractual and regulatory issues as well cost over-runs, delay and defects. Cleaver Heights is examined in more detail in later sections²⁸³
- 17.2. The Commission received little evidence specifically directed towards defective workmanship, save in respect to the Cleaver Heights Housing project, where serious issues are raised. The Commissioners observed standards of workmanship on other housing projects which could be regarded as unacceptable, but we were not told that this had been regarded as an issue. We also observed questionable standards of workmanship on the Scarborough Hospital project. Given that there were mutual notices of termination coupled with major issues of design, delay and additional cost, it is not surprising that defects were not regarded as a separate issue.
- 17.3. Our general observations of projects in course of construction and after completion led us to conclude that high standards of workmanship were achievable both from foreign and local contractors. However, low-cost projects, such as community housing, were often constructed to somewhat marginal standards, no doubt reflecting the drive to reduce costs. Where poor or marginal workmanship exists, we believe that this reflects primarily on the standards of supervision and monitoring provided, and that given the right conditions, the local construction industry and its workforce is generally possessed of the requisite skills to produce high standard work.

²⁸³ Sections 24 to 27

18. Education Facilities Company

18.1. Education Facilities Company Ltd (EFCL) in a separate submission²⁸⁴ provides a summary of cost overruns and delays on the 7 primary school projects and 13 secondary school projects undertaken to date (tables 2 and 3). They provide a summary chart setting out “*Project Implementation Issues*” in respect of each of the 20 projects indicating which have been subject to events impacting on time or cost or both (table 4). Tables 2, 3 and 4 are attached at **Annex 14**. EFCL further state that while there have been cost increases, none is expect to exceed 10% of the contract sum. The major project implementation issues encountered are the following:

- (i) Disruption to Contractor’s schedule because of close proximity of existing Schools.
- (ii) Design changes during construction.
- (iii) Non performance of the Contractors.
- (iv) Under-measurement in the Bills of Quantities.
- (v) Increase in cost of specialist items such as supply and installation of HVAC, Generators and Elevators.

18.2. With regard to (i), disruption through proximity of an existing school has occurred on 5 projects where pile driving had to be restricted to outside school hours. EFCL took mitigating measures to reduce the disruptive effect. With regard to (ii), design changes are noted in 6 projects relating to matters such as redesign of ramp, canopy, foundations and ground beams. Where the design consultant was not the supervising consultant, delay was noted in response to requests for information. Delays were also noted through non-provision of construction drawings. EFCL is now implementing a design-build approach which is expected to mitigate these problems.

18.3. With regard to (iii), delay has been experienced to both local and foreign contractors in mobilisation, particularly with insufficient labour during early phases of construction, also contractors not adhering to work schedules. Late submission of construction details was noted in 6 contracts and unavailability of labour in 8 projects. With regard to (iv), inconsistencies between Bill of Quantities and drawings was noted in 4 contracts and omission from the Bill of Quantities in 10 contracts. With

²⁸⁴ Dated 25 March 2009.

regard to (v) increase in cost of specialist items was noted in 10 contracts, 8 of which also suffered from increase in cost of NGC gas pipeline. Other individual causes of delay are noted as lack of alternative accommodation to decant school during construction (3 contracts), relocation of buried WASA pipeline (1 contract), expansion of sewage treatment plant (2 contracts), inadequate provisional sums for temporary classrooms (3 contracts), land unavailability (1 contract), delays to connect to T&TEC and WASA (2 contracts) and disruption of works by the local community (1 contract).

18.4. Delays and the causes thereof on the 20 contracts extant, can be summarised as follows.

Primary Schools

- (i) ICACOS Government: Contract period 12 month, delay 9 months due to (i) non-approval by WASA of septic tank waste water system and subsequent provision of aerobic unit; (ii) accompanying delay by design consultant; (iii) further delay by T& TEC in the provision of electrical supply; (iv) further 3 months delay in provision of design and structural drawings for a canopy, omitted from the structural drawings.
- (ii) ARIMA West Government: Contract period 17 months, delay 6 months due to (i) design consultant needing to increase sizes of steel members; (ii) 3 months delay in provision of AC drawings by design consultant; (iii) claim for adverse weather still under evaluation.
- (iii) Arima New Government: Commencement of project delayed as a result of non-availability of decanting accommodation and need to find a new site.
- (iv) Tranquility Government: Contract period 20 months, projected delay 8 months due to (i) acceptance of contractor's proposal to substitute alternative steel frame design; (ii) long lead items, such as elevator, not being procured in sufficient time.
- (v) St. Mary's Government: Contract period 14 months, delay 6 months due to (i) interruptions by locals demanding employment; (ii) discrepancies between steel quantities in BOQ and drawings; (iii) need to redesign sewerage system; (iv) re-design of major retaining walls.

- (vi) Fanny Village Government: Contract period 15 months, projected delay 6 months due to (i) design consultant unable to issue construction drawings; (ii) relocation of site of new building.
- (vii) Cap de Ville Government: No progress: construction being reconsidered due to declining school population.

Secondary Schools

- (i) Chaguanas Senior: Contract period 14 months, delay 5.5 months due to (i) delay by Main Contractor in deploying steel fabricator and erection sub-contractor and further delay by these sub-contractors; (ii) projection of poor quality blockwork and plaster; (iii) inadequate labour on site; (iv) under measurement in Bill of Quantities and additional work required.
- (ii) Marabella South: Contract period 12 months, delay 10 months due to (i) insufficient labour; (ii) delay in mobilisation of piling sub-contractor; (iii) delay in procuring HVAC plant.
- (iii) Princes Town East: Contract period: 28 months, projected delay 12 months due to (i) insufficient labour at commencement; (ii) delay in mobilisation of piling work and (iii) protest against excessive noise from work, (iv) redesign of piles to reduce noise; (v) redesign of retaining walls.
- (iv) Siparia Secondary: Contract period: 28 months, projected delay 6 months due to (i) insufficient labour; (ii) delay in mobilisation of piling work; (iii) restrictions due to excessive noise.
- (v) Couva West Secondary: Contract period 24 months, projected delay 6 months due to (i) deficient site management; (ii) insufficient work force; (iii) restrictions due to excessive noise; (iv) change to pile design.
- (vi) North Aranguez Secondary: Contract period 24 months, projected delay 2 months due to (i) insufficient labour at start of project; (ii) restrictions due to excessive noise.
- (vii) Barataria North Secondary: Contract period 24 months, projected delay 5 months due to (i) initial shortage of labour on site; (ii) delayed receipt of drawings; (iii) omission of items from Bill of Quantities.
- (viii) Charapichaima West Secondary: Contract period 24 months, projected delay 1.5 months due to (i) late mobilization of labour; (ii) restrictions due to excessive noise of work.

- (ix) Five Rivers Secondary: Contract period 24 months, current delay 2 months due to (i) insufficient labour but (ii) contractor had undertaken to expedite work.
- (x) Mount Hope Secondary: Contract period 24 months, projected delay 5 months due to (i) delays in mobilisation by Contractor; (ii) need to reconstruct reinforced concrete beams and slabs rejected for insufficient cover to reinforcement.
- (xi) St. Augustine Secondary: Contract period 27 months, projected delay 4 months due to (i) failure of design consultant to issue construction drawings.
- (xii) St. Joseph's Secondary: Contract period 24 months, projected delay 2 months due to (i) inadequate initial mobilisation and insufficient labour.
- (xiii) Pleasant Ville Secondary: Contract period 24 months, projected delay 3 months due to (i) non-provision of temporary accommodation for schools and (ii) unforeseen conditions.

Initial Conclusions

- 18.5. It needs to be borne in mind that the material in this section is provided exclusively by the Government Agency responsible for commissioning the projects. There was no oral presentation and time and resources did not permit further investigation. On some projects, presentations received from contractors and consultants have painted a somewhat different picture from that put forward by the Agency²⁸⁵. However, the Commissioners have no such grounds to question material put forward by EFCL.
- 18.6. Assuming that the EFCL predictions of cost overruns in respect of projects still under construction are fulfilled, the level of post-contract cost increase can be seen to be relatively modest. This is not unique in the public sector, but nevertheless to be welcomed. While the cost overruns in all cases are relatively modest, it is to be noted that some of the secondary schools are said to have been let to Chinese Contractors because the tenders submitted by local Contractors were substantially in excess of the in-house estimate.

²⁸⁵ refer particularly to Belmont Police Station, section 10

18.7. Delays, conversely, in relative terms, are a much more serious problem than cost overruns, amounting to an average of 25% of the Contract period. The causes of time overruns are divided between Employer (Consultant) delays and Contractor delays, although it is to be borne in mind that the definitive causes have yet to be determined or agreed. One notable feature of these contracts is that, while all the primary schools, with the exception of Icacos, have been undertaken by local contractors, the secondary schools number 1, 2, 3, 4, 5, 8, 9 and 10 (8 out of 13) are being undertaken by Chinese Contractors. While the causes of delay in respect of these contracts appear primarily to be the result of late mobilization rather than subsequent construction problems, it has to be concluded overall that there is little if any difference in the performance of Chinese Contractors compared to local contractors.

19. Estate Management & Business Development Co

19.1. Estate Management and Business Development & Co submitted information on time and cost overruns for residential development over the past 5 years. Thus, of 19 contracts said to be completed, 2 were in fact still in progress as a result of termination and replacement of the contractor. Of those substantially completed by the original contractor 3 (out of 17) were completed within the contract period. In respect of the remaining 14, the intended contract durations ranged from 4.5 months to 15 months, while delays ranged from 1 month to 8 months with an average of 3.5 months or approximately one third of the original contract period. The information provided by EMBD was only as to the principal reason or reasons for delay which in every case, with one exception, was stated as "*inclement weather*". The sole exception was stated to be material availability which applied in one other case as well. No information was provided as to whether the inclement weather in question was merely seasonally inclement or exceptionally inclement. But the regularity of this ground of delay strongly suggests the former.

19.2. EMBD also provided information of 31 agricultural development projects. Whilst strictly outside our Terms of Reference, this provided more information on grounds of

delay which followed a similar pattern to residential developments. Again, in the great majority of the 31 developments listed, inclement weather was the major delaying factor accompanied by resource problems (material equipment and labour) as well as variations and site access problems.

- 19.3. In terms of cost overruns, EMBD simply state that there were “*no cost overruns*”. The figures quoted, surprisingly, reveal that in no case has the contractor been paid more than about 90% of the contract value. This includes two contracts (Woodland & Hermitage) in which a new contractor is said to have been appointed. The same pattern is reported in respect of agricultural developments where the maximum sum recorded as having been paid equates to about 95% of the contract value.

Initial Conclusions

- 19.4. As in the case of the Educational Facilities Company, the material in this section is provided exclusively EMBD. There was no oral presentation and time and resources did not permit further investigation. Nevertheless, a similar pattern emerged to that presented by EFCL, of limited (if any) cost over-run accompanied by relatively substantial delays, which are a regular feature of most construction projects encountered. However, the performance of EMBD on residential development appears to be in marked contrast to substantial cost over-runs experienced in housing projects undertaken by the Housing Development Corporation.

20. Housing projects: Trinidad

- 20.1. In addition to Cleaver Heights, which is considered in some detail under separate terms of reference in a later section of this report, four housing projects have been considered, two in Trinidad (Beverley Hills and Real Spring, Valsayn) and two in Tobago (Blenheim and Roxborough), the latter being dealt with in section 21 below. These projects have all been managed either by the Housing Development Corporation (HDC) or its predecessor National Housing Authority (NHA) or by UDeCOTT. Details of the operation of NHA and HDC are set out elsewhere in this

Report.²⁸⁶ The Trinidad projects in particular gave rise to a number of issues beyond those of time and cost over-runs.

Beverley Hills

- 20.2. This was originally a UDeCOTT project for the construction of 120 multi-family units in 10 blocks. The contract was awarded to HKL in about June 2003 at the contract price of \$35,011,875. The project was handed over to HDC in October 2006 when already subject to very substantial delay and cost over-run²⁸⁷. HKL was still on site at the date of transfer. HDC, however, stated that it was unable to confirm the monies paid to HKL or the state of certification of works prior to the transfer. HDC was advised in December 2006 by QES & Associates (QES) that the cost of completion as at September 2006 was the surprisingly large sum of \$39,751,921 suggesting that the project had made little progress.
- 20.3. HDC engaged an independent Project Manager, CE Management Services Ltd (CEMAS), who assessed the works which were still being carried out by HKL and recommended payment in the total sum of \$6,913,008 including a settlement figure of \$2,300,000, for all works completed as at 30 June 2008, which sum was duly paid by HDC. HKL then withdrew from the site by agreement and HDC took steps to engage a new contractor in December 2008. Keith Baldwin & Company (Baldwin) was engaged as independent Quantity Surveyors to estimate the cost of completion of the work, which was then assessed as 42% complete with two of the blocks then being occupied.
- 20.4. The Beverley Hills project was exceptional in being located in an area of unusually high risk in which thefts, vandalism and a number of fatalities were recorded during the initial phase of construction. Work was disrupted to the extent that a joint police and army presence became necessary on site at all times and HDC found it necessary to include a premium risk allowance of 15% in any new contract. A Contract for completion was awarded to AJKJ Construction Ltd in January 2009 in the sum of \$63,870,758. The work is currently in progress and there are no present issues as to defects. The original contract period was 18 months from June 2003. At the date

²⁸⁶ Sections 24 and 25

²⁸⁷ Dr. Rowley Exhibit 19: meeting July 2006.

HDC took over the project, October 2006, the time taken was already more than double the original contract period. The current estimated completion date is May 2010. The huge delay, amounting to more than 4 times the original contract period, and the cost overrun of the order of 3 times the original price, are each attributable primarily to the high risk nature of the site making it difficult and at times impossible for the Contractor to retain labour and to proceed with the works.

- 20.5. This project is clearly a-typical but does illustrate, in extreme form, one of the factors which can be found present in some parts of Trinidad.

Real Spring, Valsayn

- 20.6. This project concerns land at Valsayn comprising some 9 hectares (22 acres) which was owned by the National Housing Authority. The Cabinet, during Dr. Rowley's tenure as Minister of Housing, agreed to sell the land at a greatly reduced price to the National Union of Government and Federated Workers (the Union) to facilitate the construction of low-cost housing on behalf of the Union. The Commissioners have not seen the original documentation but it is accepted that the sale took place in February 2004 at a price of \$2,530,000. Some months later the Union took the decision to resell the land to UDeCOTT at a price of approximately \$7.5 million. Dr. Rowley stated that he attempted to investigate the resale but was unable to obtain any further information. In particular, no information has been volunteered as to whether the windfall profit realised by the Union is still held in their account, and if so on what terms. The Commissioners were not provided with any rationale for the re-sale of the land. This requires further investigation.
- 20.7. On 21 May 2004 a valuation of the land was prepared by Mervyn C Thompson, Chartered Surveyors, in the sum of \$14.9 million. Dr. Rowley's interpretation of events was that the land, having been made available to the Union at a greatly reduced price, had then been bought back by the State, through UDeCOTT, at an increased price. Minutes of a special Board Meeting of UDeCOTT of 8 April 2004 recorded the decision to approve a proposal from HKL to construct 426 dwellings on the land at a cost of \$129 million.

20.8. With regard to the construction works, the Commission was provided with a copy of the Contract entered into between UDeCOTT and Hafeez Karamath Ltd dated 5 June 2005, which was for the construction of 144 two bedroom apartments, 144 three bedroom apartments, 43 single family units and 77 townhouses (total 408 units) at a Contract Price of \$134,632,200 (VAT exclusive). The form of contract was the FIDIC Conditions for EPC/Turnkey Projects (1999 Edition) with particular conditions, including amendments to Standard Clauses 1 to 20 and Additional Clauses 21 to 36. Of interest is the list of statutory approvals which included Town and Country Planning Outline Approval dated 5 October 2004, but no subsequent or final approval.

20.9. The Contract completion date was 31 March 2007. By April 2007 the work was substantially in delay with a completion date of March 2008 being quoted. By March 2008 the multi-storey apartments, comprising the bulk of the work remained at 35% completed with no completion date quoted. By July 2008 the "*approved revised completion date*" was 30 April 2009 with multi-storey apartments still only 38% completed. The last Project Status Report dated December 2008 was reporting the same period of delay. By letter dated 10 October 2008 the Contractor put forward the following reasons for delay.

- Manpower – shortage of skilled labour
- Very slow response from utilities (T&TEC, WASA, Highways Division)
- Price escalation
- Material availability

No information was provided as to the final completion date of the units.

Initial Conclusions

20.10. Neither of the projects examined can be regarded as revealing issues of general application. Only the Real Spring, Valsayn project provided any insight in to construction problems which, in that case, were substantial. A broader insight into problems on housing projects in Trinidad is provided by the Lockwood Greene Report²⁸⁸, summarised in section 12 above. This should also be contrasted to the

²⁸⁸ Dated May 2006: see exhibit NR 26 to 1st statement of N Rampaul

problems encountered on the Cleaver Heights project, which are considered in detail in sections 24 to 27 below.

21. Housing Projects Tobago

- 21.1. The Commissioners viewed two housing estates in Tobago on 2 and 3 February 2009 and subsequently received written and oral evidence on the projects.

Blenheim

- 21.2. This was an estate of social housing being undertaken for the Tobago House of Assembly (THA) by the NHA (subsequently HDC) who undertook the construction work, and UDeCOTT who undertook infrastructure work. The project commenced in May 2006 when it was intended to build 114 houses. The site had very steep slopes and there were obvious difficulties of access and siting of houses. As a result the total number of units constructed was only 61, indicating a major failure of initial planning and investigation of the site. No proper explanation of this failure was offered. HDC said that planning was undertaken by THA and UDeCOTT.
- 21.3. When the Commissioners inspected the site it was apparent that, despite the houses being substantially complete for over a year, much of the infrastructure work remained to be done and none of the houses was occupied. The outstanding work included waste water, water supply and electrical supply to infrastructure works, as well as final installation of fixtures and fittings which had not been completed to avoid vandalism.
- 21.4. For the construction work HDC engaged six Contractors to build the 114 houses (approximately 20 houses to each contract), with a start date in May 2006 and a contract period of 30 weeks, to be completed by 22 January 2007. The total cost of the six contracts was originally \$18,429,732. The cost up to March 2009 amounted to \$18,306,876, but for only 61 houses, thus representing a huge escalation in cost to

balance the reduction of the number of units. The additional costs are said to be as a result of:

- (i) Improvements to the specification required by THA;
- (ii) Failure of slopes requiring units to be relocated at additional cost and time;
- (iii) Slope failures resulting in complete loss of units;
- (iv) Additional foundation and substructure works required by steep terrain.

21.5. The fact that only 61 units have been provided at a cost close to that of building 114 represents a major failure of organisation. It is not suggested that any more units could have been built on the site, given the hostile terrain, but the cost could undoubtedly have been reduced substantially with proper planning. Furthermore the continuing delay waiting for infrastructure works to render the houses habitable represents a further avoidable loss of both revenue and amenity.

21.6. It is to be noted that any building work in Tobago conventionally attracts a premium of about 30% compared to costs in Trinidad. This is said to be due to difficulties in securing materials and labour. On further enquiry it appears there is no centrally organised system for bringing in, storing and distributing commonly used building materials such as blocks, cement and rebar. Such a system should certainly be considered by anybody undertaking regular construction, including the HDC. There are plainly serious economies which could be achieved by this approach.

Roxborough

21.7. This was a THA project for the construction of 74 housing units. UDeCOTT was again retained for infrastructure works and HDC for building works. At the date of HDC's involvement the infrastructure works had already been procured but much remained incomplete. HDC indicated that it had incurred substantial additional costs in remedying infrastructure works. HDC engaged 9 Contractors who commenced work on 8 May 2006 with a completion period of 30 weeks. The costs of the project increased from \$19,254,671 for the 9 contracts to a total of \$26,857,509, an overall increase of almost 40%, with similar levels of increase applying to each of the individual Contracts. HDC attribute the reasons for cost increase to the following:

- (i) The THA required improvements to the specification;

- (ii) Need to elevate the site to avoid flooding, resulting in additional site and superstructure costs;
- (iii) Remedial works to waste water and water supply networks on site and connections from road networks to units.
- (iv) Waste water disposal tanks and mains connection required to be installed.

21.8. The completion date for the 9 Contracts was 22 January 2007. Delays were experienced which would have postponed completion to early 2008, about one year late. A major cause of this delay was the failure of T&TEC to provide power, which was finally installed 6 months late. However, on 29 February 2008 THA instructed HDC to award a contract for remedial infrastructure works, which were not completed until June 2008. Then in July 2008 THA submitted a list of defects which were rectified by HDC Contractors, with possession finally being taken by THA in December 2008. At the time of the Commissioners' inspection in January 2009 there were still no occupants in the houses.

21.9. In oral evidence Mr. Reynold Patrick²⁸⁹ gave further reasons for the delay. In addition to the logistics of procuring supplies from Trinidad, building materials were in short supply in Trinidad due to over-heating in the construction industry in 2006/7. Housing projects in Tobago were arranged to overlap, so that HDC could be administering up to 22 individual contracts at the same time. The programme was set by the THA. Despite being encouraged to pool resources, contractors continued to order their materials individually. Mr. Patrick also stated that HDC had no interface with UDeCOTT nor with utility installers and had to accept the site as it was.

Initial Conclusions

21.10. These two projects revealed serious problems of poor planning and poor management which appears to have been exacerbated by a division of responsibilities which allowed HDC and UDeCOTT to blame each other, and both to blame THA. The lack of any proper appreciation of the inevitable problems on the Blenheim site is scandalous and has resulted in a doubling of the cost of the houses. Even so, they are left uninhabitable as a result of a failure to liaise with services undertakers. The

²⁸⁹ Transcript 1 April 2009

Roxborough site posed no particular topographical problems, yet here also there were substantial delays attributed to services undertakers, substantial cost increases and huge delays. While some of these problems may be attributable, in part, to shortage of resources and over-heating in the construction industry, these are not problems which should have taken experienced managers by surprise.

21.11. As in the case of the Trinidad housing projects, the problem may usefully be compared to the detailed report produced by Lockwood Greene in May 2006²⁹⁰ on earlier housing projects. The conclusion must be that these projects, particularly the two examined in Tobago, represent a serious and avoidable drain on the public purse and a serious loss of amenity in the number of housing units that could be constructed within the available funding. The Commissioners are convinced that the root of the problem lies in management, and that the solution lies with achieving a better understanding and appreciation of problems likely to occur, and proper planning to mitigate their effect.

22. **NIPDEC Projects**

22.1. In this section we review delay, cost over-runs and defects on the Scarborough Hospital project, and on a large number of other projects, of varying size, on which NIPDEC has provided information on time and cost. To this list should be added the Belmont Police Station for which NIPDEC was responsible, and which has already been reviewed in section 10 above.

Scarborough Hospital

22.2. This is a major new project undertaken by NIPDEC for the Ministry of Health in which the Tobago House of Assembly (THA) has a "Watching Brief". The hospital is prominently sited on high ground with extensive approach roads and retaining walls. The Project was to be undertaken using the conventional design-tender method, with the FIDIC form of contract. Design and supervision of the works was

²⁹⁰ Exhibit NR26 to first statement of N. Rampaul.

undertaken by Stantec, a Canadian firm of Architects and Engineers. The successful tenderer was NH International (Caribbean) Ltd (NHIC), who was awarded the contract by letter dated 30 January 2003. The Contract Sum was \$135,912,829 (VAT inclusive) with a contract period of 730 days (2 years).

22.3. Disputes developed during the course of the works, following variation orders which included major retaining walls and the addition of air-conditioning which was not included in the original Project. The disputes were not resolved. The contractor elected to suspend the work and subsequently both parties served notices of termination. At termination the full Contract Sum had been expended but only 55% of the work had been carried out. The original disputes plus the issue of the disputed termination, were taken to Arbitration under the Rules of the International Chamber of Commerce, who appointed Dr Robert Gaitskell QC as sole arbitrator. Meanwhile the work remained at a standstill.

22.4. NIPDEC identified a number of issues said to be responsible for time and cost overruns comprising problems with contractor performance, site logistics, relationship between consultant and contractor and consultant performance. With regard to contractor performance, NIPDEC contended that the work was not procured or executed in an efficient or timely manner, site management, supervision and co-ordination were inadequate, as were site and quality control personnel. The contractor had failed to deploy sufficient labour, materials or equipment. There was failure to engage requisite skilled operatives, poor construction management, failure to provide programmes or scheduling data, non-compliant work, failure to submit or review shop drawings in a timely manner or to maintain an accurate submittal log, quality assurance failures, failure to secure major suppliers and outstanding defective work.

22.5. With respect to site logistics, NIPDEC contended that there were insufficient experienced supervisors and a shortage of experienced manpower to carry out the work; and there was lack of communication between consultant and contractor. With regard to the design, NIPDEC accepted that there was insufficient data on topography of the site and on the extent of unsuitable overburden material, resulting in the need for variations to retaining walls involving additional cost of some \$20m, together with

other variations issued by the consultant. There was a lack of reinforcement detailing resulting in the need for site bending of steel.

- 22.6. Further information on Scarborough Hospital was received as part of other issues in the Enquiry. In the debate on issue (iii) Peter Morris, a Quantity Surveyor and Project Manager who was engaged by NHIC, said that the overall design concept had been flawed and that major variations had been inevitable. Problems were made worse by the absence of competent and experienced Project Managers²⁹¹. In the context of management, Mr. Morris emphasised the need for issues and disputes to be resolved quickly which had not happened on the Scarborough Hospital project, where many issues were not resolved at all.²⁹² Mr Morris provided a written submission²⁹³ to which NIPDEC served a written response.²⁹⁴
- 22.7. NIPDEC, through Ms Wendy Ali, defended the design changes, saying that they could be beneficial in leading to delivery of a better project. She accepted that there had been instances of incomplete design and failure of supervision²⁹⁵. Ms Ali said that NHIC, the Contractor, had become “positional” and difficult to manage. It was also noted that NIPDEC’s appointment by the Ministry of Health provided that overall responsibility for the project was with a non-executive Steering Committee and executive responsibility for project execution was to lie with a team of Senior Managers and officials. The management services provided by NIPDEC were to be on an “as needed basis”²⁹⁶ which made it even less likely that they would be able to respond timeously when management input was needed to keep the project on course.
- 22.8. Work on the project was suspended, after the termination, for some 3 years (2005 to 2008) while the arbitration proceedings took their course. This resulted, inevitably, in deterioration of the incomplete works. A design-build contract for re-design and reconstruction was let to China Railway Construction Corporation (CRCC) by letter dated 4 June 2008 with a contract price of \$415,362,921. This included both remedial work, completion of the building and provision of fixed medical and other equipment.

²⁹¹ See further para 5.3

²⁹² Transcript, 1 April 2009, p85-101.

²⁹³ Dated 27 March 2009

²⁹⁴ Dated 4 May 2009

²⁹⁵ See further para 5.6

²⁹⁶ Transcript, 1 April, p120 and see further para 30.9-30.10

The contract period is 18 months. The Engineer under the new contract is NIPDEC, with additional specialist services being provided by Genivar. Work was under way when the site was inspected by the Commissioners on 2 February 2009. NIPDEC indicated that as at 31 August 2009 the sum of \$47,718,801 (VAT exclusive) had been paid to CRCC and that the anticipated completion date is 30 April 2010. The estimated final cost remains at \$415,362,921 which implies no delay or cost over-run.

- 22.9. At the date of this report several Awards have been issued in the arbitration and there are outstanding proceedings concerning the Awards in both the High Court and the Court of Appeal of Trinidad and Tobago. It is understood that it has been held in the arbitration that NHIC was correct in its notice of termination, but that financial/quantum issues are still being dealt with.

Other projects

- 22.10. NIPDEC provided a summary of the grounds giving rise to time and cost overruns in respect of a large number of their other projects comprising Health facilities, Rehabilitation Centres, Police Stations, Community Centres, Sports Facilities and a Youth Centre. The material provided is summarised in the following paragraphs.
- 22.11. With regard to the Eric William's Medical Sciences Complex, NIPDEC identified an error in the specification of air handling units resulting in the delivery of wrong sized equipment; also inadequate site supervision by consultants, leading to delays. NIPDEC contended that elevator refurbishment was prolonged as a result of new regulations and inadequate supervision and inspection by consultants; and that there was further delay to the new incinerator attributed to contractor delay in providing design data; also an increase in the cost of the incinerator owing to delayed ordering. Further delays were said to be caused by uncertainty as to location of subterranean services.
- 22.12. The Port of Spain General Hospital contract is said to have incurred additional cost through making provision for decanting, and delay resulting from the supervising consultant refusing to start work until outstanding payments were made from the Ministry of Health. For the San Fernando General Hospital contract NIPDEC contended that there were time and cost overruns resulting from disputes between the

contractor and the employer, variations, late instructions from the Engineer and lack of satisfactory performance by the contractor.

- 22.13. For the St James's District Health Facility, time and cost overruns are said to have resulted from the contractor being slow and inexperienced in specialist work and from consultants also being slow in responding to design preparation and changes required. For the Oxford Street Enhanced Health Centre, time and cost overrun were attributed to the contractor being slow and inexperienced in specialist work and the consultants similarly being slow in responding to design preparation and design changes. There were reported problems with theft and violence on the site which slowed the progress of work; also the contractor is said to have been forced to employ persons with inadequate skills and experience to satisfy community leaders.
- 22.14. For the St Joseph Enhanced Health Centre NIPDEC identified reasons for time and cost overruns as: rapid inflation in the cost of labour and materials resulting in cash flow problems to the contractor, and slow pace of work by the contractor. For the Rehabilitation Centre at Piparo, NIPDEC attributed time and cost overruns to excessive rainfall resulting in loss of 3.5 weeks and client variations.
- 22.15. NIPDEC was responsible for 5 police stations including the Belmont Station which has been considered in some detail earlier in this report²⁹⁷. For the Mayaro Police Station NIPDEC identified reasons for time and cost overruns as: inclement weather and shortage of materials, incomplete designs for external works, the contractor having inadequate construction management expertise, client variations, delay in the procurement of imported components, the provision of additional water and sewerage connections, significant price increase of materials and an inadequate project period (of 10 months). For the Gasparillo Police Station reasons for time and cost overruns were: slope failure due to underground water, lack of timely response by design consultants, inclement weather, shortage of materials, incomplete designs for external works and significant price increase of materials.

²⁹⁷ Section10

- 22.16. For the Toco Police Station reasons for time and cost overruns were said to be: access problems due to the collapse of a bridge, omission of essential foundation works, shortage of cement aggregate and concrete, inclement weather, delay in the arrival of imported components, delay in the provision of electrical connection by T&TEC, client variations, significant price increase of materials and inadequately short project period. For the Tunapuna Police Station, the reasons for the time and cost overruns were said to be: inexperienced design personnel, modifications to structural engineering designs, lack of timely response by the design consultants, client variations and significant price increases of materials.
- 22.17. NIPDEC was responsible for constructing five Community Centres, at Beetham Gardens, Pelican Extension, Morvant, Maracas Bay, Thick Village and Preysal. NIPDEC contended that the projects were all subject to substantial time and cost overruns as a result of intervention by the client (Ministry of Community Development, Culture and Gender Affairs) at approximately 60% completion when instructions were given to increase the seating area in the halls by a factor of 5. This resulted in re-design taking about ten months, claims for works stoppage by contractors and the need to prepare a new contract document and to have the project re-priced. With respect to two of the projects the original single storey design was replaced with a two storey structure. Further delays are said to have resulted from external works not being designed and provisional sums in the contract proving to be inadequate. The increased seating capacity required a significant increase in the provision of car parking and waste water treatment capacity. In addition there was a last minute request from the client to incorporate air conditioning in two of the centres, thereby increasing the electrical load and requiring changes to wiring and transformers and further associated work. There are said to have been general delays due to a slow response from WASA and T&TEC.
- 22.18. For the Mayaro Sports Facility, NIPDEC contended that time and cost overruns resulted from logistical errors, programme deficiencies and defective work. For the St James's Youth Centre time and cost overruns are attributed to the additional cost of nominated sub-contract work and variation by both consultant and client resulting in a 65% increase in the cost of the works.

Initial conclusions

- 22.19. NIPDEC has identified the causes of time and cost overruns on the “other projects” as the following: inexperienced design personnel and inadequate designs, lack of timely response by design consultants, modifications to structural engineering designs, contractor’s lack of resources, client variations, poor communication and relationship with nominated sub-contractors and significant price increase of materials. These are essentially failures by contractors and consultants; but for these projects we have been presented with only the views of NIPDEC.
- 22.20. By contrast, the reported events at Scarborough Hospital (in para 22.2 to 22.9 above) and Belmont Police Station (in section 10 above), have been reviewed taking into account the views of other relevant parties. While we have no reason to doubt that the matters identified by NIPDEC were grounds of delay and cost over-run on these “other projects”, they provide no assistance on whether there were contributory failures by NIPDEC itself.
- 22.21. In the case of Belmont, NIPDEC did not appear to play any role in resolving the emerging problems on the project. The fact that NIPDEC was appointed Project Manager may even have created an expectation that they would perform this role.²⁹⁸ In the case of Scarborough Hospital, while the matter is still under review in the arbitration and court proceedings, it appears that NIPDEC’s role was similarly low-key, in this case expressly devoid of executive authority. Thus, for whatever reason, NIPDEC did not provide effective management of the project²⁹⁹. Thus, we do not accept that the failure of the original project can be deployed as an argument against use of the design-tender method in general. However, we do accept that the accumulated problems of design and construction on the Scarborough project indicate that design-build was the right solution for completion of the project, which has been let on this basis, still with NIPDEC employed as manager.

²⁹⁸ See para 10.11 to 10.14

²⁹⁹ See para 30.13

23. UDeCOTT Projects

23.1. This section reviews time and cost over-runs and defects in relation to eight projects undertaken by UDeCOTT from 2002 onwards, including some which are ongoing.

Prime Minister's residence

23.2. According to the Statement of Ms. Rampaul³⁰⁰, the original designer was a local architect, Nigel Thomas and Associates, who also provided an initial estimate on incomplete drawings of \$40 million. As further drawings became available the costs substantially increased. As stated in the Government's answer given in Parliament by the Minister at the time, the Hon Chin Lee on February 14 2007, the sum of \$43.2 million had been spent on the project for demolition works, site clearance, grubbing, site preparation and construction work. UDeCOTT is said to have carried out a value engineering exercise from which it was determined that the cost of the project, following the existing design-tender method would exceed \$200 million and would additionally result in substantial delays. The Commissioners have not been able to verify any of the quoted figures.

23.3. In the light of the Waterfront project, which was then being executed by design-build, the Commissioners were told that UDeCOTT decided (with the knowledge and approval of Government) to use this project as a further test of design-build methodology. The decision was also said to be influenced by the nature of the project, being the intended official residence for the Prime Minister. The decision was therefore taken to change the project to design-build, with use of a Government to Government arrangement between the Government of Trinidad and Tobago and the Government of China. The Cabinet resolved in August 2006³⁰¹ that UDeCOTT be instructed to negotiate with the Shanghai Construction Group International (SCG) to undertake the project under a design-build contract. UDeCOTT contended that the project falls within "special circumstances" which permit the use of sole selective tender process.³⁰² UDeCOTT had in fact only three months earlier³⁰³ signed the contract with SCG for the design and construction of the Performing Arts Academies.

³⁰⁰ Statement 14 January 2009 para 102

³⁰¹ Cabinet Minute No. 2219 of 30th August 2006

³⁰² clause 6.01(ii) of UDeCOTT's Procurement Procedures

³⁰³ 12 May 2006

- 23.4. UDeCOTT advised that the Prime Minister's residence and Diplomatic Centre was delivered within 9 months, within budget and to the highest standards of quality and workmanship. UDeCOTT contended that the initial design-tender proposal would have led to increased building costs and escalating design fees, and that there would have been claims for additional payment by the contractor for variations and additional work instructed by the Architect.
- 23.5. The JCC, whose members include the original architect, take a different view of the project. Mr Riley³⁰⁴ claimed that the adoption of a sole source tendering procedure by UDeCOTT has had disastrous consequences. In cross-examination³⁰⁵ he said that it was a gross insult to suggest that a two or three storey building of that size could not be designed and constructed locally. The people of Trinidad and Tobago, whose money was being spent on the project, had been over-looked. Mr Riley also questioned³⁰⁶ whether the life cycle costs of the project had been considered. He said that his information was that there are repairs going on to the building already. Mr Mikey Joseph, President of the Contractors Association, claimed that there had been extensive repairs carried out, almost from inception, to the floors and to the electrical system, which was not yet fully functional. He also claimed that the marble used in the building was artificial. As in the case of the Performing Arts Academies, the choice of SGC was a matter for Government and is not a criticism of UDeCOTT.
- 23.6. It may be recalled that in mid-2006 none of the major design-build projects undertaken by UDeCOTT had reached completion. The contracts for the Chancery Lane Complex and for the International Waterfront Project had each been placed in mid-2005 and the contract for the Performing Arts Academies had been placed only months earlier. The decision to switch to a Design and Build Contract for the Prime Minister's residence was, therefore, something of an act of faith. In terms of cost overrun and delay the decision clearly paid off handsomely. The disappointment of local contractors and consultants, including the local architect whose contract was terminated, is easy to understand; and such a relatively modest, yet iconic building,

³⁰⁴ First statement paragraph 89

³⁰⁵ Transcript January 16 p20

³⁰⁶ Transcript January 30 p97

should have been well within the capacity of local construction forces. However, given the delay which, by 2006, was clearly apparent on the major Government Campus Project and the stalled Scarborough Hospital Project, the decision to try an alternative approach to procurement is entirely understandable. In terms of defects, the complaints by members of the JCC may have substance but they have not been substantiated. Only the Chairman has visited the building which, on a superficial inspection, appears to be completed to a very high standard.

Customs & Excise Building

- 23.7. The C&E Building was subject to an initial delay from about March 2003 to January 2004 as a result of the procedural wrangles over the initial round of tender evaluations and the eventual decision to abort the process and re-tender the Project. As noted in Section 13 above, the Project was eventually let to NH International (Caribbean) Limited (NHIC) on 5 March 2004 under a JCT 80 Form of Contract in the VAT inclusive sum of \$114,460,303 (\$99,530,699 exclusive), with Turner Alpha (TAL) appointed as Project Managers. The contract start date was 17 May 2004 and the completion date 16 March 2006 i.e. a contract period of 22 months. There were substantial delays to the Works including a collapse of full-height scaffolding to the East elevation which occurred in July 2006 (during the contract over-run) and is understood to be the subject of on-going court proceedings involving both NHIC and TAL.
- 23.8. The delays resulted in an application by NHIC for extension of time and loss and expense which was ultimately compromised by a Settlement Agreement entered into, on the advice of TAL³⁰⁷. The Settlement Agreement extended the time for completion and included granting a Partial Possession Certificate dated 28 January 2008 and the removal of certain elements of work from the scope of NHIC's Contract. The work elements not included in the Partial Possession Certificate were: the roof, external cladding, external works, elevators and MEP Works. The approximate value of the works taken over was \$63,113,426. By September 2008, the gross value of work

³⁰⁷ Expert Report of Richard Pope, Gleeds, dated 17 March 2009

certified as completed in accordance with the Contract was \$101,461,073 (excluding VAT). TAL records the value of work still outstanding as amounting to \$800,000 which valuation is disputed by NHIC. UDeCOTT stated that NHIC has refused to carry out the remaining Works.

23.9. The revised Contract Price in accordance with the Settlement Agreement is \$113,000,000 (excluding VAT) representing a net cost overrun of approximately 13%. The revised Contract price includes the following:

(I) Variations and instructions for additional works, the major components being additional aluminium cladding and use of Hydrostatic Voltex. Total of variations:	\$6,973,301
(II) Settlement Agreement which NHIC was awarded an extension of time of 716 days up to 14 May 2008. TAL had assessed extensions of time up to the end of September 2006 (124 days) which was then extended on the advice of TAL pursuant to the Settlement Agreement which effectively relieved NHIC of potential liability for delay up to May 2008. Within the Settlement Agreement UDeCOTT agreed to pay the following additional sums to NHIC:	
(1) Settlement of claims for EOT/loss and expense:	\$5,567,000
(2) Ex-gratia payment for increase in price of raw materials, primarily steel:	\$5,179,000
(3) Contractor's claims for interest on late payment:	\$250,000
	\$10,996,000

23.10. At the heart of the Settlement Agreement is the inter-relationship between different elements of the Government Campus Project, referred to as packages or PK 1 to 9, the C&E Building being PK1. On TAL's advice, the Project was split up as follows:

- PK1: Customs and Excise Building
- PK2: Car Park
- PK3: Board of Inland Revenue Tower
- PK4: Mechanical Installation for all buildings
- PK5: Electrical installation for all buildings
- PK6: Ministry of Legal Affairs Tower
- PK7: Curtain walling for the Towers
- PK8: Elevators for all buildings
- PK9: Ministry of Social Development Building

23.11. This division required a number of contractors to range across the entire site working in buildings being constructed by other contractors. The division of responsibility called for a high degree of co-operation between the Contractors and placed responsibility on TAL, as Project Managers, effectively to monitor and enforce the co-operation required for the Project to succeed. PK9, the Ministry of Social Development Building, included many of the areas of external works and paving surrounding the other buildings. Thus, the Contractor who was awarded PK9 effectively controlled large areas of the site with regard to access and was in a position to impose serious impediment on other Contractors thus giving considerable commercial advantage to the PK9 Contractor. The successful tenderer for PK9 was NHIC which, according to UDeCOTT, was able to use its commercial advantage to achieve a favourable settlement agreement. The agreement the remove from the PK9 contract of the external works to PK3 and PK6, which then removed NHIC's stranglehold over the GCP site.

23.12. UDeCOTT thus explained the commercial settlement reached on PK1 in the following terms:

"[NHIC] held the potential to leave UDeCOTT open to multi-package claims as a consequence of the degree of inter-relationship and reliance between the various packages consequent upon the TAL work package system employed on the GCP. This left UDeCOTT in a position whereby the potential was for a massive influx of claims vastly out-sizing those of NHIC. Further, if NHIC was ultimately found to be culpable for such delay, it might have been that NHIC would not have the financial ability to meet those claims. This may have

left UDeCOTT holding financial liability for these further potential claims. In this situation UDeCOTT would have no alternative but to either terminate the Contract with NHIC or to buy its way out of this situation, even if this was at a premium very much to the advantage of NHIC”³⁰⁸.

23.13. The Commissioners appreciate that there is and will continue to be differences between UDeCOTT, TAL and NHIC as to how the situation described above could have come about. It is not the task of the Commissioners to draw conclusions or make any observations as to actual or potential responsibility. The Commissioners would observe, however, that the inter-relationship between the GCP Packages, particularly PK9 with PK3 and PK6 (that is the three major components of the Campus, together with the C&E Building), once those packages were defined, was obvious. The consequences of such inter-relationship, coupled with the effect of the Contract Terms between UDeCOTT and the respective Contractors, should have been entirely predictable and capable of relatively conventional contractual analysis. It is beyond the scope of the present Enquiry to examine what alternatives might have been available to avoid the situation which UDeCOTT found itself in with NHIC. It is likely, however, that the cost of “buying off” the rights of NHIC under PK9 greatly exceeded whatever additional costs would have been generated by an alternative contractual strategy which would not have given the PK9 Contractor the commercial advantage it was given. In short, this was a serious failure of project management.

23.14. UDeCOTT responded to this by pointing out that it is “*primarily a development company*” and not responsible “*for actively managing the projects at an operational level*”. Consequently, it is said that the decision on how the GCP project should be split was taken by TAL and it would have been inappropriate for UDeCOTT to second guess such advice. The problem is said to have arisen from the “*outrageous behaviour of NHIC in imposing impediments to the progress of other contractors*”. The Commissioners observe in the first place that UDeCOTT’s self-description as not being responsible for management at an operational level appears somewhat at odds with the Project Management role and indeed the high level of expertise which it also claims, *inter alia* in its Final Submissions. This adds weight to the view of the

³⁰⁸ UDeCOTT’s presentation on C&E Building, paragraph 36 and see also Expert Report of Gleeds, commenting further on the commercial settlement.

Commissioners that UDeCOTT's role needs to be re-defined. However, the Commissioners do not accept that such major decisions can be made "by" the professional Project Manager, whose tasks is to advise UDeCOTT on major management decisions. UDeCOTT possesses adequate expertise to make such important decisions itself. The third point is that it is not suggested that NHIC was acting outside its contractual entitlement. If it was doing so, it was the clear responsibility of UDeCOTT to take appropriate steps to enforce the contractual rights of the employer. As it is, UDeCOTT has simply allowed the additional cost and delay to be loaded onto the public purse.

Government Campus Plaza

- 23.15. The delay and cost overrun which occurred on the C&E Building is summarised above. As set out in Section 14, the C&E Building was the first of nine packages comprising the Government Campus Plaza (GCP) which included five major buildings, the Customs & Excise Building (PK1), the Board of Inland Revenue Tower (PK3), the Ministry of Legal Affairs Tower (PK6) and the Ministry of Social Development Building (PK9) and the multi-storey car park (PK2). The Project overall is described in Section 14.
- 23.16. As noted in Part II above, the tendering process for the C&E Building and subsequently the award of the MLA Tower to Sunway Construction Limited proved to be controversial. The award of the remaining sections of the GCP was not controversial as such, but has been the subject of much criticism by reason of the use of the design-tender procedure, with the suggested inference that the Project would have been executed more efficiently and more quickly had the design-build procedure been employed. This section therefore reviews the time and cost overruns which occurred, which are closely linked with events in relation to the C&E Building.
- 23.17. It is to be noted that Turner Alpha Limited (TAL) had been engaged as Project Managers for the GCP during 2003 and continued to be so engaged when they were also commissioned to act as Project Managers for the Brian Lara Stadium from 2004 onwards. Furthermore, when TAL was effectively removed from the BLA Project in 2008, they continued work on GCP and remained in place as the Project Manager

throughout 2009. TAL was still in post when the Commissioners visited the GCP on 25 March 2009.

23.18. With regard to cost overruns, the projected Final Accounts on the nine projects, PK1-9, together with an additional PK10 for the LED screen and PK13 for miscellaneous works, is set out in a spreadsheet attached as **Annex 15**. In summary, the total of the Contract Sums as awarded, including estimated figures in respect of PK10 (\$38,500,000) and PK13 (\$10,000,000) together with other adjustments, gives a gross figure of \$1,393,164,115, including allowances in the contracts for dayworks, Provisional Sums and Contingencies. The anticipated Project final cost is stated to be \$1,527,337,873, amounting to a cost overrun of just under 11%. The anticipated cost includes claims accepted on PK1 as summarised above (including an ex gratia payment in respect of steel escalation of over \$5,000,000). The anticipated cost also includes the cost of variations in the total amounts, across all projects, of \$62,715,308 actual and \$24,038,325 further anticipated, total \$86,753,633. Part of this cost is represented by dayworks, Provisional Sums and Contingencies already included in the contract sums. A somewhat larger figure (\$99,319,712) is attributed to costs of extension of time. Overall, as assessed by Mr. Arun Buch, the cost of the Project has not escalated substantially and should be regarded, in terms of cost at least, as a successful project.

23.19. With regard to delay, each component of the Project has been subject to very substantial delays such that the Completion Dates, which ranged from March 2006 in the case of PK1 to August 2007 in the case of PK9, have all been exceeded by more than two years, with the Project typically taking more than twice the contractual period. The principal reasons for delay were the following:

- (i) Access problems involving PK1 and PK9, eventually resolved by the Settlement Agreement covering these packages. All other packages were delayed in consequence of the access problems.
- (ii) As noted above, the total volume of Variations represented something over 5% of the total cost and could not therefore account for a 100% time overrun. Variations to the cladding system, however, were decided upon during the course of the Project and involved substantial delays in the procurement of materials. These delays were concurrent with access delays.

23.20. It is also to be noted, however, that, in common with other major projects in Trinidad and Tobago undertaken by largely domestic companies, there was a perceived lack of impetus and drive towards timely completion and seemingly a ready acceptance that contractual completion dates were to be seen as targets which could be exceeded with impunity. Indeed, neither on this Project nor any other projects in Trinidad and Tobago, was there evidence of liquidated damages or other delay damages being deducted or even threatened. We comment later on this state of affairs, but conclude that this was one of the major elements in allowing the GCP to drift in the way that it has done.

Academy of the Performing Arts (North and South),

23.21. As noted above, this contract was placed with Shanghai Construction Group International (SCG) some months before the design and build contract with SGC for the Prime Minister's residence. The initial work at NAPA suffered delay and problems involving both public tennis courts and the private Colonial Tennis Club, which occupied part of the land required for the project.

23.22. Mr. McCaffrey noted in his first report³⁰⁹ that the eastern section of the site was occupied by functioning public tennis courts between the start of the project in April 2007 and about March 2008. This resulted in the Contractor, Shanghai Construction Group (SCG) being compelled to progress the work from west to east, contrary to the original proposed construction sequence. SGC say that the delay was mitigated down to an 8 month critical delay. It appears that an extension of 8 months was granted by Mr. Calder Hart himself, rather than by Genivar, who were the appointed FIDIC Engineer.

23.23. The details of eventual takeover of the Colonial Tennis Club were set out in a letter to the Enquiry dated 1 April 2009 from Ms. J S Kelsick, a longstanding member of the club, which was placed on the Commission's web-site. The matter was well aired in the press at the time and details are contained in the letter and attachments. The Commissioners did not deem it necessary to ask Ms Kelsick to give further oral

³⁰⁹ 20 February 2009 Sect 3.3.

evidence, and no party so requested. The early planning of the Academy required the removal of the public tennis courts but not the private Colonial Club. It appears there were changes to the layout of the building which resulted in the Colonial Club site being required. UDeCOTT had omitted to give any notice of the change and club members found themselves threatened with forcible eviction by SCG operatives. Only when club members appealed to the Prime Minister was a meeting arranged with UDeCOTT, who promised to replace the facilities with new courts on King George V Park. The takeover took place in April 2008; but by April 2009 no action had been taken to provide the promised new courts. UDeCOTT responded in Final Submissions³¹⁰ which pointed out that several meetings had taken place between the Executive Chairman and club representatives. A draft note had been submitted to the Ministry of Sport seeking approval for the construction of additional courts and a clubhouse, but no further action has been taken either by UDeCOTT or the ministry.

23.24. At the time of Mr. McCaffrey's investigation, in 2009 the structure of the building was substantially complete and cladding about to commence. Mr. McCaffrey estimated the project at no more than 50% complete while Mr. Zhang, MD of SCG, estimated 60% complete and was projecting completion by 4 September 2009 with final handover mid October 2009. Mr. McCaffrey expressed doubt as to whether this was achievable. During Mr. McCaffrey's investigation, SCG was unable to provide a copy of the baseline or original programme. Mr. Zhang undertook to provide a fully detailed programme to completion, but no such programme has ever been provided. During the Commission's brief meeting on 7 September 2009, sections of the cladding to the main arch structure were seen still to be incomplete. The building was, however, finally opened on 10 November 2009³¹¹ and used for the Commonwealth Heads of Government Meeting in Port of Spain on 27-29 November 2009. The Commissioners were taken on a brief tour of inspection of the completed building on 10 December 2009.

23.25. With regard to cost issues, no information was provided to Mr. McCaffrey or to the Commission regarding actual or intended claims. It was evident in January 2009 that, using SCG's projected completion dates, that there would be an overall delay of

³¹⁰ Served 16 March 2010

³¹¹ www.trinidadandtobagonews.com

some 10 months. It seems very likely if not inevitable that SCG will mount a claim for additional costs in respect of all or part of this 10 month period, which is likely to be extended as a result of further delays up to the date of completion of November 2009. In addition to any claims from SCG, UDeCOTT will need to provide for the additional costs of replacement tennis courts as and when these are constructed.

- 23.26. With regard to the Southern Academy, additional works for the diversion of a sewer line across the site have already been referred to. Mr. McCaffrey³¹² reported that SCG intended to submit a request for extension of time of 18 months. As at January 2009, it was estimated that SAPA was currently 15% complete and this was consistent with the Commissioners' own observations during their visit to the site on 20 January 2009. The projected extended completion for SAPA was September 2011. SGC further anticipated that a financial claim would be submitted for an estimated additional \$19 million in addition to the apportioned Contract Price of \$189m (\$630 x 0.30).

International Waterfront Project

- 23.27. This project, together with the Prime Minister's residence, is put forward as demonstrating what can be achieved by the proper and informed use of Design-Build procurement.
- 23.28. As already noted in Section 15 above, the project was completed to time and budget with less than 1% of the Contract Sum being represented by variations. It needs to be stated that such a level of performance is not achieved without careful and active project management at site level, which was provided by Genivar. Mr. McCaffrey rightly questioned whether the avoidance of claims from the Contractor could be explained by the original price including "*so much fat in that price that the need to pursue claims did not arise*". Mr. Shenker of Genivar responded, stating that the price had been broken down in some detail and compared to other benchmarking data. This had revealed that the Contract did represent value for money, although the data upon which this conclusion was based has not been divulged.

³¹² Sect 3.4.

23.29. In addition to positive project management Mr. McCaffrey identifies, as a factor in the success of the Waterfront Project, the sound financial standing of Bouygues, which enabled them to act decisively to circumvent difficulties which might have slowed down other contractors.

Chancery Lane Office complex

23.30. The proposed Chancery Lane Complex was intended to be a major feature in the development of San Fernando. The Project included offices, retail outlets, a library and car parking, to be provided under a Design-Build package. On 2 July 2004 UDeCOTT submitted Requests for Proposals (RFP). The preferred tenderer was Johnson International Ltd. of Turks & Caicos whose initial proposal was submitted on 30 July 2004. The completed Proposal Documentation was submitted on 22 October 2004 and detailed Contractor's Proposal on 3 May 2005. The Contract was executed on 8 June 2005 incorporating the FIDIC Plant and Design and Build Conditions of Contract (1999) with Particular Conditions amending Clauses 1-20 and additional Clauses 21-28. Johnson's designers were Design Collaborative Ltd., Architects and Town Planners.

23.31. The preliminary cost estimate for the project in 2004, before proposals were invited and therefore before the design was established, was some \$100m. The final cost as estimated in March 2009 was \$732m. These figures have given rise to newspaper reports, before the start of the second hearing, suggesting that costs were out of control. While the matter was not dealt with at the oral hearing, UDeCOTT published a paid advertisement³¹³ giving reasons for the apparent escalation of costs, which were further detailed in a report presented by Arun Buch.³¹⁴ Major increases in cost over the original estimate of \$100m were accounted for by the following:

- (i) the contract price as let to Johnston International Ltd was \$296m
- (ii) Expansion of the car park cost \$65.5m
- (iii) Re-location of services cost an additional \$1.6m
- (iv) Other change orders were costed at \$1.4m
- (v) Extension of time and other claims by contractor were valued at \$48.2m

³¹³ Daily Express 19 March 2009 p 47

³¹⁴ Report 20 March 2009

- (vi) Fit-out costs amounted to \$127m
- (vii) Additional costs of dislocation and re-location of tenants amounted to \$10.7m
- (viii) Land acquisition, legal and insurance cost were \$9.2m
- (ix) Owner's contingency fee was \$42.3m
- (x) Project management fees (UDeCOTT and Genivar) amounted to \$33.7m.
- (xi) VAT amounted to \$95.5m.

23.32. The adjusted contract sum (\$413), including the above matters, represented an increase of some 40% over the contract sum, but the major cause of escalation was the car park extension. Apart from this the cost increase was around 17%. Mr Buch noted in his report that that base building cost was \$813 psf which represented the "best bargain for UDeCOTT" particularly given that sub-soil conditions were more difficult than GCP and more like those at Tarouba (where foundation costs escalated to 3 times). Overall the project cost was \$1275 psf compared to nearly \$1500 for the GCP and Waterfront.

23.33. Arun Buch commented further that the Design-Build approach worked very well as UDeCOTT had picked the "right team" which drove the project forward in spite of obstacles, which were solved as they arose. This cost the contractor money but saved time. This was to be compared to GCP where, according to Mr. Buch, simpler problems generated extensive paper trails with no or delayed decisions. In Mr. Buch's view the Design-Build team at Chancery Lane showed the level of integrity and professionalism necessary to achieve a successful outcome.

Financial Complex Tobago

23.34. This was intended to be a modest conversion and upgrade project of an existing two-storey office building into a financial complex. The original building, which had been used as a Post Office, was constructed in reinforced concrete and was approximately 30 years old. A geotechnical investigation was carried out in early 2003 which recommended the use of piles for the new building. The professional team appointed comprised Alvin Dawsett as architect, Romain & Associates as structural engineer and Welch Morris & Associates as QS. UDeCOTT was the developer on behalf of the Tobago House of Assembly (THA). Invitations to tender were sent out in February 2004. Heron Lewis Construction, the lowest of eight tenderers, was notified

of the contract award on 24 August 2004. The contract commencement date was 16 February 2005 and original completion date 15 May 2006 (15 months). When the Commissioners inspected the building works on 3 February 2009, the current estimated completion date was said to be June 2011.

23.35. The Commissioners, together with lawyers for the parties, attended the site of the works on 3 February 2009, accompanied by Patrick Caesar (NIPDEC/UDeCOTT, Project Manager) with Ivan Daly and Winston Chin Fong (UDeCOTT), Noel Providence (Project Manager for Heron Lewis Construction) and Reginald De La Rosa (Client's Clerk of Works). The Commissioners were informed that for works in Tobago NIPDEC and UDeCOTT worked together and on occasions shared staff (Mr Caesar). After viewing the works a "round table" discussion was conducted at which the Commissioners ascertained from those present the history and present circumstances of the project as summarised below.

23.36. The construction works duly commenced in February 2005 with the driving of piles outside the perimeter of the existing building. When a proportion of the piles had been driven it was reported by the contractor that the structural concrete of the existing building appeared to be under-strength. It appears that this was revealed through the reaction of the building to the driving of piles in close proximity. The structural engineer conducted tests on the existing structure and concluded that the building had to be demolished. The design consultants then took the opportunity to redesign the building, adding two additional floors and revising the building design, which was made available to the client, the THA, in November 2005.

23.37. Heron Lewis Construction Limited (Heron) was asked to submit a price for demolition of the existing building. In October 2005 a price of \$1,776,840 was quoted which was considered too high, despite further negotiations. A decision was made to tender the demolition work. Following numerous further negotiations by the professional team, UDeCOTT intervened to negotiate a contract with the proposed sub-contractor, Martineau Construction Limited for the demolition of both the old Post Office building and the old bus terminal for the sum of \$1,550,000, the demolition to include pile caps. However, the original construction contract remained in being. Heron was accordingly requested to carry out the demolition works using

Martineau as sub-contractor, with an additional mobilisation fee of 10% being paid to Heron. The demolition works were undertaken on this basis and completed in July 2006.

23.38. Between July and October 2006 the consultants undertook revision of the design of the project. The final design involved replacement of the existing building with a new four-storey structure involving a new piling layout. Piles were procured and arrived on site between December 2007 and March 2008. After pile testing, piling commenced in April 2008 and was completed in August 2008 with 100 additional piles, added as a result of the pile tests. The original accepted tender sum was \$31,817,102, including VAT. In September 2008 the quantity surveyor submitted a revised cost for the four-storey structure in the sum of \$96,101,488. As at January 2009, negotiations on the revised contract price were continuing with Heron, notwithstanding which they had, by that date, driven all the new piles and carried out a substantial proportion of the new pile cap construction. The new building, when completed, will be twice the size of the original project but the cost will be more than three times the original. The project, if completed by June 2011 will be some five years late.

23.39. Plainly a proportion of this delay, and additional cost, is attributable to the changing scope of the works and necessary time taken up with re-negotiation of the contractual arrangements. According to UDeCOTT's report to the Commission³¹⁵ there were additional causes of delay as follows:

- (i) Delays in submission of test pile location drawings by structural consultants, which were due in January 2007 and submitted in March 2008;
- (ii) Delays in bringing piles to site between June 2007 and March 2008;
- (iii) Delays due to repair to pile driving hammer, July to August 2008;
- (iv) Delay in submission of construction drawings by consultants, which are still awaited;
- (v) Outstanding requests for information and technical queries by contractor, which still await answers ;
- (vi) Slow response from consultants;

³¹⁵ Submitted in documentary form with annexures in March 2009.

23.40. UDeCOTT also raised the following matters as issues which are said to have effected the overall efficiency of the project:

- (i) Capacity of the architects, who are said to have insufficient staff to accommodate this and other major projects;
- (ii) Lack of response from Tobago House of Assembly: UDeCOTT is still awaiting response on various matters;
- (iii) Labour shortages in Tobago: the contractor has had to import skilled labour from Trinidad;
- (iv) Difficulty in getting approvals from the Division of Infrastructure and Public Utilities (DIPU): UDeCOTT continues to have problems securing necessary approvals for the project. To date the new architectural designs have not been approved because of objection to some aspects by DIPU;
- (v) Length of time for submission of revised BOQ from quantity surveyor: the revised BOQ was finally received in April 2008.

23.41. The above summary records the bare facts as presented by UDeCOTT. In the view of the Commissioners, however, there are at least two matters which call out for explanation and which appear to lie at the heart of the gross delay and additional cost which is being incurred. First, no satisfactory explanation is offered as to why the poor state of the original Post Office building was discovered only after the contract for construction of the original modest project had been let, and indeed after pile driving had commenced. The fact that UDeCOTT and the THA have taken the opportunity (subject to DIPU approval) to construct a much enlarged building does not in any way justify the huge delay and additional cost.

23.42. The late discovery that the original building had to be demolished effectively negated the whole of the original design effort and the time taken up in tendering and placing the contract, which would in any event have had to be re-priced to whatever new design was decided upon. This would have been the case had the project continued as a two storey development. No doubt some of the costs expended on the original pile installation could have been saved by adhering to the original modest design as closely as possible. The decision to switch to a larger four-storey building inevitably

meant that the cost of the works carried out up to the discovery that the existing building had to be demolished was almost entirely wasted.

23.43. The second unexplained factor, which has placed UDeCOTT and THA in a parlous contractual position as regards additional cost, is the failure to terminate the original contract with Heron Lewis Construction at the point it was decided to demolish the original building and necessarily to embark on a different project. Allowing a reasonable time to consider the options, it should have been apparent to UDeCOTT and THA within weeks, or three months at most, that the cheapest option would be to pay for the work carried out together with prospective loss and profit, and to start with a clean sheet, no doubt offering Heron Lewis Construction Limited the opportunity to re-tender for the new project, when decided upon. Instead the original contractor remains on site and, although the financial and legal position under the contract is unclear, it is inevitable that major claims will be brought for additional payment as a result of Heron remaining on site between mid-2005 and the current estimated completion date of 2011.

23.44. UDeCOTT responded to the matters above in Final Submissions³¹⁶, in which it was pointed out that the original structure had been assessed by Engineers from UWI. The Commissioners make it clear that they are not concerned to attribute blame to any organisation or individual but note that the structural assessment was obviously inadequate. UDeCOTT also question whether termination of Heron's contract could be seen to be the cheapest option at the time. As to this the Commissioners entertain little doubt that re-tendering was the obvious option for the new and different project being undertaken. However, the Commissioners have not sought to investigate what decisions were made and by whom, but believe the likely explanation of events is that there was no-one clearly in charge and that the option to terminate Heron's contract was allowed to go by default.

23.45. The conclusion is that a modest project which should have been carried out with reasonable economy, has turned into a financial fiasco with virtually no remaining controls on cost. This state of affairs is substantially the result of the two factors

³¹⁶ Dated 16 March 2010

identified above, namely the initial failure to establish the structural state of the original building, and the subsequent failure to take contractual control of the project in order to re-tender the work when finally redesigned. In short, this was another major failure of project management.

Brian Lara Stadium

23.46. The somewhat unusual history of this project is set out in section 16 above. It is evident that the project has suffered massive delays, which are continuing. The delays can be seen as having two aspects. The first aspect is a series of procedural and administrative failures which resulted in the initial, highly ambitious, programme to complete in time for the ICC competition in 2007 being missed. This led to the situation in which the project became saddled with a contract for all the outstanding packages which was entered into only in October 2006, the *raison d'être* for which was a last-ditch attempt to secure completion by early 2007. Yet by October 2006 completion by the ICC deadline was already a lost cause. The second aspect of the project delay is the events surrounding the individual package contracts, particularly the contract with HKL for balance of the work, PK 3 and 5-8.

23.47. The performance of HKL on the site from October 2006 has been characterised by excessive and continuing delays and serious lack of progress, which is still evident at the site. In this regard it can be seen that throughout 2007 and 2008 the project encountered increasing problems leading to progressive slow-down of the work almost to the point of standstill. This was accompanied by increasingly soured relations between UDeCOTT and its principal consultant, TAL, leading to UDeCOTT deciding to bring in Genivar, who eventually replaced TAL in 2008.

23.48. The delays which built up in 2007 and 2008, accompanied by increasing advancement of the projected completion date, are conveniently summarised in the first interim report of Gerry McCaffrey. Mr. McCaffrey's report was based primarily on conversations with UDeCOTT personnel and resulted in a list of 26 potential causes of delay (listed as a to z). These were confirmed in the course of oral evidence by Messrs. Christopher Pilgrim, Hayden Paul and Winston Chin Fong, given on 26 March 2009. Having reviewed Mr McCaffrey's report and the evidence presented,

the likely causes or contributory causes of delay to the project can be summarised as follows.

23.49. In the view of Mr. Pilgrim, the most significant causes of delay were: suspension of the design work initially between July and October 2005 (h), insufficient resources applied to available work-faces (r) and general slow progress by contractor (s).³¹⁷ Mr. Paul additionally identified the following causes of delay: mistakes in design assumption (d), the change of location to Tarouba (q), over demand on resources and materials due to the over-heated economy (o) and ground conditions differing from assumptions (l).³¹⁸ Mr. Chin Fong additionally identified causes of delay as: incompleteness of the design (e), inexperience of designers and undue complexity of the design (f), delayed start to construction (g), lack of design team input September 2007 to July 2008 (j), designers being insufficiently responsive (m), inclement weather (n), growth in scope of work (p) and quality control issues (t).³¹⁹

23.50. Mr McCaffrey also offered the instinctive view, having spent three intense days with UDeCOTT staff, that HKL would probably be able to substantiate a reasonable case to justify around half the overall delay experienced on the project. It would follow that the balance will be delay for which the contractor is culpable.

23.51. With regard to cost over-runs, this can similarly be seen as having two aspects. The first aspect is escalation from cost estimates and budget figures when compared to actual tendered amounts. The second aspect is the increase in sums payable under the individual construction contracts. As in the case of delays, the primary focus is on the contract let to HKL for PK 3 and 5-8. The over-all figures for increases in sums payable under individual construction contracts can be summarised as follows. These figures do not include separate professional or design fees, which have been estimated at \$103.7m up to 2009.

³¹⁷ Transcript 26 March, p.181.

³¹⁸ Transcript 26 March, p.179

³¹⁹ Transcript 26 March, p.180 and see also review of causes of delay at p.125-178.

	Contractor	Contract Price \$	Cost Increase \$	Delay
PK1 Earthworks	Seereeram Bros	57m	97m	7 months late
PK2A Piling	GWL	23m	5m	12 months
PK4 Pitch & Field	Terra Forma	8m	n/a	n/a
PK2 Building Structure	HKL	168m	40m	Start 10 months late, finish 24 months late.
PK3&5-8 (excluding PK2)	HKL	211m	148m plus (uncompleted)	Approx 3 years to date

23.52. Despite requests from the Commission, no up-to-date figures were provided by UDeCOTT. However it was reported³²⁰ on 4 September 2009 in answer to a Parliamentary question, that some \$700m exclusive of VAT (15%) had been spent on the project to date including site works, drainage, roads and utilities (\$108.7), stadium structure (\$419.5), project design, project management, construction management, consultants, OSHA, security and site office (103.7m). On 10 September it was reported that UDeCOTT's figure for construction costs to date was \$685m with a further \$31.8m to be spent in fiscal year 2010.³²¹ These latter figures have been used to calculate the cost over-run to 2010 in the table above, but it is to be noted that the project is still far from complete.

Initial Conclusions

23.53. The above summaries disclose a pattern from which can be identified factors common to projects which have been successful. One of these is obviously the use of design-

³²⁰ Trinidad Guardian, 5 September 2009

³²¹ Newsday 10 September 2009

build rather than design-tender, a conclusion urged on us by a number of parties, notably those representing various arms of Government. However, we do not consider it justified to draw this particular conclusion for a number of reasons already discussed elsewhere. First, there are only three design-build projects (the Waterfront, NAPA and the PM Residence) which are arguably successful in terms of time, cost and quality, each of which has been let on a particular form of design-build. Further, each of the three projects was undertaken by a foreign contractor and the conclusion that successful projects require a foreign contractor using design-build would be quite unwarranted. Chancery Lane could be included as a fourth successful design-build project which, however, fails on the issue of delay. It was, however undertaken by contractors who rank as “local”.

23.54. It is of some credit that the majority of the projects considered, irrespective of the procurement method, have been undertaken economically, if not strictly to original budget. This includes the Government Campus project and Chancery Lane, each substantially undertaken by local contractors. Where both of these projects fail, however, is in delay to completion. This is indeed one of the recurrent features of most projects examined in Trinidad & Tobago with only a few notable exceptions. Delay seems to be accepted as a way of life with no expectation of the payment of any penalty or of the contractors otherwise being held to account. It is surprising that UDeCOTT, with all the professional resources available to it, should not take a firmer line on delay and insist on holding contractors to account where proper grounds for extension are not established.

23.55. Another creditable feature of all or most of these projects is the general absence of quality issues. It would be wrong to say that no such problems exist, but the general quality achieved by both foreign and local contractors has been acceptable and for the most part good. The exceptions to both the above creditable features are the last two projects analysed: the relatively modest Tobago Financial Centre and the very substantial Brian Lara project. Both concern projects which, by any normal standards, are failed projects. In each case it has been said that UDeCOTT should have better managed the failure, once it was apparent. In each case this should have led to termination of the relevant contract but in neither case has this been done.

23.56. The difference is that the Tobago Financial Centre will eventually be completed satisfactorily, albeit at greatly increased cost and very considerable delay. Regrettably, it is not at all clear how or when the Brian Lara project can be brought to anything approaching satisfactory completion. The delays and additional costs are of such magnitude that they will stand as monumental examples for future projects to avoid. Furthermore, the grossly over-designed steel superstructure will remain an object lesson for designers.

23.57. The common feature which links success, and separates out failure, in the case of UDeCOTT and any other developer, is management. Good and timely management may be provided by contractors or by separately employed project managers. The Brian Lara project shows that it is not enough simply to employ expert managers: they must be put in the position to use their expertise. Regrettably we have been disappointed by the quality of management demonstrated by UDeCOTT itself; and the same conclusion is to be drawn in respect of other Government Agency companies, particularly NIPDEC. Their proper function should be to ensure that appropriate management resources are available and that managers are motivated and enabled to use their expertise effectively.

**REPORT OF THE ENQUIRY INTO THE
PUBLIC CONSTRUCTION SECTOR,
TRINIDAD and TOBAGO**

By the Commissioners

Professor John Uff CBE QC (Civil Engineer and Barrister)

Desmond Thornhill (former Perm Sec, Ministry of National Security)

Kenneth Sirju (Registered Civil and Structural Engineer)

Israel Khan SC (resigned 11 August 2009)

Secretary to the Commission

Mrs Ida Eversley (resigned 1 December 2008)

Ms Judith Gonzales, Attorney at Law

PART IV: CLEAVER HEIGHTS

24. Introduction

- 24.1. The Cleaver Heights Housing Development (Cleaver Heights for short) falls within a Government policy introduced in 2002 to increase the provision of low and middle income residential housing with an initial target of 10,000 homes per year. The bulk of this task was to be handled by the National Housing Authority (NHA), a government-owned Agency whose constitution mirrored that of many other such agencies discussed in earlier sections of this Report. NHA was mandated to deliver 8,000 units annually, with the balance being provided by the private sector. The number assigned to NHA was later reduced.
- 24.2. A Request for Proposals for a number of potential sites, including Cleaver Heights, was issued by the NHA, in the form of newspaper advertisements, in August 2003. NH International (Caribbean) Limited (NHIC) responded and subsequently submitted a proposal in 2004 for 408 houses to be built on land owned or controlled by NHIC. After negotiation and obtaining Ministerial approval a letter of award was issued in May 2005 and the work then proceeded. Later in 2005, the functions and powers of the NHA were transferred to a new statutory body, the Housing Development Corporation (HDC). The HDC Act 2005 was assented on 13 September 2005. Thus, staff of the NHA transferred to the new HDC, including Ms Margaret Chow as Managing Director (acting) and management of the Cleaver Heights project was taken over by the HDC from this date. The earlier contractual arrangements for the development were, however, subject to the rules and procedures of the NHA.
- 24.3. Construction of the houses and associated infrastructure proceeded, subject to certain delays. By late 2008 the project was nearing completion but was held up by a number of issues. In about September 2008, when the present Enquiry was already under way, certain contractual issues arose which resulted on, 10 December 2008, in the altering and enlargement of the Terms of Reference of the Commission to include these issues (referred to herein as the First Cleaver Heights Issues).
- 24.4. Shortly after the start of the Enquiry hearings, in January 2009, a number of documents were provided to the Commission concerning the First Cleaver Heights

Issues. Directions were given by the Commission for a hearing during the second session of the Enquiry in March, but this was deferred and the issues were eventually heard on 14 and 15 May 2009 during the third session of the Enquiry. After completion of those issues, the Terms of Reference were again altered and enlarged, on 21 May 2009, to include further issues concerning alleged non-compliance with contractual and legal requirements (referred to herein as the Second Cleaver Heights Issues). Further documents were provided to the Commission concerning the Second Cleaver Issues which were directed to be heard in September 2009. The hearing in September 2009 was aborted owing to the defect in the Commission's constitution and the Second Cleaver Heights Issues were finally heard on 7 to 9 December 2009.

- 24.5. While the Terms of Reference, as successively altered, raise wide issues concerning Cleaver Heights, the documents and evidence provided to the Commission concerned more specific topics, which are reviewed in the sections below. Further, while the Second Cleaver Heights Issues potentially include all the issues 1(i) to 1(vii) of the original Terms of Reference, only some of those issues have any application to the Cleaver Heights project. Thus, the topics comprising the First Cleaver Heights Issues are Contractual Issues concerning procurement rules, issues as to the contract and title to the land and particular issues concerning the stated contract price. The topics comprising the Second Cleaver Heights Issues are Performance Issues, concerning compliance with Statutory and regulatory requirements, design and management, cost over-runs, delay and alleged defective workmanship.
- 24.6. While the hearing in May 2009 was intended to complete the examination of the First Cleaver Heights issues, a number of parties proposed that the Commission should consider further evidence and material in relation to these issues at the final hearing, which eventually took place in December 2009. Further evidence and material was provided which was so considered, and all the evidence and material received in relation to the First Cleaver Heights issues is reviewed in section 25 below. Evidence and material in relation to the Second Cleaver Heights issues is reviewed in section 26. General conclusions in relation to the whole of the issues considered are set out in section 27.

25. **First Cleaver Heights Issues: Contractual Matters**

- 25.1. The procurement of the Cleaver Heights project is documented and can be followed in the correspondence provided. NHIC was pre-qualified with NHA from 2002³²². In August 2003 NHA placed newspaper advertisements requesting proposals for a number of potential sites, including Cleaver Heights. NHIC responded and on 22 December 2003 NHA invited submission of a specific proposal for development of the site. An outline proposal was submitted on 22 January 2004 but without any firm price for the development. The letter proposes that any Joint Venture Agreement should take the form of an agreement which already existed in their development at North Taruba. However, it appears the matter was not followed up for some time.
- 25.2. On 1 December 2004, following “*recent meetings*” NHIC submitted a formal proposal for “*Design Finance and Construction of Housing Units at Cleaver Woods North*”³²³. It is stated that the scheme has been developed “*incorporating comments from Town & Country Planning and EMA approvals are almost finalised*”. The attached outline specification states expressly that any treatment plant for treatment of effluent liquids is excluded from the proposal and will be provided by the NHA; also that should T&TEC insist on an underground ducted network for electricity supply, this would be an additional cost. The proposal included prices for three housing-types, being a single storey detached unit, a single storey duplex and a two storey town house. A price was also given for sale of 64 acres of land at \$22,000,000 and for the development of infrastructure on the land at a price of \$18,480,000, giving a total of \$40,480,000. NHA commissioned two land valuation reports, one of which valued the undeveloped land at \$11m; the second valued the developed land at £30m. NHA do not appear to have pursued these valuations with NHIC and instead accepted the higher figures offered by NHIC. Thus, the price for the specified house units and the land and infrastructure, including two provisional sums of \$500,000 each, was correctly stated as \$135,698,000.
- 25.3. There were then meetings and negotiations which resulted in a revised offer from NHIC on 21 January 2005, in which the price of the single storey Duplex units was reduced from \$221,000 to \$202,500 with adjustments to the specification. Other

³²² HDC Submission 21 January Appendix D

³²³ Relevant correspondence is at Appendix E to HDC Submission 21 January 2009

elements (land and infrastructure and provisional sums) remained unaltered. On 22 March 2005 NHA wrote to NHIC stating that favourable consideration was being given to the proposal, requesting that NHIC should produce, inter alia, a “cash flow projection” and additionally an “advance payment bond” of 10%. It is noted that the final decision requires Board approval and the letter concludes:

“Between the period of such approval and until a formal agreement is executed between the parties, the authority’s letter of acceptance (which we will issue consequent on such approval) and your proposal dated January 22 2004 shall constitute a binding agreement between the parties”.

25.4. NHIC responded on 31 March, accepting most of the matters in the letter of 22 March but noting that the number of units had been amended to conform to town and Country Planning requirements. NHIC state also that

“The binding agreement between the parties should be the Authority’s Letter of Acceptance and our proposal dated 1 December 2004, subsequently amended by a letter issued on 21 January 2005 (The proposal dated 22 January 2004 was subsequently superseded)”

At this stage, the numbers of houses and the agreed fixed prices therefor was as follows

Single storey detached 77 @ \$271,000	20,867,000
Single storey Duplex 74 @ \$202,500	14,985,000
Two storey town houses 257 @ \$221,000	56,797,000
Sub-total	\$ 92,649,000

25.5. The proposal to award the Contract to NHIC was put to the NHA Board in a note dated 11 April 2005, recommending the award of a “Joint Venture Agreement with NH International Limited” for 408 housing units for which the (correct) price of

\$92,649,000 is quoted. However, the total “fixed sum” for the project is stated as \$143,449,000 with no further explanation. The note was unanimously accepted at a Board Meeting on 15 April 2005, the minutes of which repeated the Contract Sum as quoted in the Board Note. A “*Pre-Construction Meeting No. 1*” was held on 25 April 2005 at which it is stated that NHA “*has been requested to prepare the letter of award in favour of NHIC based on the letter of 22 March 2005*”.

- 25.6. On 26 April 2005 NHA, after receiving Board approval, submitted a list of six housing projects including Cleaver Heights to be agreed by the Minister Dr. Keith Rowley who subsequently signed the letter of authorisation. Finally, by letter dated 3 May 2005 NHA wrote to NHIC stating that:

“the Board of the Authority is pleased to award a Joint Venture Contract to your company for the design, finance and construction of building works at the above named site inclusive of all associated infrastructure necessary for the satisfactory completion and delivery of serviced housing units to the Authority according to the following schedule for the sum of \$143,449,000”.

The letter restates the constituent figures within the Contract Sum as:

<i>Housing units</i>	<i>\$92,649,000.</i>
<i>All infrastructure and utility works</i>	<i>\$40,800,000.</i>

The letter concludes by stating:

“This letter together with the attachments shall form a binding agreement with the NHA until the NHA is satisfied that all the prerequisite conditions are met following which a formal contract shall be executed”

The attachments included the form of contract for “Joint Venture Agreement for the Construction of Housing Units and Infrastructure Works” It is common ground that no formal contract was ever executed.

Submissions and Evidence

- 25.7. During the January 2009 hearing the Commission requested a submission from HDC on Cleaver Heights. This was eventually produced on 21 January, prepared by the acting Manager Director, Ms. Margaret Chow and Mr Reynold Patrick. The Submission provided information on the tender and award process, which had been carried out by HDC's predecessor, NHA; and drew attention to errors contained in the Letter of Award, which had been repeated in subsequent documents. It is said that the errors were not detected by HDC personnel until late 2008. It was in September 2008 that the errors or discrepancies came to the public attention through a statement in Parliament by the Hon Prime Minister. This was followed by the enlargement of the Terms of Reference on 10 December 2008, introducing the First Cleaver Issues.
- 25.8. The submission on behalf of HDC was followed by a statement dated 27 January 2009 from the line minister with responsibility for HDC, Dr Emily Dick-Forde which raised the following additional concerns which, in her view, had not been satisfactorily explained.
- (i) Lack of a signed contract between NHA/HDC and NHIC.
 - (ii) Inconsistencies both in HDC and NHIC documents on the agreed contract price.
 - (iii) A total variation sum of approximately 23% of the contract sum, of which 93% had been paid to NHIC with no evidence of internal approvals.
 - (iv) NHIC had received full payment for the land but no title had yet been transferred to HDC nor had documents been lodged confirming NHIC's ownership.
 - (v) The number of contracted houses had been reduced from 408 to 383 with no commensurate decrease in price.
 - (vi) The project has only outline planning permission and there are no final regulatory approvals from relevant authorities.
 - (vii) There was no evidence of established project management tools such as cost analysis and change order procedures.

25.9. Ms Chow produced a second statement dated 16 March 2009 in response to the statement of Minister Dick-Forde which, according to Ms. Chow “*contains significant inaccuracies and omissions*” and which she considered reflected odiously on her in a personal and professional capacity. This had been brought to the attention of the HDC Board on 30 January 2009. Ms. Chow subsequently prepared her second statement which was intended to be filed on behalf of HDC. However the statement was not approved by HDC and on 16 March 2009 Ms. Chow tendered her resignation and submitted the statement to the Commission as her own response, not on behalf of HDC. Ms Chow’s answers to the points made in the Statement of the Minister were the following:

- (i) She was not involved in contractual arrangements.
- (ii) The inconsistencies were the result of errors. However, she drew attention to two different versions of Valuation 39³²⁴, the former showing only the original typed version of the “contract amount” in the sum of \$134,129,000 which was the version as approved by Ms. Chow. It appears the document was subsequently altered in manuscript by the Quantity Surveyor, Learie Bowen.
- (iii) Variations amounted to 17.15%, not 23% of the contract sum and comprised
 - (a) variations suggested by NHIC to the value of approximately \$3.7 million;
 - (b) variations mandated by statutory authorities (WASA, T&TEC etc.) amounting to approximately \$17.2 million and
 - (c) variations requested by NHA/HDC amounting to approximately \$1.77 million.
- (iv) NHIC has not received the final 5% payment for the value of land. Ms. Chow became aware that the land was in the ownership of Cleaver Heights Development Company Ltd during the course of preparing HDC’s Submissions. A report on the status of the land was submitted on 27 January 2009³²⁵ which indicated that arrangements were being made to have the lands released from a mortgage in favour of First Citizens Bank Ltd.

³²⁴ MC3 and MC4

³²⁵ MC6

- (v) Payments due to NHIC are dependent upon the number of units completed and accordingly any reduction in the number of units will be reflected in the payment to be made.
- (vi) While Ms. Chow was not involved in regulatory approvals, it is not uncommon for such approvals to be obtained during the course of building projects or after their completion.

25.10. HDC responded to Ms Chow's statements by a further statement from Sydney Andrew McIntosh, current Chairman of HDC, who stated that the current Board dissociated itself from certain parts of those statements. In particular, the Board did not endorse her explanation for certain irregularities or for the treatment of discrepancies in the contract price. At the third hearing HDC was represented by Dr. Lloyd Barnett, who was instructed in place of Counsel previously acting, Ms. Deborah Peake SC. In addition to the statements of Ms Chow, the Commission received the following further statements or submissions pertaining to the First Cleaver Height issues:

- (i) Submission by Dr. Keith Rowley dated 9 March 2009.
- (ii) Statement of John Connon, MD of NHIC dated 13 March 2009 together with Appendices.
- (iii) Statement of Colm Imbert, Minister of Works & Transport dated 29 April 2009.
- (iv) Statement of Sydney Andrew McIntosh, Chairman of HDC, dated 12 May 2009

25.11. Oral evidence was heard by the Enquiry on 14 and 15 May 2009 when the following witnesses gave evidence and were cross-examined.

Margaret Chow

John Connon

Minister Dick-Forde

Minister Imbert

Dr. Keith Rowley

Closing Submissions on behalf of HDC were made by Dr. Lloyd Barnet, for HDC on 16 May. Closing Submissions for other parties on Cleaver Heights issues were made in the course of general closing submissions. However, further submissions were received after the further hearing, following extension of the Terms of Reference on 21 May 2009.

25.12. A further hearing took place in December 2009 at which the Commission received further evidence, including evidence relevant to the First Cleaver Heights issues. The additional witnesses who gave evidence and who were also cross-examined were:

Noel Garcia (Chief Executive Officer, HDC up to June 2008)
Reynold Patrick (Project Manager)
Learie Bowen (Senior Quantity Surveyor).
Minister Imbert
John Connon

After the conclusion of the hearing additional written submissions were received from HDC, NHIC, Dr Keith Rowley, the Attorney General and from Minister Imbert.

Applicable Procurement Rules

25.13. The relevant procurement process as at May 2005 was that of the National Housing Authority. No formal rules governing procurement were produced, but Ms. Chow in her First Statement³²⁶ listed twenty steps involved in the procurement and award process including:

- Public request for expressions of interest
- Prequalification
- Receipt of proposal from Contractor
- Pricing of proposal by NHA
- Negotiation with Contractor
- Agreement with Contractor
- Approval of Board
- Issuance of letter of award

³²⁶ Para 2.4

Ms. Chow was cross-examined and asserted that the Cleaver Heights Contract was awarded in accordance with NHA Tender Rules³²⁷. However, Dr. Lloyd Barnett in his Final Submission contended that HNA remained subject to the Central Tenders Board Act³²⁸ particularly in terms of the requirement to enter into a formal contract: Section 26 of the Act requires that where an offer has been accepted by or on behalf of the Board there shall be a "*formal contract for the supply of the Articles or the undertaking of the works or services*". No document containing formal procurement or tender rules of the NHA was produced.

25.14. A new policy initiative was agreed by the Cabinet on 14 October 2004³²⁹ for expansion of the Joint Venture Programme by implementing "*turnkey projects*" with private entities. The intention was that housing would be provided on privately owned land where the land owner, while retaining ownership, was to arrange for the design, construction and financing of housing units, which would be sold by the land owner direct to intended purchasers at NHA recommended prices, in keeping with Government policy. Sale of the units was to be guaranteed by NHA who would carry out preliminary financial screening of beneficiaries to obtain financing for the purchase of the houses prior to the start of construction³³⁰. The Developer would receive payment only at the point of sale and would thus need to provide private finance up to this point³³¹. As appears below, this was not the procedure employed for the Cleaver Heights project and it will be necessary to examine the reasons for this.

25.15. Although not directly relevant to the award of Cleaver Heights, questions were asked about the procurement rules applicable to HDC. Pursuant to Section 29 of the Housing Development Corporation Act, HDC is required to make rules "*relating to the award of tenders and contracts*" but until such rules are made the Corporation is to follow the procedures of the Central Tenders Board Ordinance. Draft rules were produced but Dr. Lloyd Barnett confirmed that (as at May 2009) the draft rules had

³²⁷ Transcript 14 May p94

³²⁸ No. 71: 91 of 1965

³²⁹ Cabinet Minute No 2908

³³⁰ Statement of Sydney Andrew McIntosh, Chairman of HDC, dated 12 May 2009

³³¹ A further Cabinet Minute No 3431 of 9 December 2004 deals with the procedure for purchase of private land by NHA

not yet been adopted so that the HDC (as well as NHA) was formally subject to the rules of the CTB.

Compliance with Procurement Rules

- 25.16. It is clear that the Cleaver Heights Project was unusual in a number of respects and, while it could have been set up in accordance with the Government initiative for “*turnkey projects*” within the Joint Venture Programme issued in October 2004, the earlier request for proposals, of August 2003, pre-dated the proposals and made no reference to the need for the Contractor to finance the project up to the point of sale. Further, although the Government initiative of October 2004 should have been in place by early 2005, it is clear that the meetings and negotiations between NHIC and NHA from December 2004 onwards were conducted on the basis that the work would be financed by NHA in a conventional manner.
- 25.17. Minister Imbert, in a final submission dated 23 February 2010, presented new evidence as to the origin of the Cleaver Heights Project as summarised in para 25.1 to 25.6 above. It was said that outline approval for development had originally been granted in 1983, and that the development process had been revived in 2002 as referred to in a letter dated 17 September 2002 from Mr. William Agard of CEP, stating that the development was “*now likely to proceed*”. Other correspondence is referred to in July 2003 with Mr. Garcia of NHA, significantly occurring before the request for proposals was first advertised in August 2003. This led Mr. Imbert to suggest that Cleaver Heights Development (CHD), as owner of the site, had been provided with confidential information by NHA indicative of favouritism or manipulation. Minister Imbert further emphasised the failure of CHD or NHIC to provide information required of tenderers which, in his view, demonstrated NHA’s lax approach to the contract which was eventually placed in May 2005. This is material which should have been introduced when the relevant witnesses (Mrs Chow and Mr. Garcia) were available to respond, and not after the close of the hearings. Despite this, and having noted the Minister’s comments, the Commissioners remain of the view that the development of a site owned by the developer gives rise to different considerations when tenders are invited. No company can bid for the work other than the site owner, and there can therefore be no competition between tenderers.

25.18. Minister Imbert, who was a member of the Government at all relevant times, expressed the view during his oral evidence that the Developer should have financed the project up to the point of handover. The Government's intention was that the Developer would be paid for the houses only when they were completed and conveyed. It may be noted that the original request for proposals of August 2003 does use the term "*Joint Venture*" but without definition. Further, it seems that the term as used in the Cabinet Minute of October 2004 refers to the general programme for the provision of housing between NHA and private developers, within which one option was for "*turnkey projects*". The "*Joint Venture*" proposed in 2003 refers to the fact that the land was to be provided by the Developer, who would also be paid for constructing the units.

25.19. It is to be noted that the "*Joint Venture Agreement*" produced by NHA and incorporated by reference in the Letter of Award dated 3 May 2005 in fact contains virtually no provisions which distinguish it from a conventional construction contract: particularly there are no terms governing the transfer of title to the land upon which the works are being constructed. Thus, while it is accepted by all parties, and indeed clear on the face of the correspondence leading up to the award, that the Contract included purchase of the land from the Developer, this is not reflected in the detailed contract documentation as it plainly ought to have been.

25.20. The Cabinet Minute of October 2004 did come to the attention of the HDC Board and is referred to in the note to the Board dated 11 April 2005 in the following terms:

"Cabinet by Minute No. 2908 of October 2004 details the procedure to be followed by the Authority in entering into Joint Venture Contracts with private land owners".

However, by this time, the proposal had been submitted and negotiated on a basis that was clearly contrary to those instructions, particularly with regard to the requirement that ownership of the land should remain with the private owner.

25.21. While the intention of the Cabinet Minute of October 2004 is clear, no rules or other contract documentation appear to have been drawn up for the purpose of implementing those requirements. The intention that the Developer should finance the project is in fact reflected in the Letter of Award of 3 May 2005 where, under the heading "*Financing*", Para 2(i) states as follows:

"The Developer shall secure financing for the project from any of the following leading agencies - First Citizens Bank; Royal Bank of Trinidad & Tobago; Republic Bank Limited; Scotia Bank of Trinidad & Tobago Limited; (subject to terms and conditions agreed between yourselves). However, until this facility is finalised the NHA will be responsible for providing finance for the works".

This appears to be the first such reference: the previous letter from NHA of 22 March 2005 is silent and indeed requests the Developer to provide a "*cashflow projection*" and an advanced payment bond (on the basis that NHA would make the advanced payment); and the pre-construction meeting of 25 April 2005 is also silent on finance being provided by the Developer. In oral evidence, Miss Chow stated that, while the NHA had envisaged being able to secure finance from the private sector, negotiations had fallen through and financing had reverted to use of government funds³³². Miss Chow further stated that HDC had never in fact entered into a contract involving provision of private finance. NHIC was in fact paid monthly on the basis of conventional valuations presented by the Developer and verified by NHA/HDC.

25.22. Further evidence relating to the financing of the "joint venture" contract was given at the final hearing in December 2009. Minister Imbert stated³³³ that the Cabinet on 6 April 2004 had approved financing arrangements by way of a credit facility with a number of commercial banks for the Joint Venture Programme by a bond issue in the amount of approximately \$1 billion. Subsequently the Cabinet decision of 14 October 2004 approved the Joint Venture arrangements for private landowners, subject to the overriding principle that they would be financed by the Contractor. The Cabinet Secretary had confirmed that the Cabinet never varied or rescinded these decisions.

³³² Transcript 14 May 2009 p.32

³³³ Transcript 9 December 2009 p.111-113.

25.23. Mr Garcia, in oral evidence, was taken through the stages leading to the contract awarded on 3 May 2005. There had been a note to the NHA Board dated 17 August 2004 recommending the use of turnkey projects, in which the private entity would, inter alia, provide land and finance for the project. This had led to the recommendation to Cabinet and a Cabinet Minute of 14 October 2004 pursuant to which NHA were to negotiate with private landowners for Joint Venture arrangements, with ownership of the land remaining with the private landowner. For the financing of the projects, arrangements had been discussed with a number of banks early in 2004 under which they would set aside approximately \$2 billion of funding. However, the Banks would not agree to an interest rate below 11.5%, which represented a cost which would be passed on to HDC. By late 2004 it was evident that finance by developers was not feasible. As a result, it was decided to go to Cabinet to propose the floating of a Bond, to be backed by the Government, at a lower interest rate. The Cabinet had agreed and the Bond had been raised by NHA/HDC, who therefore became the Funders for the Projects. Although Mr Garcia no longer had access to records, his recollection was that the interest rate charged was 5.75%.

25.24. Mr Garcia's evidence was challenged on behalf of Minister Imbert. It was put to him that the rate of interest proposed by the banks in February 2004 was not 11.5% but 9% with a reduction of 1% upon completion. It was put that there were other bonds issued by NHA/HDC, inter alia, to finance completed properties on which the purchaser had been unable to obtain mortgage facilities. Mr Garcia's recollection was challenged as to whether there had been any Cabinet decision 2005 authorising the issue of a bond.

25.25. At the conclusion of the evidence all parties were invited to provide a further submission clarifying the issue of financing for Cleaver Heights. A submission was received from Dr. Rowley³³⁴ which confirmed that he had been involved in meetings with bankers in late 2003 and early 2004 which led to the raising of funding of \$1.2 billion at an interest rate of 9% specifically for the Joint Venture Programme. However, further difficulties had arisen and no funds were ever drawn down. Dr

³³⁴ Dated 18 January 2010

Rowley produced a draft Cabinet Note from the Ministry of Housing entitled “*Approval to Float Bond for Government’s Housing Programme*” dated 10 March 2005. He stated that the Note had been approved and that a bond had been raised, as testified by Mr. Garcia.

25.26. Further submissions were provided by Minister Imbert³³⁵ challenging Dr Rowley’s account of the funding process; and a further response was provided by Dr Rowley³³⁶ in which he confirmed his earlier submission. Leaving aside the apparent rivalry between the Minister and the former Minister, it is clear to the Commissioners that the Cleaver Heights project was in fact funded by the Ministry of Housing, through HDC. While we can accept that there was, during the lengthy tender process, some change of intention with regard to funding, which is reflected in certain inconsistencies in the contract documentation, no person or body has, between 2005 and 2009, sought to challenge the legality of the funding arrangement finally adopted. Those arrangements cannot have been adopted without the knowledge of the Ministry of Housing and the Cabinet.

25.27. We conclude, therefore, that there was a change Government policy, by which the arrangements referred to in the Cabinet Minute of 14 October 2004 were not to be pursued and the Cleaver Heights Development was funded through a Bond raised by NHA/HDC with Cabinet approval. While Mr Garcia’s recollection of the interest rate to be charged by the banks was incorrect, the substance of his evidence is to be accepted.

25.28. A further issue arising from the foregoing is whether, in anticipation of the project being funded by the developer, NHIC included the cost of finance in their proposal and accordingly should have deducted it from the contract price when NHA took on the financing of the project. Mr. Connon, at the December hearing, stated that NHIC had not included the cost of finance in the offer which was accepted on 3 May 2005³³⁷. It was pointed out in the final submissions for NHIC that the project was first priced on 1 December 2004, subsequent to the discontinuation of the policy of

³³⁵ Dated 26 February 2010

³³⁶ Dated 9 March 2010

³³⁷ Transcript 9 December 2009, p 159

requiring developer to provide funding. Ms Chow confirmed that no housing contract had been awarded including finance. Clearly NHA should have been aware whether or not NHIC's quotation included finance. There was no contemporary request for clarification or for review of the price after it became clear that finance was to be provided by NHA. To the extent any doubt remains, the matter would need to be settled by arbitration or litigation.

Signed contract

25.29. With regard to the requirement for a "*formal contract*" no such signed document was produced. Minister Imbert made the point in his statement that there was an exchange of offer and counter-offer leaving open the possibility of disputes about the final contract terms. He also makes the point that at the end of the process HDC accepted some very disadvantageous contractual terms including terms as to payment for the land which was to be included within monthly valuations without any obligation, it appeared, to transfer the land. Mr. Imbert's view is that there was an implied obligation to transfer title upon payment for the land, although no such term is to be found within the contract. The question of transfer of title is considered further below.

25.30. Miss Chow's evidence was that she first realised that there was no formal contract only when preparing documents for the Commission i.e. in January 2009. Mr. Conan expressed the view that a Binding Contract did exist despite the absence of a formal document. His view was that the letter of acceptance was sufficient to create a Binding Contract³³⁸. The absence of a written contract was put in context in the cross-examination of Minister Dick-Forde when she confirmed advice from HDC to the effect that none of their large projects and none of the small projects either had a signed contract³³⁹. It was subsequently confirmed that as at January 2009 HDC had 64 large projects ongoing and 591 small projects, none of which had a signed contract. Large projects were those over \$50m in value. Thus, while there appeared to be no good reason why a formal contract was not signed between NHA and NHIC, it seems clear that to have done so would have been a highly unusual step and one which was presumably regarded, both by NHA and HDC, as unnecessary.

³³⁸ Transcript 14 May 2009 p.193.

³³⁹ Transcript 14 May 2009 p.247.

25.31. In strict legal terms, an exchange of correspondence can give rise to a fully enforceable contract provided that is the intention to be deduced from the documentation. As noted above, the NHA letter of 3 May 2005, which appears to form the end of the chain of negotiation, concludes with the words “*This letter, together with the attachments shall form a binding agreement with the NHA until the NHA is satisfied that all the pre-requisite conditions are met following which a formal contract shall be executed*”. No such “*pre-requisite conditions*” have been identified nor has attention been drawn to any other ground preventing the execution of a formal contract. There is, for example, no indication that terms still had to be agreed concerning the transfer of title to the land, simply because no one had raised the issue. Thus, no ground has been put forward to suggest that there was not a formally binding contract as from the letter of 3 May 2005 and the Developer’s acceptance of that letter by proceeding with the work. This is fortified by the fact that both parties now accept that a Binding Contract exists and both parties proceeded on this assumption between 2005 and January 2009.

Was the project fixed price: what was the Contract Price?

25.32. This issue is simple on its face, but there are underlying matters of considerable complexity and difficulty. The concept of a “*Fixed Price Contract*” has a well known technical meaning. In a Fixed Price Contract, fluctuations in the price of labour or materials are to be borne by the contractor. It remains the case that if the Employer, under a Fixed Price Contract, elects to change the design of the works or their specification, the Contractor will be entitled to appropriate compensation; and it remains the case that if the Contractor’s work is delayed by matters for which the Employer is responsible (for example delay in giving instructions or approvals) the Contractor may recover additional payment for the cost of delay. Thus, even where a “*Fixed Price*” Contract is entered into, to achieve completion within the stated Contract Sum the employer or his agents must ensure that none of the grounds upon which additional payments may be recoverable are allowed to happen.

25.33. In the case of the Cleaver Heights Development Project, as noted above, the Developer quoted fixed sums for each of the three house types and an additional fixed sum in respect of the land divided into two separate sums for the land itself

(\$22,000,000) and development of infrastructure on the land (\$18,480,000). On this basis the Contract Sum was the addition of the fixed prices for the stated number of houses (408 in total) amounting to \$92,649,000, together with the fixed price for land and infrastructure of \$40,480,000 giving a total of \$133,129,000. The contractor had also quoted two provisional sums amounting together to \$1,000,000. Provisional sums are conventionally to be included in the Contract Sum, in which case the total becomes \$134,129,000.

25.34. However, as noted above in the summary of correspondence, the sum quoted as the Contract Price in the letter of award of 3 May 2005 is \$143,449,000. The letter does not refer to the provisional sums and accordingly the total of the cost of 408 houses plus the cost of land and infrastructure should have been \$133,129,000. As recorded above, the “*error*” in totalling the relevant figures can be traced back to the note to the NHA Board dated 11 April 2005 in which the “*fixed sum*” for the project is stated as \$143,449,000, apparently embodying two errors:

- (i) The erroneous statement of the figure for land and infrastructure as \$40,800,000 instead of \$40,480,000.
- (ii) The erroneous addition of the two figures involving a difference of \$10,000,000.

25.35. Both these “errors” were carried through into the letter of 26 April 2005 where six projects and their “*approximate budget*” were approved by Minister Rowley; and then the same “errors” were carried forward into the mis-stated total figure set out in the letter of 3 May 2005. The Commission heard no explanation which could account for the figure of \$143,449,000 going through the system without comment. The Commissioners cannot understand how such “errors” could have gone unnoticed, given that there were several meetings between teams from NHA and NHIC which must have gone through the details of the proposed contract, including particularly the price. Mr. Connon, on behalf of NHIC, accepted that the correct Contract Sum (excluding provisional sums) was \$133,129,000 and confirmed that no claim was being made and no payment had been made on the basis of the erroneously stated figures. Mr. Connon stated that NHIC had recognised the “*errors*” at the time of Valuation No. 9 on 1 March 2006. However, an examination of the valuations

prepared in respect of monthly payments shows that the “errors” were not restricted to the stated totals.

25.36. Mr. Cannon in cross-examination was taken through the valuations where it was noted that the prices per house units in Valuation No. 9 total up to the correct Contract Price. However, the prices per unit in Valuation Nos. 1 to 8 had been deliberately inflated in order to cause the summary to equal the erroneous Contract Sum of \$143,449,000³⁴⁰ Mr.Cannon confirmed that this change was not accidental:

“Q: Do you think that that is something that you could do by accident?”

A: Well no, it is not an accident. Obviously, he did change the figures, so if you want to use the word “deliberately” then yes.

Q: Is there another word you would use besides deliberately to describe what it is?

A: I don’t want to argue with you about it.

Q: In other words, he did it intentionally?

A: Yes.”

25.37. Mr. Cannon then confirmed that the person who made the change was a quantity surveyor who was there at the beginning of the project. His name could not be recalled. He has not been there for long and was no longer with NHIC. Mr. Cannon then gave the following evidence:

“Q: He changed the figure to match the error made?”

A: I don’t know why. All I know is when we identified it, we corrected it.”

However, there was no formal notification to HDC and the erroneous Contract Sum continued to appear in the monthly valuations. Mr. Cannon accepted that he was aware from September 2008 that the question of the discrepancy was in the public domain. Mr. Cannon accepted that NHIC had continued to quote the incorrect sum in

³⁴⁰ Transcript 14 May 2009, p.175.

valuations. He reiterated, however, that no claims had been made on the basis of the erroneous Contract Sum.

25.38. Miss Chow was not able to offer any explanation as to how the two “mistakes” occurred in the letter of award. Nor was there any satisfactory explanation as to how or why the “mistakes” came to light. No formal action was taken to regularise the position, even after attention was drawn to the discrepancies by the Hon Prime Minister in September 2008. According to Miss Chow, the matters were reported verbally to the next HDC Board Meeting. However, no formal note to the Board has been produced and the minutes of a Board Meeting on 29 October 2008 contain no such reference.

25.39. Minister Dick-Forde in oral evidence said that she was not satisfied by being told that HDC and NHIC had agreed that there was no dispute as to the Contract Price she stated:

*All of my training tells me that once I see all of these discrepancies that something is wrong, that you have very poor internal controls apparently in both Institutions and, therefore, I cannot rely on anything that either of them say. That is what my training tells me”.*³⁴¹

The Minister confirmed in oral evidence that she had consulted a forensic accountant Mr. Bob Lindquist to investigate discrepancies in the Contract Pricing. However, despite directions being given for the production of any report from Mr Lindquist, no further evidence has been presented to the Commission. In final submissions following the December 2009 hearing, NHIC produced documents³⁴² evidencing that Mr Lindquist had been appointed, that he had carried out work on the Cleaver Heights project, but that no report had been produced.

25.40. With regard to errors or discrepancies in the valuations, Valuation 38, dated 11 September 2008, was the latest valuation when the discrepant figures became public. It quotes the incorrect contract price, as stated in the letter of award, as \$143, 449,000.

³⁴¹ Transcript 15 May 2009, p61

³⁴² Disclosed under the Freedom of Information Act 1999

It was followed by Valuation 39 of which two versions were produced by Ms Chow, each giving the correct contract amount as \$134,129,000, which was then altered in manuscript in one version. Ms. Chow explained that, in her view, the stated contract sum could not be changed. The manuscript correction had been made by Mr. Bowen. She stated that the contract price was irrelevant to the payments to be made to the Contractor. In valuation 40, however, it is to be noted that an additional sum of \$10 million had been added in respect of “*off site waste water, electrical and utility*”, to make up the (erroneous) contract sum of \$143,449,000.

25.41. As noted above, further evidence was given on these issues at the final hearing in December 2009. The additional witnesses were Noel Garcia (Chief Executive Officer, HDC up to June 2008), Reynold Patrick (Project Manager) and Learie Bowen (Senior Quantity Surveyor). They were examined by the Commissioners and cross-examined on behalf of the parties. Mr Garcia emphasised that he had no access to the documents and his evidence was being given from memory.

25.42. With regard to the erroneous statement of the contract sum, the attention of all the witnesses was drawn to the Note to the Board dated 11 April 2005 and the incorrect statement as to the intended Contract Sum. Given that this appeared to be the first document containing the erroneous figures, the witnesses were each asked whether any person outside NHA could be responsible for the erroneous figures. None was suggested; and Mr. Garcia concluded that the mistake was generated within NHA. As to the fact that the erroneously stated sum was not corrected in the valuations, Mr Garcia expressed the view that it was within the authority of the HDC Quantity Surveyor to correct the sum and so advise his superiors. Mr. Bowen, conversely, stated that he had made the manuscript correction on valuation 39, but having passed this on to the project manager and the managing director (Mrs. Chow), he was told not to change the figure.³⁴³

25.43. Ms Chow was questioned about the submission of an Annual Report to the Minister as required by Section 20 of the HDC Act. She was unable to say that any report on Cleaver Heights was ever provided to Dr. Rowley in his time as Minister. However,

³⁴³ Transcript 8 December, p.96, Mr Bowen: “*Well I discussed it with the Project Manager and he said I had no authority to change the sum*”.

she was not on the Board at the time. She confirmed that none of the matters presently in issue had been reviewed by an external auditor. Complaints had been expressed through the Public Accounts Committee in 2007 and Dr. Rowley had also expressed dissatisfaction that accounts were not being audited. HDC attempted to arrange for private auditing but there remained a backlog.

Variances from the contract price

25.44. The quoted prices were “fixed” but subject to change if there were changes to the work content. One of the changes which subsequently occurred related to the landscaping of the site which affected the number of houses which could physically be built. In this case, the “Contract Sum” would fall to be reduced as a result of the smaller number of houses constructed at the fixed prices contained in the Contract. The final numbers of houses and the price payable (excluding provisional sums) was as follows:

Single storey detached 58 @ \$271,000	\$15,718,000
Single storey Duplex 53 @ \$202,500	\$10,732,500
Two storey town houses 272 @ \$221,000	\$60,112,000
Sub-total for 383 houses	\$86,562,500
Land and infrastructure	\$40,480,000
Total for houses, land and infrastructure	<u>\$127,042,500</u>

25.45. With regard to provisional sums, potential TSTT and T&TEC charges are included in the Contractor’s quotation as provisional sums in the amount of \$500,000 each. Although the form of Joint Venture Agreement makes no express provision (as do other forms of contract), it is not in dispute that the Contractor is to be paid the actual cost of such work as may be ordered within the scope of the Provisional Sums, the stated sums being treated as an estimate for budgeting purposes.

25.46. Additional sums become payable in accordance with terms of the contract both to and by the contractor. A substantial element in such sums is delay to the works. The

issues of time and cost over-runs are considered within the Second Cleaver Heights issues in the next section of this Report.

Transfer of title.

25.47. A matter which gave rise to a substantial amount of evidence was the question of transfer of the land. Minister Imbert expressed justified surprise that the effect of the Contract was to pay the contractor 95% of the value of land without either transfer of ownership or a proper title search. During the oral evidence it emerged that the land in question was not owned by NHIC but by Cleaver Heights Development Co. Limited (CHDC). The land had been charged by CHDC and the charge had subsequently been increased in March 2006, during the currency of the works, by “*up stamping*” of the mortgage. At this point HDC was already paying sums to NHIC in respect of the land.

25.48. Mr. Conan’s evidence was that the ownership of shares in Cleaver Heights Development Co. Limited had in fact been transferred to NHIC in 2005, but this transfer was not registered until 28 January 2009, the day after Minister Dick-Forde’s statement in which the question of land ownership had been raised. It seems clear that none of these difficulties had been appreciated by NHA, or indeed by their successors HDC. Not only does this indicate a lax approach to matters of potential importance, but in the present case public money had been paid over without proper security and with a complete absence of any proper contractual provision governing the transfer of land.

26. Second Cleaver Heights issues: Performance Matters

26.1. This section considers the matters raised initially at the hearing in May 2009 but primarily at the hearing in December 2009, in relation to issues referred to as Second Cleaver Heights issues. The issues are dealt with under two headings: first, defects and compliance with regulatory requirements; and secondly, delay and cost over-runs. Each pair of topics will be seen to be inter-connected and, to an extent, overlapping. The witnesses who gave oral evidence concerning these issues were:

Noel Garcia

Reynold Patrick

Learie Bowen

John Connon

Minister Imbert

Bruce Farley

Marlon Faveck

Shamshad Mohamed

Michael McKenzie

Ms. Cheryl Ann Haynes

Alan Poon King

Courtenay Mark

Prof Winston Suite (Expert for HDC)

William Agard (Expert for NHIC)

Defects and Compliance with regulatory requirements

- 26.2. With regard to regulatory breaches, it has already been noted in this Report that there is an almost universal practice of deferring regulatory compliance until post-construction, so that the works, to a large extent would be non-compliant, whether or not workmanship complied with contract standards. In relation to Cleaver Heights, evidence as to both regulatory non-compliance and defects or departures from contract standards was first put forward in the statement of Minister Imbert dated 29 April 2009, received by the Commission on 4 May, one week before the intended final hearing of the Inquiry. Part 2 of the statement, which addressed contractual issues, has been reviewed in Section 25 above. Part 1 contained Minister Imbert's observations on the construction work carried out at Cleaver Heights, following a tour of inspection on 21 April 2009 accompanied by officials of the Housing Development Corporation, the Minister of Planning, and Officials of the Ministry of Works and Transport. The statement puts forward the Minister's own observations on the quality, suitability and state of completion of the site infrastructure works and the structural details, construction and workmanship of the housing units themselves, based on the Minister's expertise as a qualified civil engineer. The Minister's observations were that:

- (i) The site lay-out was not consistent with the original lay-out submitted to the Drainage Division.
- (ii) The water-course running through the site had been covered over (culverted) over approximately 100m, this not being shown on the original site lay-out drawing and not approved by the Drainage Division.
- (iii) There was significant cutting and filling on the site without adequate soil stabilisation measures.
- (iv) A number of retaining walls were of questionable stability and had not been approved by the Design Engineering Branch of the Ministry of Works.
- (v) A large proportion of the natural forest cover had been removed without any re-vegetation with potential for soil erosion.
- (vi) Drainage retention ponds were required but had not been constructed.
- (vii) On-lot drains around several housing units were not functioning effectively.
- (viii) Housing units had no electricity supply nor valid inspection certificates from the Electrical Inspectorate.
- (ix) Housing units were constructed with reinforced concrete panels which had poor thermal performance, which would likely require provision of air conditioning.

26.3. It was initially contended on behalf of NHIC that the foregoing issues were outside the Commission's Terms of Reference. However, the Commissioners decided to admit Minister Imbert's statement and he was briefly cross-examined by Counsel for NHIC at the Hearing on 15 May 2009³⁴⁴. Subsequently, as noted above, the Commission's Terms of Reference were enlarged on 21 May specifically to include issues concerning defects. As a result, the Commission directed a further hearing which eventually took place on 7-9 December 2009.

26.4. Evidence and submissions were presented at the hearing in May 2009 on alleged non-compliance with regulatory requirements, particularly concerning planning, water supply, drainage and environmental clearance. NHIC accepted that final approvals were outstanding in most cases, but contended that they would be granted upon final

³⁴⁴ Minister Imbert served a written response, dated 31 July 2009, to the matters put in cross-examination.

inspection. Minister Dick-Forde confirmed that it was not unusual for housing projects in Trinidad to proceed without final planning permission or final regulatory approvals. Her evidence was:

“Apparently they do in fact not get the approvals – the final approval before they start; but it is a practice that has to stop because what it does is it ends up with a lot of poor planning.”³⁴⁵

The Minister accepted that to obtain approvals from all the relevant authorities would take between 6 and 12 months. Until final approvals and Completion Certificates were obtained, while properties could be physically occupied, mortgages could not be arranged and therefore the practice was to allow occupation as licensees.

26.5. Miss Chow (at the May 2009 hearing) accepted that she had not checked whether the terms of the Outline Planning Approval had been observed. However one of the reasons for proceeding prior to relevant statutory approval was to comply with the Government’s desire to get new housing completed as quickly as possible. She confirmed that Dr. Rowley was generally concerned about the pace of housing work. Mr. Connon in oral evidence referred to the need to change the location of the nursery and play areas, which had been agreed with the planning authority. Other changes had to be made to the drainage of the site, including taking the open water-course into culvert to provide access between the two sides of the site.

26.6. John Connon responded to Minister Imbert’s statement of April 2009 in a further statement dated 24 August 2009. With regard to regulatory compliance Mr Connon stated:

- (i) A request for approval had been submitted to the Highways Division on 14 April 2005, since when no official communication had been received from the Division.
- (ii) An application for outline approval was submitted to WASA on 11 April 2005 which had been acknowledged but thereafter no further communication had

³⁴⁵ Transcript 15 May 2009, p176 and see also Lockwood Green Report (NR35) where lack of final planning approval is also noted.

been received. WASA was, however, kept fully informed of work on site which included a sewer force main now constructed for the project on the advice of WASA.

- (iii) Application for preliminary approval was submitted to the fire services on 6 April 2005 and preliminary approval received on 21 April 2005. Further details were currently being submitted.
- (iv) The Certificate of Environmental Clearance (CEC) was received on 10 February 2005 and CEC monitoring commenced in May 2006. A Notice of Violation was received on 13 May 2009 which was currently under challenge.
- (v) Approval was sought from the Drainage Division on 6 April 2005 and approval was granted on 6 September 2005. An amended drainage plan, following changes to the site layout was discussed with the Drainage Division on 17 June 2009 and a further amended plan is to be submitted.
- (vi) Outline Planning Permission for the Project was received on 23 March 2005. An application for final approval was submitted on 15 May 2009 and is pending.
- (vii) The Final Completion Certificate from the Tunapuna Piarcó Regional Corporation will be issued upon all other statutory approvals being obtained.

26.7. With regard to the defects and deficiencies identified by Minister Imbert above, Mr. Cannon states that the culvert provided across the site was a requirement of the Town & Country Planning Division, to link the road network across the site. While Minister Imbert had questioned the size of the culvert, no flooding problem had occurred at the site despite flooding being reported elsewhere in Trinidad. With regard to site drainage generally, this had been designed to collect water from roofs and from roads and pavements, which was directed into box drains which discharged into retention ponds designed to filter via weirs and outfalls into natural water courses. Again, the system had functioned effectively during periods of heavy rain.

26.8. With regard to slope stabilisation, NHIC's Scope of Works omitted landscaping and stabilisation of surfaces, which were the responsibility of HDC. NHIC had written to HDC pointing out the need for such work to be carried out. NHIC had also performed re-grading made necessary by HDC's inactivity. On 27 July 2009, HDC had requested NHIC to provide a quotation for landscaping. This had been submitted on

31 July 2009 but there had been no further response from HDC. Mr. Connon contended that retaining walls were properly constructed in accordance with competent designs provided by CEP Limited (reinforced concrete walls) and KS&P Limited (block retaining walls). With regard to reinforced concrete panels, their thermal performance did not vary significantly from other types of construction. The system used had proved successful on the Tarouba Housing Development Project and has been used on many other HDC projects.

26.9. The non-installation of internet and cable TV had resulted from a requirement to provide underground infrastructure, which HDC was not prepared to finance. NHIC had objected to a cable service provider installing such services, which would involve digging up newly constructed roads. As regards standards generally, NHIC was engaged in correcting defects prior to final inspection by HDC Clerk of Works. No significant formal complaint had been received as to the quality or standard of construction.

26.10. Shortly before the Hearing in December the Ministry of Works and Transport produced the following additional reports on Cleaver Heights:

- (i) A report dated 30 June 2009 on the structural assessment of retaining walls (engineers Bruce Farley and Marlon Faveck) which concluded that no structural drawings for retaining walls had been submitted before construction; the structural drawings now received contained deficiencies; and from a visual inspection the retaining walls as constructed also exhibited numerous defects (lack of granular fill, erosion and instability, cracking, deficient weep holes and lack of waterproof membrane).
- (ii) A report dated 30 June 2009 from the Drainage Division (Shamshad Mohamed) noting that while drainage approval had been given on 7 September 2005, numerous approved items of work had not been carried out and other unapproved work had been carried out. While changes would have been required, these could not yet be approved because final calculations were yet to be submitted. It is noted that slope stabilisation and vegetative cover is a priority. The water retention system requires further work and recalculation of the roadside drainage for relocated roads is also required.

(iii) A report dated 28 August 2009 from the Highways Division (Michael McKenzie) noted that submitted plans were not up to date. However, it appeared the roads constructed had addressed concerns expressed over the submitted plans. Continuing concerns were in respect of an uncovered drain, lack of side walks and inadequate slipper drains (areas open to the public) and road drainage and turnarounds (areas not yet open to the public). There was also major concern with regard to two access points to the site.

26.11. HDC and NHIC each called evidence from experts. HDC retained Professor Winston Suite, whose report included a commentary on the Joint Venture Project and the procurement process. He provided observations on drainage issues generally and drainage of individual dwellings, on retaining walls, on stability of slopes and on general standards of workmanship including observations on details of construction and finishes. These included adverse comment on the standard of workmanship including plumbing and fittings, electrical installations and security. It was noted that a number of owners had already begun to install their own superior fittings, including French windows and doors. Professor Suite also reviewed cost overruns and delays which are dealt with further below.

26.12. NHIC instructed Mr. William Agard of Consulting Engineers Partnership Limited, whose report was limited to technical issues. Mr. Agard noted that the original water course had been placed in culvert when the Planning Authority requested construction of a road to connect the two sides of the site. The culvert had been lengthened to provide an additional flat area with an inspection chamber being provided midway. The culvert was not under-designed and in fact appeared oversized. The only distress noted in the retaining walls was where a large truck had been parked immediately behind one section of wall which was not designed for surcharge. The wall had been cut out and properly reconstructed. The cut slopes on the site were stable, in accordance with the geotechnical data provided, but were suffering from lack of vegetation. Generally the built units were in keeping with the quality to be expected of "low cost" housing. There was no excessive heat build up within the dwellings.

26.13. In a supplemental report dated 3 December Mr. Agard commented on the report of Professor Suite and on the three additional reports produced by the Ministry of

Works. With regard to roof drainage, it is noted that shallow concrete swales below the eaves is the norm for the use of guttering. A section of box drain requiring rectification was identified; otherwise the peripheral drainage system was considered adequate. The water retention ponds were under construction and required only minor work for completion. There was no need to extend retaining walls. The slopes were stable but required vegetation which was the responsibility of HDC. Mr. Agard did not accept the criticism of retaining walls which were based on visual inspection only. The walls had generally performed satisfactorily. With regard to the Drainage Division, as-built drawings were awaiting approval; and as regards the Highways Division they had responded formally only in August 2009. They could have assisted the Developers had they responded earlier. In general, the defects are minor and not unusual and were further being rectified in ongoing work.

Oral evidence on defects

- 26.14. Minister Imbert together with Messrs Farley and Faveck, Mohammed and MacKenzie were examined together by the Commissioners and then cross-examined on behalf of the parties. Minister Imbert added to his earlier statement that it was important that the serious defects which had been identified were corrected: if the Contractor did not do so, it would be down to the HDC. There had been a problem of quality standards of the Contractor and the HDC was not as diligent as it should have been. The Contractor had neither followed procedures for obtaining approval in a timely manner nor the requirements of the statutory agencies.
- 26.15. Questioned by Mr. Fitzpatrick, Mr. McKenzie agreed that it would have been more helpful if advice had been given by the Highways Division when the proposals were reviewed in 2005. It was further accepted that the original submitted drawings showed a 10m road reserve but no sidewalks. It was further agreed that uncovered box drains were not uncommon. With regard to highway requirements, the Planning Department would normally require the involvement of the Highway Authority. Mr. Farley agreed that grass cover was essential for stabilising the site. Mr. Mohammed accepted that further work had been done in regard to retention ponds but this had not yet been reviewed by the Drainage Division. In answer to Dr. Lloyd Barnett, Mr. McKenzie said that sidewalks in his view were essential; but in response to Mr. Fitzpatrick he agreed that sidewalks were uncommon outside urban areas.

- 26.16. Mr. Connon stated in further evidence in chief³⁴⁶ that it was the Fire Department which primarily requested the two sides of the site be joined, which was then relayed to the Town & Country Planning Division. In response to the suggestion that NHIC should have undertaken protective planting as part of their responsibility for the site, Mr. Connon reiterated that this had been excluded from HDC quotation and NHIC had written many times to HDC requesting them to carry out the work. Notwithstanding this, NHIC had taken temporary measures to re-grade the slopes on many occasions.
- 26.17. Prof Suite and Mr Agard were examined together by the Commissioners and then cross-examined on behalf of the parties. Mr. Agard, in addition to his Supplemental Report³⁴⁷, responded orally to the Ministry of Works officials³⁴⁸. He maintained that granular fill had been used behind retaining walls, but waterproofing had not been necessary. Adequate weep-holes had been provided. Scour had occurred on slopes, due HDC's failure to provide vegetation or other protection to the slopes. While there were minor cracks and other defects in the retaining walls, these would be repaired as part of maintenance. Overall, the retaining walls had performed adequately. With regard to access roads, the available space did not permit any further change to the layout.
- 26.18. Professor Suite considered there was a need for cut-off drains to protect retaining walls from surface water and silt. There was a dispute as to the extent to which walls sited between houses required either cut-off drains or weep holes. Mr. Agard said that the need for cut-off drains depended on the particular location. While Mr. Agard and Mr. Connon suggested there was no need for further retaining walls pending grassing and stabilisation of the site, Professor Suite's view was that more investigation was necessary at this stage.
- 26.19. With regard to defects within the dwellings, Professor Suite had concentrated on houses that had been purportedly completed and were occupied, where electrical and

³⁴⁶ Transcript 9 December 2009 p.154-191.

³⁴⁷ Dated 3 December 2009

³⁴⁸ Transcript 9 December 2009 p.116-119.

plumbing defects were noted as well as structural defects. The buildings were, however, still subject to the contractors maintenance obligations.

26.20. Mr. Agard was cross-examined by Dr. Lloyd Barnet. His view was that all the defects would be remedied as part of maintenance and were therefore not significant. Mr. Agard agreed that the first outline planning approval required details in relation to vegetation on the site.

26.21. Mr. Solomon questioned Mr. Agard's conclusion that NHIC had excluded landscaping from their contract. It was pointed out that the Certificate of Environmental Clearance required slope stabilisation measures and that this had been imposed on NHIC, including maintaining vegetation cover on steep slopes. Furthermore, the NHA letter of 3 May 2005³⁴⁹ includes all infrastructure work and was required to "*conform to the requirements of the relevant competent regulatory statutory government authority*", which was to be for the account of NHIC. In re-examination it was clarified that the letter of 3 May 2005 required the obtaining of regulatory approvals: while NHIC was thus to obtain the approvals, they were not required to carry out all the work required by such approvals.

Evidence on regulatory and utilities issues

26.22. At the request of the Commission, representatives from the Town & Country Planning Authority (Ms. Cheryl Ann Haynes, Director T&CPA), the Water and Sewerage Authority (Mr Poon King, General Manager Operations, WASA) and the Electricity Authority (Mr Courtenay Mark, T&TEC) appeared to present evidence on regulatory approvals for the Cleaver Heights project. They were each examined by the Commissioners and then cross-examined on behalf of the parties. Their evidence is also relevant to delay issues dealt with below.

26.23. Ms. Haynes confirmed that outline planning permission for the Project was given on 23 March 2005. A subsequent application for sub-division of the site into plots for residential developments was submitted on 24 August 2005 but was not determined as insufficient information was submitted. The Planning Division was next involved in

³⁴⁹ paragraph 1.2

2008 when it was noted that there were deviations from the submitted plans. An application for planning permission by retention of the development was submitted on 15 May 2009 and planning permission was accordingly granted on 22 October 2009. It was noted that approval from the Fire Services Authority had been submitted to T&CPA in August and September 2009; and a preliminary approval from the Drainage Division was submitted in August 2009. This was described as the “*normal process followed for approval of a retention application*”.

26.24. In oral evidence³⁵⁰ Ms. Haynes stated that, while it was normal for applications to be approved before the start of work, the time taken to grant approval had increased significantly in recent times with only 40% being approved within the target of 2 months. While the Planning Division had powers of enforcement including removal of unauthorised buildings, this had never been exercised in the case of a state housing project. Had the Planning Division being properly consulted on the Cleaver Heights site, there would have been a requirement for lower density. The Planning Division did require open areas to be provided on the site when outline permission was granted and this led to the reduction from 406 to 383 units. The appropriate procedure for signing off a development was that, when all relevant approvals had been granted (including fire services, roads, drains, water and electricity supply), the final certificate would be issued by the local authority. HDC is responsible for ensuring that all approvals are obtained.

26.25. Ms. Haynes stated that TCPD was not consulted about linking the two sides of the site. The culverting of the stream through the site would have required approval of the drainage division³⁵¹. Counsel for NHIC stated that meetings had taken place throughout the project between Mr. Ancil Kirk of the Arima Planning Office and the Architect, Mr. Wayne Smith. The decision to link the two sides of the site had been discussed at these meetings.³⁵²

26.26. Mr. Alan Poon King (WASA) produced a statement dated 7 December 2009 describing the general process for approval by WASA, setting out the chronology of

³⁵⁰ 8 December 2009 p.124

³⁵¹ Transcript 14 May p.222 and see also statement 23 August 2009.

³⁵² Transcript 8 December 2009 p.168.

the Cleaver Heights Project. The site being relatively remote from existing services, the provision of both water and waste water services required the construction or replacement of substantial length of mains piping, together with provision of a pumped sewer main from the site. The provision of water initially envisaged construction of a well on the site but, having found no potential for water on site, the well was moved to Beckles Lane, Arima. This has not yet been constructed and the site is currently supplied on an intermittent basis using temporary storage facilities and pumping. In oral evidence Mr. Poon King confirmed that the temporary supplies were adequate for those currently resident on the site and that any shortfall could be made up by a trucking supply. The pipelines provided could also deliver water required for fire protection. With regard to the problems with the waste water system, the question of liaison between WASA and T&TEC was a matter for the developer. Consideration had been given to a dedicated sewage treatment plant for the site, but there was an existing STP within Arima and the provision of a second plant was regarded as inefficient.

26.27. Mr. Mark (T&TEC) was also asked about the interface between WASA and T&TEC which had been noted on occasions as being inefficient. Developers were themselves required to approach T&TEC. Pumping stations required three phase electricity which T&TEC could normally make available within two weeks; but the requirement for an underground supply created much more difficulty. The decision to move to underground supply was driven by the fact that most of the necessary materials were made locally; and underground distribution eliminated the need for regular cutting and clearing of trees and maintenance of distribution lines.

26.28. Mr. Mark confirmed that there was no general shortage of power available in Trinidad; almost 500 MW of installed capacity was available to meet peak demands. Shortages were rare and subject to penalties. T&TEC would like to see more coordination with other utilities, but at present the onus was on the developer to achieve this. At Cleaver Heights there was a particular problem of vandalism involving the theft of installed copper cables.

26.29. Mr. Poon King was similarly asked whether there was any shortage of water supply. He confirmed that there was in theory sufficient volume available but there were

deficiencies of supply which needed to be improved and the rate of leakage was high. Mr. Mark stated that the cost of installing underground distribution was relatively low, the major cost being in mobilisation. In answer to Mr. Fitzpatrick, Mr. Poon King confirmed that the intention was for each housing unit to have its own storage tank, the current tank farm arrangement being temporary.

Delays and cost over-runs

- 26.30. These topics are inter-connected in that part of the cost increase is driven by delays for which NHIC claims entitlement to be compensated. A major cause of the delay was, according to Mr William Agard, NHIC's expert, additional works including additional retaining walls, underground electrical ducts, the sewerage of the site and changes to the design required by the Planning Authority and by HDC. All of these impacted seriously on the original tight programme. NHIC stated that they were also affected by very heavy rainfall experienced during the construction period, which allowed entitlement to extension of time but not additional compensation.
- 26.31. Concern as to cost over-run had been raised by Minister Dick-Forde in her first statement³⁵³ which reported a total variation sum of approximately 23% of the contract sum, of which 93% had been paid to NHIC with no evidence of internal approvals. Ms Chow in her second statement³⁵⁴ said that variations amounted to 17.15%, not 23% of the contract sum and comprised (a) variations suggested by NHIC to the value of approximately \$3.7 million; (b) variations mandated by statutory authorities (WASA, T&TEC etc.) amounting to approximately \$17.2 million and (c) variations requested by NHA/HDC amounting to approximately \$1.77 million (total \$22.67).
- 26.32. The issue of variations was examined by Mr McCaffrey who considered a list of 14 variations³⁵⁵ for which the Contractor claimed a total of \$30 million and has been paid to date approximately \$23 million. The primary ground on which variations are claimed is the exclusions set out in the Contractor's Outline Specification submitted with the Proposal dated 1 December 2004. The quotation thus excluded the

³⁵³ 27 January 2009

³⁵⁴ 16 March 2009

³⁵⁵ McCaffrey report Tab 11.

construction of any sewage treatment plant or the upgrading of any services outside the boundaries of the site. In principle the contractor is entitled to additional payment for any work required within these excluded categories. Mr. McCaffrey expressed the provisional view that NHA (through Mr. Reynold Patrick) had endeavoured to ensure that payments against variation instructions were contractually justified and that the quantum claimed was also justified. Ultimately the question of disputed variations or their valuation are matters to be settled by arbitration and are not properly the subject of this Enquiry other than to the extent some impropriety is alleged in the process of pursuing or assessing claims. It has not been suggested that the variation claims involve any such impropriety.

26.33. Professor Suite noted that, as of August 2009, while the site works were largely completed with regard to the initial contracted works, a great deal of further work remained to be done. While the Contractor claimed additional payments and extensions of time, it appeared that NHA/HDC was not up to date with submissions and claims. He further observed that assessment of which delays are compensable at the end of the Contract is difficult. Professor Suite confirmed the claims advanced by the Contractor as being the following:

- | | | |
|-------|--|--------------|
| (i) | Material cost increases | \$4,080,709 |
| (ii) | Total of variations to December 2008 | \$22,000,308 |
| (iii) | Claims for extra time, which have not yet been evaluated. | |
| (iv) | Claims for extra time and cost, many of which are noted as not being contested by HDC. | |

26.34. In oral evidence Mr. Agard pointed out that the delays caused by T&TEC were exacerbated by the fact that certificates from the T&TEC inspectorate lapsed after 3 months requiring, in the case of continuing delay to provide a mains supply, a fresh application and payment. The lack of mains supply held up commissioning of sewer lift pump stations and further delay was caused by the need to install underground ducting for electricity supply amounting to 28 km throughout the site. Delays in granting regulatory approvals were frequently caused by shortages of staff. Mr. Agard suggested a solution to late regulatory approvals (based on the practice in Florida) would be to permit work to commence 6 weeks after a proper submission, if plans were stamped by a Registered Engineer. This had in fact been proposed by the

Association of Professional Engineers: if the plans were in error, the risk would be that of the professional. An alternative system was that used in France, by which the vetting and approval of designs is sub-contracted to consultants.

26.35. NHIC acknowledged that the Project had suffered some 2 years of delay, although some completed houses had been handed over from late 2006. Mr Cannon identified the following causes of delay:

- (i) A delay of 3 months resulting from the requirement of T&TEC for Electrical Infrastructure to be placed below ground.
- (ii) Delay by T&TEC in providing its infrastructure design, not received until January 2006, and further delay by HDC in not giving timely instructions to proceed with the work.
- (iii) Changes to NHIC's design, submitted in January 2006, by T&TEC in January 2007 resulting in a total delay of approximately 6 months.
- (iv) Delay to installation of sewer system, due to late instructions from HDC and WASA; and further delay in commissioning lift stations owing to failure of T&TEC to provide electrical supply until August 2009. The delay is estimated as 5 months.
- (v) Additional work in installing temporary water storage system together with pumping equipment to the whole site.
- (vi) Further variations comprising changes to roof sheeting, replacement of louvres and additional earthworks for retaining walls, resulted in delays amounting to five months in total.
- (vii) In addition, shortages of labour resulted in a further delay of approximately three months.
- (viii) A major increase in criminal activity, particularly thefts from the site resulted in a further delay of three months.
- (ix) Further delay arising from inclement weather is assessed at four months.

26.36. Mr Cannon also identified the following additional costs incurred:

- (i) The costs involved in finalisation and approval of electrical infrastructure design amounted to \$5.43m for introduction and underground electrical infrastructure, \$2.45m million for main electrical distribution and \$0.75

million for additional electrical infrastructure to sewer lift stations: total cost which has been accepted by HDC was \$8.6 million.

- (ii) Additional costs of security amounting to over \$2 million as a result of T&TEC being unable to provide electrical supply to the site by August 2009, as a result of which 70% of the housing units remain unoccupied.
- (iii) Additional works involved in sewer installation and commissioning of lift stations amounted to \$6.144m plus delay costs for 5 months delay.
- (iv) Additional cost of providing temporary water storage and pumping system to the whole site estimated at \$0.417 million.
- (v) Increase in material prices of steel, concrete, aggregates and of labour of around 80%. HDC accepted that material price increases in excess of 10% should be recoverable (on account of imposed delay to the project) involving additional payments of \$1 million for concrete and \$0.45 million for rebar and mesh (in lieu of \$4,080,709 claimed).

27. **Conclusions on Cleaver Heights**

- 27.1. In this section, initial conclusions are drawn in relation to the First and Second Cleaver Heights issues.
- 27.2. There was a conspicuous lack of clarity as to the procurement rules to be applied to the project, notwithstanding which, NHA and HDC between 2003 and 2005 appeared to be unaware of, or at least unresponsive to, any such problem. There was an awareness of the Cabinet policy initiative of October 2004, which was reflected in the note to the Board of 11 April 2005. However, there was no attempt to identify any detailed procedure to be followed. Particularly, there was no documented account of how or when the procurement process changed as a result of the change in financing arrangements, which we accept occurred in late 2004 and was carried through into a Cabinet decision in about March 2005. It is consistent with this lack of clarity that the important letter of award of 3 May 2005 should refer to the Developer being required to "*secure financing for the project*", at a time when this was no longer the intention of the parties, if it ever had been. In fact, the contract created by

the letter of award and its appended documents was clearly inconsistent with a duty on the contractor to finance the project, and it is surprising that some parties to the Enquiry should have clung on to the apparent belief that this was not so.

27.3. With respect to the acquisition of the land, the NHA gave no plausible reason why the land was acquired for \$22m undeveloped and \$40,480,000 developed, after it had commissioned two reports which valued the undeveloped land at \$11m and the developed land at \$30m. It appeared that a third valuation was undertaken but this was not produced to the Enquiry.

27.4. With regard to the procurement and processing of tenders, while no rules were identified as being applicable, the circumstances dictated that there could not be any competition, given that the only tender could be that submitted by the company which owned or controlled the land. It was surprising, however, that no rules were identified governing the question of land transfer. These should have included at least:

- (i). Rules as to when land should be transferred, whether at completion of individual units or of sections or at the completion of the project overall.
- (ii). Rules as to whether the land was to be transferred to NHA/HDC or by way of direct sale to occupiers.
- (iii) Rules as to the interest in land to be transferred and the appropriate proof of title.

27.5. A further aspect of the issue of land ownership and transfer is the question of title to the land. Evidence emerged that the land was in fact owned by a different company in which NHIC had acquired ownership of the shares only in 2005, and had not then registered the transfer. The land had been originally charged, and was then recharged (up-stamped) during the currency of the work, in each case creating prior rights in the land for which NHA/HDC were making payments in the expectation of acquiring unencumbered ownership. Had NHA or HDC made the most elementary investigation of title to the land, which it plainly should have done, all the above matters would immediately have come to light. The failure to make any investigation of title was a gross and unexplained omission. If the true explanation was that NHA had no

experience of entering into such arrangements, this was not said; and if this was the explanation, one would have expected even more than usual diligence and caution.

27.6. NHA/HDC made monthly payments to the Developer in respect of the value of the works being carried, in the same way as under a conventional contract for construction of works on the Client's land. Here the land remained in other ownership with the result that NHA/HDC had no security in respect of the sums being paid for the work and *a fortiori* for the land and infrastructure works. The apparent omission even to give any consideration to the question of security was a grave error which could have resulted in the loss of the whole investment had the Developer or the legal owner of the land become insolvent. This grave error was perpetrated by NHA but continued by HDC, still apparently with no recognition of the consequences of this oversight. The result of these errors is that (a) the Government has effectively paid out 95% of the value of land without acquiring any title to that land and (b) *a fortiori*, the Government has paid out a sum of over \$146 million (plus VAT)³⁵⁶ without any security. Given that all these difficulties have been in the public domain since January 2009, it remains a matter of continuing surprise that the situation has not been rectified.

27.7. The one clear rule to which HDC drew attention was the requirement for a "*formal contract*" which, while not defined, can be taken to mean a contract in writing formally drawn up and executed. There was no such contract and NHA chose instead to rely on the wording of the letter of 3 May 2005. On its face, this was sufficient to create an *informal* but nevertheless fully binding contract in terms of the letter itself and the other documents incorporated by the letter. Ms. Chow's evidence that she first realised that there was no formal contract only in January 2009 is surprising, given the subsequent revelation by Minister Dick-Forde that there were some 655 projects without signed contracts. In fact, none of the current projects had signed contracts. While this may be an acceptable practice in a few cases, where there may be good reason to enter into an informal contract, the wholesale ignoring of the statutory requirement for formal contracts is inexplicable. It brings into sharp focus the function of management in HDC and clearly calls for remedial action.

³⁵⁶ Valuation 44, 16 March 2009.

- 27.8. It should be recorded that no evidence was presented of any litigation or other legal dispute over the status of any of the NHA or HDC contracts. Perhaps the best that can be said is that this particular breach of the rules can be seen as potentially less damaging when set against the complete failure to deal in any proper way with the transfer of title to the land, upon which the Authority's security depended.
- 27.9. With regard to the Terms of Contract, the Commissioners were not made aware of any other forms of contract in use by HDC. What is quite clear is that the form of contract expressly incorporated by the letter of 3 May 2005 was wholly inappropriate to the particular project, since it omitted completely to deal with the vital matter of land ownership and transfer. It may be that the very use of a standard form created the impression that it *did* cover all the matters which needed to be provided for. Clearly remedial action is required here.
- 27.10. Turning to the question of the contract price, the first issue that arose was the significance to be attached to the arithmetic "errors" which appeared in valuations. These can now be seen to have originated in the Award Letter of 3 May 2005 and before that in the Note to the Board dated 11 April 2005. It is clear that the "error" must have originated from within NHA: no other possibility was suggested. It remains a matter of surprise that, with the "error" re-appearing in many documents which followed the letter of award, none of the NHA staff picked up such an obvious discrepancy. What can be said is that the person least likely to have picked up the discrepancy was the Minister, Dr. Rowley, when authorising this project along with others, by signing off the letter of 26 April 2005. While Dr Rowley must ultimately bear responsibility for mistakes on the part of agency companies undertaking the business of the Ministry of Housing, no personal blame can attach to Dr Rowley for the original discrepancy, or for its non-discovery until 2008.
- 27.11. It is possible that the stated figure of \$143,449,000 was the summation of other figures of which there is no surviving record. What is clear is that, in the Award Letter of 3 May 2005, the financial sums set out should have added up the lesser figure of \$133,129,000. It can also be seen that the wrongly stated figure of \$143,449,000 comprises a mis-statement of the figure for land and infrastructure as

\$40,800,000 and the entirely erroneous addition of \$10,000,000. Both of these components are such that they could have been accidental “errors”. However the “errors” were patent and should have been quickly detected by the most rudimentary system of checking. It remains a matter of considerable surprise that the two “errors”, or either of them, were not picked up during the period between their first appearance on 11 April 2005 and the Letter of Award of 3 May 2005.

27.12. Had there been no other changes to the figures, the above “errors” should have been corrected automatically by the account process by which the Developer would have been paid the agreed price for the land and infrastructure and the agreed fixed price for each of the dwelling types constructed. The “valuations” which have been subjected to some detailed analysis, were prepared solely for the purpose of interim payment and would have had no bearing on the final sums payable to the Developer. However, as pointed out in particular during the cross-examination of Mr. Connon, in Valuations 1 to 8 the prices for the individual house units were changed, with the effect that they now added up to the erroneously stated Contract Sum. Mr. Connon accepted that this change must have been deliberate. Further, while the original “error” in the statement of the Contract Sum appears to have originated through NHA staff, it was accepted that the subsequent changes to Valuations 1 to 8 were done by a member of NHIC staff who could no longer be traced. Mr. Connon stated that from Valuation 9 the mis-stated valuations had been corrected; but the incorrect Contract Sum continued to be quoted in valuations. While this may have been an administrative requirement, as suggested, we are alarmed that such a serious error should not have been formally documented.

27.13. The conclusion we draw from the above facts is that, while the original “error” could have been the result of one or more clerical slips, the fact that it apparently went unnoticed up to and beyond the award of the contract is difficult to comprehend and, at best, reflects poorly on the operations and management of NHA/HDC. The subsequent manipulation of valuation was plainly not an error. It remains possible that this was no more than an attempt to reconcile the figures. But the manipulation is equally consistent with a dishonest motive. We note that Minister Dick Ford has sought assistance from a forensic accountant, but the Commission has not been offered the fruit of any such investigation and we now understand that no report has

been produced. The conclusion must be that the matter cannot be taken further unless new evidence appears.

27.14. With regard to statutory and regulatory approvals, as in the case of the requirement for formal contracts, it appears to be established practice that projects are pushed forward without all or any final approvals being in place. Mr. Dick Ford accepted that this was a recurrent problem (which she said had to stop) and had been noted in many other projects. It is the subject of a separate section of this Report. All that can be concluded at this stage is that there was nothing particularly unusual in the decision to go ahead without final approvals being in place. No doubt these practices are tolerated with the best of intentions. However, it cannot be acceptable that formal rules are promulgated and then systematically ignored. Either the practices or the rules should change.

27.15. The relevant dates on which planning and other statutory approval were applied for are set out by Mr. Connon and are not challenged as such. Various reasons were put forward as to why these were not followed up and final approvals secured before the work was carried out. These are matters to be addressed in other quarters, as are some helpful suggestions as to how the system might be made more effective. NHIC did secure the Certificate of Environmental Clearance in February 2005, before the work commenced. However, problems resulted from the absence of other approvals, well illustrated by the issue (originally raised by Minister Imbert) of the culverting of the water-course through the site. Plainly this was not something a developer would undertake without good reason. The explanation which finally emerged was that it was a requirement of the Fire Department to provide access between the two sides of the site; and this appears to have been combined with the need to provide alternative open spaces, leading to the solution of culverting. While this change was not reflected in the contemporary planning documents, it is inconceivable that the local planning office was not aware of what was happening on the site; and the planning issues have, happily, now been belatedly resolved.

27.16. Closely linked to regulatory requirement is the position of the Utility Companies. The Commission's investigation focused on WASA and T&TEC. In both cases the project was delayed by issues of design, interfacing and procurement, including late

changes to requirements, such as the decision to place all electrical infrastructure in below-ground ducting. It also emerged that any interfacing between the utilities, such as the need for T&TEC to provide three phase electricity supply to pumping stations, which were part of the WASA installation, was a matter for the Developer and not the Utilities. This indeed reflects similar problems in the securing of statutory approvals where it appears the separate authorities are largely autonomous, leaving the question of coordination up to Developers.

- 27.17. The overall issue of delay to the project was addressed by both factual and expert witnesses. The primary cause of delay was variations, a major element of which was the construction of services outside the site boundary which had been excluded from NHIC's quotation (or provided for by nominal Provisional Sums), particularly the arrangements for sewerage. While this element of the project should have been considered at the outset in terms of the inevitable cost and even as to the suitability of the site, as a matter of contract HDC plainly took the risk of delay and additional cost arising.
- 27.18. Overall, the project suffered more than two years of delay; and there has been no indication that the Developer is to be held responsible in damages for any part of that delay. This is a now-familiar outcome to projects in Trinidad & Tobago and the need for better and tighter procedures need not be rehearsed here. On Cleaver Heights, although the work has barely achieved completion, Professor Suite, HDC's expert, appeared to accept that there would be difficulties in establishing responsibility for delays and entitlement to additional costs associated with delay.
- 27.19. Delays are closely linked to additional costs. Although it was suggested at an early stage by Minister Dick-Ford that variations amounted to 23% of the Contract Sum, most of which had been paid with no evidence of internal approvals, further investigation revealed a somewhat different picture. Variations and claims for additional cost had, in general terms, been scrutinised and approved by the HDC staff. Whether their scrutiny has been sufficiently searching is a contractual matter beyond the scope of this Enquiry. However, we can conclude that the Developer was not given *carte blanche*, as illustrated by the fact that the Developer's claim for material cost increases in the amount of \$4.08 million resulted in payment (to date) of only

\$1.45 million, reflecting the fact that not all the delay which has given rise to cost escalation was the responsibility of HDC. We conclude that the variances from the Contract Sum were neither unusual nor excessive. It may be added that the relatively remote location of the site and the obvious difficulties in providing mains services meant that some not insubstantial additional costs were to be expected.

27.20. Turning to standards of workmanship and materials, the debate was initiated by Minister Imbert and pursued by his staff who concentrated on retaining walls, drainage and slope stability and highways and pavements. Prof Suite then developed Minister Imbert's complaints about standards of the houses themselves. All of this was responded to robustly by Mr. Connon and NHIC's expert Mr. Agard. Having considered the evidence, the overwhelming impression from the many complaints about the standard of work, is that their underlying cause was not primarily poor design or workmanship by NHIC, but the absence of proper supervision and monitoring as the work proceeded or even review before it started. A good example of this is the complaint about the layout of access roads: if anything was to be done, the point should have been raised before the roads were built. Likewise, complaints about the adequacy of drainage and retaining walls should have been raised at the latest during their construction, if not earlier.

27.21. An overriding issue with regard to the site itself, was the absence of protection of excavated slopes by grassing or other means. Despite suggestions that this was in fact NHIC's responsibility, we are quite clear, as was HDC at the relevant time, that responsibility for this work, and decisions as to what was to be done, fell on HDC. Any complaint as to the current state of the site must be addressed to them. It is to NHIC's credit that they have carried out some re-grading of slopes showing signs of erosion, where no instructions have been given for their proper protection. The continuing absence of protective measures should be dealt with urgently.

27.22. With regard to the dwellings themselves, it was emphasised during the presentations that the Commissioners were not concerned with the minutiae of particular complaints relating to individual dwellings: it was for this reason that we declined the invitation to make a further inspection, having already inspected the site on 22 May 2009. The

Commissioners were able to draw the following conclusions from the presentations dealing with quality:

- (a) The overall quality of the dwellings was generally lower than that which they had observed on housing projects on Tobago (Blenheim and Roxborough). There may be contractual reasons for these differences but in our estimation a material factor is likely to be absence of or inadequate supervision of the Contractor's workforce.
- (b) Many of the complaints as to the site overall involved late questioning of design decisions which should have been (and indeed were) settled at the award of the Contract. An example is the suggestion that the Developer should have provided guttering to the dwelling; another example is the suggested need for "sidewalks" which are plainly not shown on the Contractor's drawings.

27.23. Our conclusion in terms of standards is that the houses and infrastructure now on the Cleaver Heights site, while serviceable and clearly habitable, fall short of being entirely satisfactory, a fault which is at least partly attributable to lack of foresight, planning and supervision of the works. Despite the criticism, however, the Cleaver Heights site remains an area of considerable natural beauty, which may to an extent make up for shortcomings of the construction work.

PART V: GENERAL ISSUES

28. Transparency Issues

- 28.1. Transparency is one of the objectives to be addressed within the Terms of Reference. It is stated to be an objective of the Government White Paper and has been referred to as a desirable objective both in general terms and specifically in relation to procurement within the public sector. It is the name adopted by a National body, the Trinidad & Tobago Transparency Institute (TTTI), a non-profit company which operates as a National chapter of Transparency International, the global coalition dedicated to rooting out corruption in many fields including the construction industry. TTTI was formed in 1998 as one of nearly 100 national chapters of Transparency International, which was itself formed in 1993. The current Chairman of TTTI is Mr. Victor Archibald Hart, a chartered Quantity Surveyor by profession, who is currently serving his third term as Chairman of TTTI. Among other attributes, Mr. Hart served as a Commissioner in the Piarco Airport Enquiry in 2002.
- 28.2. TTTI served an Initial Statement dated 13 January 2009 followed by further submissions on 20 March 2009 and 24 April 2009 and a Closing Statement dated 16 May 2009. Mr. Hart participated in the round-table debate on the White Paper on 24 March 2009, which is the subject of Section 9 above. On 2 April 2009 the Commission received an oral presentation from Mr. Neil Stansbury, who was introduced by Mr Hart. Both Mr Stansbury and Mr Hart answered questions from the parties and the Commissioners.
- 28.3. To set the presentation in context, Mr. Hart was asked to comment on the fact that on a number of occasions the attention of the Commissioners had been drawn to circumstances which were said to “*facilitate corruption*” but no actual corruption had been drawn to our attention. Mr. Hart was asked whether this meant that the problem was theoretical only. Mr. Hart’s response was that, looking back over 50 or 60 years, the major corruption cases in Trinidad & Tobago had all been in the procurement process and more so in construction procurement. He gave examples, ranging from the 1950s to the 1990s, of the Caura Dam Project, the Caroni Racing Complex, the Inn Cogen Power Generation Plant and the Piarco Airport Development, each of

which had involved actual corruption on a grand scale in the procurement process for a construction project.

28.4. Mr. Hart, in written submissions drew attention to the scale of corruption, which was a worldwide phenomenon and was well documented, for example, in Transparency International's *Bribe Players Index 2008*³⁵⁷. This reported, *inter alia*, that public works and construction companies were the most corruption-prone when dealing with the public sector, and most likely to exert undue influence on policies, decision and practices of Governments³⁵⁸. As noted by Transparency International, the inequity and injustice that corruption causes makes it vital for Governments to re-double their efforts to enforce laws and regulations on bribery and for companies to adopt effective anti-bribery programmes. Current practices in preventing corruption on construction projects are dealt with in Mr. Stansbury's presentation.

28.5. In addition to the need to enforce local laws and regulations seeking to root out corruption, Mr. Hart³⁵⁹ also draws attention to International Treaty obligations. Thus, under the Inter-American Convention Against Corruption (IACAC)³⁶⁰, Trinidad & Tobago has agreed to consider measures to create, maintain and strengthen systems of Government hiring and procurement of goods and services that assure the openness, equity and efficiency of such systems³⁶¹. Further, under the United Nations Convention Against Corruption (UNCAC)³⁶², Trinidad & Tobago has undertaken to take 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 corruption³⁶³. Mr. Hart sees the Government White Paper as a means of fulfilling these international obligations. Given the Government's decision on the White Paper (as discussed in Section 9 above) it is incumbent on the Government of Trinidad & Tobago, to comply with its International Treaty obligations, to put in place alternative measures to secure the objectives to which the Government has signed up.

³⁵⁷ See www.transparency.org/policy_research/surveys_indices/bpi/bpi_2008

³⁵⁸ Submission 20 March 2009 para 7

³⁵⁹ Submission 13 January 2009, para. 68.

³⁶⁰ www.oas.org/juridico/english/treaties/b-58.html

³⁶¹ Article III, 5.

³⁶² www.unodc.org/documents/treaties/UNCAC/publications/convention/08-58826_E.pdf.

³⁶³ Article 9.1

- 28.6. Measures designed to prevent corruption on construction projects were outlined in the oral presentation of Neil Stansbury, following a paper submitted on 19 March 2009. Mr. Stansbury has worked as a lawyer in the construction field for over 25 years with experience in major international infrastructure projects in many different countries. He has worked with Transparency International since 2003 and is Co-Founder and Director of the Global Infrastructure Anti-Corruption Centre (GIACC). He has given numerous presentations and workshops throughout the world, written numerous anti-corruption reports and carried out assessments of the effectiveness of anti-corruption measures in several countries. He emphasised that corruption and the risk of corruption can be prevented by good management practices.
- 28.7. While measurement of corruption was impossible, estimates of its extent have ranged between 5% and 10% of gross production amounting, in the world's construction sector, to between US\$300 and 600 billion. In terms of its effect, corruption can render a project unviable, defective or dangerous, in the latter case leading to buildings collapsing and to fatalities. Construction is said to be particularly prone to corruption because of the very large number of contractual links created by major projects. Additionally, the construction industry is very diverse, covering many different skills and organisations, each needing to give individual attention to ethical training and controls. Further, each construction project is unique, making comparative costing difficult and bribery harder to detect. While transparency is the antidote to corruption, there is a conspicuous lack of transparency in public construction projects owing to their complexity.
- 28.8. Opportunities for corruption are increased by large numbers of transactions, particularly where those transactions involve intervention by Government officials. Corruption is not limited to bribery, but includes fraud, deception, collusion, money laundering and abuse of power, all of which result in excess sums of money being paid or defective standards being accepted while full payment is made. In each case the conduct of the persons concerned is criminal, involving a variety of offences. Mr. Stansbury gave examples of projects tainted by corruption including projects which were promoted for a corrupt purpose or which were promoted in order to facilitate

corruption. During the performance of construction projects there were many situations which were conducive to corruption, particularly those involving participation by several parties involved in the project.

- 28.9. Mr. Stansbury identified aspects of corruption prevention which required particular attention. First the implementation of anti-corruption management measures. GIACC has developed a project anti-corruption system designed to be integrated into project management systems and involving specific measures such as an independent assessor to monitor and report on the project. For major projects, measures were needed to raise awareness amongst staff, for example by implementing a gifts and hospitality policy.
- 28.10. Secondly, Mr. Stansbury emphasised the importance of transparency. In particular, in public sector projects the public was entitled to information as to how public funds were being spent. Project information should thus be made public on a prompt and regular basis, preferably on the project owner's website. Where information was to remain confidential, the reasons for such confidentiality should be examined carefully.
- 28.11. Thirdly, anti-corruption training was important. This should include training in identifying corruption and in awareness of the risks of facilitating corruption. Fourthly, anti-corruption forums are recommended, to involve all participants in a sector with the objective of creating a business environment free from corruption and promoting fair competition. The UK Anti-Corruption Forum, for example, was established in October 2004 and represents over 1000 UK companies and 350,000 industry professionals and publishes papers and newsletters reporting on significant issues.
- 28.12. Mr. Stansbury additionally commented on a number of topics at the request of the Chairman of the Commission. While conflicts of interest may be unavoidable, procurement rules should require any official to declare his interest and to take no part in the decision making process. Engineers acting both as designer and as project certifier could come into situations of potential conflict, where design errors lead to

the need for a variation. With regard to Government Officials, they might have many ways in which they could create opportunities for corrupt payments, in the most extreme case creating a project whose primary purpose was to facilitate payment of a bribe. Another common example was officials who might have the opportunity to delay the grant of a permit or consent, thereby encouraging the person being delayed to offer a bribe. The use of sole selective awards, whether of contractor or consultant, may involve abuse of power and impropriety and should be regulated by strict guidelines.

28.13. Nepotism or “*cronyism*” also involves the abuse of power, where appointments were made through favouritism and not on merit. This may involve corruption or may lead to further corrupt appointments, all of which creates a perception of decision making within an organisation being corrupt. Other forms of abuse of power may involve victimising or intimidating staff into making corrupt decisions or remaining silent in the face of abuse of power by seniors. An official who attempts to complain about the corrupt behaviour of a senior official (known colloquially as “*whistle blowing*”) may be victimised in various ways including being dismissal or, in an extreme case, being threatened with physical harm.

28.14. While some countries had enacted legislation to protect those revealing corrupt practices within the organisation by which they were employed (whistle blowers), there were real perils involved in reporting actual or potential corruption. Mr. Stansbury gave the example of an engineer in India who had reported on corruption in a major civil engineering project and had been assassinated. When investigated it was found that his confidential memo had been copied and circulated freely. In another example an official involved in a South African World Cup project had been assassinated shortly after blowing the whistle on corruption in the construction of a stadium. With regard to the difficulties involved in confidential reporting the Chairman referred to a system called the *National Confidential Safety Reporting System* introduced on the UK heavy rail system in 2001³⁶⁴. This enabled staff to report safety related issues that they did not feel able to report through normal channels or where normal reporting had not resolved the issue. The system was based

³⁶⁴ Railway Group Standard GE/RT 8033, August 2001

on an initiative set up by the University of Strathclyde and involved collection and analysis of reports by bodies independent of the company being reported on. Mr. Stansbury commented that most corporate and government whistle blowing systems which were effective had a third party reporting system with an impartial person observing whether the report has been followed up.

28.15. After their presentations, Mr. Stansbury and Mr. Hart were asked questions, Mr. Hart in particular concerning the funding of TTTI. Mr. Hart accepted that two of his members³⁶⁵ had provided funds to purchase a computer which was currently being used. It was not suggested that the case presented by TTTI had been affected by the manner of their funding³⁶⁶. However, in a later session of the Enquiry³⁶⁷ Minister Imbert suggested that TTTI, while holding itself up as neutral and dispassionate, had shown self-interest in refraining from attacking NHIC Ltd as a result of the financial support offered by their Chairman Mr. Emile Elias. Mr. Hart responded in a written submission dated 24 April 2009 pointing out that, while TTTI had never “*attacked*” Mr. Elias, neither had it ever attacked anyone else. TTTI never personalises issues. TTTI’s goal is to help reform systems, practices and procedures that militate against good government and may facilitate corruption and waste of public funds. TTTI responded further in Rebuttal No 2, dated 27 November 2009. In this submission Mr Hart pointed out that a number of persons who worked with TTTI had recused themselves from involvement as they had other interests in the Enquiry.³⁶⁸ Mr Hart also reported that Mr Emile Elias had donated \$109,000 to TTTI on 26 August 2009, which had been widely reported in the press and had been accepted in accordance with established guidelines.³⁶⁹

28.16. Minister Imbert also criticised Mr. Hart for a letter he had written to the Press on 30 October 2004 which absolved NHIC of wrongdoing for the alleged removal of materials from the Scarborough Hospital Site, before the Integrity Commission had

³⁶⁵ Mr. Emile Elias and Mr. Winston Riley

³⁶⁶ Transcript 2 April 2009 p183

³⁶⁷ Transcript 3 April 2009 at p61, dealing with issue (ii)

³⁶⁸ Ms Margaret Rose, who was instructed by Dr Rowley, Ms Diana Clyne, who was instructed by the JCC and Mr Brian Lewis who was an expert witness

³⁶⁹ http://www.transparency.org/support_us/donate_now/donation_policy_procedure_and_guidelines

begun its Enquiry³⁷⁰. Mr. Hart pointed out that in October 2004 he was not a member of TTTI and had applied to join only in December 2004. The Commission of Enquiry into the Landdate Project was not established until March 2005. Mr. Hart's letter had been in response to what he regarded as uninformed comment in the Press. In fact he had erroneously assumed the contract to be in the JCT form, whereas the actual project was governed by the FIDIC form which did provide for ownership of materials to pass to the employer when delivered to the site³⁷¹.

28.17. In a closing statement, TTTI pointed out that its participation in the Enquiry had the sole objective of assisting the Commissioners in fulfilling their terms of reference. TTTI was careful not to accuse anyone of corruption but had presented analyses of practices in the construction sector and offered recommendations to be considered by the Commissioners. In the view of TTTI, the procurement problems faced by the construction sector in Trinidad and Tobago were the result of poor regulation and control. TTTI rejects the view that more regulation will slow down project implementation and considers, on the contrary, that it will bring more certainty and lead to greater efficiency.

Transparency and UDeCOTT

28.18. While this section has so far reviewed transparency issues as presented to the Enquiry in an objective fashion, it would not do justice to the material presented to ignore the fact that a large proportion of the allegations of lack of transparency have been directed at the activities of UDeCOTT. The relevant material has already been reviewed and is contained primarily in the presentations and evidence of the JCC, but supported by the reports of Mr McCaffrey and the evidence of Mr Cytrinowicz for Turner Alpha. It is appropriate here to note matters which require to be addressed if UDeCOTT is to achieve an appropriate level of transparency.

28.19. First, it needs to be recognised that any decision on the award of a contract carries with it very considerable financial implications and may give rise to a suspicion of improper or corrupt influence. To allay such suspicion UDeCOTT must ensure that all of its procurement operations are conducted in as transparent a manner as possible.

³⁷⁰ See para 13.21 above

³⁷¹ Clause 7.7.

Numerous breaches of procurement rules have been noted; and while some of these have been minor, the effect has been loss of confidence and suspicion. A particular example is such apparent lack of transparency is in UDeCOTT's regular and possibly improper use of sole selective tendering powers to employ one consultant, namely Genivar. This has led to suspicion of flouting the notion of free and fair competition as well as lack of transparency. At a more fundamental level, the misuse or manipulation of tender and tender-review procedures leading to the inappropriate and potentially corrupt awards of contracts requires urgent investigation and remedial action. This observation applies particularly in the case of the awards in respect of the Ministry of Legal Affairs Tower and the Brian Lara Stadium³⁷².

28.20. UDeCOTT's internal financial administration for the Brian Lara Project has given rise to serious alarm, a material aspect of which is the difficulties encountered by Mr McCaffrey in uncovering financial details which should have been readily available, representing as they do, public finances. This raises the further question of transparency within UDeCOTT, and why such a state of affairs was not so apparent to the senior staff and Directors that alarm bells were not sounded earlier. This is even more surprising given that Turner Alpha, the original Project Manager, had sought to warn of irregularities, but was ignored and marginalised.

28.21. UDeCOTT, in the context of the Government White Paper, considered that the proposed measures to secure additional oversight and transparency were unnecessary since sufficient oversight existed through the Public Accounts Committee and the Central Audit Unit, through Ministers, the Cabinet and the Parliamentary process. Having regard to the observations above and elsewhere in this Report, it is clear that the existing level of oversight is seriously ineffective and has not secured the degree of transparency which the people of Trinidad & Tobago are entitled to expect in the expenditure of public funds.

Initial Conclusions

28.22. The Commissioners accept without question that potential corruption is a problem of serious proportions in Trinidad & Tobago and that transparency, both as a general

³⁷² Refer to sections 14 and 16 respectively

objective and in terms of the specific measures recommended to the Commission, is an important means of combating potential corruption. The Commissioners further accept without question that the construction industry is particularly prone to potential corruption by reason of its structure and the multiplicity of transactions and interfaces involved in any construction project.

28.23. Measures to root out corruption, as regards the public construction sector, must lie primarily in the hands of Government both by reason of its commitment to good governance and the proper and efficient use of public funds; and through its International Treaty obligations to undertake measures to prevent corruption. The Government White Paper of 2005 is rightly seen as containing such measures and, to the extent the White Paper is not to be implemented, there is an obligation upon the Government of Trinidad & Tobago to put in place equally effective measures to combat corruption in the construction industry.

28.24. Corruption takes many forms and involves many different types of criminal offence. Its effect was initially in terms of the payment of excess sums for goods or services involving secret payments to corrupt bodies or individuals and payments for goods or services beyond their true value. However, secondary or tertiary effects of corruption can be even more serious and far reaching. These include acceptance of sub-standard work or materials which have, in some instances, involved danger to property and to human life³⁷³. Furthermore, projects may themselves be affected by or even promoted for the primary purpose of facilitating corruption.

28.25. Careful and well documented means are available to combat corruption through systems developed by the Global Infrastructure Anti-Corruption Centre, an off-shoot of the highly respected Transparency International. The Commissioners commend these systems to all organisations who accept the need for anti-corruption measures.

28.26. Individual attempts to combat corruption, while to be commended, have resulted in very serious consequences (including assassinations) where not supported by appropriate systems. Where corruption is considered to be a serious or material risk, a

³⁷³ An example is the Hong Kong “short piles” scandal in 2000; see Civil Engineer 13 July 2000.

confidential and secure method of reporting suspected corruption should be considered.

28.27. The Commissioners consider the attempt to paint the Trinidad & Tobago Transparency Institute as “self serving” to be unfounded. There is an unfortunate tendency to mount attacks on the credibility and sincerity of other individuals without proper justification³⁷⁴. It is important that any accusations of corrupt practice should be properly based on serious and genuine concern, although it must be accepted that hard evidence will rarely be available.

29. **Legal Issues---contracts and dispute resolution**

29.1. This section reviews issues concerning contracts and disputes, which have arisen in relation to many individual projects already reviewed and in relation to several of the individual topics covered earlier in this report. Construction projects are carried out pursuant to a written contract, albeit not always formally executed³⁷⁵. The contracts are invariably lengthy and complex and need to incorporate, as a minimum, (i) a technical description of the works to be performed, (ii) mechanisms for determining the price to be paid, including stage payments as the work progresses, (iii) conditions of contract to provide for management and control of the works and (iv) provisions for the resolution of differences or disputes that may arise between the parties. Construction contracts usually make provisions for an individual or firm to be appointed as the engineer, architect or project manager, whose functions will include the rendering of decisions on matters such as stage payments and extensions of time. Their role in giving decisions operates as the first stage in the resolution of any dispute.

29.2. It has been seen in relation to the major projects reviewed in this report where UDeCOTT or NIPDEC was assigned to manage the project, that UDeCOTT or

³⁷⁴ Minister Imbert himself complained of such an attack as have several other individuals who have appeared at this Enquiry.

³⁷⁵ See para 25.28 above which records evidence that large numbers of public works contracts have been performed without formally executed contracts.

NIPDEC has acted as the Employer under the construction contract, either in an agency role or, in some cases, as a true principal. What is of interest in the present context, is that in all these projects, UDeCOTT and NIPDEC have also been appointed as “*Project Manager*”. The same goes for other Government owned agencies. We have been told that UDeCOTT and NIPDEC are paid a fee for their project management services, being a percentage of the value of the works, the fee being paid by the Commissioning Ministry; and that this represents a substantial element of the funding of UDeCOTT and NIPDEC. In addition, it has been seen that, in some major projects, private firms have also been employed in a *project management* role. Thus, the US firm Turner Alpha was employed by UDeCOTT as Project Managers on both the Government Campus Project and subsequently on the Brian Lara Stadium. That role is, in most cases, distinct from the role of the Supervisor or Certifier under the construction contract and these two roles need to be reconciled. The role and performance of “*Project Managers*” is considered separately in the following section.

Technical descriptions of the work

- 29.3. The work to be carried out needs to be set out in clear and accurate documentation, in the form of drawings and specifications. This is well understood and is the function of the designer, whether engineer or architect. Under traditional design-tender contracts, the designer is engaged by the Owner who pays an agreed fee, usually based on a percentage of the value of the works. The same arrangement applies where variations become necessary. This, however, has given rise to a particular issue highlighted on a number of occasions by Minister Imbert and others: that if for reasons which are no fault of the Employer, a variation becomes necessary, the designer becomes entitled to an additional fee. Where the need for a variation arises from the failure of the designer to have made provision for the work in question, this gives the appearance that the designer is being rewarded for his own error or omission. The Commissioners take the view that this concern of the Employer is justified. However, we believe that the solution lies in the designer’s Terms of Engagement. While the use of the “*scale fee*” is traditional and based on practices established over many decades primarily in the UK professional institutions, current practice, at least in the UK, has moved on. Scale fees are now exceptional in the UK and it is much more common for designers to be asked to quote competitively for

prospective design appointments on terms put forward by the prospective employer. Under such arrangements, additional design fees are likely to be controlled or capped, and subject to whatever terms may ultimately be agreed.

- 29.4. The entitlement of designers to be paid additional fees which may arise from their own error or omission is put forward by Minister Imbert and others as part of the argument in favour of abandoning the design-tender procedure in favour of design-build. The debate on the merits of design-build has already been reviewed in Section 7 above. It is to be noted that we do not accept this is an argument against the design-tender method since, as stated above, the solution lies in the hands of the Employer.
- 29.5. In the context of design-build, the issue of providing clear and adequate descriptions of the contract work take on a somewhat different dimension. As discussed in Section 7, design-build contracts take a number of different forms but all require, as a minimum, a clear and comprehensive statement of the “*Employer’s Requirements*” which is a key document to be drawn up by professional architects or engineers on behalf of the Employer. The form of design-build which has been found to be successful in Trinidad & Tobago is that in which the detailed design, drawn up to reflect the Employer’s Requirements, is set out in detail during the final stages of the tender process so that the final agreed contract package contains a detailed design as agreed between the “*design-build*” contractor and the employer’s professional advisors. This was the case with the successful waterfront project, where the final design was agreed between the selected contractor, Bouygues, and UDeCOTT’s “*Project Manager*” Genivar. Somewhat different procedures have been followed in other design build projects, such as the Chancery Lane office complex, where the detailed design was drawn up with the prospective contractor’s appointed designers³⁷⁶.
- 29.6. In terms of pricing mechanisms, we have noted the continuing and widespread use of traditional Bills of Quantities. The use of bills has been reviewed in Section 4 above where recommendations are made as to their use. It is relevant here to note that the extended use of Bills of Quantities under traditional construction contracts is a

³⁷⁶ See Section 23 above.

practice which developed widely in the UK, although not in the North American construction market. Contracts can function perfectly well with Bills of Quantities having no function other than to assist the contractor in arriving at a lump sum quotation. They can also function as the Schedule of Rates for valuing variations.

- 29.7. In terms of interim payments, Bills of Quantities are traditionally used to facilitate more or less detailed monthly valuations. While this may be appropriate in some cases, the practice even in the United Kingdom, has been gradually replaced by agreed milestone payments which do not require measurement, but only the achievement of specified targets. While this is not a universal panacea for the avoidance of interim payment disputes, milestone payments should be easier to administer and involve lower administrative cost.

Conditions of Contract

- 29.8. It is well known that standard forms of construction contracts in the United Kingdom have proliferated with a significant number of different organisations now producing full “*suites*” of contract documents ranging from different types of main contracts, sub-contracts, consultancy contracts and subsidiary documents such as forms of warranty. Thus, sets of contract documents are now available in the UK drawn up, *inter alia*, by the Joint Contracts Tribunal, the UK Institution of Chemical Engineers, the Institution of Engineering and Technology³⁷⁷ and by the publishers of the New Engineering Contract (NEC)³⁷⁸, the GC/Works contract³⁷⁹ and FIDIC³⁸⁰. All such forms are readily available through the internet and are written on extensively in all the usual professional journals. Fortunately, such a proliferation of contract documentation has not occurred in Trinidad to the same extent as in the UK, but it is a fact that several different forms of contracts have been encountered in the projects which have been reviewed by the Commission.

- 29.9. The standardisation of construction documentation is undoubtedly of advantage in any country, most particularly in a country such as Trinidad & Tobago with a construction

³⁷⁷ Formerly Institution of Electrical Engineers

³⁷⁸ Published by the Institution of Civil Engineers.

³⁷⁹ Formerly restricted to UK Government Contracts but now available to the private market through the Property Services Agency.

³⁸⁰ International Federation of Consulting Engineers.

industry and accompanying professions limited in size and necessarily in resources. Fortunately, only two of the currently available suites of contracts have made any penetration into Trinidad & Tobago, namely JCT and FIDIC. However, there are many variants of these forms, which are regularly updated by their promoters.

29.10. The role of the Cabinet Construction Sector Oversight Committee has already been discussed in Section 3 above. They have recommended use of the FIDIC 1999 suite of contracts for infrastructure work and the JCT 2005 suite for building works. Such an initiative is to be welcomed. However, we have observed in relation to the projects examined by the Commission, that a variety of different versions of both the JCT and the FIDIC Form of Contract are in current or recent use. We strongly urge that specific forms of contract should be adopted and their use mandated by all government agencies with only limited exceptions being permitted where unavoidable. The question whether two forms are needed should also be kept under review.

29.11. It should also be observed that the unqualified use of foreign-based forms of contract will not always represent the true intentions of the parties. What has been done in other countries is to produce a specific version of the recommended form of contract for use in the particular country³⁸¹. An example of what might be considered inappropriate under the current FIDIC Contracts, is the provision for arbitration in accordance with the rules of the International Chamber of Commerce (ICC)³⁸². While the ICC is a respected international body with extensive experience of international commercial disputes, including construction disputes, it may be thought inappropriate that the arbitrator in a dispute between a government agency and a locally based contractor within Trinidad & Tobago should be selected by a body based in Paris³⁸³. It seems clear to us that projects of the size and importance of those which have been carried out in Trinidad & Tobago over the last decades merit a form of contract specifically drawn up and taking into account local interests and practices.

³⁸¹ An example is the use of the FIDIC Form in Abu Dhabi, where a “local” version of the form has been drawn up after review by local legal and construction practitioners.

³⁸² Clause 20.6

³⁸³ This was the case in the arbitration proceeding arising out of the Scarborough Hospital contract, which was subject to the FIDIC Conditions of Contract.

Dispute Resolution

29.12. Outside the Court system there exists a variety of private dispute resolution procedures which are favoured by different sectors of the construction industry worldwide. The traditional means of resolution of construction disputes up to perhaps 20 years ago, was for a decision to be rendered by the Engineer or Architect which would be contractually binding upon the parties unless and until reviewed by arbitration, which usually could not take place until completion of the works. Substantially all these barriers have now disappeared. Decisions of the Engineer or Architect may still be provided for, but in most forms of contract they may be challenged at any time and the means of challenge are no longer limited to arbitration. The standard UK and international forms provide for adjudication³⁸⁴ or for more elaborate measures such as reference to a Dispute Adjudication Board³⁸⁵. Some contracts provide expressly for mediation³⁸⁶. The plethora of dispute resolution methods provides a further ground upon which standardisation of contracts to be used in Trinidad & Tobago is needed. It also dictates that consideration should be given to what methods are or are likely to be found useful within the local construction industry.

29.13. Adjudication, both statutory and contractual, has been found to be a valuable procedure which has proved very popular in the UK construction industry, particularly to contractors and subcontractors alleging non-payment. The essence of adjudication is that a decision is required on a dispute within a very short period of time, usually 28 days but subject to agreed extension³⁸⁷. The essence of adjudication is that a decision is to be given which will be binding on the parties unless and until the dispute is finally resolved by arbitration, litigation or other means³⁸⁸. Adjudication has been adopted, although with variants of the UK model, in a number of other commonwealth jurisdictions including each of the states of Australia³⁸⁹, New

³⁸⁴ Whether or not available as a statutory right pursuant to the Housing Grants, Construction and Regeneration Act 1996 (JCT 05 Article 7 and Clause 9.2).

³⁸⁵ FIDIC Form Clause 20.4.

³⁸⁶ JCT 05 Clause 9.1, FIDIC Clause 20.5.

³⁸⁷ Under the scheme for Construction Contracts (England and Wales) Regulations 1998, para 19, the 28 day period may be extended to 42 days with consent of the referring party or any longer period if both parties agree.

³⁸⁸ Adjudication is therefore a close equivalent to the traditional decision of the Engineer or Architect which binds the parties until reviewed by arbitration or litigation.

³⁸⁹ Each of which has adopted a different form of adjudication.

Zealand and Singapore. Variants include (in Singapore) shorter time scales and (in Australia) restrictions of the type of dispute that can be adjudicated.

29.14. The need for a rapid process for dispute resolution for Trinidad & Tobago has been touched on already. In relation to general procurement practices, the Trinidad & Tobago Contractor's Association (TTCA) complained on behalf of members of late payment being a common practice with delay sometimes extending beyond one calendar year with no proper explanation³⁹⁰. Adjudication was raised during the debate on design and build where there was support from Mr. Winston Reilly, President of JCC, and from Minister Imbert³⁹¹. The Minister commented that, following his research:

"I think it is something that we should look at for implementation in Trinidad & Tobago. And I can tell you right up front that we would welcome recommendations along those lines."

However, later in the same debate Mr. Allan Cochrane of the TT Institute of Surveyors commented that the problem was that certificates were issued by the Engineer but were not paid by the Employer: it was mainly a procedural matter that the money was not coming through from the Government³⁹². He also added that contractors were very reluctant to sue the Government.

29.15. An important element in the debate is the position of the Courts. Adjudication has been made to work in UK and in other jurisdictions only through the Courts taking an informed and robust attitude to the intention of the legislation and by consistently refusing to allow parties to challenge enforcement of adjudication decisions on technical grounds³⁹³. In the view of the Commissioners, the introduction of adjudication in Trinidad & Tobago would be to no purpose unless there could be an assurance that the Courts at first instance would take a robust attitude to enforcement actions, which will include or principally comprise actions against the Government or its agencies. In the absence of such assurance, adjudication would merely create

³⁹⁰ See para 3.31 above.

³⁹¹ Transcript 30 January 2009 p61.

³⁹² Transcript 30 January p79-81.

³⁹³ See *Macob v Morrison Construction* [1999] BLR 93.

another level of dispute in which most cases would become stuck in the Court system for long periods of time, thereby defeating the objective of speed. Given the comments of Mr. Cochrane, which were not challenged as such, there must be some doubt as to whether such a system would presently be viable in Trinidad & Tobago. If, conversely, representatives of the construction industry and Government agree that adjudication should be tried in Trinidad & Tobago, there is no shortage of models from which to select.

29.16. An alternative to adjudication under the FIDIC Form of Contract is the Dispute Adjudication Board. We understand informally that, although there are many instances of FIDIC forms being used, and no shortage of disputes, there is no or virtually no experience of Dispute Resolution Boards having been set up³⁹⁴ or producing decisions to be enforced³⁹⁵. In these circumstances we are unable to recommend Dispute Adjudication Boards but propose that the whole subject of dispute settlement provisions under construction contracts should be reviewed and an agreed clause substituted in both the FIDIC and JCT Forms.

29.17. We have already reviewed UDeCOTT's practices in amending Standard Forms of Contract, whether by Special Conditions or by amendment to standard clauses³⁹⁶. While changes to the standard forms are primarily a matter for the employer and its agent, there is a clear need for consistency. Furthermore if amendments to the standard form are themselves to be standardised, there should be full and proper debate involving all sides of the industry, whether through the agency of the Cabinet Oversight Committee or through some specific body set up for this purpose. Amendments to standard forms ought not to be made on an *ad hoc* and unpredictable basis.

³⁹⁴ Round table contribution by Peter Morris, Transcript 1 April, 2009 p 103; and at p 142 where it is said that the dispute at the Scarborough Hospital went straight to arbitration with no DAB

³⁹⁵ In reviewing contract documents provided by UDeCOTT it emerged that for the GCP PK 6 (MLA Tower) the FIDIC form of contract was amended by Conditions of Particular Application which provided under clause 20.2, that the DAB was to be "The Architect" (who was also substituted for "the Engineer" by clause 1.1.2.4). By Supplemental Conditions "A" of the same contract, functions of the Engineer or "A/E" were, in part, assigned to the "Project Manager". For the Brian Lara Stadium, PK 3-8, using the same form of contract, there were no such amendments and the Engineer remained the Engineer. The role of the Project Manager is dealt with in the next following section 30.

³⁹⁶ Debate on design-build, 29 January 2009 and First Statement of Winston Reilly para 91.

29.18. With regard to arbitration, this should be reviewed, in terms of domestic disputes, as an alternative to litigation in the Courts, and it is right that a debate should take place as to the relative merits of each. At present, it is understood that no specialist Court or Judge is available to deal with construction cases in Trinidad & Tobago³⁹⁷. A major advantage of arbitration is the ability to select a Tribunal experienced in arbitration and also in the particular technical areas which give rise to the dispute.

29.19. We received no presentation from organisations representing arbitration or other dispute resolution services in Trinidad & Tobago. We are aware that numbers of disputes are referred for formal dispute resolution by independent and agreed arbitrators and mediators, which is unsurprising given the volume of construction work in Trinidad & Tobago. We are aware that there are a number of construction professionals with experience of arbitration and mediation and that their activities are being co-ordinated by the Dispute Resolution Centre (DRC). This is an autonomous and independent organisation which was launched in 1996 and has been developed through the Trinidad & Tobago Chamber of Industry and Commerce³⁹⁸. What is surprising is that the DRC does not have a higher profile, both generally and particularly in the field of construction. This may be compared to other jurisdiction where arbitration bodies and arbitrators and mediators play a prominent role in the dissemination of information, in promoting the advantages of private dispute resolution and in organising the training and qualification of arbitrators and mediators. The Chartered Institute of Arbitrators of London has a Caribbean representative, who is located in Jamaica. We are in no doubt that high quality arbitration services should be more readily available in Trinidad & Tobago. To this end, the Chartered Institute of Arbitrators of London has recently appointed a local representative to act as a catalyst for arbitration related activities in Trinidad & Tobago³⁹⁹.

29.20. Specific mention should be made of mediation and conciliation. These processes are becoming increasingly formalised and generally follow the same pattern as arbitration

³⁹⁷ The UK has maintained a specialist jurisdiction for over a 100 years, formerly known as Official Referees and more recently as the Technology & Construction Court. The Judges are all experienced in and spend a substantial part of their time dealing with construction disputes. Similarly, specialist judges are available to deal with construction disputes in other jurisdictions.

³⁹⁸ The Dispute Resolution Centre of Trinidad & Tobago, www.chamber.org.tt

³⁹⁹ Mr John Dowse, a UK qualified Civil Engineer and Barrister, based in Trinidad since 2007.

and adjudication in terms of creation of institutions, training courses and qualification or registration of persons available to provide such services. Mediation and conciliation forms part of the services offered by the DRC, although parties frequently agree to *ad hoc* mediation conducted in accordance with rules to be set by the chosen mediator. One regular feature of mediation, found in many other jurisdictions including the UK, is the involvement, either informally or increasingly on a formal basis, of the judiciary. Again we were not made aware of any such practices in Trinidad & Tobago. We recommend that consideration be given to establishing a body to consider the use of mediation in the context of litigation, in which the involvement of the legal profession will clearly be of importance. This should be seen as applying to litigation concerning the construction industry and to wider commercial activities as well.

Holding to account

- 29.21. A recurrent feature of practice in the construction industry in Trinidad & Tobago is the extent to which rights and obligations prescribed by the Contract are or are not enforced. A simple example, discussed above, is the apparently mutual ignoring of contract provisions under the FIDIC Form for the appointment of a Dispute Review Board (DAB). While the reference to a DAB is optional, the setting up of a DAB is mandated under the Contract⁴⁰⁰. More serious examples are the apparently routine non-payment of sums becoming due under Construction Contracts in circumstances where contractors may be understandably reluctant to bring proceedings against Government⁴⁰¹. The Commission understands that there is a general perception that Court procedures for obtaining summary judgment do not operate as efficiently as parties would wish; nor in a way which discourages the unjust withholding of payments due⁴⁰².
- 29.22. Another example, this time representing potential claims by the Employer, is the almost universal practice, as we have understood, of not deducting liquidated or other damages for delayed completion. In some of the projects we have examined in detail, the apportionment of responsibility for delay would be complex. Yet it is incredible

⁴⁰⁰ FIDIC Clauses 20.2, 20.3.

⁴⁰¹ See paragraph 29.14 above.

⁴⁰² Refer to the evidence of (the late) Mr. Hafeez Karamath, Transcript 4 February p.16-24.

that no liquidated damages at all have been deducted following the massive delays on all the contract packages involved in the Government Campus Project; nor have any damages been deducted following successive and cumulative delays on the Brian Lara Stadium. The deduction of liquidated damages (or indeed general damages) requires no dispute resolution procedure or application to any court or tribunal: the Employer has a general right of set off⁴⁰³ which can be exercised at any time he may choose. The non-deduction delay damages has in most cases been justified by the granting of extensions of time, often in terms of a negotiated settlement. While we are not in a position to suggest that any particular settlement was unreasonable, it remains incredible that no liquidated damages should be deducted, even as an interim measure.

Initial Conclusions

- 29.23. The recommendations of the Cabinet Oversight Committee on the use of two selected Standard Forms of Contract is commended. But this initiative needs to be taken much further. First, a particular edition of each of the selected Forms of Contract (JCT and FIDIC) should be chosen and a committee of specialists set up to produce a version of the form to be recommended for general use in Trinidad & Tobago reflecting the particular conditions which are to apply. At the same time, the various sets of Special Conditions in use by different government agencies should be examined with a view reducing these to a common list, after considering the views of all sides of the industry.
- 29.24. Consideration should similarly be given to the adoption of standard forms and procedures for consultants, whether Architects, Engineers or Project Managers. Issues to be considered include the payment of scale fees in general and in particular on variation work. Any additional payments should be provided for in terms which are satisfactory to both Employer and Consultant.
- 29.25. Provisions for the resolution of construction disputes should be considered as a separate topic involving, as it does, specialist institutions and bodies, both in Trinidad & Tobago and abroad. The objective should be to provide, as part of the Construction Contracts, procedures covering only those dispute resolution methods

⁴⁰³ Whether under the terms of the Contract or at common law: see *Hanak v Green* [1958] 2 QB 9 and *Gilbert-Ash v Modern Engineering* [1974] AC 689.

the parties wish to implement. Where there is no desire or intention to make use, for example, of Dispute Adjudication Boards, any such provision should be removed from the Forms of Contract. For the review of dispute resolution procedures, considerable expertise and guidance is likely to be available through international bodies such as the Chartered Institute of Arbitrators of London. Full use should be made of their experience and services.

29.26. Underlying all the foregoing, however, is the question of enforcement of contractual rights and duties. What has been observed by the Commissioners is a culture of non-enforcement of rights, which appears to operate mutually, for example, by contractors not pressing for payment of outstanding sums while the employer does not enforce payment of liquidated damages. Whatever the explanation, the non-enforcement of contractual rights available to Government is a serious dereliction of duty on the part of those charged with protecting public funds. Equally, the non-pursuit of sums properly owed to commercial companies is a dereliction on the part of the directors of that company.

29.27. While the Commissioners have no mandate to promote the pursuit of disputes, if commercial transactions are to be undertaken in accordance with legal obligations, those obligations must be seen to be enforced; and while the settlement of commercial disputes and differences is always to be encouraged, proper settlements cannot be reached unless the claims and contentions which are to be settled are first properly and accurately formulated. Simply refraining from pursuing claims on either side cannot be regarded as commercially acceptable.

29.28. The Commission understands that consideration is being given to the establishment of a specialist Court for Trinidad & Tobago, modelled on the Commercial Courts found in London and elsewhere, to handle commercial, financial and construction cases. It is likewise understood that consideration is being given to promoting a new Arbitration Act, to take into account developments in many other countries since the publication of the UNCITRAL Model Law on Arbitration⁴⁰⁴. Both these initiatives are seen as part of a wider programme through which Port-of-Spain would become

⁴⁰⁴ Letter from Mair & Co 17 July 2009.

established as an International Finance Centre, with commensurate high quality Court facilities and professional services being available to fulfil the requirements of the new business community. While the Commission warmly endorses such long-term plans, a starting point must be the firm and unquestioning acceptance of the rule of law, not simply as a matter of theory but as a matter of practice in commercial transactions of all kinds, including Construction Contracts, which must be seen to be enforced in a speedy and efficient manner. In terms of the generation and resolution of construction disputes, Trinidad & Tobago has some way to go in the achievement of these objectives.

30 Management Issues---problems of non-performance

30.1. As noted in a number of different contexts within this Report, most of the major projects investigated by the Commissions have involved the employment of "*Project Managers*". In each case this has been in addition to the employment of architects or engineers to act as the certifier under the Conditions of Contract, which have usually been the JCT Conditions or, in many cases, the FIDIC Conditions. A point to be made at the outset is that neither the JCT Conditions nor the FIDIC Conditions, as drafted, contain any role for a Project Manager. It is therefore necessary to examine the Contract Documents to find what role or function is to be performed by the Project Manager.

30.2. In the case of Government Campus Project PK-6, the Ministry of Legal Affairs Tower (MLA Tower), UDeCOTT produced a copy of the relevant Contract Documents which were based on the FIDIC Conditions of Contract for Construction (with design by the Employer). As already noted above⁴⁰⁵, the functions of the Engineer (or Architect) under that contract were expressly assigned, in part, to the "*Project Manager*" by Supplemental Condition "A". The relevant provisions are as follows:

⁴⁰⁵ See para. 29.16.

“(2) Project Manager

The references in the tender documents to “Engineer” as it applies to project operational matters shall be deemed to refer to the Project Manager, sometimes referred to as the PM, in respect of project operations and financial matters and the contract administration. This shall include direct time and cost management administration and the Contracts Management process.

The Employer shall designate a Project Manager to directly manage and administer the activities of the parties responsible for the design, tender and construction process. The Employer shall designate certain responsibilities and authorities to the Project Manager.

The Project Manager shall generally manage, administer and supervise the activities of the A/E Engineer and the Contractors in the execution of their respective works related to the design, tender and construction process.

(3) A/E Engineer

The references in the tender documents to “Engineer” as it applies to project technical matters shall be deemed to refer to the A/E Engineer, sometimes referred to as the A/E in respect of all design, engineering and resident supervision services.

The Employer shall designate an A/E to directly manage, administer and carry out design and engineering during the design, tender and construction process. The A/E shall provide quantity surveying (QS) services.

The A/E shall assist the Employer and Project Manager with tender and construction process, attend regular project technical and co-ordination meetings, provide responses to technical queries, carry out technical and financial analyses and make recommendations on proposed variation orders and claims.

- 30.3. As noted elsewhere, the appointed Engineer (Architect) was Design Collaborative Ltd. and the Project Manager was Turner Alpha Ltd., which, for this project designated itself "*TA Project Management*". In addition, separate engineering consultants (ENCO) were appointed to deal with the relocation of the T&TEC cable for the site, although they do not appear to have had any wider role. It must also be recalled that the appointment of UDeCOTT itself included a project management role as part of the services for which they were paid a fee.
- 30.4. Leaving aside the role of UDeCOTT, the precise division of responsibility between the Engineer/Architect and the Project Manager, as provided by the Supplemental Conditions above is not easy to determine. The drafting of the Conditions is hardly ideal and raises many questions such as what is meant by "*Project Operational Matters*" and whether this is the same as "*Project Operations*". At one point the clauses suggest that the Project Manager is to be responsible for specific parts of the overall management task by way of "*vertical*" division; but it is then provided that the Project Manager is to "*supervise the activities of the A/E Engineer*", suggesting that what is intended is a "*horizontal*" division of responsibility. The drafting is novel, to say the least, and it was not suggested that it was based on any experience or precedent. The fact that no such division of responsibility was attempted in relation to the Brian Lara Stadium project is of some note, considering that the placing of contracts for the two projects overlapped in 2005, and the final contract for PK3 and 5-8 on Brian Lara was drawn up (in September 2006) at a time when construction work and management activities on the Government Campus Project must have been approaching their peak.
- 30.5. Aside from drafting questions, the employment of Project Managers necessarily creates interface problems, as clearly seen on the Brian Lara project⁴⁰⁶. The task of tracing day to day activities and problems on projects of the size and complexity of the Government Campus Project or the Brian Lara Stadium is beyond the scope of the present Enquiry. Nevertheless, the question can be asked whether the

⁴⁰⁶ See section 16.

employment of separate Project Managers and the necessary redefining of the role of the Engineer/Architect can be seen to have had a beneficial effect in achieving more efficient management of the project. In the case of the Brian Lara Project, the answer is almost certainly No. But it must be added that extraneous events, as related in Section 16 above, would in any event have dominated the progress of the Project, or lack of it, with or without appointed Project Managers.

- 30.6. With regard to the Government Campus Project, as summarised in Section 23 above, the Project can be accepted as successful in terms of cost but not so in terms of delay, all the packages having exceeded the Contractual Completion Date by more than 2 years. Part of that delay was due to an unfortunate and ill-advised decision on the division of the packages which led not only to delay but to a Settlement Agreement which effectively removed any right the Employer might have had to recover liquidated damages. While we have not examined the detailed reason for division of the packages, the problems that arose in consequence should have been anticipated and avoided by proper management of the Project. Given the division of responsibility between the Architect, Project Manager and UDeCOTT, it is impossible to assign individual responsibility. What can be said is that this was a significant management failure.
- 30.7. Likewise, in the case of the Brian Lara Stadium, the way in which PK-3 and 5-8 have been allowed to drift, seemingly out of control both financially and technically, suggests a monumental failure of management. Again, any division of responsibility between UDeCOTT, TAL, the Design Team and Genivar (who only took over from Turner at a late stage in the Project) cannot be attempted. We should add here that we were quite unconvinced by UDeCOTT's attempt to place the whole blame on TAL, the more so as UDeCOTT continued to employ TAL, in virtually the same capacity and at the same time, on the Government Campus project without complaint. The point that should be made is that there was no shortage of project management resources and expertise. Those resources and expertise were not, however, properly applied as they should have been, and it is clear that a number of wrong if not disastrous management decisions were taken during the early course of the Project.

30.8. It would be wrong to create the impression either that everything UDeCOTT managed turned out badly, or that UDeCOTT was alone in having projects which have got into major difficulties. In terms of successful projects, UDeCOTT rightly hold up the Waterfront Project as demonstrating the way in which design-build can deliver a high class project on time and budget. The Academy of the Performing Arts (North) is also held up as demonstrating the success of design-build, although this Project has been subject to significant delay and the question of cost over-run has not yet emerged. An up-date report on both delay and cost over-run was requested from UDeCOTT but this has not been provided. Nevertheless, both of these Projects have much to commend them, particularly when compared to the serious delay on the Government Campus Project and the general failure of the Brian Lara Project. However, the relevant question is what these Projects reveal about the performance of UDeCOTT, a question we return to further below.

30.9. The proposition that UDeCOTT was not alone in having projects which have got into major difficulties naturally leads to consideration of the performance of NIPDEC, a company which in many ways mirrors the set-up and functions of UDeCOTT. Two NIPDEC Projects have been examined in some detail. First, the Scarborough Hospital Project, which led to a disastrous termination in which it has been ruled in Arbitration that the Contractor was justified in the actions taken. Of more concern here is the account of shortcomings in the management of the Project, as already summarised in Section 22 above. In addition, the Commission received oral contributions from Peter Morris and responses from Wendy Ali of NIPDEC during the round table session on 1 April 2009. It must be borne in mind that Mr Morris and Ms Ali represented the two sides in the original contract and in the ongoing arbitration.

30.10. With regard to management issues, Mr. Morris emphasised the need for issues and disputes to be resolved quickly and said that on the Scarborough Hospital project this did not happen and many issues were not resolved at all.⁴⁰⁷ In response Ms. Ali said that the Contractor, NHIC, had become “positional” and difficult to manage. In her view Scarborough Hospital was a prime example where the design-tender system had

⁴⁰⁷ Transcript, 1 April 2009, p85-101.

failed. NIPDEC's appointment was by the Ministry of Health, and included a provision that:

“Overall responsibility for the project will lie with the non-executive HSRP Implementation Steering Committee”

Ms. Ali confirmed that the Steering Committee was chaired by the Minister of Health.⁴⁰⁸ Nevertheless, NIPDEC was the Project Manager and had the responsibility to manage day to day events. They also had the responsibility to satisfy themselves that adequate management resources were being provided; and if this was being inhibited by the terms of their appointment, to draw this to the attention of the Client. NIPDEC did not seek to say that their ability to manage was in fact inhibited by their terms of appointment.

30.11. It is relevant here to recall the initial conclusions reached in relation to the Belmont Police Station Project⁴⁰⁹, where the views of all involved parties were considered. A series of mistakes occurred and it was seen that the parties each reacted in different ways designed to protect their own position. In particular, it was concluded that the effect of design errors had been magnified by the failure to resolve them in a timely manner and that NIPDEC, as “project manager” had remained passive and ineffective. Again, it was suggested that such problems could be resolved by placing these Projects on design-build contracts rather than design-tender, a proposition which the Commissioners were unable to accept. NIPDEC had simply failed to perform their contractual duty as project managers, while their presence on the Project may have made the problem worse by creating an impression that they were in charge.

30.12. Thus, there are common threads between these two Projects which serve to confirm our conclusion that NIPDEC's performance as Project Manager has been poor and generally ineffective. Various reasons have been put forward including a suggestion by Mr Morris that problems resulted from the different training and professional background as between UK and US Project Managers. In the case of Scarborough Hospital, it is relevant that NIPDEC was not given full authority and may have been

⁴⁰⁸ Exhibit L to Statement of Wendy Ali

⁴⁰⁹ See section 10

hampered by having to refer to higher authority. However, we believe the root of the problem, both with regard to Scarborough Hospital and Belmont Police Station, was substantial under-performance by NIPDEC of their contractual function, which we take to be the effective management of the project.

30.13. We have observed both in the case of NIPDEC and UDeCOTT a consistent lack of definition as to the tasks and functions to be undertaken by Project Managers, and confusion as to the separate roles of individual parties apparently working towards the same end. We have also observed an apparent lack of experienced and motivated persons performing project management roles, which we take to require positive and pro-active decision making and generally taking the initiative when the project so demands. We make this latter observation on the basis of what was, in our view, the successful deployment of project management skills on the Waterfront Project, not by UDeCOTT but by Genivar who, in our estimation, did provide experienced and motivated persons who were able to move the job forward and to solve problems in a timely manner, as had to be done for the Project to be completed on time and budget.

Initial Conclusions

30.14. It is a matter of some significance that "*Project Management*" services have been employed on practically all recent major construction projects undertaken for the Government in Trinidad and Tobago, given that the chosen forms of contract make no provision for such an appointment. It may be that this was seen as the natural role of companies such as UDeCOTT and NIPDEC. It may be also that, having taken on a Project Management role, UDeCOTT concluded that there was a need to enhance the role by the separate employment of professional project management firms such as Turner Alpha and Genivar. Whatever the rationale, the situation which has now developed creates problems which we believe have contributed significantly to the difficulties encountered on these projects. One fundamental problem is how to divide responsibility and functions between more than one Project Manager and between Project Managers and traditional architects/engineers appointed under the Construction Contracts. This appears not to have been seen as a problem. However, the major projects which we have examined have revealed many instances in which it has been unclear which party was responsible for particular actions. It is clear to us

that, where multiple layers of professional services, including project management services, are to be used in future, a great deal more thought will be necessary to define the roles of the various parties, including UDeCOTT and NIPDEC.

30.15. Quite apart from the division of responsibility, we have also observed a conspicuous lack of definition of the actual role of Project Managers. In some forms of contract, this is spelt out in detail.⁴¹⁰ We have seen no attempt to define with any precision what role UDeCOTT and NIPDEC take on when appointed as project managers. The lack of definition becomes clear when it is observed that the most basic functions of project managers, such as ensuring that necessary decisions are given and disputes resolved in a timely manner, are simply not being performed. To take another basic example, variations requested by the client are a notorious source of delay. It is or should be part of the functions of the project manager to control the incidence of variation requests and at least to ensure that requests are made as early in the project as possible. Yet we have seen no requirement for project managers to perform this function; and if it is thought to be implicit in the appointment of a project manager, we have seen no evidence of it being carried out.

30.16. While we have noted examples of project management being performed successfully, notably by Genivar, we have not been able to identify any occasions on which either UDeCOTT or NIPDEC had, through their own project management activities, materially contributed to the success of a project, or to the avoidance of potential disputes. Rather the reverse: in the case of NIPDEC in particular, we have had to conclude that their project management, at the point of delivery, has been of a low order; and the contribution of UDeCOTT to the management of the projects they have overseen has on occasions been to inhibit their contracted project managers from performing effectively. We have been made aware of a number of occasions on which project management was called for but was simply not delivered, to the detriment of the project.

30.17. It is possible that the true role of UDeCOTT and NIPDEC as Government Agencies has been misunderstood and mis-cast. UDeCOTT has a good record in setting up

⁴¹⁰ For example, in the JCT Form of Management Contract.

projects and arranging finance. They are experienced in operating tender procedures, even though in some cases the outcome has proved contentious. Once the performance stage is reached, we have not been convinced that UDeCOTT has played any beneficial role in the continuing management of the project. The same observations can be made about NIPDEC.

30.18. It may be that the role of these Government Agencies needs to be redefined. If they are to carry out project management services, it is essential that they take on only such tasks as can be successfully carried out. If they are to hold themselves out as performing project management functions, they must demonstrate an ability to deploy properly experienced and motivated persons and to carry out carefully defined functions. For the avoidance of doubt, neither UDeCOTT nor NIPDEC should hold themselves out as being “*in charge*” of any project. It needs to be made clear that UDeCOTT and other Government agencies can perform only those functions assigned to them, and have no overall mandate to “*control*” projects other than through the exercise of powers assigned to them by contract.

30.19. We observe finally that project management, as a particular skill in the construction process, has to be properly understood and the skills and tasks involved properly appreciated. No-one should be appointed to a project management role without being properly qualified for that role and without experience commensurate with the tasks being taken on. If the function under discussion were to be structural design, these propositions would be obvious and beyond question. They should be equally obvious in the case of project management.

31 Statutory Approvals – Planning Issues and Utilities

31.1. Issues concerning planning and utilities have become evident in most if not all of the projects examined by the Commission. These issues have already been reviewed in the context of the Cleaver Heights development⁴¹¹. In the case of Utilities, principally concerning water, sewerage and electricity supply, the issues have

⁴¹¹ Paras 27.13 to 27.15

concerned delay through late provision of such services. In the case of Planning, it appears to be an almost universal practice that projects are started and sometimes finished before final planning approvals have been given. In this case, while lack of planning consent has not (save in exceptional cases) resulted in delay as such, the prospect of final consent not being forthcoming raises questions of legality and the possibility of changes being required to the work to conform to planning requirements. In addition, the lack of planning consent raises potentially serious issues of control and the proper administration of development policy. In addition to planning requirements, some projects require environmental clearance approval, which raises similar issues to planning concerns.

31.2. Dealing first with planning issues, these were raised in the second statement of Winston Riley on behalf of the Trinidad & Tobago Society of Planners (TTSP). The TTSP raise concerns about pre-design and pre-construction stages of the development which should take into account a large number of broad issues including population dynamics, patterns of development and movement, environmental, social and natural hazard impacts as well as site analysis and selection. Large scale developments imply changes to working patterns and traffic flows and TTSP consider that some large projects, particularly in Port of Spain, appear to be implemented outside the framework of a comprehensive National spatial strategy and plan. Indeed, some projects appear to be in direct contravention of the Town & Country Planning Act⁴¹² which requires prior permission of the Minister responsible for Town & Country Planning. Not only is the development unlawful, but it contravenes the spirit and intent of the legislation in circumventing and losing the benefit of input from the Town & Country Planning Division and other regulatory agencies whose function is to assess the impacts of the development and to seek to mitigate negative impacts. Also, key stakeholders, including the general public, are denied the opportunity to contribute and comment on future development of major centres of population.

31.3. TTSP identify particular projects for which permission of the Minister responsible for Town & Country Planning was not obtained prior to the start of construction. Those

⁴¹² Cap. 35:01

for which the Commissioning Agency was UDeCOTT are identified as: Olera Heights Housing Project, the Brian Lara Cricket Complex, the National Academy for Performing Arts (North) and the Chancery Lane Complex. In addition to lack of final planning consent, none of these projects had obtained a Certificate of Environmental Clearance (“CEC”) which requires input from and approval by the Environmental Management Authority (EMA). The general issue of planning consents and statutory authorities was raised during the debate on design-build when Minister Imbert agreed that these were matters the Commission needed to address⁴¹³.

31.4. Issues concerning both lack of final planning consent and delays by Utilities, specifically T&TEC and WASA, were seen in relation to a number of housing projects examined by the Commission. In the case of Olera Heights, Dr. Rowley’s evidence was that work had been commenced with major planning issues unresolved, resulting in extensive delays and additional costs. In relation to the Blenheim Housing Project, Tobago, while the issue of statutory planning consent was not raised, there was nevertheless a gross and unexplained failure in the design of the intended units within the site which resulted in the planned 114 units being reduced to only 61. In addition, when units were completed, none of the waste water, water supply or electrical supply services was available, resulting in the whole estate standing unoccupied for a period of many months. We were told that the water and waste water supply were dependent on availability of electricity to power the pumps. In similar fashion, the Roxborough Housing Estate, while substantially completed, had stood vacant for many months, a major cause of the delay being the failure of T&TEC to provide power. In both cases, infrastructure works (utilities as well as access roads) had been taken over by UDeCOTT. This demonstrates a lack of effective planning and a failure to co-ordinate the operations of the bodies whose work is essential to achieving completion.

31.5. In relation to the Cleaver Heights Housing Project, which was examined in somewhat more detail than other Housing Projects, all the above problems were found to be present. As regards planning issues NHIC stated, at the time of their first formal proposal in December 2004, that the scheme incorporated comments from Town &

⁴¹³ Transcripts 29 and 30 January 2009.

Country Planning and that EMA approvals were almost finalised. With regard to utilities, the proposal from NHIC included drainage, road works, water reticulation works (service mains, fittings, valves and fire hydrants) and sewer installation within the site, but excluded any treatment plant for effluent liquids, which was to be provided by NHA (or HDC). The proposal also included a provisional sum for charges by T&TEC for providing power supplies; and provided that upgrading of existing water, sewage and electricity supplies beyond the site boundaries would be carried out by NHA.

31.6. While all the above contingencies and outstanding matters could have been resolved before finalising the contract, and *a fortiori* before commencement of the Works, it is plain from the narrative set out in Section 25 above, that the priority of NHA was to get on with the work and that none of these matters had been further clarified at the time the work commenced in May 2005. NHIC took the position that all final approvals would be granted upon final inspection of the Works. As regards planning issues, there were substantial changes with parts of the estate being re-located because of the topography of the site. This was said to have been agreed with the planning authority although no formal consent was produced. During the course of evidence on 15 May 2009⁴¹⁴ the Minister of Planning, Housing and the Environment, Minister Dick-Forde confirmed that it was the practice for projects to start without final planning approval. While she asserted that this practice should stop, she accepted that this would necessarily involve a delay to projects. With regard to utilities, there was similarly no attempt to finalise the requirement of T&TEC or WASA before the project started. Undoubtedly delay would have resulted had NHA insisted on finalising these details, but the result of leaving such matters unresolved was potential delay and additional costs.

31.7. Problems with planning and utilities can be seen to recur in varying degrees on virtually every project considered by the Commission. In relation to UDeCOTT Housing Projects being conducted in 2005, Ricardo O'Brien, the then CEO, commissioned a report from Lockwood Green on causes of budget and schedule

⁴¹⁴ Transcript page 176.

overruns⁴¹⁵. Six projects were examined, each of which was being project managed by Planning Associates Ltd (PAL)⁴¹⁶. The general conclusions of the report are referred to in Section 12 above. Of specific note here is the observation that two of the projects which were to be completed in May 2006 would not be able to be occupied due to the lack of sewer connections. It is noted that “*design, WASA approval and installation of the sewer connections may take over 9 months to complete*”⁴¹⁷. The Report also noted that the time taken for approvals by Town & Country Planning and WASA considerably exceeded those encountered by the writers in other jurisdictions, the delays being added to by changes in statutory requirements by WASA after final project approvals. It is noted that PAL’s contract required that they obtain all statutory approvals, but that certain approvals remained outstanding. The difficulties encountered by PAL may be compared to the experience of Genivar on the Waterfront project where, it appears, similar problems with utilities were overcome by timely intervention with the relevant authorities, perhaps aided by the somewhat higher profile of the project.

Initial Conclusions

- 31.8. There is no doubt that many construction projects in Trinidad & Tobago have suffered from unusually long periods being taken in processing and granting of approvals and in attempts to circumvent such delays. The result has been that many or most projects, promoted by a succession of public bodies and government agencies, have been started in full knowledge (or at least in deemed knowledge) that appropriate consents were still outstanding. This applies to both planning consents and approvals and work to be carried out by utility companies.
- 31.9. The consequences of these failures is potentially serious, particularly in the case of planning and environmental requirements, where final approvals, if sought at the relevant time, would be expected to affect the design of the project in ways that might be material. The carrying out of work in advance of such approval effectively denies the planning authorities the opportunity to implement proper planning policies. Where the offending agency is a major body such as UDeCOTT it can be

⁴¹⁵ Exhibit 26 to statement of Neelanda Rampaul.

⁴¹⁶ Consulting Engineers substantially owned by Mr. Winston Riley.

⁴¹⁷ Report p.5.

seen that this necessarily creates tension within government and means that officials are effectively prevented from performing their duties in a proper manner.

31.10. None of the foregoing will come as any surprise to people familiar with the construction industry in Trinidad & Tobago. What needs to be examined, however, is the reasons for this persistent state of affairs. Either the relevant authorities are too slow in performing their functions; or the relevant employing agencies fail to make timely applications and decide to proceed with projects without relevant consent having been granted. Overall, there is a clear mismatch between the needs and expectations of the development programme being pursued by government and the capabilities of the relevant agencies in terms of timely responses. This mismatch appears to have become a permanent feature of Public Construction work. It needs to be seriously addressed and a proper solution found.

PART VI: TERMS OF REFERENCE ISSUES

32 Value for Money

- 32.1. We now pass to our Terms of Reference which require us to make recommendations and observations arising out of our deliberations as may be deemed appropriate to ensure that: *“with respect to public sector construction projects and the procurement practices and methods of operation of the Urban Development Corporation of Trinidad & Tobago Ltd (UDeCOTT), tax payers get value for money”*.
- 32.2. There are two essential elements in the achievement of value for money: first, ensuring that money to be expended on public construction projects is so expended and not corruptly diverted and effectively stolen from the public; and secondly to ensure that the construction projects are planned and executed in a proper and efficient manner so that the public pays only the proper price for those Works. A third element needs to be recognised in ensuring that the projects which are commissioned are those which are properly needed in the public interest. We have received and noted some evidence on this third aspect, notably in connection with the planning and implementation of the Northern Academy of the Performing Arts, where it was suggested that interest groups had not been consulted and that the project being constructed was not appropriate to local needs. While these concerns were expressed to us and responded to by Minister Imbert,⁴¹⁸ the issue is largely political and as such beyond our mandate. We therefore note that the issue is potentially relevant in any broader discussion of value for money and observe that it is important that UDeCOTT and other public bodies should be seen to conduct their business in a fair and transparent manner to as to dispel the aura of scepticism and distrust that presently exists .
- 32.3. As to the first issue, it should be recognised that our enquiry into issues of corruption is made against a background of public suspicion, bordering on conviction, that corruption is both widespread in Trinidad & Tobago and a particular issue in the affairs of UDeCOTT. As a consequence, UDeCOTT and other public bodies should be alert to the need to be seen to conduct their functions in a fair, unbiased and

⁴¹⁸ Round table discussion on issue (iv), transcript 23 March p.75-85.

transparent manner, so as to remove the veil of scepticism and distrust which presently pervades their activities.

32.4. On the other hand, it is to be noted that Trinidad & Tobago has a historical record of incidences of corruption and of the serious consequences which flow from corrupt practices⁴¹⁹. Thus there is a balance to be drawn between the serious consequences and the gravity of corruption issues and the possibly over-hasty reaction which may give the impression of an unfair pre-disposition to find corruption where none exists.

32.5. The issues of potential corruption reviewed earlier in this report need to be viewed against the foregoing background. With regard to UDeCOTT and those who control its operations, a number of accusations have been raised concerning the tender procedure and award of contracts. It has been necessary to review at some length the history of the first major contract for which UDeCOTT assumed responsibility, the Customs & Excise (C&E) building forming the first package (PK1) of the Government Campus Project. Explicit accusations were made involving Dr. Rowley, Mr. Calder Hart and others during the first round of tendering in 2003. We have already concluded that the tendering process was flawed in a number of respects. However, we have accepted the contemporaneous explanation put forward by Mr. Calder Hart that the mistakes occurred in an attempt to correct the system "*on the run*". Perhaps the most surprising outcome of the C&E tendering process was the decision by the Integrity Commission to conduct a secret enquiry into accusations that Dr. Rowley had acted improperly over the C&E tender process, an enquiry that continued for some 2 years between 2004 and 2006. The report of that enquiry came to Dr. Rowley's attention only at the end of 2006 and led to decisions of the Court to quash the report and subsequently to award Dr. Rowley damages.

32.6. The activities of the Integrity Commission, both in relation to the secret enquiry and a further public enquiry into alleged misconduct by Dr. Rowley over the Landdate Project in Tobago, make it difficult indeed to separate out what was really going on in relation to the award of the Contract for the C&E building. In this regard, Dr. Rowley himself accepted that no actual corruption had taken place. We have

⁴¹⁹ See generally Section 28 above.

accepted, however, that there was evidence suggesting that particular individuals involved in the process might be subject to certain predispositions as to where the project was to be awarded. In more plain language, we think it likely that there were attempts to influence the placing of this contract. However, rather than indicating corruption, we think this is more a reflection on local culture in a society where no one is anonymous, and business at any level is made more complicated by the undoubted existence of many levels of personal relationships involving predispositions to favour one person over another. Such a culture cannot be changed but the consequences in terms of potential corruption must be guarded against.

32.7. The next project which was examined in detail was the Ministry of Legal Affairs (“MLA”) Tower forming Package six (PK 6) of the Government Campus Project. As set out in some detail in Section 14 above, the award of this contract to Sunway Caribbean Limited, a recently formed subsidiary of a substantial Malaysian Construction Company (also bearing the name “Sunway”) leave a number of serious and still unanswered questions. Foremost of these is how it came about that UDeCOTT, which had otherwise acted with customary prudence in regard to guarantees and recourse, should have allowed this contract to be placed with a company which itself had no proper track record or financial standing, without a full Parent Company Guarantee, as had apparently been offered during the negotiation process. The decision to award the contract to Sunway Caribbean Limited was in any event contentious since they were only the third lowest tenderer and the reasons given for preferring them to lower tenderers raised further questions. However, the most serious unanswered questions are those relating to the alleged involvement of family interests of the Executive Chairman Mr. Calder Hart and of his direct involvement in the placing of the contract through use of his own personal fax facilities. While this does not amount to direct evidence of corruption or wrong doing, the matters summarised here and listed in more detail in Section 14 require further investigation. The accusations against Mr. Calder Hart personally are serious and require to be answered. The Commissioners therefore recommend that a detailed investigation be conducted into these issues.

32.8. The third major project which has come in for detailed review is the Brian Lara Cricket Stadium, which is reviewed in Section 16 above. Here, as now generally

acknowledged, the project itself has become a scandalous disaster, described by UDeCOTT's own expert witness Mr. Arun Buch as a "*fiasco*". The design, management and performance of the Project have all seemingly passed beyond any control. The building, which is still incomplete, appears to contain serious design errors, not being such as to threaten the stability of the building but which have resulted in a steel structure which is grossly uneconomic. The structure itself is needlessly expensive and doubts have been expressed as to whether it will even serve its intended purpose of protecting spectators from the elements. Perhaps the worst aspect is the seemingly total lack of control over finance, the speed and quality of construction and particularly over payments to the Contractor currently undertaking the bulk of the work, HKL.

32.9. As in the case of the MLA Tower, no evidence of actual corruption has emerged but there are many serious and unanswered questions including why UDeCOTT chose to enter into such an obviously ill advised contractual arrangement to make advanced payments to HKL and why it chose to persist in making those payments with seemingly no control or even proper recording of sums paid and sums recovered from the contractor. The case for terminating the contract appears over-whelming and the reasons given for not doing so appear insufficient. The possibility of some corrupt relationship dictating the course of events cannot be ruled out and, in the absence of proper answers the whole project demands further investigation.

32.10. Turning to the second aspect of value for money there are some positive factors which should be recorded. First, it is the case that a number of major projects have been successfully constructed by UDeCOTT as the client where value for money can be said to have been achieved. Foremost in these projects is the International Waterfront buildings which were successfully constructed, to time and budget, using a version of the design-build method. The same is substantially true in the case of the Chancery Lane Office complex, although this has been somewhat more controversial. We have been pressed to accept that the success of these projects should lead to the conclusion that design-build should be the preferred method of procurement. While we accept the merits of this form of procurement, it by no means follows that it represents the best way to achieve value for money. This is amply demonstrated by the cost out-turn of the Government Campus Project. Leaving aside contentious

issues surrounding procurement and subsequent delays to completion, the overall cost of the project, which was carried out by traditional design-tender procedures, has been competitive and certainly does not add support to the contention that design-tender procedure should be abandoned.

32.11. Against these successes, however, must be listed a number of projects which, for a variety of reasons have “failed” in terms of proper management. Foremost is the Brian Lara Stadium already mentioned. Close behind comes the Scarborough Hospital Project, managed by NIPDEC. Here, a variety of management and design failures led to a confrontation with the contractor in which the contract was terminated. A remedial contract has now been placed, after some years of total inactivity. It is clear that the final cost overrun will be very substantial. Also in Tobago should be mentioned the smaller but still significant project of the Tobago Financial Complex, where a series of management and design errors have led to a situation in which there will be a huge and largely avoidable cost overrun.

32.12. The linking factor between the successful projects is that proper procedures have been employed and projects have been managed by experienced project managers who have made appropriate decisions at the right time. Conversely, what links the projects which have “failed” is poor management typified by failure to make decisions and to resolve issues when needed, together with a series of identifiable mistakes which, having once been made, have been adhered to tenaciously. An example of this is the inexplicable failure to terminate the contract for the Tobago Financial Complex once it became clear that the whole project had to be redesigned, this failure having been perpetuated and indeed still continuing. Similarly, the failure to terminate HKL’s Contract on the Brian Lara Stadium in the face of successive and gross defaults, accompanied by the inexplicable decision to continue making advance payments, is a situation which continues.

32.13. Given that some major projects in Trinidad & Tobago have demonstrated an ability to deliver value for money, various questions arise as to how this ability can be fully deployed and enhanced. The need to ensure the availability of good management is crucial. This topic is reviewed in Section 30 above. Good management delivering value for money encompasses management of time and budget, issues which have

been reviewed in relation to many individual projects earlier in this Report. Good management also includes delivering work to appropriate quality standards, a topic reviewed in the next following section. Good management likewise includes avoiding problems with planning issues and utilities, as reviewed in Section 31 above. In this regard the solution is two-fold: first designers and managers should plan ahead; and secondly planning authorities and utility companies should improve their delivery and reduce waiting times to a minimum. Value for money also implies that the project will serve the purpose for which it was intended.

32.14. We are in no doubt that the delivery of value for money requires consideration not simply the delivery of economic projects in the short-term, but also building up the resources and skills of the local industry which will then be better placed in the long-term to deliver both economic performance and other financial benefits through local employment and development of exportable skills. The debate on the use of foreign contractors and consultants is reviewed in Section 6 above. For the achievement of value for money it is clear that the use of foreign contractors and consultants, when otherwise justified, should also be accompanied by appropriate programmes for training of local personnel, not simply in construction techniques but extending to matters of design and management, particularly concerning design build procurement. In this regard, the enthusiasm of Government for increased use of design-build should be recognised and, while we do not recommend the displacement of the design-tender method, we believe that local contractors and consultants must be prepared to enter the field and acquire the expertise and reputation for delivering value for money by whatever procurement method the client may choose. In this regard both Government and the JCC should assist local consultants and contractors through training and other avenues to achieve this objective.

32.15. Finally we have noted that contractors operating in Tobago were usually compelled by necessity to source goods and materials from Trinidad which were then transported to Tobago in small consignments which seemed inevitably un-economic. We were told that, despite the extensive housing projects, there was no central source where even common building materials could be obtained in Tobago. Depending on future construction plans for Tobago, there would seem an obvious commercial opportunity to make a range of construction materials available in Tobago so that the

premium generally accepted for construction work in Tobago can be reduced if not eliminated. Further, while such macro-economic planning could be undertaken by Government, we are convinced that it would be better undertaken by individuals willing to assume the attendant risk against the likelihood of material profits.

32.16. We would add as a postscript that the evidence received in relation to successful building projects indicates that building costs in Trinidad (not including Tobago for this purpose) are not materially out of line with costs in other countries, including the USA and UK. It may also be observed that all countries have from time to time experienced “disaster” projects which have seemingly run out of control.⁴²⁰ Where Trinidad and Tobago stands apart from other jurisdictions is perhaps in making initial mistakes which are then persisted in rather than being resolved by taking bold decisions to cut losses.

33 High standards of workmanship

33.1. Our Terms of Reference refer, literally, to “*highest standard of workmanship*” being achieved. This clearly calls for interpretation since in some cases, for example low cost housing, it would be quite inappropriate to demand the “*highest standard*”. We therefore interpret this as a requirement for workmanship to be at an appropriate standard which, in some cases, may equate to the highest standard available and in others to something less.

33.2. To specify standards of workmanship also requires an appreciation of the work to be performed and its intended use or function. Where the work performs a structural function the appropriate standard will be such as to satisfy that function in engineering terms rather than, for example, in terms of appearance. Conversely, where the work is, for example, for a hospital, the appropriate standard must import requirements as to hygiene. Thus appropriate standards will vary according to the intended purposes and it is axiomatic that workmanship should be fit for such purpose.

⁴²⁰ Among recent examples in the UK is the Scottish Parliament building in Edinburgh originally estimated to cost £50 million and finally costing some £414 million and overran its schedule completion date by three years.

- 33.3. In the course of this enquiry we have received a large amount of written and oral evidence, and oral contributions in round table discussions, which have touched on many different identified projects. We have visited many of these projects and have also seen many other Public Sector buildings in Trinidad & Tobago. The collective conclusion from all this material is that contractors, sub-contractors, trade specialists and suppliers of goods and materials to the Public Construction Sector in Trinidad & Tobago are well capable of producing workmanship to appropriate high standards where they are required to do so. This includes interior and exterior finishings which form the “surface” of buildings and which remain visible after completion. It also includes the many concealed elements of buildings, from the foundations and structure to building elements such as doors and fenestration, as well as the multitude of services found in modern buildings.
- 33.4. The difficulties of identifying what is meant by the terms *foreign* and *local* when applied to contractors, sub-contractors, specialists and suppliers, has already been mentioned. However they are to be defined, it is to be assumed that both foreign and local tenderers will bid only for work which is within their own capability and that foreign companies will be brought in where particular skills or capabilities are required which are not available locally⁴²¹. What we would observe is that we found no pattern of higher standards being achieved by foreign contractors. Indeed it may be noted that on the International Waterfront Project, where consistently high standards of finishes were seen by the Commissioners, the workforce was said to be 75% to 80% local. We conclude from this that the local work-force can produce work of high standard, efficiently and effectively, given appropriate supervision and management.
- 33.5. It is of some significance that we have been able to conclude that the standard of workmanship in structural construction work is generally fit for purpose and of appropriate quality. We have reached this conclusion not as a result of any direct investigation of work standards, but as a result of the absence of reports of sudden structural collapses such as are found in other comparable developed countries

⁴²¹ For example we were told that there is presently no capability in Trinidad to produce large scale curved steel structures, for which foreign tenderers would be sought.

where control of building standards is a problem.⁴²² We are aware, as a matter of general knowledge, that collapses have occurred on highway bridges, usually as a result of erosion by floodwater; and one cannot be unaware of various temporary measures which have been taken, particularly on rural roads. We are not, however, aware of any such incidents affecting buildings or resulting in loss of life, as is usually the case where standards of structural work are problematic.

33.6. We have spent some time examining a number of low cost housing projects where various deficiencies have been brought to our notice. These have generally been concerned with the planning and management of the projects, which have typically become subject to delays and cost escalation through the need for re-design. In terms of workmanship standards, however, we have not become aware of any serious shortcoming. Indeed, given the paramount need for economic designs and materials, we have been impressed by the standards of finish achieved. Our impression was fortified by the fact that none of the occupiers sought to tell us otherwise.

33.7. There was an additional investigation into standards of workmanship at the Cleaver Heights Housing Project, where specific allegations were made as to deficiencies in the contractor's performance. It was noted that the general quality of the dwellings was somewhat lower than had been observed on housing projects in Tobago (Blenheim and Roxborough). The overall conclusion was that the dwellings, while serviceable and clearly habitable, fell short of being entirely satisfactory, a fault which was partly attributable to lack of foresight, planning and supervision of the works.⁴²³

⁴²² For example the widely reported collapse of the 67 room New World Hotel in Singapore in 1986 which was found to be due to under-design, shoddy workmanship and cost cutting by contractors; and the collapse of the roof of a trade hall in Katowice, Poland, in 2006, reportedly due inter alia to changes introduced to make the construction cheaper.

⁴²³ Paras 27.19 to 27.22

34 Free and fair competition, access for all

- 34.1. This section of the Terms of Reference contains what may be seen as a contradiction in terms, in that the wish for full participation and access for Trinidad-based companies is not advanced on the basis of free and fair competition, but as deserving of protection against what is seen as unfair competition. The issue has been debated and is reviewed in Section 3 above in terms of the relative performance of local and foreign contractors and consultants; and in Section 9 in terms of the White Paper. Also relevant to this section is the debate over turnkey or design-build contracting, summarised in Section 7, particularly in view of the Government's expressed preference for design-build procurement and the known reluctance of local contractors and consultants to change to this method.
- 34.2. First in relation to the capability of the local industry, we have seen nothing to indicate that local contractors and consultants are not capable of producing high quality work and of undertaking complex projects subject, however, to certain limitations based on capacity and experience where the use of foreign contractors and consultants is justified⁴²⁴. What must be assured, however, is that, open competition between local and foreign firms does not lead to local participants being placed at a disadvantage by the ability of foreign firms to offer inducements not available to local firms, such as soft loans or the employment of a workforce working at lower cost. In this regard, while wage rates paid to foreign workers may be the same as those applicable to local firms, there may be other differences through which, in effect, the foreign contractor would have an unfair advantage over the local contractor. We are firmly of the view that there must, at the least, be a level playing field on which foreign contractors compete on effectively the same terms as local contractors.
- 34.3. However, the debate concerning competition between local and foreign contractors and consultants has not been conducted on the basis of providing such a level playing field, but in terms of the creation of quotas or reserved sections of available work for local contractors, or alternatively a subsidy to local contractors operating effectively as a tax on foreign contractors. Whatever form it takes, this should be recognised as

⁴²⁴ See Section 6 and particularly 6.18-6.21.

amounting to an unlevel playing field in which local contractors are given the advantage. The question is how far can such an approach be justified.

- 34.4. Although this issue has been debated at length and accepted through the medium of the White Paper, it is difficult in purely economic terms to justify what is in reality a subsidy in favour of lower inefficiency. In a wider context, the maintenance of quotas or subsidy could be justified by the need to protect particular sectors of the local construction industry where there is public interest in developing or preserving skills or capacity. This should, however, be the subject of proper and informed debate and economic assessment in wider terms than simply the cost of one or more projects in the short-term. Such decisions are matters for Government; but we have no difficulty in finding potential justification for protecting a new or relatively immature industries within Trinidad & Tobago, where this is seen as having longer term economic advantages.
- 34.5. We would also refer, in the context of subsidies, to the apparent ready acceptance of a substantial premium being charged by contractors operating in Tobago, which was said to be justified by the difficulties of procuring resources, particularly materials. We were told that contractors routinely sourced such materials in Trinidad for transport to Tobago with no system of storage or distribution being available in Tobago itself. This we see as a good example of the type of inefficiency which will be encouraged by the easy acceptance of premium payments. For the avoidance of doubt, any degree of premium or subsidy needs to be justified and kept under regular review.
- 34.6. With regard to the debate on design and build, we are not persuaded that this system should be adopted as a convenient means of escaping the problems of time and cost overruns on more conventional design-tender projects. However, to the extent the Government (or UDeCOTT) is convinced on proper evidence that design-build is the right solution for particular projects, the fact that the local industry remains reluctant to adopt this method of procurement should not inhibit the invitation of foreign firms with appropriate expertise from being invited to tender. Not all local contractors and consultants were opposed to design-build and we are confident that the local industry will, given the opportunity, accept that entry into the design-build market is to their

advantage. Apart from the need to overcome long-established practices, there is no reason why the local industry in Trinidad & Tobago should not acquire serious expertise in design-build procurement.

34.7. There are many other more specific factors which need to be brought into account in deciding to what extent UDeCOTT and other Government Agencies and indeed the Government itself, should effectively intervene in the current free market to provide some level of subsidy or protection for the local industry. Clearly, local employment is one factor. Equally, the acquisition of foreign expertise and technology is a valuable asset which foreign contractors can be required to provide for. Also to be borne in mind is that, where very large projects are being dealt with, they may have a distorting effect on the whole local industry, so that the decision whether to place such a project with a foreign contractor should be seen not simply in terms of the economics of that project but in much wider terms.

34.8. We have noted that the local construction industry has acquitted itself with distinction on many substantial projects. We have no doubt that the local industry is capable of competing given sensitive and responsible controls on the general organisation of the public construction industry. It should also be recalled, however, that the local industry currently has a bad record in terms of time overrun and in terms of the enforcement of contractual obligations on both sides. Attention to these matters will improve the local construction industry and make it more viable and more capable of competing favourably with foreign contractors.

35 Integrity and Transparency

35.1. Finally we are asked to make recommendations and observations to ensure integrity and transparency in the public construction industry. Like the notion of "*free and fair competition*" the words "*integrity and transparency*" are individually significant and carry many shades of meaning. They are by no means interchangeable or even overlapping. Transparency, in some respects at least, must be seen as a relative quality to be aimed at, in that complete transparency in business is both unachievable

and undesirable. Integrity, however, is more nearly an absolute requirement. Yet even here the exigencies of business would suggest some qualification.

35.2. Integrity in public service should be an absolute requirement and we are aware that rules governing integrity in public life are generally enforced without question in Trinidad & Tobago⁴²⁵. These requirements apply to the directors of UDeCOTT and other government agency companies. We would add that the same rules should apply, by analogy, to the conduct of UDeCOTT and other government agencies such that the propriety of their action should never need to be called into account. We have found it necessary in this report to question the propriety of certain actions and events where questions remain to be answered.

35.3. At a somewhat lower level, “*integrity*” refers to the avoidance of corruption in its many forms. The Enquiry is fortunate to have had the benefit of submissions from both the Trinidad & Tobago Transparency Institute (TTTI) and from its world-wide counterpart Transparency International, through the Global Infrastructure Anti-corruption Centre and its Director Mr. Neil Stansbury. Mr. Stansbury presented a global view of corruption and Mr. Victor Hart, the current President of TTI, presented an overview of corruption issues in Trinidad & Tobago. Corruption is a world-wide problem which impacts particularly on construction. It would indeed be surprising if the construction industry in Trinidad & Tobago were not susceptible to corrupt influences and Mr. Hart gave a number of examples of corruption which has affected major projects in Trinidad & Tobago.

35.4. It is clear that the fight against corruption in the public construction sector must be pursued vigorously. We have identified a small but significant number of instances concerning UDeCOTT Projects where potential corruption has been alleged and where we have not been able to conclude that the allegations are unfounded. It is not the function of this Commission to make specific findings or to reach conclusions on such matters; but we regard it of the highest importance that the activities of UDeCOTT, its Directors and Managers and all other government agencies and their

⁴²⁵ Through the Integrity Commission and its Enquiries and, in appropriate cases, through criminal court proceedings.

staff should be able to justify public confidence in their activities as being beyond reproach.

35.5. We noted an unfortunate attempt to suggest that both TTI and Mr. Victor Hart were in some way compromised by the support they had received from Mr. Emile Elias and his companies. We believe this criticism to be entirely misplaced and regret that it was pursued. TTTI and Mr. Hart are both sufficiently experienced and mature as to be capable of repelling any attempt that might be made to compromise their independence.

35.6. With regard to transparency, we believe that government agencies and the government itself, in their dealings with public construction projects, should strive to maintain an appropriate level of transparency. That this is not presently the case has been demonstrated in a number of instances, mostly involving JCC members who have passed on their complaints to be raised in this Enquiry⁴²⁶. The actions of UDeCOTT in particular have caused us surprise. It has engendered a public perception of secrecy and arrogance which is at least partly justified and wholly inappropriate in a body performing a public function on behalf of the Government of Trinidad & Tobago. While confidentiality is important in regard to some of UDeCOTT's functions, where this is not the case we believe that it should cultivate and be seen to cultivate a policy of openness so as to build up public confidence in the maintenance of proper standards of integrity and transparency.

35.7. An important part of transparency in public life is to present not just the facts to the public but reasons for decisions concerning matters of public interest. We fully accept that the Government must maintain the right to govern and that this applies also to UDeCOTT and other government agencies. However, where decisions are made on matters of public interest it is of particular importance that they should be justified by proper reasons in order to avoid what may be unjustified criticism.

35.8. With regard to the public construction sector we believe that the maintenance of proper dialogue between the public as users, the producers (contractors and

⁴²⁶ See Section 12 above.

consultants) and Government through its various agencies, should be maintained through appropriate channels. One of these channels is the JCC which is or should be regarded as the proper representative of producers. We are aware of considerable mistrust between the JCC and UDeCOTT which appeared to have been exacerbated by the proceedings of this Enquiry, and which seems to have become a focus for mutual point-scoring. While this is regrettable, it is to be hoped that the Enquiry proceedings will be seen as a watershed and that proper relations can be re-established hereafter. We commented during the course of the Enquiry that UDeCOTT (and other government agencies) ought to become members of or at least be represented on the JCC, a proposal that was viewed positively by the JCC President Mr. Riley⁴²⁷ and has not been rejected by UDeCOTT.

- 35.9. Leaving aside any future role of JCC, the current representative body covering all sides of the public construction industry, including the Government itself, is the Cabinet Oversight Committee⁴²⁸. In addition to causes which it has taken up in the past, this committee should take on the wider role of establishing a regular dialogue between all sides of the industry and promoting appropriate levels of transparency both between different sides of industry and with the public.

⁴²⁷ Transcript 16 January 2009 p.121

⁴²⁸ See paragraph 3.36.

PART VII: RECOMMENDATIONS

36 Recommendations

The following specific recommendations are made, which reflect and summarise the detailed conclusions set out in Sections 28 to 31 and in Sections 32 to 35.

For the attainment of value for money

1. Money assigned for public construction projects must not be allowed to be corruptly diverted and thereby stolen from the public.
2. Management roles should be performed only by experienced persons, who should be motivated to take positive and pro-active decisions and to take the initiative when the project so demands.
3. There must be proper definition of the tasks and functions to be undertaken by Project Managers. Where separate roles are to be performed by different managers, there must be a clear delineation between the functions of different parties so that they neither conflict nor overlap.
4. Good project management includes (a) monitoring all project activities (b) taking action pro-actively to avoid foreseeable delay, including (c) identifying and resolving design errors in a timely manner (d) controlling the timing of unavoidable variations and (e) when appropriate freezing the design. Project Managers who fail to perform adequately must be held to account.
5. Planning authorities and utility companies should reduce their response times to a minimum. Attention should be given to co-ordinating the range of regulatory approvals required with a view to motivating developers to obtain all such consents before starting work.
6. Planning and other regulatory consents should be subject to procedures aimed at ensuring either that appropriate consents are given before a development starts, or at

least that appropriate considerations are given before work starts: it is unacceptable that rules should be systematically ignored.

7. The provision of utility services should be properly planned and co-ordinated so as to avoid such services being unavailable at completion of projects. Procedures should be put in place to facilitate the efficient co-ordination of utility suppliers, particularly WASA and T&TEC.
8. Value for money requires that projects should be performed efficiently by all parties, in accordance with their contractual duties and with due professional skill.
9. Value for money also requires conservation and enhancement of the long-term resources and skills of the local industry, so as to be capable of delivering both economic performance and other economic benefits through local employment and development of exportable skills.
10. The employment of foreign contractors and consultants, when appropriate, should be accompanied by appropriate programmes for training of local personnel, both in construction techniques and extending into design and management issues, particularly concerning design-build procurement.
11. Local contractors and consultants must be prepared to adopt a flexible approach to acquiring new expertise and skills with a view to delivering value for money by whatever procurement method the client may choose
12. For housing (and other) projects in Tobago arrangements should be put in hand to transport and stockpile materials for the more economic provisions thereof to construction sites.
13. Proposed sites for housing projects should be appropriately surveyed and detailed plans for siting of houses drawn up before contracts are tendered.
14. Rules requiring signed or formal contracts should either be enforced or amended, not ignored.

15. Development Contracts must not be let without adequate security being available in the event of failure or insolvency of the Contractor. As a minimum there should be a secure right of recourse exceeding the aggregate of all sums paid to the Contractor.
16. The Contract pursuant to which development is carried out on land owned by the Developer must make adequate provision for transfer of title either to individual purchasers or to the Government Agency.
17. User groups and other interest groups should be properly consulted on decisions regarding public building projects, to ensure that relevant views can be expressed at the appropriate time and taken into account before decisions are made.
18. There should be an audit of the performance of each Government agency against agreed Key Performance Indices to ensure proper levels of technical performance and transparency.
19. Efficient dispute resolution services should be developed through existing Trinidad & Tobago Institutions, making full use of available overseas and international expertise. Consideration should be given to establishing a body to promote the use of mediation in the context of litigation, involving both the legal profession and the judiciary
20. There should be an assumption, wherever contractual obligations are taken on, that the parties will be held to account for any non- performance of such obligations. This should include enforcement of any additional sums payable to the contractor and the payment of damages by the contractor for any culpable delay. Any such claims, on either side, should be properly formulated before being settled, if possible, by amicable means.
21. Where claims cannot be settled by amicable means they should be referred to an impartial tribunal in accordance with such terms as may be agreed between the parties.

22. The Arbitration Act of Trinidad & Tobago (No 5 of 1939) should be replaced by a modern Arbitration Act in line with current international practices. This is needed also to support the establishment of Port of Spain as an international finance centre for the Caribbean.
23. There should be a specialist court available to deal expeditiously with construction disputes.

For the delivery of projects with high standards of workmanship

24. The Cabinet Oversight Committee of the Construction Industry should pursue the objective of creating one or more bespoke forms of contract for general use in Trinidad and Tobago incorporating all necessary special conditions.
25. The Cabinet Oversight Committee should seek to establish regular dialogue between all sides of the industry and to promote dialogue with public interest groups.
26. The objectives of the Cabinet Oversight Committee should include (a) the creation of a range of Standard Procedures and Documentation (SPDs) for the construction industry in Trinidad and Tobago which are known and accepted throughout the industry and which are not changed without proper debate and (b) the establishment of training programmes to ensure that SPDs are interpreted and applied in a uniform manner.
27. SPDs should include (a) agreed forms of construction contract for use in Trinidad & Tobago (see recommendation 24), (b) a standardised procedure for design-tender contract procurement, (c) a standardised procedure for design-build contract procurement, (d) standardised dispute resolution procedures.
28. The objectives of the Cabinet Oversight Committee should also include the drawing up and keeping under review Recommendations for Good Practice (RGPs) for the construction industry in Trinidad and Tobago.

29. These roles of the Cabinet Oversight Committee should, in time, be taken over by a body organised by the whole construction industry including representation from Government and all the relevant Government Agency companies.
30. RPGs should include recommendations for ensuring (a) that designs are complete before projects are offered for tender, (b) that variations are required only where matters arise which were unforeseeable at design stage, (c) that variations which cannot be avoided are ordered promptly and (d) that the cost and time impact are agreed with the contractor.
31. RGP's should include recommendations (a) that the use of provisional and prime cost sums should be both reduced and standardised (b) that the use of nominated sub-contractors and suppliers pursuant to provisional or prime cost sums should be controlled and reduced and (c) that main contractors should be required or encouraged themselves to quote for such items of work.
32. RGP's should include recommendations (a) that specialist sub-contractors or suppliers should be selected by the contractor from a list of approved specialists and (b) that main contractors must accept, and be seen to accept, full responsibility for the performance of their sub-contractors, whether nominated or not.
33. RGP's should include recommendations (a) that Provisional Sums should not be used to represent incomplete areas of work and (b) that there should be disincentives to discourage the use of provisional sums or the acceptance of incomplete designs. Such disincentives might include reduction of the fee payable to professionals for post-contract design work; and a limitation of the sum payable to Contractors for work carried out pursuant to a Provisional Sum.
34. RGP's should include recommendations that, in place of interim payments based on measurement, contracts should provide for agreed milestone payments with appropriate conditions of contract governing the right to payment.
35. RGP's should include recommendations that conditions of contracts should place responsibility for Bills of Quantities, where used, on the Contractor, including the

acceptance of any errors of measurement or description by reference to other contract documents, so that the contract operates as a lump sum contract subject to ordered variations.

36. For housing contracts intended to be carried out at “*low cost*” HDC should exercise their power to make regulations prescribing appropriate standards for the construction of houses⁴²⁹.

For the attainment of free and fair competition

37. Procurement Rules applying to Government Agencies in the field of construction should, in general, be the same. Agencies applying different Procurement Rules should either justify any differences or take steps to adopt uniform rules. The Ministry of Finance should renew its efforts to achieve uniform procurement rules for all Government Agencies undertaking construction operations.
38. It should be the responsibility of all Government Agencies and of Ministers to ensure that, in any tender situation, it is clear beyond doubt what rules are applicable to the tender process and that those rules are readily available and clear.
39. The reviewing of tenders and the making of decisions upon the award of contracts should be undertaken in as transparent a manner as possible, including demonstrating clear compliance with procurement rules, so as to allay suspicion of improper actions or potential corrupt influences .
40. A reserved quota or subsidy in favour of local contractors or consultants could be justified by the need to protect particular sectors of the local construction industry where there is public interest in developing or preserving local skills or capacity.

⁴²⁹ Housing Development Corporation Act 2005 Section 43(1)(a).

41. While a limited premium for work in Tobago may be justified, this should be controlled and measures to increase efficiency and drive down prices should be encouraged.
42. The Government's policy on the use of foreign contractors and consultants for public construction projects should be transparent and open to review.
43. Local contractors and consultants who compete with foreign companies should be provided with the same or equivalent benefits as enjoyed by those foreign companies and should be protected from unfair competition through matters such as soft loans.
44. The introduction of design-build should be gradual. There should be a study of different systems involving local contractors and consultants in order to identify the system most suitable for adoption in Trinidad & Tobago.
45. The preferred system for design-build is likely to involve completion of the design to a minimum level, followed by competitive pricing, with provision of detailed Owner's Requirements and Performance Specification. An experienced design consultant will be needed to oversee the production of tender documents and to advise on acceptance of proposals.
46. Design-build should not be adopted as a means of escaping expected problems of time and cost overrun using design-tender procurement. Certain high-profile design-build projects have been successful because of high levels of performance from the parties involved. Such high levels of performance are likely to lead to success on any other procurement method including design-tender.
47. Potential problems of time and cost overrun using Design-Tender procurement should be overcome by taking steps to ensure that all parties perform their obligations or are held to account for not doing so.
48. Criminal activity and serious threats to life and security affecting construction projects are to be taken with utmost seriousness. Contractors who are prepared to

undertake work in such conditions are entitled to the fullest support from all quarters.

For the maintenance of integrity and transparency

49. It should be assumed that the construction industry is vulnerable to potential corruption and steps should accordingly be taken to avoid actual corruption following established guidelines and recommended practices laid down by Transparency International and its affiliates.
50. Integrity in public service should be an invariable and unqualified requirement. Rules governing integrity in public life apply to the directors of UDeCOTT and other Government agency companies and should be rigorously enforced.
51. Government agencies and other public bodies should recognise that the public may view their activities with scepticism and even distrust. They should therefore take positive steps to achieve and demonstrate openness and transparency, and to avoid actions which may lead to further recrimination and mistrust.
52. In particular, Government agencies must seek to dispel suspicion over the operation of their tender procedures and the potentially unfair award of contracts.
53. Tender procedures should be designed to eliminate the effect of personal relationships or pre-dispositions to favour one person or company against another.
54. There should be no doubt (as there presently is) as to the power of Ministers to give instructions to Government agency companies on any matter within the Minister's remit, including compliance with rules, regulations and procedures. If this cannot be achieved by voluntary means, consideration should be given to creating the agency as a statutory corporation incorporating such powers .

55. There should be a review of the decision in N H International (Caribbean) v UDeCOTT⁴³⁰ and measures, if necessary legislative, put in place to ensure that bodies making decisions involving public money are open to challenge by Judicial Review.
56. To the extent the solutions for the Construction Industry embodied in the White Paper are not to be implemented, other measures and safeguards should be introduced to secure attainment of the principles of value for money, transparency and accountability.

Particular Recommendations applying to UDeCOTT and other Government Agencies

For the attainment of value for money

57. There should be a review and re-definition of the roles of UDeCOTT and other government agencies, to ensure that the tasks they take on are consistent with their capabilities, as demonstrated and independently verified from their performance.
58. For the Government Campus project, there should be an investigation into what steps were taken by UDeCOTT's managers to control and reduce delay.
59. For the Brian Lara project, there should be an investigation into the planning and administration of the whole project including the measures taken by UDeCOTT's managers (a) to control and reduce delay to the project (b) to review and approve the design of the steel superstructure and (c) to consider the advice of TAL that the contract with HKL should be terminated (see also recommendations 66 and 67).
60. UDeCOTT should address the shortcomings identified in the Lockwood Greene Report and have their procedures audited to ensure that all such shortcomings have been appropriately rectified.

⁴³⁰ NH International (Caribbean) Ltd v UDeCOTT and Hafeez Karamath Limited Civ. App. No. 95 of 2005

61. UDeCOTT should put in place measures to rectify the financial and other shortcomings identified in the Reports of Mr. McCaffrey and have their procedures audited to ensure that all such shortcomings have been appropriately rectified.

For the delivery of projects with high standards of workmanship

62. UDeCOTT must improve its management skills and should not take on functions for which they do not have properly experienced and qualified professional staff: see recommendations 2-4 above
63. UDeCOTT must acquire skills in the measures needed to deal effectively with projects which fail, such as Brian Lara and the Tobago Financial Centre, so as to achieve the best outcome in the public interest.

For the attainment of free and fair competition

64. UDeCOTT must avoid any breach or abuse of procurement rules through excessive and unfair use of sole selective tendering, in breach of obligations as to free and fair competition and transparency.
65. Where UDeCOTT intends to dis-apply any part of its own tender rules, either those rules should be changed, or there should be a published and transparent statement of the circumstances in which the rules will or may be dis-applied and non-conforming tenderers allowed to be considered.

For the maintenance of integrity and transparency

66. UDeCOTT must recognise that a public perception of secrecy and arrogance has been engendered by its actions, which is wholly inappropriate for a body performing a public function on behalf of the Government of Trinidad & Tobago. UDeCOTT should take and be seen to take remedial action by cultivating a policy of openness

aimed at building public confidence in the maintenance of proper standards of integrity and transparency.

67. There should be a full investigation by an appropriate Law Enforcement Authority into the award of the MLA contract to CH Development including the role of Mr Calder Hart and the conduct of the Board in not ensuring that an enforceable guarantee was given by the parent company of CH Development.
68. There should be a full investigation by an appropriate Law Enforcement Authority into the award of Packages 3 and 5-8 for the Brian Lara project, particularly as to (a) why no formal terms were drawn up dealing with advance payments (b) the manner in which UDeCOTT interpreted the right to advance payments including advice sought and received (c) the accounting procedures employed by UDeCOTT for making advance payments and repayments and why no vouched accounts were drawn up.
69. There should be a full forensic audit of all sums advanced against the value of work and materials provided by HKL and of repayments made on the Brian Lara Project.
70. The roles of Chairman and Chief Executive Officer of UDeCOTT should be separated.
71. There should, in addition to the Chief Executive Officer, be at least two suitably experienced and qualified executive directors appointed to the board of UDeCOTT, one having executive responsibility for technical matters and one having executive responsibility for financial matters.
72. There should be an audit of the conduct of all UDeCOTT's senior staff and directors in the period 2004 to 2009, as to their involvement in errors and omissions concerning the Brian Lara Stadium Project in respect of which no action was taken by senior staff or by the board.
73. Senior staff and board members of UDeCOTT should undertake independently organised training courses to fortify the need for them to act professionally and

independently in regard to perceived deficiencies in UDeCOTT's methods and operations.

74. There should be an investigation into the circumstances in which 9 hectares (22 acres) of land at Valsayn, sold to the National Union of Government and Federated Workers (the Union) by the Government at reduced price, was re-sold at a profit by the Union, to include the reasons for re-sale and the whereabouts of the profit from the re-sale.
75. All State agency Boards must be held responsible and accountable for the planning and implementation of their projects. This entails, *inter alia*, ensuring that all applicable rules, regulations, procedures and laws are scrupulously followed.

Particular Recommendations deriving from the Cleaver Heights Housing Project

76. The Housing Development Corporation (HDC) should clarify and make public its rules for the procurement of housing development projects. All other agencies of the Government of Trinidad and Tobago responsible for housing developments should bring their procurement rules into line with those of HDC with only such variations as are shown to be necessary.
77. Procurement rules for housing development should ensure that, in respect of land not in the ownership of HDC or other employing agency, adequate security exists in respect of any monies to be paid on account of work carried out by the contractor.
78. Procurement rules for housing development should ensure that a formal contract is in place, complying with minimum prescribed standards of formality, before any money may be paid to a contractor.
79. A Standard Form of Contract for use on any housing development project should be drawn up by HDC and agreed with government and the JCC, covering all aspects of housing development.

80. Contracts for housing developments should contain provisions for liquidated damages to be payable in the event of delay by the contractor which is not excused under the contract. Liquidated damages provisions should be enforced initially by deduction from sums otherwise due to the contractor.
81. HDC must ensure that proper surveying and planning takes place so that the number of housing units planned and intended to be constructed can be adequately accommodated on the site.
82. HDC must ensure that the agreed contract sum is accurately transferred into the contract documents and that no additional sums are paid other than strictly in accordance with the terms of the contract.
83. HDC must clarify at the commencement of any tendering process whether the tenderer will be required to finance the project until sale or leasing of the dwellings. Where funding is to be provided by HDC it should be clarified that tenders do not include the cost of providing finance.
84. HDC must ensure that orders are placed with utility companies with appropriate lead times to avoid delay to housing projects.
85. HDC must be responsible for ensuring that all appropriate statutory consents are applied for in due time and that all reasonable and proper steps are taken to secure final consent before commencement of works.
86. HDC must exercise its powers to set minimum standards for low cost housing developments, to include matters such as the provision of side-walks, guttering to houses and minimum standards of internal finishes.
87. HDC must ensure that payment for land takes place with and not before the legal transfer of such land. The amount to be paid for land must not exceed the proper valuation of the land based on the advice of independent surveyors.

88. HDC must ensure that housing projects are adequately supervised to ensure proper standards of construction; and that delays which are likely to lead to claims for additional payment or to the enforcement of penalties are properly monitored and agreed with contractors at the time of the relevant events.
89. HDC must ensure that all tender Rules are scrupulously followed
90. HDC must ensure that joint-venture projects are implemented strictly in accordance with the guidelines established by Cabinet.
91. The HDC Board must be held accountable for any deviation from the rules, regulations, procedures and guidelines and must be held responsible for ensuring that their projects are implemented within agreed time, cost and quality standards.

END OF REPORT

**ENQUIRY INTO THE PUBLIC CONSTRUCTION SECTOR,
TRINIDAD & TOBAGO**

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- Annex 1 Commissions issued by H E the President (para 1.5)
- Annex 2 List of persons appointed to assist the Commissioners (para 1.6)
- Annex 3 List of parties and their representatives (para 1.7)
- Annex 4 Procedural Orders issued by the Commission (para 1.7)
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- Annex 6 List of persons giving sworn evidence to the Commission (para 2.6)
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- Annex 8 Documents concerning Salmon letters (para 2.18).
- Annex 9 Discussion paper on Issue (ii): use of Provisional sums etc (para 4.1)
- Annex 10 Discussion paper on Issue (iii): incomplete designs etc (para 5.1)
- Annex 11 Discussion paper on Issue (vi): local v foreign contractors etc (para 6.1)
- Annex 12 Discussion paper on Issue (v): design-build etc (para 7.1)
- Annex 13 List of UDeCOTT board members from 1993 to date¹ (para 12.4)
- Annex 14 EFCL summary² of cost overruns and delays to school projects (para 18.1)
- Annex 15 Financial account for Government Campus Project³ (para 23.17)

¹ See 1st Statement of N Rampaul

² Submitted 25 March 2009.

³ UDeCOTT’s presentation on GCP PK6, MLA Tower, Annex 13.

**ENQUIRY INTO THE PUBLIC CONSTRUCTION SECTOR,
TRINIDAD & TOBAGO**

Annex 1

Commissions issued by H E the President (para 1.5)

REPUBLIC OF TRINIDAD AND TOBAGO

By His Excellency **PROFESSOR GEORGE MAXWELL RICHARDS**,
T.C., C.M.T., Ph.D., President and Commander-in-Chief of the Republic
of Trinidad and Tobago.



A handwritten signature in black ink, appearing to read "G. Richards".

President:
Greetings:

TO: PROFESSOR JOHN UFF
KENNETH SIRJU, Esquire
DESMOND THORNHILL, Esquire
ISRAEL KHAN, S.C. Esquire

WHEREAS by section 2 of the Commissions of Enquiry Act, Chap. 19:01 (hereinafter called "the Act") it is provided, inter alia, that the President may whenever he shall deem it advisable issue a Commission appointing one or more Commissioners and authorizing such Commissioners or any quorum of them to enquire into any matter in which an enquiry would in the opinion of the President be for the public welfare :

AND WHEREAS the President on the advice of Cabinet has deemed it advisable and for the public welfare that Commissioners be appointed to enquire into the construction sector in Trinidad and Tobago and to make such observations and

recommendations arising out of its deliberations as the Commission may deem appropriate, and for this purpose to issue a Commission pursuant to the Act with the following terms of reference:

1. To enquire into :
 - (i) The procurement practices in the public construction sector;
 - (ii) The effect of the use of provisional sums, prime cost sums, nominated suppliers and nominated contractors in construction contracts in the public sector;
 - (iii) The effect of incomplete designs, design changes, variations, poor supervision and poor management on the cost and delivery of construction projects in the public sector;
 - (iv) The performance of local and foreign contractors and consultants on public sector projects;
 - (v) The effectiveness of the turnkey approach, also called the design build approach, for the delivery of public sector construction projects as compared to the traditional design and tender approach;
 - (vi) The reasons for and the effect of cost overruns, delays and defective workmanship in public sector construction projects;
 - (vii) The existence of price gouging and profiteering in the public construction sector; and
 - (viii) The procurement practices and methods of operation of Urban Development Corporation of Trinidad and Tobago Limited (UDeCOTT);

2. To make recommendations and observations arising out of its deliberations, as may be deemed appropriate, to ensure that :
 - (i) With respect to public sector construction projects and the procurement practices and methods of operation of Urban Development Corporation of Trinidad and Tobago Limited (UDeCOTT), taxpayers get value for money;
 - (ii) The delivery of projects and the highest standard of workmanship are achieved and maintained;

- (iii) There is free and fair competition, full participation and access for all citizens in the public procurement process; and
- (iv) Integrity and transparency in the public procurement practice are assured.

NOW THEREFORE, I, GEORGE MAXWELL RICHARDS, President as aforesaid, in exercise of the power vested in me by section 2 of the Commissions of Enquiry Act, Chap. 19:01, do hereby issue this my Commission appointing **JOHN UFF, KENNETH SIRJU, DESMOND THORNHILL and ISRAEL KHAN**, Commissioners to hold the enquiry into the matters aforesaid;

AND I DIRECT that you **JOHN UFF** shall be the Chairman of the said Commission;

AND I FURTHER DIRECT that you **JOHN UFF, KENNETH SIRJU, DESMOND THORNHILL and ISRAEL KHAN** forthwith proceed at such places and times as may be convenient with due diligence and dispatch to enquire into the matters aforesaid and to report to me in writing upon the said matters in September 2009 and to give your opinion and recommendations thereon and to furnish me separately with a full statement of the proceedings of the Commission and the reasons leading to the conclusions at which you have arrived;

AND I FURTHER DIRECT that the enquiry shall be held in public but that you the Commissioners shall nevertheless be entitled in your discretion to sit in private or to exclude any particular person or persons from your sittings for the preservation of order, for the due conduct of the enquiry or for any other reason;

AND I FURTHER DIRECT the Commissioner of Police to detail police officers to attend upon the Commissioners to keep them safe and to preserve order during the proceedings of the Commission to serve summonses on witnesses and to perform such duties as the Commissioners shall direct;

AND I FURTHER DIRECT that a quorum shall consist of two (2) Commissioners;

AND I CHARGE and COMMAND all public officers and all loyal citizens of the Republic of Trinidad and Tobago in their several places and according to their several powers and abilities that they be abiding and assist you the Commissioners without fear in the execution of this your Commission;

AND I DO HEREBY appoint **IDA EVERSLEY** to be the Secretary of the said Commission;

AND this my Commission shall be continued subject to any alteration or revocation thereof until you have finally reported.

Given under my Hand and the Seal of the President of the Republic of Trinidad and Tobago at the Office of the President, St. Ann's, this, *9th* day of September, 2008.

REPUBLIC OF TRINIDAD AND TOBAGO

By His Excellency **PROFESSOR GEORGE MAXWELL RICHARDS, T.C., C.M.T., Ph.D.**, President and Commander-in-Chief of the Republic of Trinidad and Tobago.

GEORGE MAXWELL RICHARDS

**President:
Greetings:**

**TO: PROFESSOR JOHN UFF
KENNETH SIRJU, Esquire
DESMOND THORNHILL, Esquire
ISRAEL KHAN, S.C. Esquire**

WHEREAS by section 2 of the Commissions of Enquiry Act, Chap. 19:01 (hereinafter called "the Act") it is provided, inter alia, that the President may whenever he

AND WHEREAS on the 9th day of September, 2008, **GEORGE MAXWELL RICHARDS**, President and Commander in Chief of the Republic of Trinidad and Tobago, issued his Commission under section 2 of the Commissions of Enquiry Act, Chap. 19:01 appointing you, **JOHN UFF, KENNETH SIRJU, DESMOND THORNHILL and ISRAEL KHAN, S.C.**, Commissioners to enquire into the Construction Sector in Trinidad and Tobago in accordance with the following terms of reference:

1. To enquire into:
 - (i) The procurement practices in the public construction sector;
 - (ii) The effect of the use of provisional sums, prime cost sums, nominated suppliers and nominated contractors in construction contracts in the public sector;
 - (iii) The effect of incomplete designs, design changes, variations, poor supervision and poor management on the cost and delivery of construction projects in the public sector;
 - (iv) The performance of local and foreign contractors and consultants on public sector projects;
 - (v) The effectiveness of the turnkey approach, also called the design build approach, for the delivery of public sector construction projects as compared to the traditional design and tender approach;
 - (vi) The reasons for and the effect of cost overruns, delays and defective workmanship in public sector construction projects;
 - (vii) The existence of price gouging and profiteering in the public construction sector;
 - (viii) The procurement practices and methods of operation of Urban Development Corporation of Trinidad and Tobago Limited (UDeCOTT);

- (i) With respect to public sector construction projects and the procurement practices and methods of operation of Urban Development Corporation of Trinidad and Tobago Limited (UDeCOTT), taxpayers get value for money;
- (ii) The delivery of projects and the highest standard of workmanship are achieved and maintained;
- (iii) There is free and fair competition, full participation and access for all citizens in the public procurement process; and
- (iv) Integrity and transparency in the public procurement practice are assured.

AND WHEREAS the President on the advice of Cabinet has altered the terms of reference of the Commission of Enquiry into the Construction Sector in Trinidad and Tobago to include the contract awarded to NH International (Caribbean) Limited to develop the land and infrastructure and to build 408 houses at the Cleaver Heights Development Project;

NOW THEREFORE, I, GEORGE MAXWELL RICHARDS, President as aforesaid, in exercise of the power vested in me by section 2 of the Commissions of Enquiry Act, Chap. 19:01 and all other powers thereto enabling, do hereby alter the terms of reference of the Commission to enquire into the Construction Sector to include inquiry into:

- (i) The procedures, practices and procurement processes employed by the Trinidad and Tobago Housing Development Corporation in the award of the contract to NH International (Caribbean) Limited to develop the land and infrastructure and to build 408 houses at Cleaver Heights Development Project (“the Cleaver Heights Development Project”);

Corporation and consistent with the procedures, practices and procurement processes employed in the award of similar types of contracts;

- (iii) The nature and consequences of the contractual arrangements;
- (iv) Whether the Cleaver Heights Development Project was a fixed price contract and if so, what was the contract price;
- (v) Whether there was a variance between the negotiated price and the contract price and if so, the reasons for/or the circumstances which caused and/or contributed to such variance; and
- (vi) The circumstances which resulted in a variance in the costs incurred in the execution of the Cleaver Heights Development Project as evidenced in Valuation Report No. 38 for the period ending August 2008.

Given under my Hand and the Seal of the President of the Republic of Trinidad and Tobago at the Office of the President, St. Ann's this 10th day of December, 2008.

REPUBLIC OF TRINIDAD AND TOBAGO

By His Excellency **DANNY MONTANO, LLB., B.Comm., C.A.**,

Acting President and Commander-in-Chief of the Republic of Trinidad and Tobago.



A handwritten signature in cursive script, reading 'Danny Montano'.

Acting President:

Greetings:

**TO: PROFESSOR JOHN UFF
KENNETH SIRJU, Esquire
DESMOND THORNHILL, Esquire
ISRAEL KHAN, S.C. Esquire**

WHEREAS by section 2 of the Commissions of Enquiry Act, Chap. 19:01 (hereinafter called "the Act") it is provided, inter alia, that the President may whenever he shall deem it advisable issue a Commission appointing one or more Commissioners and authorizing such Commissioners or any quorum of them to enquire into any matter in which an enquiry would in the opinion of the President be for the public welfare:

AND WHEREAS on the 9th day of September, 2008, **GEORGE MAXWELL RICHARDS**, President and Commander in Chief of the Republic of Trinidad and Tobago, issued his Commission under section 2 of the Commissions of Enquiry Act, Chap. 19:01 appointing you, **JOHN UFF, KENNETH SIRJU, DESMOND THORNHILL and ISRAEL KHAN, S.C.**, Commissioners to enquire into the Construction Sector in Trinidad and Tobago in accordance with the following terms of reference:

1. To enquire into:
 - (i) The procurement practices in the public construction sector;
 - (ii) The effect of the use of provisional sums, prime cost sums, nominated suppliers and nominated contractors in construction contracts in the public sector;
 - (iii) The effect of incomplete designs, design changes, variations, poor supervision and poor management on the cost and delivery of construction projects in the public sector;
 - (iv) The performance of local and foreign contractors and consultants on public sector projects;
 - (v) The effectiveness of the turnkey approach, also called the design build approach, for the delivery of public sector construction projects as compared to the traditional design and tender approach;
 - (vi) The reasons for and the effect of cost overruns, delays and defective workmanship in public sector construction projects;
 - (vii) The existence of price gouging and profiteering in the public construction sector;
 - (viii) The procurement practices and methods of operation of Urban Development Corporation of Trinidad and Tobago Limited (UDeCOTT);

2. To make recommendations and observations arising out of its deliberations, as may be deemed appropriate, to ensure that:
 - (i) With respect to public sector construction projects and the procurement practices and methods of operation of Urban

Development Corporation of Trinidad and Tobago Limited (UDeCOTT), taxpayers get value for money;

- (ii) The delivery of projects and the highest standard of workmanship are achieved and maintained;
- (iii) There is free and fair competition, full participation and access for all citizens in the public procurement process; and
- (iv) Integrity and transparency in the public procurement practice are assured.

AND WHEREAS on the 10th day of December, 2008 the President on the advice of Cabinet altered the terms of reference of the Commission of Enquiry into the Construction Sector in Trinidad and Tobago to include;

- (i) The procedures, practices and procurement processes employed by the Trinidad and Tobago Housing Development Corporation in the award of the contract to NH International (Caribbean) Limited to develop the land and infrastructure and to build 408 houses at Cleaver Heights Development Project (“the Cleaver Heights Development Project”);
- (ii) Whether the procedures, practices and procurement processes employed in the award of the Cleaver Heights Development Project were in compliance with the tender rules and/or other rules, regulations, procedures, practices and processes of the Trinidad and Tobago Housing Development Corporation and consistent with the procedures, practices and procurement processes employed in the award of similar types of contracts;
- (iii) The nature and consequences of the contractual arrangements;
- (iv) Whether the Cleaver Heights Development Project was a fixed price contract and if so, what was the contract price;
- (v) Whether there was a variance between the negotiated price and the contract price and if so, the reasons for/or the circumstances which caused and/or contributed to such variance; and
- (vi) The circumstances which resulted in a variance in the costs incurred in the execution of the Cleaver Heights Development Project as evidenced in Valuation Report No. 38 for the period ending August 2008

AND WHEREAS the President on the advice of Cabinet has further altered the terms of reference of the Commission of Enquiry into the Construction Sector in Trinidad and Tobago to indicate that the specific terms of reference of the Enquiry in the Instrument dated 9th day of September, 2008 more specifically the terms of reference in paragraph 1(i) through 1(vii) and paragraphs 2(ii) through 2(iv) apply to the Cleaver Heights Project and to add to the terms of reference relating to the Cleaver Heights Project in the Instrument dated the 10th day of December, 2008;

NOW THEREFORE, I, DANNY MONTANO, Acting President as aforesaid, in exercise of the power vested in me by section 2 of the Commissions of Enquiry Act, Chap. 19:01 and all other powers thereto enabling, do hereby further alter the terms of reference of the Commission to enquire into the Construction Sector to include inquiry into:

- (1) Whether the procurement process for, and commencement and/or execution of, the project was in accordance with the statutory and regulatory requirements and/or approvals applicable to a project of its nature;
- (2) The consequences and/or implications of the findings at (1) above;
- (3) Whether any specific agency, entity, body and/or contractor can be identified as responsible for the consequences and/or implications at (2) above;
- (4) Whether the project was implemented in accordance with the Cabinet approved guidelines for joint venture projects;
- (5) The consequences and/or implications of the result of the findings at (4) above.

Further that the terms of reference in paragraphs 1(i) through 1(vii) and paragraph 2(ii) through 2(iv) in the Instrument dated 9th day of September, 2008 apply to the Cleaver Heights Project.

Given under my Hand and the Seal of the President of the Republic of Trinidad and Tobago at the Office of the President, St. Ann's this 20th day of May, 2009.

REPUBLIC OF TRINIDAD AND TOBAGO

By His Excellency **DANNY MONTANO, LLB., B.Comm., C.A.,**

Acting President and Commander-in-Chief of the Republic of Trinidad and Tobago.



Danny Montano

**Acting President:
Greetings:**

**TO: PROFESSOR JOHN UFF
KENNETH SIRJU, Esquire
DESMOND THORNHILL, Esquire
ISRAEL KHAN, S.C. Esquire**

WHEREAS by section 2 of the Commissions of Enquiry Act, Chap. 19:01 (hereinafter called "the Act") it is provided, inter alia, that the President may whenever he shall deem it advisable issue a commission appointing one or more Commissioners and authorizing such Commissioners or any quorum of them to enquire into any matter in which an enquiry would in the opinion of the President be for the public welfare:

AND WHEREAS on the 9th day of September, 2008, **GEORGE MAXWELL RICHARDS**, President and Commander in Chief of the Republic of Trinidad and Tobago, issued his Commission under section 2 of the Commissions of Enquiry Act, Chap. 19:01 appointing you, **JOHN UFF, KENNETH SIRJU, DESMOND THORNHILL and ISRAEL KHAN, S.C.**, Commissioners to enquire into the Construction Sector in Trinidad and Tobago in accordance with the following terms of reference:

1. To enquire into:
 - (i) The procurement practices in the public construction sector;
 - (ii) The effect of the use of provisional sums, prime cost sums, nominated suppliers and nominated contractors in construction contracts in the public sector;
 - (iii) The effect of incomplete designs, design changes, variations, poor supervision and poor management on the cost and delivery of construction projects in the public sector;
 - (iv) The performance of local and foreign contractors and consultants on public sector projects;
 - (v) The effectiveness of the turnkey approach, also called the design build approach, for the delivery of public sector construction projects as compared to the traditional design and tender approach;
 - (vi) The reasons for and the effect of cost overruns, delays and defective workmanship in public sector construction projects;
 - (vii) The existence of price gouging and profiteering in the public construction sector;
 - (viii) The procurement practices and methods of operation of Urban Development Corporation of Trinidad and Tobago Limited (UDeCOTT);

2. To make recommendations and observations arising out of its deliberations, as may be deemed appropriate, to ensure that:
 - (i) With respect to public sector construction projects and the procurement practices and methods of operation of Urban

Development Corporation of Trinidad and Tobago Limited
(UDeCOTT), taxpayers get value for money;

- (ii) The delivery of projects and the highest standard of workmanship are achieved and maintained;
- (iii) There is free and fair competition, full participation and access for all citizens in the public procurement process; and
- (iv) Integrity and transparency in the public procurement practice are assured.

AND WHEREAS on the 10th day of December, 2008 the President on the advice of Cabinet altered the terms of reference of the Commission of Enquiry into the Construction Sector in Trinidad and Tobago to include inquiry into;

- (i) The procedures, practices and procurement processes employed by the Trinidad and Tobago Housing Development Corporation in the award of the contract to NH International (Caribbean) Limited to develop the land and infrastructure and to build 408 houses at Cleaver Heights Development Project (“the Cleaver Heights Development Project”);
- (ii) Whether the procedures, practices and procurement processes employed in the award of the Cleaver Heights Development Project were in compliance with the tender rules and/or other rules, regulations, procedures, practices and processes of the Trinidad and Tobago Housing Development Corporation and consistent with the procedures, practices and procurement processes employed in the award of similar types of contracts;
- (iii) The nature and consequences of the contractual arrangements;
- (iv) Whether the Cleaver Heights Development Project was a fixed price contract and if so, what was the contract price;
- (v) Whether there was a variance between the negotiated price and the contract price and if so, the reasons for/or the circumstances which caused and/or contributed to such variance; and
- (vi) The circumstances which resulted in a variance in the costs incurred in the execution of the Cleaver Heights Development Project as evidenced in Valuation Report No. 38 for the period ending August 2008

AND WHEREAS on 20th day of May 2009 the President on the advice of Cabinet altered the terms of reference of the Commission of Enquiry into the Construction Sector in Trinidad and Tobago to include;

- (1) Whether the procurement process for, and commencement and/or execution of, the project was in accordance with the statutory and regulatory requirements and/or approvals applicable to a project of its nature;
- (2) The consequences and/or implications of the findings at (1) above;
- (3) Whether any specific agency, entity, body and/or contractor can be identified as responsible for the consequences and/or implications at (2) above;
- (4) Whether the project was implemented in accordance with the Cabinet approved guidelines for joint venture projects;
- (5) The consequences and/or implications of the result of the findings at (4) above.

Further that the terms of reference in paragraphs 1(i) through 1(vii) and paragraph 2(ii) through 2(iv) in the Instrument dated the 9th day of September, 2008 apply to the Cleaver Heights Project;

AND WHEREAS it is not explicitly stated in the Instrument dated the 20th day of May 2009 that the word "project" in the further terms of reference which were added to the commission referred to the Cleaver Heights Development Project;

NOW THEREFORE, I, DANNY MONTANO, Acting President as aforesaid, in exercise of the power vested in me by section 2 of the Commissions of Enquiry Act, Chap. 19:01 and all other powers thereto enabling, do hereby further alter the terms of reference of the commission to enquire into the Construction Sector to include inquiry into:

- (1) Whether the procurement process for, and commencement and/or execution of the Cleaver Heights Development Project was in accordance with the statutory and regulatory requirements and/or approvals applicable to the Cleaver Heights Development Project and /or projects of a similar nature;
- (2) The consequences and/or implications of the findings at (1) above;

- (3) Whether any specific agency, entity, body and/or contractor can be identified as responsible for the consequences and/or implications at (2) above;
- (4) Whether the Cleaver Heights Development Project was implemented in accordance with the Cabinet approved guidelines for joint venture projects;
- (5) The consequences and/or implications of the result of the findings at (4) above.

Further that the terms of reference in paragraphs 1(i) through 1(vii) and paragraphs 2(ii) through 2(iv) of this Instrument apply to the Cleaver Heights Development Project.

Given under my Hand and the Seal of the
President of the Republic of Trinidad and
Tobago at the Office of the President, St.
Ann's this 21st day of May, 2009.

**ENQUIRY INTO THE PUBLIC CONSTRUCTION SECTOR,
TRINIDAD & TOBAGO**

Annex 2

List of persons appointed to assist the Commissioners (para 1.6)

Annex 2

Persons appointed to assist the Commission

Secretary to the Commission	Judith Gonzalez
Attorneys-at-law	
Counsel	Seenath Jairam, S.C. Garvin Simonette Kerwyn Garcia Ian Roach
Instructing Attorneys	M.K Harper and Company Marvo Harper Doril Ann Lamont
Secretariat	
Administrative	Hamid O'Brien Marilyn Arthur-Joseph
Secretarial	Louise Bentick June Lee Pack
Technical	Wally-Emmanuel Cambridge
Clerical	Gayle Tull Nadia Fraser Greer Guerra Vanessa Moonsan-Pope Lana John Gopee Kwynn Gabriel

Manipulative

Anne Marie Lambert

Harrichan Singh

Kaffin Carrington

Anderson Pierre

Raphael Riley

Marsha Jones

Court Orderly

Joyann Flatts

Security/Chauffeur

Private David Mack

**ENQUIRY INTO THE PUBLIC CONSTRUCTION SECTOR,
TRINIDAD & TOBAGO**

Annex 3

List of parties and their representatives (para 1.7)

Schedule 3 List of parties and their representatives (para 1.7)

No.	Name of Party	Counsel	Representative
1.	AD HOC COMMITTEE FOR THE ERADICATION OF CRIME IN LAVENTILLE		Ms. Hazel Guerra
2.	ARTIST COALITION OF TRINIDAD AND TOBAGO		Mr. Rubadiri Victor
3,	ARUN BUCH AND ASSOCIATES Ltd		Mr. Arun Buch Arun Buch and Associates Ltd
4.	ASSOCIATION OF PROFESSIONAL ENGINEERS OF TRINIDAD AND TOBAGO		Mr. Ahmin Z. Baksh President
5.	ATTORNEY GENERAL OF TRINIDAD AND TOBAGO	Fitzwilliam, Stone, Furness-Smith & Morgan Mr. Douglas Mendes SC – (leading) Messrs. Colin Kangaloo Michael Quamina	Ms. Nadia S. Kangaloo Attorney-at-Law Fitzwilliam, Stone, Furness-Smith & Morgan
6.	MR. CALDER HART	Mr. Frank Solomon SC Devesh Maharaj & Associates	Mr. Devesh Maharaj Devesh Maharaj & Associates Mansfield Chambers

7.	MR. CARL KHAN		
8.	MS. CHRISTINE SAHADEO		
9.	CIVSTRUCT ASSOCIATES		Mr. Orr Liyanage General Manager Civstruct Associates
10.	HON. COLM IMBERT MINISTER OF WORKS AND TRANSPORT	Mr. Frank D. Solomon SC	Mr. Devesh Maharaj Devesh Maharaj & Associates Mansfield Chambers
11.	COMMUNITY IMPROVEMENT SERVICES Ltd		
12.	MR. DEREK OUTRIDGE QES & Associates Limited	Mr. W. Guy C. Hannays Joanne Joseph-Hannays	Guy Hannays & Co. Attorneys-at-Law & Notaries Public
13.	EAST PORT OF SPAIN DEVELOPMENT COMPANY Ltd		Dr. Deborah Thomas Managing Director East Port of Spain Development Company Limited
14.	EDUCATION FACILITIES COMPANY Ltd	Mr. Anand Singh Mr. Keston Mc Quilkin	Mr. Anand Singh Attorney-at-Law Bethany Chambers
15.	EMILE ELIAS & NH INTERNATIONAL (CARIBBEAN) Ltd (NHIC)	Mr. Alvin Fitzpatrick SC Mr. Jason Mootoo	Mr. Adrian Byrne Attorney-at-Law Byrne & Byrne

16.	ESTATE MANAGEMENT & BUSINESS DEVELOPMENT COMPANY Ltd		Mr. Keith Gray Chief Executive Officer Estate Management & Business Development Company Limited
17.	GENIVAR (TRINIDAD AND TOBAGO) Ltd		Mr. Jack Shenker Vice President
18.	HAFEEZ KARAMATH/ HK LIMITED and others	Ravi Rajcoomar Danny Solomon	Ms. Alisa Khan Attorney-at-Law Trinity Chambers
19.	MR. IAN TELFER		
20.	INCH BY INCH CONSTRUCTION AND MANUFACTURING Ltd		Archpriest Victor Phillip Chairman
21.	INSTITUTE OF SURVEYORS		Ms. Stephanie Elder-Alexander President Institute of Surveyors TT
22.	MR. JACK SHENKER		Mr. Jack Shenker Vice President Genivar (Trinidad & Tobago) Limited
23.	MR. JOHN MAIR		Mair and Company

24.	JOINT CONSULTATIVE COUNCIL FOR THE CONSTRUCTION INDUSTRY (JCC)	Mr. Alvin Fitzpatrick SC Mr. Jason Mootoo Barrister & Attorney-at- Law	Mr. Jason K. Mootoo Barrister & Attorney-at-Law Chambers Abercromby Street AND Mr. Winston Riley President Joint Consultative Council for the Construction Industry
25.	MR. JULIAN S. KENNY		
26,	MS. J. S. KELSICK		
27.	DR. KEITH ROWLEY	Mr. Gilbert Peterson SC Ms. Margaret Rose Ms. Valini Chadee (instructing)	Ms. Margaret Rose Attorney-at-Law Rose & Company
29.	MR. MARTIN DALY		Mr. Martin Daly SC Attorney-at-Law
30.	MINISTRY OF EDUCATION	D. Gillian Seecharan Scott Kijana De Silva	Mrs. D. Gillian Seecharan Scott Attorney-at-Law Seecharan Scott Chambers
31.	MINISTRY OF HEALTH		Permanent Secretary Ministry of Health

32.	MINISTRY OF PLANNING, HOUSING AND THE ENVIRONMENT		
33.	MINISTRY OF WORKS AND TRANSPORT		
34.	NATIONAL INSURANCE PROPERTY DEVELOPMENT COMPANY LIMITED (NIPDEC)	Mr. Russell Martineau SC Mrs. Deborah Peake SC	Ms. Alana Umraw Legal Officer National Insurance Property Development Company Limited
35.	MR. NOEL GARCIA		
36.	PROJECT MANAGEMENT GROUP Ltd		
37.	RICARDO O'BRIEN		
38.	RURAL DEVELOPMENT COMPANY OF TRINIDAD AND TOBAGO Ltd		Mr. Tajelal Sarwan Chief Executive Officer Rural Development Company of Trinidad and Tobago Limited

39.	TELECOMMUNICATIONS SERVICES LIMITED OF TRINIDAD AND TOBAGO Ltd		Telecommunications Services Limited of Trinidad and Tobago Limited
40.	TOBAGO HOUSE OF ASSEMBLY		Chief Administrator Tobago House of Assembly
41.	TOWN AND COUNTRY PLANNING DIVISION		Director Town and Country Planning Division Ministry of Planning, Housing and the Environment
42.	TRINIDAD AND TOBAGO CONTRACTORS ASSOCIATION (TTCA)		Mr. Neil Marquez General Manager Trinidad and Tobago Contractors Association
43.	TRINIDAD AND TOBAGO ELECTRICITY COMMISSION		
44.	TRINIDAD AND TOBAGO HOUSING DEVELOPMENT CORPORATION		Alexander Jeremie & Company Attorneys-at-Law
45.	TRINIDAD AND TOBAGO INSTITUTE OF ARCHITECTS		Mr. Gary Turton President Trinidad and Tobago Institute of Architects
46.	TRINIDAD AND TOBAGO MANUFACTURERS' ASSOCIATION		Ms. Natasha Mustapha-Scott Chief Executive Officer Trinidad and Tobago Manufacturers' Association

47.	TRINIDAD AND TOBAGO TRANSPARENCY INSTITUTE	Mr. Victor Hart Mr. Ronald Rodney Mr. G. Boyd Reid	Mr. G. Boyd Reid Secretary Trinidad and Tobago Transparency Institute
48.	TURNER ALPHA Ltd	Mr. Vigel K. Paul	Mr. Vigel K. Paul Attorney-at-Law LEX CARIBBEAN
49.	URBAN DEVELOPMENT CORPORATION OF TRINIDAD AND TOBAGO LIMITED (UDECOTT)	Andrew Godard QC Stuart Young	Ms. Vanita Lutchmeesingh Pollonais, Blanc, de la Bastide & Jacelon Pembroke court
50.	VISHNU D. K. MUSAI & CO.		Mr. Vishnu D. K. Musai Vishnu D.K. Musai & Co.
51.	TRINIDAD AND TOBAGO WATER AND SEWERAGE AUTHORITY		Mr. Dion M. Abdool Chief Corporate Officer Trinidad and Tobago Water and Sewerage Authority
52.	WARNER'S CONSTRUCTION & SANITATION Ltd		Mr. Allan Warner Chief Executive Officer Warner's Construction & Sanitation Ltd
53.	MR. WINSTON AGARD		

**ENQUIRY INTO THE PUBLIC CONSTRUCTION SECTOR,
TRINIDAD & TOBAGO**

Annex 4

Procedural Orders issued by the Commission (para 1.7)



**COMMISSION OF ENQUIRY
INTO THE CONSTRUCTION SECTOR**

PROCEDURAL ORDERS

**PART 1
Interpretation**

1: In these Rules:

- I. "document" is intended to have a broad meaning and includes the following forms: written, electronic, audiotape, videotape, digital reproductions, photographs, maps, graphs, microfiche and any data and information recorded or stored by means of any device.
- II. "party" means a person, group of persons or organization who has been granted standing by the Commission under Part 3 of these Rules.
- III. "Commission Counsel" refers to Counsel appointed by the Commission and retained by the Government of Trinidad and Tobago to act as Commission Counsel, and includes any co-counsel appointed by Commission Counsel with the approval of the Commission and under the authority of Commission Counsel's retainer.
- IV. "Commission" means John Uff, CBE, QC; Israel Khan, S.C., Kenneth Sirju and Desmond Thornhill as appointed by His Excellency the President of the Republic of Trinidad and Tobago on September 09 2008 under the provisions of the Commissions of Enquiry Act, Chap 19:01

Part 2
General

2. The Commission's mandate established by its Terms of Reference is -
- a) To enquire into:
- I. The procurement practices in the public construction sector;
 - II. The effect of the use of provisional sums, prime cost sums, nominated suppliers and nominated contractors in construction contracts in the public sector;
 - III. The effect of incomplete designs, design changes, variations, poor supervision and poor management on the cost and delivery of construction projects in the public sector;
 - IV. The effectiveness of the turnkey approach, also called the design build approach, for the delivery of public sector construction projects as compares with the traditional design and tender approach;
 - V. The reasons for and the effect of cost overruns, delays and defective workmanship in public sector construction projects;
 - VI. The existence of price gouging and profiteering in the public construction sector and
 - VII. The procurement practices and methods of operation of Urban Development Corporation of Trinidad and Tobago Limited (UDECOTT).
- b) To make recommendations and observations arising out of its deliberations, as may be deemed appropriate, to ensure that:
- i. With respect to public sector construction projects and the procurement practices and methods of operation of Urban Development Corporation of Trinidad and Tobago (UDECOTT), taxpayers get value for money;
 - ii. The delivery of projects and the highest standard of workmanship are achieved and maintained
 - iii. There is free and fair competition, full participation and access for all citizens in the public procurement process and
 - iv. Integrity and transparency in the public procurement process are assured.
- c) The Commission's mandate was altered by His Excellency the President of the Republic of Trinidad and Tobago on December 10th 2008, to include inquiry into:

- (i) The procedures, practices and procurement processes employed by the Trinidad and Tobago Housing Development Corporation in the award of the contract to NH International (Caribbean) Limited to develop the land and infrastructure and to build 408 houses at Cleaver Heights Development Project (“the Cleaver Heights Development Project”);
- (ii) Whether the procedures, practices and procurement processes employed in the award of the Cleaver Heights Development Project were in compliance with the tender rules and/or other rules, regulations, procedures, practices and processes of the Trinidad and Tobago Housing Development Corporation and consistent with the procedures, practices and procurement processes employed in the award of similar types of contracts;
- (iii) The nature and consequences of the contractual arrangements;
- (iv) Whether the Cleaver Heights Development Project was a fixed price contract and if so, what was the contract price;
- (v) Whether there was a variance between the negotiated price and the contract price and if so, the reasons for/or the circumstances which caused and/or contributed to such variance; and
- (vi) The circumstances which resulted in a variance in the costs incurred in the execution of the Cleaver Heights Development Project as evidenced in Valuation Report No. 38 for the period ending August 2008.

c) The Commission’s mandate was altered by His Excellency the President of the Republic of Trinidad and Tobago on December 10, 2008 to include enquiry into:

- (i)

d) The Commission is governed and guided by the Commissions of Enquiry Act, Chap 19:01.

3. The Commissioners are charged with completing and delivering their report by September 2009. The time available is therefore limited and all parties will be required to adhere to time limits which the Commissioners will determine as the hearing proceeds.
4. The proceedings of the Enquiry shall be conducted in public. The Commission will hold public hearings at: Winsure Building, 2nd Floor, 23-25 Richmond Street, Port of Spain or such other place as the Commission directs on dates to be determined by the Commissioner including on the following dates: January 12 to February 6, 2009 from 9.00am to 4.00pm each day, Monday to Friday
5. Notice of dates of subsequent hearings will be provided in a timely manner.
6. Unless otherwise directed by the Commission hearings will commence at 9.00am and conclude at 4.00 p.m. or later, if required with a flexible break for lunch of 1 ½ hours. Other breaks will be taken at times convenient to the proceedings.
7. All parties and their counsel shall be deemed to undertake to adhere to these Rules. Any party may raise any issue of non-compliance with the Commission. The Commission shall deal with a breach of these Rules as it sees fit including, but not restricted to, revoking the standing of a party, and imposing restrictions on the further participation in or attendance at the hearings by any party, counsel, individual or member of the media.
8. The Commission may depart from these Rules when it considers it appropriate to do so.
9. The Commission may amend these Rules or dispense with compliance with them as it deems necessary to ensure that the hearing is thorough, fair and timely.

10. The Commission may postpone any date set for any hearing or application or the doing of anything. The Commission shall notify all counsel and any person, organization or office affected by the postponement of the new date.

Part 3

Standing

11. The Commission has appointed counsel to represent it and the public interest during the Enquiry. Commission Counsel will assist the Commission throughout the Enquiry and are responsible for ensuring that the Enquiry is conducted in an orderly fashion, and that all matters bearing on the public interest and falling within the scope of the Commission's mandate are brought to the Commission's attention. Commission counsel have standing throughout the Enquiry.
12. Persons, groups of persons or organizations who wish to participate in the Enquiry may seek standing before the Enquiry. The Commission may grant standing if it is satisfied that an applicant has a substantial and direct interest in the subject-matter of the Enquiry or that the applicant's participation in the Enquiry may be helpful to the Commission in fulfilling its mandate. Persons, groups of persons or organizations which are granted standing are referred to in these Rules as "parties".
13. The Commission will determine on what terms a party may participate in the Enquiry, and the nature and extent of such participation
14. As provided for in Part 4 (Evidence), Counsel representing a witness who is called to testify before the Commission may participate during the hearing of that witness's evidence without the necessity of applying for standing.

Part 4
Evidence

A. General

15. The Commission may receive any evidence that it considers to be helpful in fulfilling its mandate whether or not such evidence would be admissible in a court of law.

B. Preparation of Documentary Evidence

16. All parties granted standing under Part 3 of these Rules shall, as soon as possible after being granted standing, produce to the Commission true copies of all documents in their possession or control having any bearing on the subject-matter of the Enquiry. Documents in the possession or control of a party that are already in the possession of the Commission shall be listed but need not be produced, unless specifically requested by the Commission. Upon the request of Commission, parties shall also provide originals of relevant documents in their possession or control for inspection.

17. Upon the request of the Commission, any non-party shall produce to the Commission true copies of all documents in their possession or control having any bearing on the subject matter of the Enquiry. Documents in the possession or control of a non party that are already in the possession of the Commission shall be listed but need not be produced, unless specifically requested by Commission. Upon the request of Commission, such non-parties shall also

provide originals of relevant documents in their possession or control for inspection.

18. All documents received by the Commission will be treated by the Commission as confidential, unless and until they are made part of the public record or the Commission otherwise directs. This does not preclude the Commission from producing a document to a potential witness prior to the witness giving his or her testimony, as part of Commission's investigation, nor does it preclude the Commission from disclosing such documents to the parties to this Commission of Enquiry, pursuant to and subject to the terms and limitations described in paragraph 19 below.
19. Any party or non-party required to produce a document or documents pursuant to paragraphs 15 or 16 above or pursuant to a subpoena or summons issued under the Commissions of Enquiry Act Chap 19:01 and who claims privilege over any such document shall produce a list of the documents over which privilege is claimed stating the basis and reasons for the claim of privilege. Commission will determine whether such claim of privilege is justified with the assistance of Commission counsel.
20. During the argument of a privilege claim under paragraph 18 above the Commission shall not disclose any disputed document to the other parties but may with the assistance of the party or non-party claiming privilege, prepare and produce a summary of the document.

C. Witness Interviews and Disclosure

21. The Commission with or without the assistance of Commission Counsel may interview persons believed to have information or documents bearing on the subject. The Commission may choose whether or not to attend an interview and the Commission Counsel will provide the Commission with a transcript or report of all interviews conducted in their absence. Persons interviewed by the Commission Counsel may choose to have legal counsel present during the

interview, but are not required to do so. Persons whose interview is requested by the Commission or the Commission Counsel shall answer all relevant questions and produce any relevant document. A subpoena or summons may be issued if the person to be interviewed request one or if the Commission or the Commission Counsel deems it advisable to compel the attendance of the witness.

22. If the Commission or the Commission Counsel determines that a person who has been interviewed should be called as a witness in the public hearings referred to in Part 2, the Commission may prepare a statement of the witness's anticipated evidence or a transcript of their interview, and may provide a copy of this statement or the interview transcript to the witness before he or she testifies in the hearing. After the statement or transcript has been reviewed by the witness, copies shall be disclosed to the parties on their undertaking to use it only for the purposes of the Enquiry, and on the terms described in paragraph 23 below.
23. If the Commission Counsel determines that it is necessary for a person who has been interviewed to be called as a witness in the public hearings referred to in Part 2, the Commission Counsel may tender the witness statement or transcript to the Commission at the hearing, and the Commission may consider the information in the witness statement or transcript when making its final findings, conclusions and recommendations. If the Commission or the Commission Counsel interviews a person and decides not to call that person to testify at the public hearings, the Commission Counsel may provide the parties with a transcript of the interview, if available, or a summary of the relevant information provided by that person. A party may apply to the Commission for leave to call any person as a witness or for a direction that that person be called as a witness.
24. Unless the Commission orders otherwise, all relevant non-privileged documents in the possession of the Commission shall be disclosed to the parties at a time reasonably in advance of the witness interviews and/or public hearings or within a reasonable time of the documents becoming available to the Commission. Before these documents are provided to a party or the witness, he or she must

undertake to use these documents only for the purposes of the Enquiry, to keep their contents confidential to himself or herself and their Counsel before the Commission unless and until those documents have been admitted into evidence during a public phase of the Commission of Enquiry, and to abide by such other restrictions on disclosure and dissemination that the Commission considers appropriate. All documents provided by the Commission of Enquiry to the parties and witnesses that have not been admitted into evidence during a public phase of the Commission of Enquiry, and all copies made of such documents, are to be returned to the Commission, in the case of witnesses on completion of their testimony, and in the case of parties within seven days of the Commission issuing its final Report. The Commission may, upon application, release any party or Counsel in whole or in part from the provisions of an undertaking regarding the use or disclosure of documents or information.

D. Witnesses

25. A summary of the material which any party or person intends to put to the Commission shall be provided to the Enquiry Secretariat in accordance with such time limits as may be laid down by the Commission.
26. Written and signed statements of persons intended to be called as witness shall similarly be provided to the Enquiry Secretariat in accordance with such time limits as maybe laid down by the Commission. All such material shall be provided in both hard copy and in electronic form where possible.
27. Witnesses who testify will give their evidence under oath or upon affirmation.
28. Witnesses who have provided signed statements will be invited to confirm their written statements, which will, subject to the following, be accepted as the evidence of that person. Provided that where such evidence, another person is alleged to have acted improperly, that evidence shall be given orally.

29. Witnesses are entitled to have their own Counsel present while they testify. A witness's Counsel has standing in the Enquiry for the purposes of that witness's testimony, and may examine the witness as provided in paragraphs 32 and 33.
30. Witnesses may be called to give evidence in the Enquiry more than once.
31. Where it considers it advisable, the Commission may issue a summons or subpoena requiring a witness to give evidence on oath or affirmation and/or to produce documents or other things. A summons or subpoena may be issued in relation to either the pre-hearing interviews conducted by Commission or Commission Counsel, the pre-hearing requests for documents or the public hearings.
32. The Commission will admit any evidence, providing it is relevant to the Enquiry. Where evidence is challenged or objected to on any ground, the Commission will give only such weight to that evidence as it determines to be appropriate.

E. Oral Examination

33. The order of examination of a witness will ordinarily be as follows, subject to paragraph 34, below:
- (a) The Commission or the Commission Counsel may examine the witness at any stage of the proceedings. The Commission or the Commission Counsel may adduce evidence from a witness by way of both leading and non-leading questions;
 - (b) The parties who have been granted standing to do so will then have an opportunity to cross-examine the witness to the extent of their interest and in accordance with such time limits as the Commissioners may direct. If these parties are unable to agree on the order of cross-examination, this will be determined by the Commission;
 - (c) Subject to paragraph 34, counsel for the witness will examine the witness as directed by the Commission, regardless of whether or not counsel is also representing another party;
 - (d) The Commission or the Commission Counsel will then have the right to

examine or re-examine the witness. Except as otherwise directed by the Commission, the Commission or the Commission Counsel may adduce evidence from a witness during this re-examination by way of leading and non-leading questions.

34. A witness's counsel may apply to the Commission for permission to present that witness's evidence-in-chief. If permission is granted, the witness will be examined in the following order:

(a) Counsel will examine the witness in accordance with the normal rules governing the examination of one's own witness in court proceedings, unless otherwise directed by the Commission.

(b) The other parties with standing will be entitled to cross-examine the witness, as provided for in paragraph 33(b);

(d) Commission will then be entitled to conduct an examination of the witness, as provided for in paragraph 33(d).

(e) Counsel for the witness will then be entitled to re-examine the witness.

35. After a witness has been sworn or affirmed at the commencement of his or her testimony, no Counsel or party other than Commission may speak to that witness about the evidence he or she has given until the witness has completed his or her evidence. The Commission Counsel may not speak to the witness about his or her evidence while the witness is being cross-examined by other counsel, except with the permission of the Commission.

36. Once the Commission has indicated that they will not be calling a particular witness to testify at the public hearings referred to in paragraph 4, a party may apply to the Commission and request that the witness be called to give evidence. If the Commission is satisfied that the witness's testimony is needed, the Commission may direct that the witness be called (in which case paragraph 33 applies) or may allow the requesting party to call the witness and adduce his or her evidence in chief (in which case paragraph 34 applies, with suitable modifications).

F. Use of Documents at Hearings

37. Before a witness testifies at the Enquiry, the Commission may, where practicable and appropriate, provide the witness and the parties with a binder, bundle or a list of those documents that are likely to be referred to during the witness's testimony.
38. Without leave of the Commission, no document shall be used in cross examination or otherwise except copies of the documents have been provided to the Commission in a timely manner pursuant to paragraphs 15 and 16.

G. Access to Hearings and to the Evidence

39. Subject to paragraph 40, the hearing referred to in paragraph 4 will ordinarily be open to the public. The press, television and public radio broadcasters shall have access to the hearing at any time subject to paragraph 40 below. One pooled television camera will be permitted, but the Commission may direct that television broadcasting be suspended at any time in the interest of avoiding disturbance to the proceedings.
40. Where the Commission is of the opinion that it is necessary in the interest of maintenance of order or the proper administration of justice to exclude all or any member of the public from the hearing room, it may, after hearing submissions from interested parties direct that portion of the hearing be held in the absence of the public or on such terms and conditions as the Commission may direct.
41. Applications from witnesses or parties to withhold any part of the hearing in the absence of all or any members of the public should be made in writing to the Commission at the earliest possible opportunity.
42. The transcripts and exhibits from the hearings will be made available as soon as practicable for public viewing. Transcripts will be posted on the Commission's web site as soon as is reasonably practicable and will be available to both the parties and the public. Transcripts of any portions of the hearing held in the

absence of the public pursuant to paragraph 40 above will be made available for public viewing on such terms as the Commission may direct if, after hearing the evidence and any submissions, the Commission concludes that it is in the public interest to release these transcripts.

Part 5: Notices Regarding Alleged Misconduct

43. The Commission will not make a finding of misconduct on the part of any person unless the person or, if the person is deceased, his estate, has had reasonable notice of the substance of the alleged misconduct and has been allowed full opportunity during the enquiry to be heard in person or by counsel.

44. Any notices of alleged misconduct will be delivered on a confidential basis to the person to whom the allegations of misconduct refer.

45. The Commission shall perform its duties in accordance with its Terms of Reference without expressing any conclusion or recommendation about the civil or criminal liability of any person or organization. The Commission will, however, if it thinks appropriate make observations as to whether criminal conduct has taken place.

**Part 6
Submissions**

46. All counsel may make submissions as directed by the Commission subject to any restrictions that the Commission deems appropriate.

47. The Commission will direct when submissions are to be made and whether there are to be made orally and/or in writing.

Part 7
Opening Speeches

48. The Commission may invite parties or their counsel to make opening speeches before the commencement of witnesses testimonies and on such terms and conditions, including time limits, as the Commission may direct

Part 8
Amendments To The Rules

49. These Rules may be amended and new Rules may be added if the Commission considers it advisable to do so in order to fulfill its mandate and ensure that the process and fair and thorough.

Issued by the Chairman on behalf of the Commissioners

John Uff

**ENQUIRY INTO THE PUBLIC CONSTRUCTION SECTOR,
TRINIDAD & TOBAGO**

Annex 5

List of submissions and statements received by the Secretariat (para 1.8)

COMMISSION OF ENQUIRY INTO THE CONSTRUCTION SECTOR

Annex 5

List of submissions and statements received by the Secretariat (para 1.8)

No.	Person/Organization	Document	Received
1	Ad Hoc Committee for the eradication of crime in Laventille	Submission on behalf of Small Micro Contractors dated 16.3.09	16/03/2009
2	Artist Coalition of Trinidad and Tobago	Submission - 08/01/09 Submission - (2) 15/01/09	8/01/2009
3	Arun Buch	Submission dated 28/04/09 in response to COE's request dd 31/3/09 i.r.o Implementation schedule for GCP, Int. Waterfront and Chancery Lane Complex – Enc. A1 Chart of Base Building; B1 Critical Pgs. Regarding Project; C1 Table of cost	29/04/2009
4	Arun Buch & Associates	Commentary on the procurement and implementation procedures for the construction of major public sector projects in Trinidad & Tobago	22/1/2009
5	Arun Buch & Associates	Submission – Expert Statement on the Brian Lara Cricket Stadium Vol 1-3 General Engineering Review Programme –v- Progress	19/3/2009
6	Arun Buch & Associates	Submission – Government Campus Plaza; Comments on Chancery Lane Complex	20/03/2009
7	Arun Buch & Associates Ltd.	Submission dd 3/4/09 re comments made by Peter Morris Submission dd 3/4/09 Pkg Exhibits 1-6 Brian Lara Cricket Academy; Exhibits 7-8 (GCP) Government Campus Plaza	3/4/2009

8	Arun Buch & Associates Ltd.	Submission dated 7/5/09 Preliminary response to Witness Statement of Mark Cytrynowicz (Turner Alpha Ltd.) re the Brian Lara Cricket Academy Project and Government Campus Plaza (GCP)	7/5/2009
9	Arun Buch and Associates Ltd.	Submission dd 14/5/09 in response to Witness Statement of Mark Cytrynowicz (Turner Alpha Ltd) re Brian Lara Cricket Academy	14/05/2009
10	Arun Buch and Associates Ltd.	Submission dd 28/4/09 in response to -COE's request dd 31/3/09 re International Waterfront and Chancery Lane	15/5/2009
11	Arun Buch and Associates Ltd.	Submission dated 31/7/09 in response to Witness Statement of Turner Alpha on the Government Campus Plaza Project	31/07/2009
12	Association of Professional Engineers of Trinidad and Tobago (APETT)	Vaughn Lezama- Submission	15/01/2009
13	Attorney General of Trinidad and Tobago	Bernard Sylvester – Witness Statement - 09/01/09	9/01/2009
14	Attorney General of Trinidad and Tobago	Witness Statement - 26/01/09 Kaisha Ince (NIDCO)	26/01/2009
15	Attorney General of Trinidad and Tobago	Hon. Mr Colm Imbert Witness Statement - 27/01/09	27/01/2009
16	Attorney General of Trinidad and Tobago	Final submission dated 12/2/2010 re Procurement process in T&T and the White Paper	12/2/2010
17	Christopher Pilgirm	Witness statement dated 17/03/09	17/03/09
18	Carl Khan	Statutory Declaration of Carl Khan 18.5.09	18/5/09
19	Carl Khan	Statutory Declaration of Carl Khan dd 19.05.09	19/5/2009

20	Carl Khan	Statutory Declaration of Carl Khan	2/09/2009
21	Christine Sahadeo	Witness Statement Appendix 1-6	4/02/09
22	Civstruct Associates	Submission 3/02/09	3/02/2009
23	Community Improvement Services Limited	Submission – Project information dated 16/12/08 in response to request from COE	2/01/2009
24	Dereck Outridge	Witness Statement - Mr Derek Outridge	5/02/2009
25	Dr Keith C Rowley	Submission of Court Order 3/6/2008	28/01/2009
26	Dr Keith C Rowley	Further written submission dated 31.07.09 in respect of Terms of Reference (i) and (xiii)	31/072009
27	Dr Keith C Rowley	Revised further written submission dated 31.07.09 in respect of Terms of Reference (i) and (xiii)	6/08/2009
28	Dr Keith C Rowley	Witness Statement - 03/12/08 Addendum 23/12/08	03/12/2008 29/12/2008
29	Dr Keith C Rowley	Video of Dr K Rowley at press conference	28/01/2009
30	Dr Keith C Rowley	Submission 28/01/09	29/01/2009
31	Dr. Keith C Rowley	Submission re Cleaver Heights Housing Project 9/03/09	9/03/2009
32	Dr Keith C Rowley	Final Written submission re Cleaver Heights Housing Development Project dd 18/1/2010	18/1/2010
33	Dr Keith C Rowley	Final Written Submisison (Pt 2) re Cleaver Heights Housing Project 9/3/2010	10/3/2010
34	East Port of Spain Development Company Limited	Submission dd 20.7.09 09. in response to COE's request dd 18/6/09: Two specimen contract docs.	20/07/2009
35	Education Facilities Company	Report of the Secondary Programme 1) Information on Financing Projects 2) Town and Country Planning Phase I 3) Information on implementation of Semp Phase II School construction Programme	16/12/2009

36	Education Facilities Company Limited	Submission of (6 Vols. of Procurement Practices in the Public Sector)15/01/09	15/01/2009
37	Education Facilities Company Limited	Witness Statement of Mr Paul Taylor In response to Mikey Augustine Joseph 3/02/09	4/02/2009
38	Education Facilities Company Limited	Submission – Project Implementation Issues dated 20/03/09	25/03/2009
39	Education Facilities Company Limited	Submission dd 11/05/09 Pks. Technical and Financial Evaluation Report Early Childhood Care and Education Centres; Award of Contract for Design	11/05/2009
40	Estate Management & Business Development Co. Ltd	Information in response to COE’s request. dated 17.11.08 re major projects etc. Appendices 1-11 dated 13.3.09	16/03/2009
41	GENIVAR (Trinidad and Tobago) Limited	Submission dd 25.5.09 in response to Salmon’s letter	25/05/2009
42	GENIVAR Trinidad & Tobago Ltd.	Submission dd 27/04/09 in response COE’s request dd 25/3/09 re: 1) National Academy of Performing Arts 2) International Waterfront Project	30/04/2009
43	GENIVAR Trinidad & Tobago Ltd	Response to CoE’s letter of March 10, 2010	17/3/2010
44	Hafeez Karamath Ltd	Witness Statement dd 21/01/09	21/01/2009
45	Hafeez Karamath Ltd.	Submission – Information on the Brian Lara Cricket Academy Appendices 1-8	24/03/2009
46	Hon. Colm Imbert Minister of Works & Transport	Submission dated 31.7.09 response to allegations of bias	5/08/2009
47	Hon. Colm Imbert, Minister of Works	Submission – Statement on the White Paper of the Public Sector Procurement Regime dated 17/03/09	23/03/2009

48	Hon. Colm Imbert, Minister of Works & Transport	Submission – Statement on the performance of Local Contractors –v- Foreign Contractors dated 17/03/09	25/03/2009
49	Hon. Colm Imbert, Minister of Works and Transport	Witness Statement dated 29/4/09 re Cleaver Heights Housing Project	4/5/2009
	Hon Colm Imbert, Minister of Works and Transport	Final statement re Cleaver Heights 23/2/2010	6/2/2010
	Hon Colm Imbert, Minister of Works and Transport	Further final statement re Cleaver Heights	18/3/2010
50	Housing Development Corporation of Trinidad and Tobago (HDC)	Submission in response to COE's request dd 30/12/08 re Cleaver Heights	21/01/2009
51	Housing Development Corporation of Trinidad and Tobago (HDC)	Submission in response to request of COE dd 25/03/09 re 5 Housing Projects	31/03/2009
52	Housing Development Corporation of Trinidad and Tobago (HDC)	Final Submission on behalf of the Board of the Housing Development Corporation dd 15.5.09	16/0520/09
53	Housing Development Corporation of Trinidad and Tobago (HDC)	Amended final submission on behalf of the Board of the Housing Development Corporation dd 18.5.09	18/5/2009
54	Housing Development Corporation of Trinidad and Tobago (HDC)	Submission dated 20.5.09 Valuation Reports 41, 42, 43, 44 and 45	20/05/2009
55	Housing Development Corporation of Trinidad and Tobago (HDC)	Expert Report of Prof. Winston H.E. Suite re Cleaver Heights Housing Project 26.8.09	19/11/09
56	Housing Development Corporation of Trinidad and Tobago (HDC)	Letter to COE request for information dated 17/11/2008 and 22/12/2009	5/1/2009
57	Housing Development Corporation of Trinidad and Tobago (HDC)	Submission re Cleaver Heights	7/12/09
58	Housing Development Corporation of Trinidad and Tobago (HDC)	Witness Statement of Learie Bowen	8/12/09
59	Housing Development Corporation of Trinidad and Tobago (HDC)	Submission dd 18/12/09 Addendum to amended final submission filed on behalf of the Trinidad and Tobago Housing Development Corporation	18/12/09

60	Housing Development Corporation of Trinidad and Tobago (HDC)	Submission dd 15/01/2010 Re: Tarouba Agreement NHA/NH International (Caribbean) Limited Joint venture agreement for the design finance and construction	15/01/2010
61	Housing Development Corporation of Trinidad and Tobago (HDC)	Information in response to COE's request Minutes of HDC for the period September 2008 to December 2008	28/12/09
62	Ian Telfer	Witness Statement dated 17/3/09	17/0320/09
63	Inch by Inch Construction and Manufacturing Limited	Written Statement Archpriest Victor Phillip	13/02/2009
64	Institute of Surveyors of Trinidad & Tobago (ISTT)	Submission on provisional and Prime Costs Sums 3/02/09	3/02/2009
65	Institute of Surveyors of Trinidad and Tobago	Afra Raymond - Witness Statement 5/01/09 Addendum 1 and 2 - 5/01/09	5/01/2009 5/01/2009
66	John Mair	Witness Statement dd 21/01/09	21/01/2009
67	Joint Consultative Council for the Construction Industry (JCC)	Witness Statement - M Bynoe 3/2/09	3/02/2009
68	Joint Consultative Council for the Construction Industry (JCC)	Winston Riley – Witness Statement 1 - 08/12/08 Witness Statement 2 - 08/01/09	8/12/2008 8/01/2009
69	Joint Consultative Council for the Construction Industry (JCC)	Trinidad and Tobago Contractors Assoc. Mikey Joseph Witness Statement 8/01/09	8/01/09
70	Joint Consultative Council for the Construction Industry (JCC)	Trinidad and Tobago Institute of Architects (TTIA) Jack Bynoe - Witness Statement 09/01/09	9/01/2009
71	Joint Consultative Council for the Construction Industry (JCC)	APETT Vaughn Lezama - Submission	15/01/2009
72	Joint Consultative Council for the Construction Industry (JCC)	Planning Associates Ltd. Report and Addendum submitted to Speaker of the House	16/01/2009
73	Joint Consultative Council for the Construction Industry (JCC)	Bundle of documents (a) Turner Alpha letter of 15/8/2008; (b) position paper on rapid rail; (c) Comments on Section 00400- Amendment to FIDIC	23/01/2009
74	Joint Consultative Council for the Construction Industry (JCC)	Documents from ISTT, CIOB et al dated 28/1/2009	28/01/2009

75	Joint Consultative Council for the Construction Industry (JCC)	Address at TTCA 40 Anniversary	30/01/2009
76	Joint Consultative Council for the Construction Industry (JCC)	Submission in response to UDeCoTT's of 27/01/09	5/02/2009
77	Joint Consultative Council for the Construction Industry (JCC)	Trinidad and Tobago Contractors Association – Local -v- Foreign Contractors Item IV ToR dated 17/03/09	18/03/09
78	Joint Consultative Council for the Construction Industry (JCC)	Closing Submission Vol. I Tabs 1-42; Vol 2, Tabs 43-83 dd 18.5.09	22/05/2009
79	Julian S Kenny	Submission 9/02/09	9/02/2009
80	Margaret Chow	1) Witness Statement dated 16.3.09 2) Information given to HDC 19/3/09	16/03/2009
81	Margaret Chow	Submission dd 19.5.09 re Information given to Commission re the HDC	19/05/2009
82	Martin Daly	Letter with copy of release made in the Sunday Express dd 1/2/2009	3/02/2009
83	Ministry of Education	Information provided in response to C.O.E's request re Secondary Schools Programme dated 16/2/09	17/02/2009
84	Ministry of Education	Submission in response to COE's request dd 1/4/09 re Secondary Schools Expansion Programme	22/05/2009
85	Ministry of Health	Letter to COE dd 29/12/08 re major projects Scarborough Hospital report	30/12/2008
86	Ministry of Planning, Housing and the Environment	Senator the Hon. Dr Emily Gaynor Dick-Ford Witness Statement 27/01/09	27/01/2009
87	Ministry of Works and Transport	Structural Assessment Report re Cleaver Heights Housing Project 30/6/09	19/11/09
88	Ms J.S. Kelsick.	Submission of letter re demolition of Colonial Tennis Court dd 1/4/2009	2/4/2009
89	National Insurance Property Development Company Ltd (NIPDEC)	Submission of NIPDEC 05/01/09	5/01/2009
90	National Insurance Property Development Company Ltd (NIPDEC)	Information provided in response to COE's request 20/11/2008	5/01/2009

91	National Insurance Property Development Company Ltd (NIPDEC)	Submission re Belmont Police Station in response to COE's request dd 30/12/08	21/01/2009
92	National Insurance Property Development Company Ltd (NIPDEC)	Submission re Issue V of the Terms of Reference of the Commission 4/02/09	4/02/09
93	National Insurance Property Development Company Ltd (NIPDEC)	Exhibits re Scarborough Hospital dd 31/03/09 in response to COE's letter of 25/03/09 -	31/03/2009
94	National Insurance Property Development Company Ltd (NIPDEC)	Submission re Scarborough Hospital in response to Peter Morris's statement dd 27/03/09	4/5/2009
95	National Insurance Property Development Company Ltd (NIPDEC)	Submission re Scarborough Hospital on behalf of Min. of Health in response to COE's request dated 30/12/2008 Exhibits A-Y 8 Volumes	20/03/2009
96	National Insurance Property Development Company Limited (NIPDEC)	Submission re NIPDEC's construction contract dated 7.7.09 on behalf of the Ministry of Health in response to COE's letter dd 18.06.09	7/07/2009
97	National Insurance Property Development Company Limited (NIPDEC)	Information re Scarborough Hospital in response to COE's request 9/7/2009	14/9/2009
98	NH International (Caribbean Ltd)	Statement of John Cannon 13.3.09	16/3/2009
99	NH International (Caribbean) Limited	Closing submission dd 15.01.2010 re Cleaver Heights Development project	15/01/2010
100	NH International (Caribbean) Ltd	Statement of John Connon on the Government Campus Plaza, Customs & Excise Building- 31/03/09	31/03/2009
101	NH International (Caribbean) Ltd	Statement of William J Agard re Cleaver Heights	3/12/09
102	NH International (Caribbean) Ltd	Statement of John Connon	4/12/09
103	NH International (Caribbean) Ltd.	Witness Statement John Connon Cleaver Heights; Expert Report William Agard - Cleaver Heights	21/08/2009
104	Noel Garcia	Witness Statement	7/12/09
105	Project Management Group Ltd	Submission - Peter Morris – 27/03/09	27/03/2009

106	Quantity Surveyor and Associates (QES) (Derek Outridge)	Submission dated 16/4/09 in response to COE's request re O'Leara Heights Development, S/F'do. Beverly Hills and Roy Joseph Apartments	21/04/2009
107	Rural Development Company of Trinidad and Tobago ("RDC")	Submission dd 1/5/09 in response to COE's request dd17/11/08	1/5/2009
108	Rural Development Company Trinidad and Tobago Limited	Submission dd 21.7.09 in response to COE's request dd 18.6.09 (1) Payment to Contractors in T&T; (2) Form of contract in use in public contracts	21/07/2009
109	Tobago House of Assembly	Response to COE 's request dated 22.12.08 regarding major projects implemented within the last five years	21/8/2009
110	Town and Country Planning Division	Response to COE's request dated 29/9/2009 - flow chart and information sheet	6/10/2009
111	Town and Country Planning Division	Submission in response to COE's request	7/12/09
112	Trinidad & Tobago Transparency Institute	Victor Archibald Hart – Submission	14/01/2009
113	Trinidad & Tobago Transparency Institute	Submission Written Statement of Victor Archibald Hart dated 20.03.09	20/03/2009
114	Trinidad & Tobago Transparency Institute	Written Submission by Neill Stansbury (GIACC) doc. on Preventing Corruption on Construction Projects dd 19/03/09	2/4/2009
115	Trinidad and Tobago Electricity Commission	Submission dated 5/05/09 in response to COE's request of 16/04/09 re Blenheim Housing Project, Tobago, Academy of Performing Arts, North and South; Belmont Police Station	8/05/2009
116	Trinidad and Tobago Electricity Commission	Response to paras 6-10 and para 16 of the Witness statement of John Connon NHI Managing Director re Cleaver Heights; T&TEC's policy dd 18.12.09	18/12/09
117	Trinidad and Tobago Housing Development Corporation	Submission dd 13/5/09 in response to COE's request dd 5/5/09 re Cleaver Heights project	13/052009
118	Trinidad and Tobago Institute of Architects	Jack Bynoe - Witness Statement 09/01/09	9/01/2009

119	Trinidad and Tobago Manufacturers Association	Letter to COE re: Public procurement Practices in the Construction Sector 24/12/2008	6/1/2009
120	Trinidad and Tobago Manufacturers Association	Letter to COE: Comments re Presentation by UDECoTT 8/1/2009	8/1/2009
121	Trinidad and Tobago Telephone Company	Submission dated 16/4/09 in response to COE's request re Tel No. 624-8239	20/4/2009
122	Trinidad and Tobago Transparency Institute	Closing Statement by Victor Archibald Hart dd 16.5.09	16/5/2009
123	Trinidad and Tobago Transparency Institute	Written statement of Victor Archibald Hart: Recommendation on the reform of the Public Sector Procurement regime	29/10/2009
124	Trinidad and Tobago Transparency Institute (TTTI)	Written Statement of Archibald Hart re 'The Independence of TTTI' dated 24/04/09	27/4/2009
125	Trinidad and Tobago Transparency Institute (TTTI)	Written statement of Victor Archibald Hart: Rebuttal No. 2, the independence of TTTI dated 27/11/09	27/11/09
126	Turner Alpha Ltd.	Further submission dd 21/5/09 from Mark Cytrynowicz regarding PK2 Contractor's work in place as at 3.10.061 with exhibits; Canopy Design BLCA	21/05/2009
127	Turner Alpha Ltd.	Witness Statement of Mark Cytrynowicz dd 3/5/09 re Brian Lara Cricket Academy Project	4/5/2009
128	Urban Development Corporation of Trinidad and Tobago (UDeCoTT)	Cross examination of Mark Cytronowicz 16/5/09	16/5/09
129	Urban Development Corporation of Trinidad and Tobago (UDeCoTT)	Appendices Tenders Procedures of Company Listed in Questions 1-7 dd 20/5/09	20/05/2009
130	Urban Development Corporation of Trinidad and Tobago	Submission – (1) Procurement of pkts. 2,3,5,8, (2) Prequalification Form 2/02/09	2/02/2009

131	Urban Development Corporation of Trinidad and Tobago (UDeCOTT)	Bundle Document 09/12/08 Presentation on behalf of UDeCOTT	9/12/2008
132	Urban Development Corporation of Trinidad and Tobago (UDeCOTT)	Cross examination of Christine Sahadeo	5/02/2009
133	Urban Development Corporation of Trinidad and Tobago (UDeCOTT)	Minutes of UDeCoTT's Board meeting for the period 2003 to 2009	
134	Urban Development Corporation of Trinidad and Tobago (UDeCOTT)	Bundle re Opening submission	13/01/09
135	Urban Development Corporation of Trinidad and Tobago (UDeCOTT)	Witness Statement – Neelanda Rampaul 15/01/09	15/01/2009
136	Urban Development Corporation of Trinidad and Tobago (UDeCOTT)	Disclosure to Rose and Company 19/1/2009	19/01/2009
137	Urban Development Corporation of Trinidad and Tobago (UDeCOTT)	Bills of Approx. Quantities Part Two proposed office Building for Customs and Excise	21/01/2009
138	Urban Development Corporation of Trinidad and Tobago (UDeCOTT)	Agreement between UDeCOTT and Johnston International Ltd re Chancery Lane Complex Vol. I	23/01/2009
139	Urban Development Corporation of Trinidad and Tobago (UDeCOTT)	Document requested by COE from Neelanda Rampaul 23/1/09	
140	Urban Development Corporation of Trinidad and Tobago (UDeCOTT)	Contract agreement Brian Lara Cricket Academy Project Pk-2 Building structure	26/01/2009
141	Urban Development Corporation of Trinidad and Tobago (UDeCOTT)	Disclosure pursuant to COE Disclosure Order of 14/1/2009 (Binders 1-15)	26/01/2009
142	Urban Development Corporation of Trinidad and Tobago (UDeCOTT)	Submission (a) Environmental Clearance Certificate (b) Town & Country Planning Approval – Brian Lara Stadium	28/01/2009
143	Urban Development Corporation of Trinidad and Tobago (UDeCOTT)	Submission re Realspring Housing Development	5/02/2009
144	Urban Development Corporation of Trinidad and Tobago (UDeCOTT)	Submission – Brian Lara Project 100% Drawing and specification 3 CDs Brian Lara Pk 2, 5, 8	6/02/2009

145	Urban Development Corporation of Trinidad and Tobago (UDeCoTT)	Submission UDeCoTT in reply to those of JCC dated 2 Feb, 2009	9/02/2009
146	Urban Development Corporation of Trinidad and Tobago (UDeCoTT)	GLEEDS - Expert Report on Quantum and Delay matter re Customs and Excise Building) dd 16.3.09	17/03/2009
147	Urban Development Corporation of Trinidad and Tobago (UDeCoTT)	Submission – Witness Statement of Winston Chin Fong dd 18/3/09	18/3/2009
148	Urban Development Corporation of Trinidad and Tobago (UDeCoTT)	Submission – Witness Statement of Safia Noel dd 18/3/09	18/3/2009
149	Urban Development Corporation of Trinidad and Tobago (UDeCoTT)	Submission CD Binders 1-6 dd 19/01/09	20/1/2009
150	Urban Development Corporation of Trinidad and Tobago (UDeCoTT)	Presentation - the National Academy and the International Waterfront Projects	25/4/2009
151	Urban Development Corporation of Trinidad and Tobago (UDeCoTT)	Port of Spain International Waterfront Project Stage 2 Contract	23/01/2009
152	Urban Development Corporation of Trinidad and Tobago (UDeCoTT)	Presentation – Brian Lara Cricket Academy	26/4/2009
153	Urban Development Corporation of Trinidad and Tobago (UDeCoTT)	Submission in response to COE's request of 25/03/09 – Government Campus Plaza Pk 6, Legal Affairs Tower	1/4/2009
154	Urban Development Corporation of Trinidad and Tobago (UDeCoTT)	Submission in response to COE's request of 25/03/09 Scarborough Financial Complex, Tobago	1/4/2009
155	Urban Development Corporation of Trinidad and Tobago (UDeCoTT)	Witness statement of Calder Hart 15/01/09	15/01/2009
156	Urban Development Corporation of Trinidad and Tobago (UDeCoTT)	2 nd Witness Statement of Calder Hart dated 8/05/09	8/05/2009
157	Urban Development Corporation of Trinidad and Tobago (UDeCoTT)	Final submission of Calder Hart dated 24/2/2010	24/02/2010
158	Urban Development Corporation of Trinidad and Tobago (UDeCoTT)	Disclosure pursuant to COE disclosure ruling 1.4.09 categories A,C,E dd 20/4/09	21/04/2009
159	Urban Development Corporation of Trinidad and Tobago (UDeCoTT)	Disclosure pursuant to COE disclosure ruling 1/4/09 categories H-K 30/4/09 (1+ 6 Binders)	30/4/2009

160	Urban Development Corporation of Trinidad and Tobago (UDeCoTT)	Documents submitted in response to COE's request	7/05/09
161	Urban Development Corporation of Trinidad and Tobago (UDeCoTT)	2 nd Witness Statement of Neelanda Rampaul dd 8/5/09	8/05/2009
162	Urban Development Corporation of Trinidad and Tobago (UDeCoTT)	Table of response to requests made in cross examination of Neelanda Rampaul and Calder Hart dd 19/05/09	19/05/2009
163	Urban Development Corporation of Trinidad and Tobago (UDeCoTT)	List of UdeCoTT projects and contract values as at 30/04/09	20/05/2009
164	Urban Development Corporation of Trinidad and Tobago (UDeCoTT)	Preliminary Master Plan for the Elite Athletes Training Centre at the Brian Lara Sports Academy	25/05/2009
165	Urban Development Corporation of Trinidad and Tobago (UDeCoTT)	Presentation to COE Customs and Excise Building	31/03/09
166	Urban Development Corporation of Trinidad and Tobago (UDeCoTT)	Government Campus Plaza Customs and Excise Building	
167	Urban Development Corporation of Trinidad and Tobago (UDeCoTT)	Additional Documents Customs and Excise Building	1/4/2009
168	Urban Development Corporation of Trinidad and Tobago(UDeCoTT)	Interrogatories re Hafeez Karamath Bundle in connection with the Brian Lara Cricket Academy	9/02/2009
169	Urban Development Corporation of Trinidad and Tobago(UDeCoTT)	Witness Statement of Ricardo O'Brien dated 24/03/09	24/03/2009
170	Urban Development Corporation of Trinidad and Tobago(UDeCoTT)	Written closing submission 1/3/2010	1/3/2010
171	Urban Development Corporation of Trinidad and Tobago(UDeCoTT)	Further submission of UDeCott on matters raised by the COE's letter of 8/03/2010	16/3/2010
172	Vishnu D.K. Musai & Co	Submission dated 20/3/09 documents relating to Hafeez Karamath Construction Ltd, Hafeez Karamath Engineering, Jade Developments Ltd.	24/04/2009
173	Warner's Construction & Sanitation Ltd	Submission – Scarborough Regional Library Project dated 2/02/09	3/02/2009
174	Water & Sewerage Authority of Trinidad & Tobago	Submission in response to request from COE dd 16.4.09 re Belmont Police Station, Blenheim Housing Project, Tobago, Academy of Performing Arts – North and South dd 28/04/09	29/04/2009
175	Water and Sewerage Authority	Submission in response to COE's request re Cleaver Heights	7/12/09
176	Winston Agard	Witness Statement dated 17/3/09	17/3/2009
177	Winston Agard	Statutory Declaration dated 9.6.09	10/06/2009

**ENQUIRY INTO THE PUBLIC CONSTRUCTION SECTOR,
TRINIDAD & TOBAGO**

Annex 6

List of persons giving sworn evidence to the Commission (para 2.6)

**ENQUIRY INTO THE PUBLIC CONSTRUCTION SECTOR,
TRINIDAD & TOBAGO**

Annex 6

List of persons giving sworn evidence to the Commission (para 2.6)

- 1 Winston Riley, President of the Joint Consultative Counsel for the Construction Industry (JCC).
- 2 Afra Raymond, of Raymond & Pierre Limited, President-elect of the Institute of Surveyors of TT and journalist.
- 3 Mikey Augustine Joseph, President TT Contractors' Association.
- 4 Bernard Sylvester, Acting Permanent Secretary, Ministry of Finance.
- 5 Dr. Keith Rowley, Member of Parliament for Diego Martin West.
- 6 Neelanda Rampaul, Chief Operating Officer, UDeCOTT
- 7 John Calder Hart, Chairman and Chief Executive Officer, UDeCOTT
- 8 Hafeez Karamanth, Chairman, Hafeez Karamath Limited (HKL).
- 9 Martin Daly SC, President, Law Association of Trinidad and Tobago, appearing in personal capacity.
- 10 Christine Sahadeo, former Senator and former Minister, Ministry of Finance.
- 11 John Mair, former UDeCOTT Board Member.
- 12 Derek Outridge, Quantity Surveyor, Managing Director of QES & Associates Limited (QES).
- 13 Winston Agar, former CEO, UDeCOTT
- 14 Jack Shenker, Vice President Genivar Trinidad & Tobago.

- 15 Winston Chin Fong, senior manager, UDeCOTT.
- 16 Christopher Pilgrim, former UDeCOTT senior engineer
- 17 Ian Telfer, former chief construction engineer UDeCOTT.
- 18 Hayden Paul, chief construction engineer, UDeCOTT.
- 19 Emil Elias Chairman, NH International (Caribbean) Limited.
- 20 Ricardo O'Brien, former CEO UDeCOTT.
- 21 Safiya Noel, Chief accountant, UDeCOTT.
- 22 Col Imbert, Minister of Works and Transport
- 23 Carl Khan, formerly married to Mrs Calder Hart
- 24 Margaret Chow, former MD NHA and HDC
- 25 John Connon, MD of NHIC
- 26 Minister Dr Emily Dick-Forde, Minister of Planning

**ENQUIRY INTO THE PUBLIC CONSTRUCTION SECTOR,
TRINIDAD & TOBAGO**

Annex 7

List of persons taking part in “round table” sessions (para 2.7).

**ENQUIRY INTO THE PUBLIC CONSTRUCTION SECTOR,
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ANNEX 7

List of persons taking part in “round table” sessions (para 2.7).

1. The Hon Col Imbert, Minister of Transport
2. Calder Hart, Executive Chairman, UDeCOTT
3. Winston Riley, President JCC
4. Vaughan Lezama, Assoc of Prof Engineers TT
5. Gary Turton, President Architects’ Assoc of TT
6. Mikey Joseph, President TTCA
7. Arun Buch, Consulting Engineer
8. Jack Bynoe Architects’ Assoc of TT
9. Michael Bynoe, Architect
10. Alan Cochran, IQS
11. Michael Samms IQS
12. Peter Morris, Quantity Surveyor
13. Wendy Ali, NIPDEC
14. Rodney St Hilaire NIPDEC
15. Brendan George NIPDEC
16. Margarita Hospedales, NIPDEC
17. Patrick Caesar, NIPDEC
18. Reynold Patrick, NIPDEDC

19. Lallan Samaroo, NIPDEC
20. Rubadiri Victor, TT Artists' Federation
21. Orr Liyanage, Civstruct Associates.
22. Neill Stansbury, Transparency International
23. Victor Hart, President Transparency Institute.
24. Paul Taylor, Education Facilities Co
25. Gillian Seecharan-Scott, Min of Education
26. Prof Winston Suite, formerly UWI
27. Carla Herbert, member White Paper committee

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Annex 8

Documents concerning Salmon letters (para 2.18).



COMMISSION OF ENQUIRY
INTO THE CONSTRUCTION SECTOR

Commission of Enquiry into the Construction Sector

2nd Floor Winsure Building

23-25 Richmond Street

Port of Spain

1-(868) 625-7453 Ext. 1206 FAX:627-5014 email: secretary@constructionenquiry.gov.tt web-site: www.constructionenquiry.gov.tt

13 January 2010

Pollonais, Blanc, de la Bastide & Jacelon
Attorneys-at-Law
Pembroke Court
17-19 Pembroke Street
Port of Spain



Ms. Vanessa Mohammed

Dear Sirs

Commission of Enquiry into the Construction Sector of Trinidad and Tobago

This letter sets out the matters which the Commissioners of the Commission of Enquiry into the Construction Sector (Commission of Enquiry), in the light of the evidence, submissions and addresses so far received in the Commission of Enquiry, are minded to consider could amount to criticism of your client, the Urban Development Corporation of Trinidad and Tobago Limited (UDeCOTT). You are being notified of these matters so that you have the opportunity to answer such possible criticism, in further written submissions or in such other manner as the Commissioners may direct.

You have been sent similar (Salmon) letters dated 30 April and 8 June, 2009, in respect of which you have raised certain objections and have commenced Judicial Review proceedings. You are aware that the Commission of Enquiry is advised that both of the earlier Salmon letters comply with the undertaking given by the Commissioners on the first day of the hearings, 12 January, 2009 and further that they are compliant with your client's rights as to natural justice and their constitutional rights. Notwithstanding this, the attorneys representing the Commission of Enquiry in the Judicial Review proceedings, M. Hamel-Smith & Co, have stated that the Commission of Enquiry will agree to provide a further letter setting out accusations potentially adverse to UDeCOTT by way of enhancement of the Salmon letter of 8 June 2009. By letter dated 16 December 2009, the Secretary to the Commission of Enquiry notified you that it was anticipated that the further letter would be provided by 11 January, 2010, which date was revised to 13 January 2010.

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This letter accordingly sets out the matters originally included in the Salmon letter of 8 June 2009, together with, and by way of enhancement thereof, accusations potentially adverse to UDeCOTT which the Commissioners are provisionally minded to include in their Report to His Excellency the President, but subject to considering such responses UDeCOTT may choose to place before the Commission of Enquiry. The accusations potentially adverse to UDeCOTT, by way of enhancement, are set out in bold type within the text at an appropriate place.

As in the previous Salmon letters, the items are arranged by reference to the Commission of Enquiry Terms of Reference. However, as these topics obviously overlap, the whole of this letter should be read in order to identify the accusations potentially adverse to UDeCOTT, which UDeCOTT has the opportunity to answer.

1. *Procurement practices:*

- (i) Failing to adopt Ministry of Finance (MOF) Standard Procurement Procedures, 2005 (the 2005 Rules); alternatively, failure to clarify or record whether or not such procedures were to be adopted.

By further enhancement:

The MOF procedures required that “*These procedures shall be placed before the Board of Directors to be approved*” (para 1(iii)). UDeCOTT failed so to place the procedures before the board.

- (ii) Reliance on Urban Development Corporation of Trinidad and Tobago Limited (UDeCOTT) 1995 Rules (revised 1998) to authorise single source tendering without regard to this practice not being permitted by 2005 Rules.
- (iii) Failure to comply with either set of rules from 2006 in regard to the composition of the Tenders Committee.

By further enhancement:

UDeCOTT did not, during 2005-2006, comply with the 1998 tender rules which required tenders to be put before a separate Tenders Committee. Tenders were instead put before the full board. There was no reason why a separate Tenders Committee could not have been established and this was not, as asserted by Ms. Rampaul, a minor infraction.¹

¹ Commission of Enquiry Transcript of 23 January 2009 p46-52

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- (iv) Failure to comply with reporting requirements under the 2005 Rules;

UDeCOTT is referred to the first statement of Winston Riley and to the submissions on behalf of the Joint Consultative Council for the Construction Industry (JCC) at Commission of Enquiry Transcript of 18 May, 2009 p 11 and 29-30. UDeCOTT is invited to state whether or not monthly reports were submitted in accordance with Section 11.01 of the 2005 Rules.

- (v) Allowing or facilitating improper and potentially corrupt influence over tender processes;

With regard to C&E Building, refer to Exhibit KR13 to Dr. Rowley's first statement and submissions of on behalf of Dr Rowley at Transcript 19 May, 2009 p.18-22; also to submissions of the JCC, 18 May p.17-18 and refer to further enhancement below.

With regard to the MLA Tower, refer to the oral submission on behalf of JCC, Transcript 18 May, 2009 at p.44-63, also the evidence of Mr. Carl Khan and refer to further enhancement below.

With regard to Brian Lara Stadium, refer to the oral submissions of JCC, Transcript 18 May at p.64-90, to the first and second reports of Gerry McCaffrey and to Cytrinowicz exh 19.3 59 and refer to further enhancement below.

The Commissioners understand it to be contended that Mr. Calder Hart as Executive Chairman acted so as to cause or facilitate the improper and potentially corrupt award of contracts to CH Construction (Sunway Construction Caribbean Ltd) for the MLA Building and to HKL for the Brian Lara Stadium, Packages 3 and 5-8 and refer to further enhancement below. It is understood that no actual corruption or impropriety is alleged in respect of the award of the contract for the C&E Building.

By further enhancement:

UDeCOTT caused or permitted misuse or manipulation of tender review procedures under the 1998 procurement rules so as to facilitate or allow the inappropriate and potentially corrupt award of contracts. This applies in the case of the awards for the Ministry of Legal Affairs Tower and the Brian Lara Stadium.

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- (vi) Permitting the introduction of bidders after close of the pre-qualification process; Refer to first statement of Winston Riley, para 91(d), 101 and 102.

By further enhancement:

UDeCOTT permitted the introduction of a further bidder after close of the prequalification process for the Chaguanas Administrative Headquarters contract, the additional bidder being Times Construction Company².

- (vii) Permitting bidders who are not compliant with the tender rules.

This allegation of the JCC is understood to relate to tenderers who fail to comply with requirements as to previous experience and audited accounts, also requirements for a BIT number, NIS compliance certificate and VAT certificate: see submissions of JCC, Transcript 18 May p 45-50

2. *Methods of operation:*

- (i) Facilitating or permitting fragmented management procedures (see report of Lockwood Greene);

By further enhancement: (these contentions apply to all the sections under *Methods of Operation* below)

- (a) **Fragmented management:** it is reported that management groups – finance, legal and engineering – appear to be standalone entities without significant integration and with no glue holding them together in an integrated project management team. There does not appear to be an internal group whose task it is to manage projects in their entirety.
- (b) **No centralised filing system:** various management groups appear to maintain project files pertaining only to their functions. UDeCOTT is said to be aware of the issue and working to put a better system in place.
- (c) **Insufficient project staff:** only one field engineer was assigned to four projects, that engineer also having duties on other projects. Further, a single Chief Construction Engineer had responsibility for all UDeCOTT projects.

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² See letter 20 December 2005, WR28.

- (d) **Lack of project control tools:** there was lack of cost forecast reports, schedule deviation reports and overdue RFI logs, also change order recap reports.
 - (e) **Late payment to contractors:** this was the most significant criticism directed towards UDeCOTT. Lack of cash flow resulted in considerable delay to projects. PAL themselves were often late in certifying, but additional delay occurred within UDeCOTT once certificates were issued.
 - (f) **No full-time UDeCOTT presence on site:** while Clerks of Works were UDeCOTT employees, PAL insisted they were supervised by and reported to the PAL Project Manager leading to unreliable recording of events.
 - (g) **Lack of follow-up on issues:** numerous issues were allowed to languish. The Chief Engineer initiated action but issues were not resolved.
 - (h) **Failure to control the engineer:** while UDeCOTT expressed dissatisfaction with the performance of PAL, in many cases the contract provisions were not enforced, nor were issues escalated to higher management levels.
- (1A) **By further enhancement:** as stated in the Interim Report of Mr. McCaffrey dated 20 February, UDeCOTT's methods of operation were flawed in the following respects:
- (a) While UDeCOTT had been provided with a list of materials to be made available some days prior to the meeting with Mr. McCaffrey, none of the material had been marshalled in advance. Mr. McCaffrey stated that *"It is apparent to me that UDeCOTT's filing and document control cannot possibly be described as good."*
 - (b) In relation to the identification and analysis of delay issues relating to the Brian Lara Stadium, he commented that: *"Neither party, it appears, has developed even a rudimentary delay analysis. The production of an as-built programme is one of the fundamental requirements."*³

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³ Report dated 20 February 2009, para. 5.3.5.

(c) In relation to payment issues at Brian Lara Stadium, Mr. McCaffrey expressed the view that: *"The files are so poorly organised that tracking such issues with any confidence could not be carried out The degree of disarray within those files has led to an extensive examination of the content and many questions cannot be answered at the moment....."* and that *"UDeCOTT's administration and recording of the payment process is, without doubt, appalling. That alone contributes to fuelling controversy, even if no controversial actings exist."*⁴

(ii) Failing to recruit and to motivate properly qualified and experienced staff ;

Refer to Riley's first statement and Submission of JCC, Transcript 18 May p.90-98 (written submission para 105-111). In the absence of any financial constraint on recruitment, it is to be inferred that UDeCOTT failed to motivate staff and in consequence suffered an excessive turnover of staff. Failure to motivate includes failure to manage and organise professional staff so that individuals are afforded proper authority to act within their areas of professional competence. It is alleged that this did not happen because all significant decisions were made by the Executive Chairman (including overruling or disregarding UDeCOTT's own consultants) resulting in uncritical and misguided loyalties to the Executive Chairman.

Further: see (i) (c) and (f) above.

And by further enhancement:

(a) Staff and directors within UDeCOTT spoke with one voice. No note of dissent was to be heard, even when actions were being taken on behalf of UDeCOTT which should have raised questions as to their propriety or even legality.

(b) Particular occasions when UDeCOTT Staff and/or directors should have raised concerns include (i) the placing of the contract for the Ministry of Legal Affairs Tower with CH Construction (ii) the placing and subsequent management of the contract for Packages 3 and 5-8 for the Brian Lara Stadium (iii) the ignoring or side-lining of Turner Alpha on the Brian Lara project in the face of their serious concerns about sums of money being advanced to HKL.

⁴ Report 20 February 2009, para. 4.5.2 to 4.4.5

- (iii) Relying unduly on consultants without proper oversight by senior staff;

This potential criticism relates to consultants employed by UDeCOTT and arises from the question what expertise (if any) UDeCOTT itself actually provides to the projects which it undertakes. For example, UDeCOTT purports to act as Project Manager, yet in many cases it appoints Consultants to act as Project Manager (in the case of Brian Lara being Turner Alpha, followed by Genivar). Furthermore, although UDeCOTT employs a limited number of relatively senior technical staff, it may be inferred from the events which occurred on Brian Lara Stadium that such senior technical staff failed to provide any proper oversight in respect of project management or design issues.

By further enhancement:

Project management by UDeCOTT, at the point of delivery, has been of a low order; and the contribution of UDeCOTT to the management of the projects they have overseen has on occasions been to inhibit their contracted project managers (TAL and Genivar) from performing effectively. We have been made aware of a number of occasions, on which project management was called for but was simply not delivered, to the detriment of the project.

- (iv) Failing to put in place appropriate management structures and project control systems, in particular with regard to:
- a. proper lines of reporting and responsibility;
 - b. recording, filing and following up necessary actions;
 - c. maintaining appropriate presence on project sites; and
 - d. liaising with the appointed Engineer.

UDeCOTT is referred to the Lockwood Greene Report. While these matters refer to housing projects, it may be inferred that similar failings continue to apply in the case of other projects, notably Brian Lara Stadium; see also the Report of Arun Buch and the First and Second Reports of Gerry McCaffrey.

- (v) Lack of control and lack of independent governance by the Board;
This is a matter of necessary interference rising from allegations of excessive power being placed in the hands of the Executive Chairman: see Closing Submissions of JCC, Transcript 18 May, p.96-99.

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By further enhancement:

From 2002 The Board permitted the Chairman Mr. Calder Hart to wield powers beyond those of a Chairman, on occasions without prior reference to the Board. Examples are Mr Hart's decision to take legal advice from Deborah Peake⁵ and, following this, the commissioning of a report from QES, both during the Customs & Excise tender process in July 2002.

- (vi) Absence of Board Members with executive authority and experience; Refer to the Snaggs Report which recommends a Board including two Executive Directors and a Non-Executive Chairman. Given the huge expansion in the workload undertaken by UDeCOTT, it is to be inferred that there is an even greater need for Executive representation on the Board in order to exercise proper Governance.
- (vii) Combining posts of Chairman and Chief Executive Officer, contrary to international good practice.

Such a practice would be acceptable in the case of a private company. However the work-load, use of public funds, international field of operation and commercial importance of UDeCOTT to the Trinidad and Tobago economy arguably dictates that it should be treated as a public company and run according to international good practice.

By further enhancement:

Combining posts of Chairman and Chief Executive is contrary to the OECD Guidelines on Corporate Governance of State-Owned Enterprises 2005. While Trinidad is not a member of OECD, such Guidelines should be followed because they represent internationally accepted good practice, particularly in the light of the Government's policy of seeking to achieve developed nation status by 2020⁶.

- (viii) Vesting Chairman with excessive and disproportionate powers. Refer to JCC Submissions, Commission of Enquiry Transcript of 18 May, 2009 p.96-99 and see (vii) above.

⁵ Commission of Enquiry Transcript of 28 January 2009 p 179)

⁶ See Closing Submission of Dr. Keith Rowley 31 July 2009, para 23-26

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3. *Value for money:*

- (i) failing to procure or manage projects in a manner conducive to the attainment of value for money, in the following respects:-
- (ii) with regard to the Brian Lara Stadium:
 - (a) failure to put in place effective design and management team;
 - (b) failure effectively to control design and management of project;
 - (c) failure to put in place proper contractual measures to protect the public interest;
 - (d) failure to enforce contractual measures in the public interest;
 - (e) making advanced payments to Hafeez Karamath Limited (HKL) without contractual justification, without adequate protection and without securing any benefit to the public;
 - (f) making advanced payments in circumstances which represented unwarranted favouritism to HKL;
 - (g) failing to monitor or control the project so as to be aware whether the ICC deadline for completion was achievable; and
 - (h) failing to take appropriate steps to protect the public interest once it was obvious that the ICC deadline was unachievable;

By further enhancement:

- (a) **The decision to award effectively the bulk of the whole project (with the exception of earthworks, piling and the pitch) was irrational and flawed because, by the time the award was made (even as a letter of intent) the original impetus, of seeking to comply with the ICC deadlines, had disappeared.**
- (b) **The decision was further flawed in that the design remained incomplete in important respects, creating additional risk of cost over-run.**

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- (c) With regard to the adoption of a "guaranteed maximum price", it should have been obvious to all the professionals (including the engineers and quantity surveyors on UDeCOTT's staff) that the terms of the proposed contract would not preclude the making of claims which would negate any concept of a guaranteed price.
- (d) If Mr. Calder Hart as Chairman and Mr. O'Brien as CEO were under any illusion about this, their own staff should have disabused them.
- (e) HKL's proposal of 22 August 2006 was conditionally recommended by TAL by letter of 23 August 2006⁷ in the following terms:
"If it is truly the intent of UDeCOTT to do what it takes to make this stadium game day ready I see no other option than to recommend the HKL proposal with the following provisions .."
- TAL's proposed conditions for acceptance included the provision of penalties against milestone dates. UDeCOTT's Letter of Acceptance, dropped the recommendation for penalties, thereby exposing UDeCOTT to further risk.
- (f) UDeCOTT by letter of 2 October 2006, informed HKL that their proposal (identified as that dated 22 August 2006) for Packages 3, 5, 6, 7 and 8 *"has been accepted"* and instructed HKL to commence the works.⁸ If it was UDeCOTT's expectation that HKL would perform to time and keep within the guarantee price, UDeCOTT and its staff and advisers had failed to appreciate the effect of the contract terms combined with the incomplete design. They had further overlooked or decided to ignore the fact that, after the ICC announcement on 21 September 2006, there was no longer any deadline to be aimed at as the stadium was no longer in the running for the World Cup events.
- (g) HKL's quotation of 14 September 2006 was patently ambiguous and uncertain, yet no attempt was made to clarify it, particularly as to the conditions governing advanced payment. UDeCOTT, without proper analysis or justification, chose to interpret the "accelerated payment" provision as entitling HKL to advance payment in respect of materials, which were paid for on receipt of invoice, and in the full amount invoiced with no deduction for retention and no requirement as to custody or storage of the material in question, or even as to its existence.

⁷ Exhibit NR 35 to the First Statement of Neelanda Rampaul.

⁸ Exhibit NR 36 to the First Statement of Neelanda Rampaul.

- (h) Such an interpretation was irrational, unsupported by any proper legal analysis and in any event overlooked and made no provision as to what was to be covered by the advanced payments, when such payments were to be made, when and on what conditions re-payment was to be made, what evidence was to be provided to justify payments and in respect of pre-payment for materials, what evidence of title and security was to be provided. UDeCOTT, irrationally, failed to address any such matters, thereby exposing themselves to serious risk.
- (i) Having commenced to make such accelerated payments to HKL UDeCOTT inexplicably failed to maintain an accurate, vouched, list of such payments and of re-payments through deductions, so as to show the amounts currently outstanding.
- (j) UDeCOTT's administration and recording of the payment process was "appalling" according to the Initial report of Mr McCaffrey⁹.
- (k) UDeCOTT decided, irrationally or without proper explanation, to make payments direct to HKL with which TAL as the appointed engineer did not agree. UDeCOTT irrationally had dealings with HKL to which TAL, as the appointed engineer, was not privy and failed to inform TAL of the sums being paid, despite many requests from TAL.
- (l) UDeCOTT made advanced payments to HKL which were so excessive that the value of work still to be completed greatly exceeded the amount left in the budget to pay HKL.
- (m) In an attempt to correct its records, UDeCOTT decided to back-fit data to certificates they had previously issued, to make it appear that certificates had been properly issued.
- (n) UDeCOTT ignored the recommendation of TAL for termination of the HKL Contract for default at the end of 2007, continued to make unjustified advanced payments to HKL and sought to marginalise TAL, eventually replacing them with Genivar.
- (o) HKL were treated in a manner materially more favourable than any other contractor on the Brian Lara project or any contractor on any other project. UDeCOTT had no proper reason for so doing and HKL delivered no corresponding benefit.

⁹ 20 February 2009

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- (p) UDeCOTT failed properly to administer or supervise or to secure the supervision of HKL's work such that: (i) substantial delays and cost over-runs were allowed to occur, primarily as a result of incomplete designs and poor performance by HKL; (ii) as well as being delayed, the steelwork was seriously defective in that over 70% of welds failed when tested independently.
 - (q) UDeCOTT should not have awarded any further contract to HKL in the light of their performance on the first contract for PK2 (building structure). This had been awarded in March 2006 with a contract period of 6 months; but after 7 months the work was less than 50% complete. No reasonable explanation was given for ignoring the performance of HKL up to this point, and the decision to "roll up" PK2 with all the remaining works into the final contract awarded to HKL provided no justification.
 - (r) It may also be noted that the UDeCOTT standard contract terms at the Brian Lara Stadium required that the Contractor should himself perform not less than 60% of the work directly without sub-contracting¹⁰. When HKL was awarded PK3 and 5-8, UDeCOTT allowed this provision to be removed, with some 70% of the work being sub-contracted, with no explanation being provided.
 - (s) UDeCOTT bears responsibility for excessive cost over-run, a major part of which resulted from the development of the design of the Stadium. There is no good reason why a much more simple and cost effective design could not have been adopted, as used for a number of existing stadia. In particular, the roof design adopted was needlessly costly, inappropriate and should not have been approved. Further, excessive cost arose from the needless overdesign of the steel structure in the absence of proper design information.
 - (t) UDeCOTT additionally bears responsibility for poor quality of the work, primarily as to welding, where there was a failure to give proper attention to questions of build ability.
- (iiA) By further enhancement: as asserted in his report dated April 2009, Mr. McCaffrey criticised UDeCOTT's financial management of the Brian Lara Stadium contract in the following respects:

¹⁰ PK2 Contract, in particular Condition 4.4.

- (a) **Of seventy-nine (79) Certificates issued for advance payments, thirty-nine (39) were wrong in relation to the sum for payment of advance payment, sixty (60) were wrong in relation to the amount of advance payment made to date and only four (4) out of seventy-nine (79) correctly recorded the advance payment and the amount of repayment.¹¹**
 - (b) **UDeCOTT's contemporaneous reporting of advance payment is materially wrong (i.e. under-reported) by tens of millions of TT\$ for the vast majority of the duration of the project.¹²**
 - (c) **UDeCOTT decided to back-fit Payment Certificates in February 2008. Those back-fitted Certificates also materially under-report the amount of advance payment made. All the back-fitted Certificates have been endorsed by at least two signatories and in some cases three.¹³**
 - (d) **Mr. McCaffrey's observations, whilst specific to a particular project, demonstrate that UDeCOTT's accounting system is seriously deficient to an extent that should not be tolerated in any commercial organisation, let alone one handling public funds. The deficiencies identified by Mr. McCaffrey are scandalous and UDeCOTT management at all levels are at fault in permitting this to occur and in not taking steps to prevent its continuance.**
- (iii) with regard to the Government Campus Plaza:
- (a) failure to put in place effective and co-ordinated management team;
 - (b) failure effectively to control management of project;
 - (c) failure to co-ordinate Packages so as to achieve necessary co-operation, between different contractors, designers and managers; and
 - (d) failure to enforce contractual measures in the public interest.

¹¹ Para. 2.1.3.

¹² Para. 2.5.1.

¹³ Para. 2.5.2 – 2.5.4.

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By further enhancement:

- (a) It should have been clear to UDeCOTT that the contractor who was awarded PK9 effectively controlled large areas of the site with regard to access and was in a position to impose serious impediment on other contractors thus giving considerable commercial advantage to the PK9 Contractor.
- (b) The successful tenderer for PK9 was NHIC, who was thus permitted to impose a highly beneficial Settlement Agreement in return for agreeing to remove from the PK9 contract the external works to PK3 and PK6 (23.11).
- (c) UDeCOTT's failure to take proper account of the inter-relationship between PK9 and PK3 and PK6, or to take proper advice as to the consequences of such relationship was a major failure of project management which led to serious risk.

(iiiA) By further enhancement: In respect to the C&E Building

- (a) UDeCOTT proceeded with tender evaluations, on two occasions, before advice was taken (from Mrs. Peake) on fundamental legal issues which undermined much of the work that had already been carried out.
- (b) the decision to instruct QES was mistaken; and the fact that Mr. Outridge produced a second report which was not disclosed by Mr. Calder Hart when it should have been, created unnecessary suspicion.

(iiiB) By further enhancement: in respect to the MLA Tower:

- (a) The award to Sunway Caribbean Ltd breached UDeCOTT's tender rules in the following respects.
- (b) In 2004 when CH Construction applied to UDeCOTT for pre-qualification, shortly before invitations to tender, CH Construction was without any assets¹⁴.

¹⁴ Letter dated 25 October 2004 at Exhibit NR 38 – pages 852 and 853 – to First Witness Statement of Neelanda Rampaul; Transcript 27 January 2009/139/13-17

- (c) On 10 November 2004 when it received an invitation from UDeCOTT to tender for the Ministry of Legal Affairs Tower¹⁵ CH Construction had no VAT Certificate, no NIB Certificate and no PAYE File Number, each of which was required. The lack of a VAT Certificate in particular had, in other cases, caused the rejection of tenders¹⁶.
- (d) In awarding the contract UDeCOTT wrongly took into account the financial strength of Sunway Malaysia¹⁷ and ignored the fact that CH Construction was not pre-qualified¹⁸.
- (e) CH Construction could not have satisfied the pre-qualification criteria set by UDeCOTT and therefore could not have been in a position to properly obtain a contract¹⁹.
- (f) UDeCOTT failed to obtain a parent company guarantee from Sunway Malaysia, notwithstanding that CH Construction had no assets²⁰.
- (g) The award of the MLA Tower contract to Sunway Caribbean Ltd demonstrated that Mr. Calder Hart had an ongoing relationship with CH Construction which had not been revealed to the UDeCOTT Board by reason of the following:
 - (i) The letter dated 25 October 2004 from CH Construction to UDeCOTT which lists Mr. Hart's fax number²¹.
 - (ii) Mr. Hart's explanation that this was due to an error²², was implausible because the tender was submitted 3 months after first letter was sent.
 - (iii) It is unlikely that such an error could have gone unnoticed for 3 months; faxes to CH Construction would have been arriving at Mr. Hart's home.
 - (iv) No evidence has been given to suggest that Mr. Hart ever wrote to CH Construction to ask for an explanation.

¹⁵ Exhibit NR 38 to the First Statement of Neelanda Rampaul, pg 862

¹⁶ Exhibit NR 32 to the First Statement of Neelanda Rampaul (pg 801) and Exhibit NR 38 (pg 905); Commission of Enquiry Transcript of 27 January, 2009 p156

¹⁷ Commission of Enquiry Transcript 27 January, 2009 p 107 -117

¹⁸ Exhibit MR 38 to First Witness Statement of Neelanda Rampaul, pg 981 to 982

¹⁹ Commission of Enquiry Transcript of 29 January, 2009 p 117

²⁰ Exhibit NR 38 to the First Statement of Neelanda Rampaul, pg 858

²¹ Commission of Enquiry Transcript of 28 January, 2009 pg 117

²² Mr. Hart's Second Witness Statement dated 8 May 2009, para 43

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- (v) CH Construction did fax its acceptance of UDeCOTT's offer from Mr. Hart's home fax.
 - (h) The Tender Evaluation Report for MLA Tower noted that the tender of CH Construction was some \$67 million higher than the lowest tender, from HKL, and \$22 million higher than that of Johnston International Ltd. There were no proper reasons not to award the contract to either of these companies. The decision to award the contract to CH Construction was motivated by Mr. Caider Hart's relationship with that company.
 - (i) It was clear, when on 22 June 2005 UDeCOTT reissued their letter of award to Sunway Construction Caribbean Limited, that this company was a subsidiary company with no assets or track record whose ability to perform the contract was wholly dependent on support from the parent company. Despite this, the UDeCOTT Board neglected their own resolution of November 2004 for a parent company guarantee. By so doing the UDeCOTT Board knowingly exposed the public purse to a grave risk of non-performance with no available recourse.
- (iiiB) By further enhancement: with regard to the Academy of Performing Arts (North):
- UDeCOTT omitted to give any notice of changes to the design of the Academy which resulted in the Colonial Tennis Club site being required for the building. This led to the club being threatened, without prior notice, with forcible eviction by SCG operatives and to delay to the project. The Club members were left themselves to seek a solution whereby UDeCOTT promised to replace the facilities with new courts on George V Park. The courts were acquired in April 2008 yet by April 2009 no action had been taken to provide the promised new courts.
- (iiiC) By further enhancement: with regard to the Tobago Financial Centre:
- (a) UDeCOTT were at fault in not ascertaining or causing to be ascertained the poor state of the original Post Office building, which was discovered only after the contract for construction of the original project had been let, and after pile driving had commenced.

- (b) **UDeCOTT were at fault in failing to terminate, or to consider termination of, the original contract at the point it was decided to demolish the original building and necessarily to embark on a different project.**
- (iv) with regard to projects generally:
 - (a) failure to put in place effective and co-ordinated management teams;
 - (b) failure effectively to manage or control projects;
 - (c) failure to co-ordinate work of contractors with that of Utilities;
 - (d) failure to enforce terms of contracts in the public interest.

With regard to the matters above, UDeCOTT is referred primarily to the expert reports of Arun Buch and Gerry McCaffrey and the Statement of Mark Cytrinowicz (Brian Lara Stadium), and to the expert reports of Gleeds and Arun Buch (GCP). With regard to projects generally, the Commissioners accept that none of the potential criticisms (a) to (d) apply in the case of the Waterfront project; however each of the other projects referred to in the Commission of Enquiry potentially involved criticism under one or more of (a), (b), (c) or (d).

4. *Free and fair competition:*

- (i) introduction of foreign contractor (Sunway Construction (Caribbean) Limited) in breach of tender procedures;
- (ii) appointing consultants without proper tendering process;
 Refer to the first statement of Winston Riley pages 47 to 58 and JCC written closing submission para 54-57;

By further enhancement:

- (a) **UDeCOTT regularly employed one firm (Genivar) as project manager on a sole selective basis (*inter alia* for the Waterfront Development, the Academy for Performing Arts, and for the Brian Lara Stadium, replacing TAL). This was an abuse of the provision of the 1998 Rules, under which sole selection should, in keeping with the objectives of free and fair competition as well as transparency, be used only in exceptional circumstances.**

(b) **By so acting, UDeCOTT further created the risk of a “special relationship” developing through which Genivar would be motivated to turn a blind eye to matters which should, as part of their professional duty, have raised concern. This applies particularly in the case of the Brian Lara Stadium where Genivar failed to address serious concerns expressed by Turner as to financial irregularity.**

(iii) failing to allow free and fair competition to local contractors and consultants:
Refer to the first statement of Winston Riley pages 89 to 90 and JCC written closing submission para 54-57.

By further enhancement:

The procurement process for the completion contract for the Prime Minister's residence was inappropriately and unfairly based on sole source tendering and inappropriately selected a foreign contractor.

5. *Integrity and Transparency:*

(i) absence of appropriate degree of openness;
Refer to the first statement of Winston Riley paras 60 – 79, and to submissions of JCC, Transcript 18 May pages 7-11;

By further enhancement:

(a) **UDeCOTT failed to provide copies of its guidelines and procedures to JCC members and further failed to provide evidence that such guidelines and procedures had been followed. By way of example the TTCA over a period of time up to 2005 submitted numerous requests for a copy of UDeCOTT's Procurement Rules, eventually submitting a request for production of the documents under the Freedom of Information Act. UDeCOTT provided the documents, as they were bound to, but chose to impose a fee and a requirement to obtain permission for any reproduction, distribution or dissemination of the rules and procedures²³.**

²³ UDeCOTT letter 6 June 2005, WR11.

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- (b) **As asserted by Mr. Bashir Rahemtulla, UDeCOTT provided him with files which in his opinion had been culled²⁴. Mr Rahemtulla asserted that *"I noted that several of these files appeared to have been culled and that certain information was not present. UDeCOTT also denied me access to some documents, such as certain Board Minutes, on the basis that UDeCOTT's legal officer was of the view that they were unrelated to this matter."***
 - (c) **Excessive and unfair use of selective tendering powers amounting to breach of obligations as to free and fair competition as well as transparency.**
 - (d) **UDeCOTT failed, as asserted by letter dated 13 November 2006 from the then Minister of Planning and Development, the Hon. Camille R. Robinson-Regis, to provide information in response to questions posed to Ministers in Parliament²⁵.**
- (ii) failing or refusing to provide information to Government:
 Refer to the first statement of Winston Riley pages 36-40;
 - (iii) failing or refusing to conduct dialogue with local construction professionals, practitioners and with the Joint Consultative Council for the Construction Industry (JCC):
 Refer to the first statement of Winston Riley paras 91-99;
By further enhancement:
 - (i) **UDeCOTT refused or failed to agree to introduce fluctuation clauses into contracts at a time of unprecedented material price inflation.**
 - (ii) **UDeCOTT introduced massive changes to standard clauses in the FIDIC Form of Contract without appropriate consultation.**
 - (iv) irrational denigration of the JCC as justification for lack of such dialogue;
 Refer to the cross-examination of Mr Winston Riley by counsel acting for UDeCOTT and for Mr Calder Hart and to First Statement of Mr Calder Hart.²⁶

²⁴ Riley 1st statement Para 78

²⁵ In WR13.

²⁶ Statement 15 01 09, para 13, 14

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- (v) failing or refusing to publicise or make available applicable tender rules:
refer to the first statement of Winston Riley paras 62-63;
- (vi) failing or refusing to entertain debate or dialogue over appropriate contract forms:
Refer to the first statement of Winston Riley paras 91-99;
- (vii) introducing massive changes to standard forms without considering views of
practitioners or contractors;
- (viii) failure to make timely payment to contractors without proper reason:
Refer to the Lockwood Greene report and to other evidence of a continuing culture
of late payment including Winston Riley's first statement paras 113-118.

Yours sincerely,



Judith Gonzalez
Secretary
Commission of Enquiry into the Construction Sector



COMMISSION OF ENQUIRY INTO THE CONSTRUCTION SECTOR

Commission of Enquiry into the Construction Sector
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Port of Spain

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8 June 2009

Ms. Ariana Krishinge
Attorney-at-Law
Pollonais, Blanc, de la Bastide & Jacelon
Pembroke Court
17-19 Pembroke Street
Port of Spain

Dear Madam,

Commission of Enquiry into the Construction Sector of Trinidad and Tobago

This letter sets out the matters which the Commissioners of the Commission of Enquiry into the Construction Sector (the Commission of Enquiry), in the light of the evidence, submissions and addresses so far received in the Commission of Enquiry, are minded to consider could amount to criticism of your client, the Urban Development Corporation of Trinidad and Tobago Limited (UDeCOTT). You are being notified of these matters so that you have the opportunity to answer such possible criticism, in further written submissions or in such other manner as the Commissioners may direct.

You were sent a similar letter dated 30 April 2009 (the letter of 30th April), in respect of which you have brought court proceeding. You have provided an informal note to Counsel to the Commission of Enquiry which the Commissioners take as indicative of your concerns. While not accepting that the original letter of 30 April was in any way inadequate, nor your assertions as to natural justice or constitutional rights, the Commissioners set out in this letter further details regarding the matters raised in the letter of 30 April, taking onto account your concerns.

Commissioners: Professor John Uff, QC, Mr. Israel Khan, SC, Mr. Desmond Thornhill, Mr. Kenneth Sirju

One of your concerns, as the Commissioners understand it, is that the letter of 30 April does not set out the evidence which the Commissioners consider to be relevant to any possible criticism. The Commissioners do not accept that this is either appropriate or necessary in the present Enquiry for a number of reasons, most particularly that the Commission of Enquiry is inquisitorial. While some issues have been dealt with by formal evidence, many have not and the Commissioners must take account of all the material received, in whatever form. However, to assist UDeCOTT, the Commissioners have set out what are understood to be the principal sources of possible criticism with an explanation, where appropriate, of the matters to be answered.

The matters which the Commissioners are minded to consider could amount to criticism of your client are set out below in bold type, with principal sources of such criticism or other explanation below. The items are arranged by reference to the Commission of Enquiry Terms of Reference.

1. Procurement practices

(1) Failing to adopt Ministry of Finance Standard Procurement Procedures, 2005 (the 2005 Rules), alternatively, failure to clarify or record whether or not such procedures were to be adopted.

(2) Reliance on Urban Development Corporation of Trinidad and Tobago Limited (UDeCOTT) 1995 Rules (revised 1998) to authorise single source tendering without regard to this practice not being permitted by 2005 Rules.

(3) Failure to comply with either set of rules from 2006 in regard to the composition of the Tenders Committee.

(4) Failure to comply with reporting requirements under the 2005 Rules -

UDeCOTT is referred to the first statement of Mr. Winston Riley and to the submissions on behalf of the Joint Consultative Council for the Construction Industry (JCC) at Commission of Enquiry Transcript of 18 May 2009 p. 11 and 29-30. UDeCOTT is invited to state whether or not monthly reports were submitted in accordance with section 11.01 of the 2005 Rules.

(5) Allowing or facilitating improper and potentially corrupt influence over tender processes -

With regard to the Customs and Excise Building (C&E Building), refer to Exhibit KR13 to Dr. Keith Rowley's first statement and submissions on behalf of Dr. Rowley at Commission of Enquiry Transcript of 19 May 2009, p. 18-22; also to submissions of the JCC, 18 May 2009 p. 17-18.

With regard to the Ministry of Legal Affairs Tower (MLA Tower), refer to the oral submission on behalf of JCC, Commission of Enquiry Transcript of 18 May 2009 at p. 44-63, also the evidence of Mr. Carl Khan.

With regard to Brian Lara Stadium, refer to the oral submissions of JCC, Commission of Enquiry Transcript of 18 May 2009, p. 64-90, to the first and

second reports of Mr. Gerry McCaffrey and to Mr. Mark Cytrynowicz's Exhibit 19.3.59.

The Commissioners understand it to be contended that Mr. Calder Hart as Executive Chairman acted so as to cause or facilitate the improper and potentially corrupt award of contracts to CH Construction (Sunway Construction (Caribbean) Ltd) for the MLA Tower and to Hafeez Karamath Limited (HKL) for the Brian Lara Stadium, Packages 3 and 5-8. It is understood that no actual corruption or impropriety is alleged in respect of the award of the contract for the C&E Building.

(6) Permitting the introduction of bidders after close of the pre-qualification process
Refer to first statement of Mr. Winston Riley, paras 91(d), 101 and 102.

(7) Permitting bidders who are not compliant with the tender rules -

This allegation of the JCC is understood to relate to tenderers who fail to comply with requirements as to previous experience and audited accounts, also requirements for a BIR number, NIS compliance certificate and VAT certificate: see submissions of JCC, Commission of Enquiry Transcript of 18 May 2009, p. 45-50.

2. *Methods of operation*

(1) Facilitating or permitting fragmented management procedures -
See Lockwood Greene Report.

(2) Failing to recruit and to motivate properly qualified and experienced staff -

Refer to Mr. Winston Riley's first statement and submission of JCC, Commission of Enquiry Transcript of 18 May 2009 at p. 90-98 (written submission paras 105-111).

In the absence of any financial constraint on recruitment, it is to be inferred that UDeCOTT failed to motivate staff and in consequence suffered an excessive turnover of staff. Failure to motivate includes failure to manage and organise professional staff so that individuals are afforded proper authority to act within their areas of professional competence.

It is alleged that this did not happen because all significant decisions were made by the Executive Chairman (including overruling or disregarding UDeCOTT's own consultants) resulting in uncritical and misguided loyalties to the Executive Chairman.

(3) Relying unduly on consultants without proper oversight by senior staff -

This potential criticism relates to consultants employed by UDeCOTT and arises from the question what expertise, if any, does UDeCOTT itself actually provide to the projects which it undertakes. For example, UDeCOTT purports to act as Project Manager, yet in many cases it appoints Consultants to act as Project

Manager (in the case of the Brian Lara Stadium being Turner Alpha Limited, followed by Genivar). Furthermore, although UDeCOTT employs a limited number of relatively senior technical staff, it may be inferred from the events which occurred on Brian Lara Stadium that such senior technical staff failed to provide any proper oversight in respect of project management on design issues.

(4) Failing to put in place appropriate management structures and project control systems, in particular with regard to -

- (a) proper lines of reporting and responsibility;**
- (b) recording, filing and following up necessary actions;**
- (c) maintaining appropriate presence on project sites; and**
- (d) liaising with the appointed engineer.**

UDeCOTT is referred to in the Lockwood Greene Report. While these matters refer to housing projects, it may be inferred that similar failings continue to apply in the case of other projects, notably Brian Lara Stadium: See also the Report of Mr. Arun Buch and the first and second Reports of Mr. Gerry McCaffrey.

(5) Lack of control and lack of independent governance by the Board -

This is a matter of necessary interference arising from allegations of excessive power being placed in the hands of the Executive Chairman: See closing submissions of JCC, Commission of Enquiry Transcript of 18 May 2009, p. 96-99.

(6) Absence of Board Members with executive authority and experience -

Refer to the Snaggs Report which recommends a Board including two Executive Directors and a Non-Executive Chairman. Given the huge expansion in the workload undertaken by UDeCOTT, it is to be inferred that there is an even greater need for executive representation on the Board in order to exercise proper governance.

(7) Combining posts of Chairman and Chief Executive Officer, contrary to international good practice -

Such a practice would be acceptable in the case of a private company. However the work-load, use of public funds, international field of operation and commercial importance of UDeCOTT to the Trinidad and Tobago economy arguably dictates that it should be treated as a public company and run according to international good practice.

(8) Vesting Chairman with excessive and disproportionate powers -

Refer to submissions of JCC, Commission of Enquiry Transcript of 18 May 2009, p. 96-99 and see (2) above.

3. Value for money

(1) Failing to procure or manage projects in a manner conducive to the attainment of value for money, in the following respects -

(a) with regard to the Brian Lara Stadium

- (i) failure to put in place effective design and management team;**
- (ii) failure effectively to control design and management of project;**
- (iii) failure to put in place proper contractual measures to protect the public interest;**
- (iv) failure to enforce contractual measures in the public interest;**
- (v) making advanced payments to HKL without contractual justification, without adequate protection and without securing any benefit to the public;**
- (vi) making advanced payments in circumstances which represented**
- (vii) unwarranted favouritism to HKL;**
- (viii) failing to monitor or control the project so as to be aware whether the International Cricket Council (ICC) deadline for completion was achievable; and**
- (ix) failing to take appropriate steps to protect the public interest once it was obvious that the ICC deadline was unachievable.**

(b) with regard to the Government Campus Plaza

- (i) failure to put in place effective and co-ordinated management team;**
- (ii) failure effectively to control management of project;**
- (iii) failure to co-ordinate Packages so as to achieve necessary co-operation, between different contractors, designers and managers; and**
- (iv) failure to enforce contractual measures in the public interest.**

(c) with regard to projects generally

- (i) failure to put in place effective and co-ordinated management teams;**
- (ii) failure effectively to manage or control projects;**
- (iii) failure to co-ordinate work of contractors with that of the public utilities;**
- (iv) failure to enforce terms of contracts in the public interest.**

With regard to the matters above, UDeCOTT is referred primarily to the expert reports of Mr. Arun Buch and Mr. Gerry McCaffrey and the Statement of Mr. Mark Cytrynowicz (Brian Lara Stadium), and to the expert reports of Gleeds and Arun Buch (Government Campus Plaza). With regard to projects generally, the Commissioners accept that none of

the potential criticisms (i) to (iv) apply in the case of the Waterfront project: However, each of the other projects referred to in the Commission of Enquiry potentially involved criticism under one or more of (i), (ii), (iii) or (iv).

4. Free and fair competition

- (1) Introduction of foreign contractor - Sunway Construction (Caribbean) Limited - in breach of tender procedures.**
- (2) Appointing consultants without proper tendering process -**
Refer to the first statement of Mr. Winston Riley p. 47 to 58 and written closing submission of JCC, paras 54-57.
- (3) Failing to allow free and fair competition to local contractors and consultants -**
Refer to the first statement of Mr. Winston Riley p. 89 to 90 and JCC written closing submission paras 54-57.

5. Integrity and Transparency

- (1) Absence of appropriate degree of openness -**
Refer to the first statement of Mr. Winston Riley paras 60 – 79, and to submissions of JCC, Commission of Enquiry Transcript of 18 May 2009 p. 7-11.
- (2) Failing or refusing to provide information to Government -**
Refer to the first statement of Mr. Winston Riley p. 36-40.
- (3) Failing or refusing to conduct dialogue with local construction professionals, practitioners and with the JCC -**
Refer to the first statement of Mr. Winston Riley paras 91-99.
- (4) Irrational denigration of the JCC as justification for lack of such dialogue -**
Refer to the cross-examination of Mr. Winston Riley by counsel acting for UDeCOTT and for Mr. Calder Hart.
- (5) Failing or refusing to publicise or make available applicable tender rules -**
Refer to the first statement of Mr. Winston Riley paras 62-63.
- (6) Failing or refusing to entertain debate or dialogue over appropriate contract forms -**
Refer to the first statement of Mr. Winston Riley paras 91-99.

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08 June 2009
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Attorney-at-Law
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(7) Introducing major changes to standard forms without considering views of practitioners or contractors.

(8) Failure to make timely payment to contractors without proper reason -

Refer to the Lockwood Greene Report and to other evidence of a continuing culture of late payment including Mr. Winston Riley's first statement paras 113-118.

The Commissioners are anxious that UDeCOTT should address all the possible areas of criticism. Accordingly, if any of the matters above are unclear the Commissioners will be happy to provide further explanation.

Yours sincerely,



Judith Gonzalez
Secretary
Commission of Enquiry into the Construction Sector



COMMISSION OF ENQUIRY INTO THE CONSTRUCTION SECTOR

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30 April 2009

Ms. Ariana Krishinge
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Pembroke Court
Nos. 17-19 Pembroke Street
Port of Spain

Dear Madam,

Commission of Enquiry into the Construction Sector of Trinidad and Tobago

This letter sets out the matters which the Commissioners of the Commission of Enquiry into the Construction Sector (Commission of Enquiry), in the light of the evidence, submissions and addresses so far received in the Commission of Enquiry, are minded to consider could amount to criticism of your client. You are being notified of these matters so that you have the opportunity, at the final oral hearing and in any further written submissions, to answer such possible criticism.

The Commissioners believe that, in the interests of avoiding speculative and unfair press comment this letter should, at least until delivery of the Commission of Enquiry Report, remain confidential as between the Commission Secretariat and yourselves and your clients. If you take any different view, please communicate this to the Secretariat before any further action is taken.

The matters referred to, arranged by reference to the Commission of Enquiry Terms of Reference, are the following:

1. Procurement practices:
 - (i) failing to adopt Ministry of Finance Standard Procurement Procedures, 2005 (the 2005 Rules); alternatively, failure to clarify or record whether or not such procedures were to be adopted;
 - (ii) reliance on Urban Development Corporation of Trinidad and Tobago Limited (UDeCOTT) 1995 Rules (revised 1998) to authorise single source tendering without regard to this practice not being permitted by 2005 Rules;

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- (iii) failure to comply with either set of rules from 2006 in regard to the composition of the Tenders Committee;
- (iv) failure to comply with reporting requirements under the 2005 Rules;
- (v) allowing or facilitating improper and potentially corrupt influence over tender processes;
- (vi) permitting the introduction of bidders after close of the pre-qualification process;
- (vii) permitting bidders who are not compliant with the tender rules.

2. Methods of operation:

- (i) facilitating or permitting fragmented management procedures (see report of Lockwood Green);
- (ii) failing to recruit and to motivate properly qualified and experienced staff ;
- (iii) relying unduly on consultants without proper oversight by senior staff;
- (iv) failing to put in place appropriate management structures and project control systems, in particular with regard to:
 - a. proper lines of reporting and responsibility;
 - b. recording, filing and following up necessary actions;
 - c. maintaining appropriate presence on project sites; and
 - d. liaising with the appointed Engineer.
- (v) lack of control and lack of independent governance by the Board;
- (vi) absence of Board Members with executive authority and experience;
- (vii) combining posts of Chairman and Chief Executive Officer, contrary to international good practice;
- (viii) vesting Chairman with excessive and disproportionate powers.

3. Value for money:

- (i) failing to procure or manage projects in a manner conducive to the attainment of value for money;
- (ii) with regard to the Brian Lara Stadium:
 - (a) failure to put in place effective design and management team;
 - (b) failure effectively to control design and management of project;
 - (c) failure to put in place proper contractual measures to protect the public interest;
 - (d) failure to enforce contractual measures in the public interest;
 - (e) making advanced payments Hafeez Karamath Limited (HKL) without contractual justification, without adequate protection and without securing any benefit to the public;
 - (f) making advanced payments in circumstances which represented unwarranted favouritism to HKL;
 - (g) failing to monitor or control the project so as to be aware whether the ICC deadline for completion was achievable; and
 - (h) failing to take appropriate steps to protect the public interest once it was obvious that the ICC deadline was unachievable;
- (iii) with regard to the Government Campus Plaza:
 - (a) failure to put in place effective and co-ordinated management team;
 - (b) failure effectively to control management of project;

- (c) failure to co-ordinate Packages so as to achieve necessary co-operation, between different contractors, designers and managers;
and
 - (d) failure to enforce contractual measures in the public interest.
- (iv) with regard to projects generally:
 - (a) failure to put in place effective and co-ordinated management teams;
 - (b) failure effectively to manage or control projects;
 - (c) failure to co-ordinate work of contractors with that of Utilities;
 - (d) failure to enforce terms of contracts in the public interest.

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- 4. Free and fair competition:
 - (i) introduction of foreign contractor (Sunway Construction (Caribbean) Limited) in breach of tender procedures;
 - (ii) appointing consultants without proper tendering process; and
 - (iii) failing to allow free and fair competition to local contractors and consultants.
- 5. Integrity and Transparency:
 - (i) absence of appropriate degree of openness;
 - (ii) failing or refusing to provide information to Government;
 - (iii) failing or refusing to conduct dialogue with local construction professionals, practitioners and with the Joint Consultative Council for the Construction Industry (JCC);
 - (iv) irrational denigration of the JCC as justification for lack of such dialogue;
 - (v) failing or refusing to publicise or make available applicable tender rules;
 - (vi) failing or refusing to entertain debate or dialogue over appropriate contract forms;

- (vii) introducing massive changes to standard forms without considering views of practitioners or contractors; and
- (viii) failure to make timely payment to contractors without proper reason.

Please note that the Commission of Enquiry wishes to make it clear that the matters above are not findings of fact, but are synopses of evidence and of matters extracted from the transcripts only.

Yours sincerely,

Judith Gonzalez
Secretary
Commission of Enquiry into the Construction Sector

COMMISSION OF ENQUIRY
INTO THE PUBLIC CONSTRUCTION SECTOR

NOTE ON SALMON PRINCIPLES

A. BASIC FACTS

1. It was stated at the outset of the Enquiry that “*Salmon letters*” would be provided after the conclusion of the evidence. This was included in the Chairman’s opening address in the following terms.

“What the Commissioners do undertake is that after the conclusion of the evidence and submission, before any party is called on to make a final submission defending its position against accusations that have been made in the Enquiry, a concise statement of the accusation which the Commissioners intend to consider will be delivered to each affected party or their representative in accordance with the guidelines established by the distinguished English Judge Lord Salmon ...”¹

Later, Mr. Frank Solomon SC, Leading Counsel appearing for Mr. Calder Hart asked for confirmation that:

“Your Counsel Mr. Jairam, supported by his team, will be primarily responsible for producing to us in accordance with the Salmon recommendations a precis of those allegations or charges which the Commission is minded to take into consideration and that such precis will be served upon the party criticised together with the evidence in substantiation of those charges; and that thereafter a party criticised will have a full opportunity of dealing as that party may be advised with the criticisms so identified and with the evidence so provided.”

The Chairman then responded as follows:

“You do appreciate that the Commissioners will be taking carefully into account the advice they receive from experienced Counsel who have been instructed to advise us. And therefore we would certainly not be in a position to give you any response until consulting Counsel who will advise us. On a

¹ Transcript 12 January 2009 p11.

more practical note we would certainly be relying on Counsel to draft the document that you refer to, mainly (namely) giving particulars of the criticism and the evidence which is against your client, if that is the case

Mr. Solomon: Support of the criticism, if any.

Mr. Chairman: I am sorry.

Mr Solomon: The evidence in support of the criticism.

Mr. Chairman: Yes. And I think there should also be no misunderstanding as to how and when you would be given the opportunity to respond and in what fashion. The normal procedure, as I understand it, is that you would be given these particulars a reasonable time in advance of being asked to make your final submission. That needs to be carefully drafted so that there are no possibilities of misunderstanding ...”²

2. Mr. Solomon later referred to correspondence dated 24 October 2008 which asked to be provided with full details of any allegations made against UDeCott, and the Commission’s response dated 30 October 2008 which included the following:

“You will appreciate that in the nature of an enquiry it is not possible at this stage to provide details of the criticisms made against UDeCott.”

The reason for this response was that, as at 30 October 2008, the Commission had not received any submission or criticism, whether of Udecott or any other party.

3. The Enquiry was programmed to take place in three tranches, namely:
 - (i) A four week hearing from 12 January to 6 February 2009 primarily for the taking of evidence.
 - (ii) A further evidence hearing of two weeks from 23 March to 3 April 2009.
 - (iii) A final hearing of two weeks from 11 May to 22 May 2009 to hear Closing Submissions from interested parties.

² Transcript 12 January 2009 p21, 22.

In accordance with the Commission's undertaking, "*Salmon letters*" were served on all relevant parties on or about 30 April. In respect of most parties or individuals, many of whom had been present at the Enquiry only intermittently, the Salmon letters provided transcript references and summaries of criticism made against that party. With respect to UDeCott, the Salmon letter set out a concise summary of the matters which the Commission was minded to consider could amount to criticism of UDeCott.

4. On 5 May 2009 Attorneys acting for UDeCott wrote to the Commission referring to the "*Salmon principles*" and stating that the purpose of a Salmon letter was to guide any party who may be subject to criticism by:
 - (i) Particularising any criticism of that party that the Commission is minded to consider making; and
 - (ii) Identifying the evidence which the Commission considers, *prima facie*, to be credible and supportive of the said criticisms.

It was contended that the Salmon letter served on 30 April did not contain the attributes of an effective Salmon letter and prevented it fulfilling its essential purpose, namely "*to satisfy the fundamental principle of natural justice that a person who may be subject to sanction or criticism is entitled to know the case against him and the evidence relied upon in support thereof*".

5. The Commission responded on 6 May, stating that UDeCott's interpretation of both the Salmon procedure and the requirements of natural justice was not accepted and that the Salmon letter served on 30 April would stand. Attorneys acting for UDeCott responded on 8 May setting out examples of matters where further particularity was said to be required. The letter attached "*an example letter from the Royal Liverpool Children's Inquiry*" said to show the "*sort of level of detail which, we suggest, ought to be given in respect of potential criticisms of Udecott*". However, without further prior notice to the Commission UDeCott on 11 May 2009 (the first day of the third hearing) applied to the High Court in Trinidad, *ex parte*, and obtained an Order

staying further proceedings of the Enquiry pending resolution (*inter alia*) of its claims regarding the Salmon letter. The stay was lifted by consent on 13 May on terms that:

- (i) UDeCott was not expected to respond to the Salmon letter dated April 30th 2009 at all.
 - (ii) UDeCott would proceed to make its oral closing submissions without reference to the Salmon letter.
 - (iii) Upon completion of UDeCott's oral closing submissions the Commissioners would issue to UDeCott a Salmon letter on or before 8 June 2009.
 - (iv) UDeCott would thereafter be at liberty to submit written submissions in relation to any issues raised in such letter, on or before July 31 2009.
6. The Commission accordingly issued a further Salmon letter dated 8 June 2009 containing more detail of the matters which the Commissioner's were minded to consider could amount to criticism of UDeCott, taking into account a note provided by counsel to Udecott setting out matters of criticism said to require further explanation.
7. On 20 and 21 May, at the conclusion of the third hearing, oral closing submissions were made on behalf of UDeCott. Those submissions were, with UDeCott's agreement, curtailed on 21 May on the basis they would be completed in writing in accordance with the agreed order.
8. Subsequently UDeCott has:
- (i) Contended that the Salmon letter served on 8 June 2009 is ineffective and provides insufficient particulars of criticisms for UDeCott to respond.

- (ii) Elected not to serve any further final submission until after the conclusion of outstanding evidence to the Enquiry.
 - (iii) Stated that it intends to pursue the application for judicial review in relation to the Salmon letter, listed for 21 October 2009.
9. Notwithstanding the above UDeCott, by letter of 22 September 2009, provided a further example of potential criticism contained in the letter of 8 June 2009 which UDeCott says cannot be responded to because it is not possible to determine what it is the Commission actually has in mind. UDeCott has also provided a detailed note dated 22 September 2009 setting out further detail which UDeCott requires of the allegations in the Salmon letter. The commission responded to Udecott's letter of 22 September on 24 September 2009.
10. This note sets out the Commissioners' understanding of the applicable principles and their approach to the preparation of Salmon letters. It concludes that the material provided to UDeCott is more than sufficient for them to provide a proper response. Notwithstanding this, the Commission have stated that if any of the matters set out in the Salmon letter are unclear the Commissioners will provide further explanation³.

B. THE LAW IN TRINIDAD AND TOBAGO

11. Enquiries in Trinidad and Tobago may be carried out pursuant to the Commissions of Enquiry Act, Chap 19.01, Act 2 of 1892⁴. This Act is similar to the (now repealed) UK legislation entitled Tribunals of Inquiry (Evidence) Act 1921. The law applying to Enquiries in Trinidad and Tobago is therefore (at least up to 2005) substantially the same as in England and Wales and the "Salmon principles" of course derive from English practice. The Commission of Inquiry Act, Chap 19.01, Act 2 of 1892 provides:

"7. Duties of commissioners.

³ Letter 8 June 2009, last para

⁴ Amended by 27 of 1932, 172/1961, 8/1962, 16 of 1962, 136/1976.

The commissioners shall, after taking the oath make a full, faithful and impartial enquiry into the matter specified in the commission, and conduct the enquiry in accordance with the directions, if any, in the commission...

11. *Power to summon and examine witnesses, and privilege of commissioner from suit.*

Commissioners acting under this Act shall have the powers of the High Court to summon witnesses

12. *Witnesses*

- (1) *All persons summoned to attend and give evidence ... **shall be bound** to obey the summons served upon them as fully in all respects as witnesses are bound to obey subpoenas issued in the High Court..*

- (2) *Offences*

Any person who refuses or fails, without sufficient cause, to attend at the time and place mentioned in the summons served on him, and any person who attends, but leaves the commission without the permission of the commissioners, or refuses without sufficient cause to answer or to answer fully and satisfactorily to the best of his knowledge and belief, all questions put to him by or with the concurrence of the commissioners, or refuses or fails without sufficient cause to produce any books, plans or documents in his possession, or under his control, and mentioned or referred to in the summons served on him... ”

[Emphasis added]

C. ENQUIRIES: GENERAL PRINCIPLES

12. There are many different types of inquiry. The different categories of enquiry are summarised by Wade and Forsyth, *Administrative Law*,⁵ as:

“On the one hand, by far the most common is the statutory inquiry which is the standard technique for giving a fair hearing to objections before the final decision is made on some question of government policy affecting citizens’ rights of interests.... what is characteristic about these inquiries is that they assist in the proper formulation of policy in the decision-making process.

*...
On the other hand, there is the inquiry which essentially finds facts and may attribute responsibility once something has gone wrong ... The law generally requires such inquiries to be held once certain events have occurred. But the law does not always require such an inquiry and then such inquiries are discretionary.”*

⁵ 10th Edn (2009) at p. 801

13. Enquiries which are discretionary are further divided, as described by Wade and Forsyth⁶, thus:

“On the one hand there is the inquiry set up by the minister on an ad hoc basis under no statute and with no legal powers ... on the other hand, is the inquiry clothed with legal powers of the High Court to call and compel witnesses. Such inquiries, when held were previously held either under subject-specific legislation or under the Tribunals of Inquiry (Evidence) Act 1921. They are now generally held under the Inquiries Act 2005 (which repealed the 1921 Act).”

14. In Supperstone, Goudie and Walker, *Judicial Review* (2005)⁷ there is described the “conundrum” that arises in all enquiries as follows:

“Are all individuals subject to adverse comment entitled to procedural safeguards before the report is produced? Clearly in a large inquiry an investigation giving individuals protection akin to that afforded to defendants in a court of law would significantly lengthen the proceedings, add to the cost and could create an unacceptable delay in the inquiry. Conversely, however, it is unacceptable to subject individuals to adverse criticism when they have no chance to answer those criticisms and to protect their good name.”

15. *Supperstone*⁸ considers these conflicting interests in the context of investigations under the Companies Act. As an illustration, *Supperstone* cites the authority of *Re Pergamon Press Ltd*⁹ which concerned the investigation of two companies under the Companies Act¹⁰. In that case, certain directors refused to respond to questions unless they were informed of the detail of each of the allegations made against them. The inspectors refused to supply the directors with such details, and the directors claimed that the same was a breach of natural justice. The Court of Appeal rejected the directors’ contentions. They held that notwithstanding that the inspectors must act fairly, this could be achieved by putting the *gist* of any criticism to the directors and giving them opportunity to comment. In reaching his decision, Lord Denning M.R. said at p. 399 onwards:

⁶ *Administrative Law*, 10th Edn (2009) at p. 824

⁷ at [10.27]

⁸ at [10.27.2]

⁹ [1971] Ch 388

¹⁰ For a more recent application of these principles, see *Clegg v Secretary of State for Trade and Industry* [2001] EWHC 394; [2001] All ER (D) 242 (Apr).

"It seems to me that this claim on their part went too far. This inquiry was not a court of law. It was an investigation in the public interest, in which all should surely co-operate, as they promised to do....."

*.....It is true, of course, that the inspectors are not a court of law. Their proceedings are not judicial proceedings: see *In re Grosvenor & West-End Railway Terminus Hotel Co. Ltd.* (1897) 76 L.T. 337. They are not even quasi-judicial, for they decide nothing; they determine nothing. They only investigate and report. They sit in private and are not entitled to admit the public to their meetings: see *Hearts of Oak Assurance Co. Ltd. v. Attorney-General* [1932] A.C. 392. They do not even decide whether there is a *prima facie* case, as was done in *Wiseman v. Borneman* [1971] A.C. 297.*

*But this should not lead us to minimise the significance of their task. They have to make a report which may have wide repercussions. They may, if they think fit, make findings of fact which are very damaging to those whom they name. They may accuse some; they may condemn others; they may ruin reputations or careers. Their report may lead to judicial proceedings. It may expose persons to criminal prosecutions or to civil actions. It may bring about the winding up of the company, and be used itself as material for the winding up: see *In re S.B.A. Properties Ltd.* [1967] 1 W.L.R. 799. Even before the inspectors make their report, they may inform the Board of Trade of facts which tend to show that an offence has been committed: see section 41 of the Act of 1967. When they do make their report, the Board are bound to send a copy of it to the company; and the board may, in their discretion, publish it, if they think fit, to the public at large.*

*Seeing that their work and their report may lead to such consequences, I am clearly of the opinion that the inspectors must act fairly. This is a duty which rests on them, as on many other bodies, even though they are not judicial, nor quasi-judicial, but only administrative: see *Reg. v. Gaming Board for Great Britain, Ex parte Benaim and Khaida* [1970] 2 Q.B. 417. The inspectors can obtain information in any way they think best, but before they condemn or criticise a man, they must give him a fair opportunity for correcting or contradicting what is said against him. They need not quote chapter and verse. An outline of the charge will usually suffice.*

That is what the inspectors here propose to do, but the directors of the company want more. They want to see the transcripts of the witnesses who speak adversely of them, and to see any documents which may be used against them. They, or some of them, even claim to cross-examine the witnesses.

In all this the directors go too far. This investigation is ordered in the public interest. It should not be impeded by measures of this kind.....

.....I take it to be axiomatic that the inspectors must not use the evidence of a witness so as to make it the basis of an adverse finding unless they give the party affected sufficient information to enable him to deal with it.

*It was suggested before us that whenever the inspectors thought of deciding a conflict of evidence or of making adverse criticism of someone, they should draft the proposed passage of their report and put it before the party for his comments before including it. But I think this also is going too far. This sort of thing should be left to the discretion of the inspectors. **They must be masters of their own procedure. They should be subject to no rules save this: they must be fair.** This being done, they should make their report with courage and frankness, keeping nothing back. The public interest demands it. They need have no fear because their report, so far as I can judge, is protected by an absolute privilege: see *Home v. Bentinck* (1820) 2 Brod. & Bing. 130, 162, per Lord Ellenborough, and *Chatterton v. Secretary of State for India in Council* [1895] 2 Q.B. 189, 191, per Lord Esher M.R.”*

[Emphasis added]

16. *Supperstone* concludes¹¹:

“In some inquiries the paramount need to find facts in the public interest has been held implicitly to exclude those procedural guarantees which are natural to litigation.”

D. THE SALMON PRINCIPLES

17. Following dissatisfaction with procedural aspects of Lord Denning’s inquiry into the Profumo Affair, Lord Justice Salmon chaired a Royal Commission on Tribunals of Inquiry conducted under the Tribunals of Inquiry (Evidence) Act 1921. That Act was passed to provide a mechanism for investigating allegations of improper behaviour by certain officials in connection with armament contracts¹² and allegations of misconduct made by civil servants¹³. Following the inquiry, in 1966, Lord Justice Salmon published a report making over 50 recommendations¹⁴. This contained reference to six “cardinal principles” of fair procedure under the Tribunals and Inquiries Act 1921 which came to be known as “the **Salmon Principles**”¹⁵.

18. The Salmon Principles are at [32] of the Lord Justice Salmon’s Report:

*“The difficulty and injustice with which persons involved in an inquiry may be faced **can however be largely removed** if the following cardinal principles which we discuss in Chapter IV are strictly observed: -*

¹¹ At [10.27.5]

¹² Wraith, R. and Lamb, G., *Public Inquiries as an Instrument of Government* (Allen & Urwin, 1971) at pp 212-217.

¹³ Feldman, P., *English Public Law*, (2004) at [22.88].

¹⁴ Report of the Royal Commission on Tribunals of Inquiry, Cmnd 3121 (1966).

¹⁵ Summary taken from: <http://www.ffw.com/publications/all/articles/investigations-and-inquiries.aspx>

1. *Before any person becomes involved in an inquiry, the Tribunal must be satisfied that there are circumstances which affect him and which the Tribunal proposes to investigate.*
2. ***Before any person who is involved in an inquiry is called as a witness he should be informed of any allegations which are made against him and the substance of the evidence in support of them.***
3. (a) *He should be given an adequate opportunity of preparing his case and of being assisted by legal advisers.*
 - (b) *his legal expenses should normally be met out of public funds.*
4. *He should have the opportunity of being examined by his own solicitor or counsel and of stating his case in public at the inquiry.*
5. *Any material witness he wishes called at the inquiry should, if reasonably practicable, be heard.*
6. *He should have the opportunity of testing by cross-examination conducted by his own solicitor or counsel any evidence which may affect him."*

[Emphasis added]

19. Further guidance is given on the first three cardinal principles at Chapter IV of the Report where it is stated:

"(ii) More time

49. *The question arises, how is it possible to ensure that any allegations against witnesses and the substance of any evidence against them will be made known to them so as give them an adequate opportunity of preparing their case (Cardinal principles 1, 2 and 3(a)). We believe that the answer to this question lies mainly in less haste. ... a few weeks more in preparing the material for arriving at the truth is a small price to pay in order to avoid injustice.*
50. *Any potential witness from whom a statement is taken should be told that, if he so wishes, his own solicitor may be present when the statement is taken. ... As soon as possible after he has given his statement **he should be supplied with a document setting out the allegation against him and the substance of the evidence in support of those allegations.***
51. *... the form of the document disclosing to a witness the substance of the evidence against him must be left, in each case, to the **discretion of the Tribunal.** We realise that however thoroughly the case is prepared fresh evidence may emerge during the course of any inquiry which may give rise to further material allegations. In such circumstances, the witness concerned should be given a reasonable opportunity of*

meeting those allegations even if this means adjourning the inquiry for a few days.”

[Emphasis added]

20. Chapter V of the Report considered whether the Cardinal Principles should be codified. The Report favoured non-codification of the principles so as to maintain flexible application:

- “68. *The question arises as to whether or not there should be statutory rules which lay down the procedure to be followed by Tribunals of Inquiry. The disadvantage of having such rules would be that they would necessarily be detailed and rigid.*
69. *Moreover, the procedural requirements of the Tribunal differ according to the circumstances of each case and it is accordingly desirable to keep the procedure as flexible as possible so that it may be adapted by the Tribunal to meet the needs of the particular case.*
70. *Rather than have a rigid set of rules, we consider that it is sufficient to lay down general principles to be followed as we sought to do in Chapter IV.”¹⁶*

21. This, of course, is also the position in Trinidad and Tobago, where the “Salmon Principles” continue to apply by analogy and as part of the overall obligation to act fairly.

22. The Salmon principles continue to be accepted in UK as guidance, subject to the discretion of the Tribunal. Feldman, P., *English Public Law*, (2004) it states:

“22.91 *A government White Paper, published in 1973¹⁷, accepted these six principles but significantly quantified this acceptance by also stating that the Salmon Commission’s report should be used as ‘guidelines’ and there would be circumstance where practicalities meant that the principles could only be observed in the spirit and not the letter. ...*

..
22.92 *The Scott Inquiry into the Arms to Iraq affair (1995-6) was heavily criticised for not following the Salmon principles. In particular witnesses were not represented by counsel and were given no opportunity to cross-examine other witnesses. The Scott Inquiry was not a tribunal of inquiry as it was set up on a non-statutory basis but it*

¹⁶ However, note that it has now been accepted that some codification is necessary.

¹⁷ Cmnd 5313, 1973.

nevertheless illustrates the difficulty of injecting into what is primarily as investigatory process adversarial principles of procedure.”

23. Lord Scott was, as noted, critical of strict application of the Salmon Principles. On the second of the Salmon Principles, he said in the article *Procedures at inquiries – the duty to be fair* (1995) LQR 596 at p. 603:

*“The point of inquisitorial Inquiries is to investigate and, at the end of the investigation, to draw such conclusions as the evidence allows. At the outset of the investigation there may be no allegations against anyone ... Of course, as the Inquiry proceeds, evidence, written or oral, will be given which may involve others. If the evidence is potentially damaging to those affected by it, and is relevant to the matters being investigated by the Inquiry, those affected must be given notice of the evidence and invited to give their responses. If an individual against whom damaging evidence has been given is himself invited to give evidence on the matter in question, he should, unless there is some special reason to the contrary, **be referred to the damaging evidence and to the relevant background documents.** The second cardinal principle is, in my opinion, **inappropriate to inquisitorial proceedings.**”*

[Emphasis added]

24. As to the third of the Salmon Principles, Lord Scott said at p. 604:

“The need to prepare ‘a case’ may, of course, come at a later stage ... The conclusions may be adverse to some individuals ... But this stage will not arise until conclusions, preliminary or draft (as the case may be), have been reached by the Inquiry. It will not apply at the stage when, in the course of the investigation, individuals are asked to give evidence.”

25. It has also been described as¹⁸:

“Although the procedural model favoured by the Salmon Royal Commission has been strongly criticised by many, it also has passionate defenders. Given the criticisms, it was not surprising that not only was there no legislative implementation of the recommendations of the Royal Commission, but that the non-statutory inquiry became the fashionable and preferred tool, despite the fact that such inquiries had no power to complete the attendance of witnesses or to refer those obstructing them to the courts for contempt. Non-statutory inquiries were thought to afford greater flexibility and efficiency.”

26. More recently, the Salmon Principles have been commented upon by Wade and Forsyth¹⁹ as follows:

¹⁸ Beaston, J., *Should judges conduct public inquiries?* (2005) L.Q.R. 221 at p. 248 -9.

¹⁹ *Administrative Law*, (10th Edn.) (2009) at p. 82

“The outcome of the Scott Inquiry has been severely criticised by Lord Howe of Aberavon because of its denial of legal representation before the inquiry and because in these circumstances the inquisitorial nature of the proceedings impaired the impartiality of the tribunal²⁰. He considers that the Salmon principles should be strictly applied. However, the Council on Tribunals, when asked by the Lord Chancellor to consider Sir Richard’s views, came to the conclusion that it was ‘wholly impractical’ to devise a set of mode rules that would serve every inquiry²¹. All that could be done was to set out the key objectives which were effectiveness, fairness, speed economy and the practical considerations that would determine the procedure actually adopted. The government accepted the advice of the Council as a response to Sir Richard’s recommendations²². The Salmon Principles, it seems, will no longer be followed slavishly (if at all).”

[Emphasis added]

F. SALMON LETTERS

27. Pursuant to the second of the Salmon Principles, letters are commonly issued to participants in an inquiry where there is potential criticism that might be made of their conduct. These letters are known as “Salmon Letters”.
28. Such letters have been described thus²³:

“Warning letters

These are normally known as Salmon letters, after the Salmon principles, which hold it to be necessary to give fair notice to a witness in advance of publication of the final report of a public inquiry of any criticism of him that the report may contain.

The better practice, where it is practicable, is to give notice to witnesses and others who may be criticised at the earliest possible stage. It may be possible to do that when conducting interviews or the opportunity may arise during the course of calling evidence. Naturally it is in the nature of a public inquiry to uncover the facts, and facts which give rise to criticism may emerge only at a late stage in the evidence. Nonetheless it will generally be desirable to give the person liable to be criticised an opportunity to respond to it while the hearings are in progress, even if that means reconvening for the purpose. Not only is that fairer but it is also the one most likely to test the evidence.”

²⁰ [1996] PL 445.

²¹ *Annual Report, 1995-96*, pp 6-8 and Appendix A.

²² *Annual Report, 1996-97*, p. 46.

²³ See: www.publicinquiries.org (accessed on 07 09 09).

Examples of Salmon Letters being used in public inquiries:

29. Material is available giving details of enquiries where Salmon Letters have been used.

(1) *Ashworth Special Hospital*

30. In the Report of the Special Committee of Inquiry into the Ashworth Special Hospital (cmdnd 4191) (1999)²⁴, the Committee described Salmon Letters thus:

“1.7.0 Salmon Letters

1.7.1 A third thorny problem was that of the issue of these documents, so-called "Salmon letters". The Royal Commission had recommended their issue as a result of their historical review of inquisitorial processes. From the middle of the seventeenth century until 1921 the investigation of events giving rise to public concern had been by Select Parliamentary Committee or Commission of Inquiry. By 1921 this type of inquiry was entirely discredited and the Tribunals of Inquiry (Evidence) Act 1921 was passed. The 1921 Act had its defects and the Royal Commission was set up to examine whether it should be abolished or kept in its then, or amended, form. It was concluded that certain matters which gave rise to public concern could not be dealt with by ordinary civil or criminal proceedings. Although the inquisitorial procedure was "alien to the concept of justice generally accepted in the United Kingdom", it must be used "to preserve the purity and integrity of our public life without which a successful democracy is impossible".

1.7.2 Having recognized defects in the 1921 Act Lord Salmon recommended six cardinal principles to remove the difficulties and injustices with which people involved in an inquiry may be faced. These are quoted in paragraph 1.4.2 above. The issue of Salmon letters was recommended to implement the second of those cardinal principles.

*1.7.3 Lord Salmon recognized that the form of the document disclosing to the witness the substance of the case against him must be left in each case to the discretion of the tribunal. **The point is this: the six cardinal principles introduce into the inquisitorial process limited elements of the adversarial system so that the Tribunal is as fair as possible to the witnesses it calls.** What has to be remembered is that the inquisitorial process has none of the formality of the adversarial process, as Lord Salmon recognized (Paragraph 30).*

1.7.4 In their Report into Complaints at Ashworth Hospital Sir Louis Blom-Cooper and his team warn against the tendency to interpret the Salmon letter process too rigidly. We agree. There is a lack of

²⁴ See <http://www.archive.official-documents.co.uk/document/cm41/4194/ash-01.htm> (accessed on 11 09 09).

precision in the machinery of an inquisitorial inquiry. If this were not so the raison d'être for its use would be defeated.

- 1.7.5 *We would also note in passing that all of the six Salmon principles are recommendations, rather than rules. As Sir Richard Scott, Vice Chancellor, said in the context of his own Inquiry:*

" . . . there has been a tendency for the media and some commentators to regard the six cardinal principles in the Salmon Report not as recommendations but as rules. I regard this as an unhelpful approach. The Salmon recommendations are rightly recognized as providing important guidelines to inquiries about how injustice and unfairness to witnesses can be avoided. But . . . every inquiry must adapt its procedures to meet its own circumstances."

Our general procedure, however, was different from that adopted by Sir Richard Scott.

- 1.7.6 *In this spirit it must be understood that a Salmon letter is not a precise document. It is intended to help a witness who may be criticized to understand what he may have to address when he gives evidence. It does not however circumscribe permitted questioning of a witness, and any attempt by legal representatives to seek to treat it as a quasi-pleading must be resisted.*
- 1.7.7 *In this Inquiry we were conscious that a large number of individuals could potentially be subject to Salmon letters in relation to relatively minor criticisms. It seemed more appropriate to restrict the use of Salmon letters to more central figures.*
- 1.7.8 *We adopted a policy of sending those individuals who were judged to be at risk of **serious criticism** a letter setting out the main areas where the Committee requested their assistance. These letters made clear that further issues might arise during the course of the Inquiry to which individuals would have to respond. We tried to draw these letters as a series of issues or questions²⁵."*

[Emphasis added]

(2) *Southall Inquiry*

31. The issuing of Salmon Letters and provision of a procedure for meeting criticism was considered in the Report into the Southall Inquiry (2000)²⁶. That Report follows an Inquiry held between September and December 1999 into the cause of a major rail accident which occurred on 19 September 1997 at Southall, 9 miles west of

²⁵ For the example referred to in Appendix 2 to the Report, please see Appendix A of this Note.

²⁶ A copy is available at: http://www.railwaysarchive.co.uk/documents/HSE_Southall1997.pdf (accessed on 14 09 09).

Paddington, London. The procedure adopted for meeting criticism was described at Chapter 8 as follows:

“Procedure for meeting criticisms

- 8.30 *In common with the practices of other public inquiries, steps were taken to ensure that both organisations and individuals who might be the subject of criticism in this Report were given a reasonable opportunity to meet such criticism. **The steps appropriate to ensure fairness in this regard must, of course, depend upon the circumstances and procedures adopted.** In the case of the Southall Inquiry, the issues which I was concerned to investigate were identified in a letter sent to the parties on 19 February 1999 (Annex 20). It was to those issues that the parties were asked to direct their disclosure of documents and provision of witness statements. The scope of the Inquiry was further refined in letters following the Ladbroke Grove Accident (Annex 21).*
- 8.31 *The opening statements of Counsel to the Inquiry and those of the represented parties **gave notice of many areas of potential criticism, as did also the witness statements distributed in advance of the oral evidence.** Other criticisms were put to witnesses in the course of their evidence and responded to. As new points arose, the represented parties took the opportunity to submit further evidence in the form of documents or witness statements. **During the course of the proceedings all the parties were invited to submit to the Inquiry a considered list of criticisms they wished to advance against other parties or individuals. Most, but not all parties, did so.***
- 8.32 *After the conclusions of the oral evidence, the Secretariat prepared and served collated lists of potential criticisms to both organisations and individuals. Notice was given to individuals through their employers or trade unions. The parties responded to potential criticism in the course of two rounds of written submissions and in the final oral submissions heard on 20 December 1999. The relevant individuals, to the extent that they wished to do so, responded separately. In so far as this report contains criticisms of organisations or individuals, in each case I am satisfied that a reasonable opportunity has been provided for that criticism to be met.”*

[Emphasis added]

32. For an example of the letter sent to parties providing them with warning of the criticisms, see Annex 20 to the Report, which is available at: http://www.railwaysarchive.co.uk/documents/HSE_Southall1997.pdf.

(3) *Ladbroke Grove Inquiry*

33. The Ladbroke Grove Inquiry arose out of the crash at Ladbroke Grove Junction on 5 October 1999 between trains operated by Thames Trains and First Great Western (FGW), which caused considerable loss of life and injuries. The Report on the Ladbroke Grove Inquiry makes the following observations as to the procedure for criticism at Chapter 2²⁷:

*“As the evidence in Part 1 progressed parties were informed that if they wished to criticise anyone, whether or not his or her interests were already represented at the Inquiry, then they should, through the Inquiry, **give advance notice of the criticism, in accordance with usual practice.** After these notices had been received, the parties who represented the interests of the persons criticised were given the opportunity to state any procedural objection to the Inquiry considering that criticism. Thereafter the procedure provided for substantive replies to such criticism to be contained in closing submissions.”*

[Emphasis added]

(4) *Liverpool Children’s Hospital Inquiry*

34. The Liverpool Children’s Hospital Inquiry (also called the “Alder Hey Inquiry”) arose from the evidence to the Bristol Royal Infirmary Inquiry of Professor R H Anderson, Professor of Morphology at Great Ormond Street Hospital for Sick Children, on 7 September 1999. He spoke of the benefits of retaining hearts for the purpose of study and teaching referring to collections at various hospitals around the country. He identified the largest collection at Royal Liverpool Children’s NHS Trust (Alder Hey Children’s Hospital).
35. The Report of the Liverpool Children’s Hospital Inquiry is relevant to the current inquiry for two reasons:
- (i) It used Salmon Letters; and
 - (ii) More significantly, Udecott relies on the letters sent in that Inquiry as providing a benchmark for the level of detail required for a valid Salmon Letter.

²⁷ A copy of the report can be obtained at: <http://www.pixunlimited.co.uk/pdf/news/transport/ladbrokegrove.pdf> (accessed on 14 09 09).

36. On the issuance of Salmon Letters, the Report of the Liverpool Children’s Hospital Inquiry ²⁸ states:

*“10.1 We ensured that before witnesses were called to give evidence they were informed of any general allegations to be made and the substance of the evidence in support. This information was contained in an initial letter known as a Salmon letter (a requirement of The Royal Commission on Tribunals of Inquiry) which was served on each witness. A written statement was then provided. The Solicitor to the Inquiry took the statements. Witnesses had the lawyer of their choice present at the interview. They had the opportunity to alter, add to or amend their statements before signing. **Where appropriate** a more detailed Salmon letter was then served with details of relevant allegations and documents likely to be referred to at the hearing. In Appendix 5 we enclose examples of both an initial and a more detailed Salmon letter.*

10.2 The purpose of the Salmon letters was to assist witnesses who faced possible criticism to understand the issues which were likely to be raised at the hearing. They were not designed to prejudge issues but merely to give witnesses a full opportunity to consider all matters to be dealt with in evidence. Matters set out in the Salmon letter, but not referred to at the hearing, were not used as the basis for criticism in the Report.”

[Emphasis added]

37. The above examples show that Tribunals have used, as appropriate to the circumstances of the enquiry either an initial letter before evidence is take, or a letter written after the evidence; or in some cases both. In each case letters are served *“where appropriate”*. As such, it is wrong of for Udecott suggest that the detailed salmon letter served in the Alder Hey Inquiry provides a benchmark for the detail required in all cases: this was not the case on the particular facts of the inquiry; nor does the report suggest that this is the case.²⁹

Conclusion

38. The Salmon Principles have been applied differently in various inquiries. It has been emphasised that the principles are guidelines and not law which must be applied to the letter in all circumstances.
39. The Report on the Liverpool Children’s Hospital Inquiry did not purport to set out any particular benchmark for the level of detail required for a valid Salmon Letter. In that

²⁸ A copy of which can be found at: <http://www.rlcinquiry.org.uk/download/chap1.pdf> (accessed on 14 09 09).

²⁹ Copies of both the initial salmon letter and the detailed salmon letter can be found at Appendix B

particular inquiry the Tribunal decided that it was appropriate to have two types of Salmon Letter, an initial warning letter; and a more detailed letter served "*where appropriate*".

40. Neither the "*Salmon principles*" nor any requirement of natural justice impose any fixed procedure on the Commissioners.
41. Each Enquiry has historically adopted its own interpretation of the requirements of fairness guided, as appropriate, by the "*Salmon principles*".
42. In the present case, no particulars of accusations were served in advance of the start of the Enquiry simply because no such material was provided to the Enquiry until literally days before its commencement.
43. The matters which the Commissioners are minded to consider could amount to criticism of UDeCott are all derived from submission of the parties appearing in the Enquiry, or from other documents provided to the Enquiry. In each case the source within those submissions or documents has been identified. Such an approach cannot be said to be out-with the discretion of the Commissioners.
44. While the Commission has sought to identify the principal sources of evidence relied on, there is no obligation to identify the evidence in question since UDeCott has had access to the full record of the oral proceedings and has received copies of all submissions, statements, documents and other materials provided in the Enquiry. Accordingly, there is no evidence which UDeCott is not aware of.
45. What Udecott are demanding in the present Enquiry is for the Commissioners to deliver their detailed analysis of the evidence submitted before final submissions are delivered. Such a task would take many months and could not be accommodated within the Enquiry timetable. In any event different parties will have different views of the evidence, and it is up to Udecott to make their own analysis.

46. The Salmon letter delivered on 8 June provides more than enough detail for Udecott to answer the accusations of other parties to the Enquiry.

The Commission of Enquiry

24 September 2009

**ENQUIRY INTO THE PUBLIC CONSTRUCTION SECTOR,
TRINIDAD & TOBAGO**

Annex 9

Commissioners' discussion paper

Issue (ii) Effect of the use of provisional sums, prime costs sums, nominated suppliers
and nominated contractors in construction contracts in the public sector

ENQUIRY INTO THE PUBLIC CONSTRUCTION SECTOR

Annex 9: Commissioners' discussion paper

Issue (ii) Effect of the use of provisional sums, prime costs sums, nominated suppliers and nominated contractors in construction contracts in the public sector

1. Provisional sums and prime costs sums represent amounts of money included within the contract sum for unspecified work. As such they plainly represent a risk of unforeseen expenditure occurring, since conditions of contract invariably provide for the employer to pay the cost of whatever work is carried out. Also, where additional fees, such as those of consultants, are to be paid as a percentage of the cost of the works, a fee will be levied on the amount of the provisional or prime cost sum and that fee will similarly increase as the sum increases. The sum may, of course, decrease but this is unusual.
2. NIPDEC recommend in their Submissions that the use of provisional sums should be limited or avoided totally and recommend other contingency measures where such sums are included.
3. Prime cost sums similarly represent un-designed work and may result in the payment of additional fees. Prime cost sums are, however, usually associated with the intended nomination of a specialist sub-contractor, to be selected by or on behalf of the employer and to enter into a nominated sub-contract on terms which usually seek to preserve the interest of the main contractor, sometimes to the detriment of the employer.
4. NIPDEC point out that PC sums are usually specified for plumbing, electrical and AC installations. They are also commonly used for other specialist mechanical and

electrical plant, including lifts. NIPDEC point out that the main advantage of nomination is in the ability to select specialist firms to undertake such work. NIPDEC recommend that, where the FIDIC Conditions of Contract are utilised, PC sums be replaced by provisional sums and that tenderers for main building works be allowed to price as many as such items as possible.

5. Nomination of sub-contractors was introduced in the middle of the last century in the UK JCT (then RIBA) Form of Contract and subsequently appeared in other Standard Forms of Contract, latterly the Institution of Civil Engineers' (ICE) Form and the FIDIC Forms as well as others. The UK JCT form established the practice, through the terms of the main contract, of absolving the main contractor, to a substantial extent, of responsibility for the performance of nominated sub-contractors in terms of delay and financial failure. Dissatisfaction with the use of nomination under the JCT Form was such that in the 1980 versions an alternative method was introduced of using "named" suppliers or sub-contractors, identified in the tender documents, from which the main contractor is required to select his sub-contractor, but without any dilution of responsibility for the performance of the chosen sub-contractor. The system of "named" sub-contractors rapidly replaced nomination under the JCT Form which was finally removed from the Standard Forms altogether in 2005. Provisions for nomination remain in many Forms of Contract, including the 1998 FIDIC form.
6. The concept of nomination can thus be seen as somewhat outdated and contractually unnecessary, as shown by the recent history of the UK JCT Forms.

7. The FIDIC Conditions of Contract as currently used in Trinidad & Tobago, as noted in the NIPDEC Submissions, provides various benefits including the rights of reasonable objection to a particular nominated sub-contractor. Although the terms of the FIDIC Form of Contract do not absolve the main contractor from responsibility, NIPDEC point out other disadvantages including the relationship between contractor and nominated sub-contractor not usually being smooth. They say further that the process of selecting and nominating is tedious and burdensome. Their recommendation is for a system similar to that employed in the JCT Forms. NIPDEC also point out that the design and build process eliminates the delays and additional cost involved in nomination.
8. Provisional sums---see CA Midland Expressway v Carillion [2006] EWCA Civ 936

Issues to be debated

- (i) Are provisional sums ever justified?
- (ii) Should consultants be permitted to charge any fees in respect of provisional or Prime Cost sums?
- (iii) Are provisional sums ever justified other than to facilitate nomination?
- (iv) What are the advantages of nomination?
- (v) Can these advantages be secured by methods other than nomination?
- (vi) Should main contractors take full responsibility for nominated sub-contractors and suppliers?
- (vii) What other safeguards should be provided to main contractors?

NOTE JCC is opposed to contractors being responsible for Bills of Quantities.

JCC wish to maintain Bills of Quantities using SMM.

The Commissioners

January 2009

**ENQUIRY INTO THE PUBLIC CONSTRUCTION SECTOR,
TRINIDAD & TOBAGO**

Annex 10

Commissioners' discussion paper

Issue (iii): The effect of incomplete designs, design changes, variations, poor supervision and poor management on the cost and delivery of construction projects in the public sector

ENQUIRY INTO THE PUBLIC CONSTRUCTION SECTOR

Annex 10: Commissioners' discussion paper

Issue (iii): The effect of incomplete designs, design changes, variations, poor supervision and poor management on the cost and delivery of construction projects in the public sector

1. The first group of items (incomplete design, design changes and variations) are each matters which are bound to cause delay and additional cost under a conventional design-tender arrangement. Each is to be avoided if projects are to be completed in accordance with the budget. Incomplete design, however, is the hall-mark of the design and build system where the expectation is that the design will be completed as the work proceeds.
2. Incomplete designs should, in theory, be entirely avoidable. Designs may be incomplete for a number of reasons. Specialist items which are intended to be designed by nominated or selected specialist sub-contractors may remain undesigned at the date of the main contract. This is conventionally accepted but in fact there is no reason why specialist items should not be fully designed. Indeed the reason why such items are not designed at the outset is usually because insufficient time is allowed at the design stage.
3. Designs may also be "incomplete" in the sense that details are intentionally left to be determined by the contractor. This may be the case, for example, with the detailing of steelwork joints, rebar detailing and cladding connections to secondary steelwork. Note, however, that practices vary between different countries and any mismatch in the intentions of the design engineer and the contractor (if they come from different jurisdictions) may result in a serious lacuna.

4. Design changes represent a species of variation involving, for example, an amendment to the specification or contract drawings. This may be unavoidable where upgrades occur in plant, equipment or materials, which must in practice be incorporated into the works. Generally, however, the specification and drawings should not be altered once the contract has been let.
5. Variations are exclusively client-led and allow the opportunity to change the original design details or concept. The impact of a variation depends crucially on its timing in relation to the stage of completion of the work. The client should be strongly advised to order variations, if unavoidable, at a time when the disruptive effect on the works will be at a minimum.
6. As to the cost of incomplete designs, design changes and variations, contract terms provide mechanisms for valuation which not infrequently lead to disputes. Many forms of contract today provide for the contractor to quote for the cost and time consequences of design changes or variations which can therefore be agreed in advance of ordering the change, to the benefit of both parties. Some contracts make the power to order a variation conditional on the cost and time effect having been agreed. This level of contractual discipline is, however unusual and would require a culture of adherence to contract terms which may be lacking. Even in countries with a well developed construction sector, an excessive number of variations will lead to disputes both during the performance of the work and at final account stage. The underlying problem is likely to be insufficient design prior to commencement of construction.

7. Poor supervision and poor management necessarily imply contracts which require appropriate supervision and management. It is self evident that poor supervision and poor management will impact on both cost and delivery through additional measures needed to correct work which is out of specification or which is otherwise unsatisfactory.
8. “Management” is an umbrella term which includes all the tasks and techniques employed by those planning and directing rather than performing construction work. “Supervision” to an extent overlaps with management, but is usually taken to be limited to the direct overseeing of physical work. Traditionally appointed engineers and architects (and surveyors) carry out management and supervision as part of their wider function including design and certification. The Engineer etc or the Employer will often employ specialist supervisors, particularly for demanding work such as welding. Separate managers or “Project Managers” may be employed, but this is outside the scope of traditional design-tender or design and build contracting.
9. Supervision and management will thus be provided by the employer’s engineer or architect. It will also be provided by the contractor to the extent performance of the work demands supervision and management. In either case the workforce requires adequate and appropriate management and supervision to ensure performance first time to specification standards. Alternatively, where work is undertaken which may result in a proportion being rejected and requiring re-work (such as site welding) it is important that the supervising and management teams are set up to deal with re-work and re-testing systematically and efficiently.

Issues to be debated

- (i) Can incomplete designs be avoided and if so how?
- (ii) What measures are needed to avoid the possibility of mis-match between the expectations of the designer and those of the contractor where design detailing is left to the contractor?
- (iii) What measures are needed to prevent or discourage avoidable design changes?
- (iv) What measures are needed to ensure that unavoidable variations are ordered so as to minimise cost and time effects?
- (v) How can variations be valued without giving rise to disputes?
- (vi) What measures are necessary to ensure that adequate supervision and management are provided?
- (vii) Particularly do the standard forms of contract require amendment to ensure that adequate supervision and management are provided?

The Commissioners

January 2009

**ENQUIRY INTO THE PUBLIC CONSTRUCTION SECTOR,
TRINIDAD & TOBAGO**

Annex 11

Commissioners' discussion paper

Issue (iv): The performance of local and foreign contractors
and consultants on public sector projects

ENQUIRY INTO THE PUBLIC CONSTRUCTION SECTOR

Annex 11: Commissioners' discussion paper

Issue (iv): The performance of local and foreign contractors and consultants on public sector projects

1. The employment and performance of foreign contractors and consultants in the TT construction market gives rise to important national issues. First it can be assumed that there are social and economic interests in the maintenance of a strong and vibrant domestic construction industry. Secondly, foreign contractors and consultants can provide services, whether in terms of technology, management or capacity, which are not available in the domestic market.
2. The performance of foreign contractors is one factor to be taken into account when deciding whether to offer contracts for foreign bidding. There are other factors, however, and it would be helpful to identify a list of all the factors which should be taken into account when considering the range of contractors and consultants who should be invited to tender for a particular project.
3. Evidence concerning the performance of local or foreign contractors on individual projects will be of limited value unless placed in the wider context of the whole construction sector of TT.
4. To place the evidence in context statistics will be required covering the following
 - (a) overall GDP for years 2003 to 2008
 - (b) proportions represented by construction industry annually
 - (c) for each year, expenditure on foreign and domestic contractors
 - (d) for each year, expenditure on foreign and domestic consultants

- (e) annual breakdown between different construction sectors (housing, energy, infrastructure etc)
 - (f) annual levels of employment/unemployment generally and in the construction sector.
5. Appropriate criteria need to be established which would need to be satisfied before projects should be opened to foreign competition.
 6. In the case of a private employer.
 7. The effects of contracts placed with local contractors and consultants then needs to be assessed in financial term with a similar assessment being made in respect of foreign contractors and consultants.
 8. Statistics on different categories of employees in the construction industry would allow an assessment of whether the construction industry, both contractors and professionals, had capacity in any particular year to take on projects which were in fact let to foreign contractors.

The Commissioners

January 2009

**ENQUIRY INTO THE PUBLIC CONSTRUCTION SECTOR,
TRINIDAD & TOBAGO**

Annex 12

Commissioners' discussion paper

Issue (v): The effectiveness of the turnkey approach, also called the design build approach for the delivery of public sector construction projects as compared to the traditional design and tender approach

ENQUIRY INTO THE PUBLIC CONSTRUCTION SECTOR

Annex 12: Commissioners' discussion paper

Issue (v): The effectiveness of the turnkey approach, also called the design build approach for the delivery of public sector construction projects as compared to the traditional design and tender approach

1. The turnkey approach requires the contractor to undertake to complete the design during the performance of the works. There are a variety of standard forms of design and build contract available. The effectiveness of all such contracts depend on adherence by the employer's advisors to certain well established principles.
2. First the employer must, at the tender stage, provide a clear design brief, sometimes called "employer's requirements" setting out the parameters to which the contractor's detailed design must comply. The employer must accept that, subject to the constraints of the design brief, the contractor will be allowed to exercise full discretion over all remaining design details as an essential part of the contract bargain.
3. The employer must, therefore, accept that the contractor need only achieve minimum compliance with the design brief. Any attempt to impose higher standards than those specified in the contract will amount to a change to the employer's requirements with potentially serious cost and time consequences. The employer therefore loses the right, save at serious additional cost, to control the standard or quality of fitting and finishes to a building and must leave all unspecified choices to the contractor.
4. A serious potential disadvantage of the turnkey approach from the point of view of the contractor and his design team is that the tender process usually includes a design

competition. The Employer has the advantage of selection both on the basis of price and design merit. This may result in a large amount of wasted design effort and cost, as pointed out in the Statement of Jack Bynoe, which cost must ultimately be borne by the industry or reflected in higher overall costs. Measures to avoid excessive tendering costs are thus needed for the well-being of the industry

5. There are advantages of design and build to the employer in terms of cost and time. With regard to cost, giving the contractor the right to decide all unspecified matters of detail as well as construction methods, offers the opportunity of economies and costs reduction. Additionally it encourages adoption of system building, especially on projects containing repetitive designs.
6. The use of design and build also allows the employer to move to a contract at a significantly earlier stage in the design cycle. The contractor's detailed design process, which is under his control, takes place as the work is performed. The contractor should therefore have the ability to provide design details when needed, in contrast to a traditional design tender contract where the contractor may estimate when design details are needed, but will have no control over their provision.
7. A major advantage of the traditional design and tender approach is that the employer maintains full control over the design of the works, including particularly design and quality of plant and equipment, finishes and fittings.

8. The design build approach is less likely to generate high quality or innovative designs, even more so in a climate of healthy construction activity. Quality issues are thus more likely to arise during project execution.
9. Material and workmanship defects may not be easily discerned or admitted by a contractor as testing regimes are more likely to be relaxed on design build projects; and the alternative of an independent parallel supervision team would be contractually cumbersome and expensive.
10. Projects on which Design and Build has been employed by Udecott include:
 - (a) Prime Minister's residence
 - (b) Performing Arts Centre
 - (c) Waterfront Project

Issues to be considered

- (i) What are the advantages of design and build to the Employer?
- (ii) Specifically, are there advantages to the Employer in terms of time and cost?
- (iii) Is the loss of choice of design details a material disadvantage to the Employer?
- (iv) Is the potential wastage of design effort a major disadvantage?
- (v) If so what measures should be adopted to minimise such wastage?
- (vi) Should qualifying tenderers be compensated for design work?
- (vii) What other safeguards should be provided to protect the interests of Employers and Contractors?

(viii) What safeguards should be provided against defective work or materials?

The Commissioners

January 2009

**ENQUIRY INTO THE PUBLIC CONSTRUCTION SECTOR,
TRINIDAD & TOBAGO**

Annex 13

UDeCOTT's Board of Directors from 1998 to 2009

Annex 13

UDeCOTT's Board of Directors from 1998 to 2009
(First Statement Neelanda Rampaul, 14 January 2009, para 30)

Name	Occupation	Date of Appointment	Ceased to Hold Office
Kenneth Snaggs	Director – Planviron Ltd.	<i>*Pre 1998 Continuation</i>	14 th January 2000
Krishna Bahadoorsingh	Property Developer	<i>*Pre 1998 Continuation</i>	
John Mair	Attorney-at-Law	<i>*Pre 1998 Continuation</i>	14 th January 2000
Calder Hart	Banker	<i>*Pre 1998 Continuation</i>	
Wayne Maughan	Senior Project Analyst	20 th May 1999	7 th September 1999
Victoria Mendez-Charles	Ag. Permanent Secretary – Min. Planning and Development	20 th May 1999	14 th January 2000
Timothy Mooledhar	Town Planner/Construction Manager	20 th May 1999	19 th July 2002
Robert Tang Yuk	Managing Director TYE Manufacturing Co. Ltd.	14 th January 2000	25 th October 2001
Ameer Edoos	Chairman West Indies Stock Brokers Ltd.	14 th January 2000	17 th January 2002
Umesh Rampersad	Financial Comptroller Crews Inn Marina and Boat Yard	14 th January 2000	23 rd March 2000
William Aguiton	Consultant	14 th January	19 th July

		2000	2002
Devi Ramnarine	Attorney-at-Law	14 th January 2000	19 th July 2002
Kameel Khan	General Manager Property and Industrial Development Co. of Trinidad and Tobago Ltd.	14 th January 2000	20 th November 2001
Madan Ramnarine	Chartered Accountant	19 th July 2002	22 nd July 2008
Wayne Maughan	Consultant	19 th July 2002	23 rd March 2004
Robert Le Hunte	Banker	19 th July 2002	24 th August 2005
Brian Harry	Managing Director – TIDCO	<i>* in 2004</i>	9 th September 2004
Vishnu Dhanpaul	Economist	9 th September 2004	27 th October 2005
Michael Annisette	Trade Union Leader	16 th December 2005	
John Mair	Attorney-at-Law	*appointed in 2003	16 th December 2005
Anthony Cherry	Attorney-at-Law	29 th September 2006	
Wendell Dottin	Manager – Unit Trust Corporation	29 th September 2006	
Devanand Ramlal	Businessman	29 th September 2006	

**ENQUIRY INTO THE PUBLIC CONSTRUCTION SECTOR,
TRINIDAD & TOBAGO**

Annex 14

Education Facilities Company Limited, submission 25 March 2009

Table 2: Status of Primary School Programme

Item No.	Name of Facility	Address	Design Consultants	Supervision Consultant	Contractor	Comments	Contract Sum Exclusive of VAT (TT \$'mn)
1	Icacos Gov't Primary School	Erin Beach Road, Icacos	Forum A & D Architects Ltd	Forum A & D Architects Ltd	China Jiangsu International Corporation Trinidad and Tobago Limited	Completed	16.64
2	Arima West Govt Primary School	Arima Old Road, Mausica North, Arima	Reynald Associates Ltd	Reynald Associates Ltd	Moosai Development Construction Caribbean Ltd	Construction in Progress	34.54
3	Arima New Govt Primary School	Simone Avenue, Arima	Reynald Associates Ltd	Reynald Associates Ltd	Moosai Development Construction Caribbean Ltd	Site acquisition in progress by MOE.	28.28
4	Tranquillity Govt Primary School	2 Stanmore Avenue, Port-of-Spain	Reynald Associates Ltd	Reynald Associates Ltd	Uniform Building Contractor Limited	Construction in Progress	33.62
5	St. Mary's Govt Primary School	St Mary's Village, Moruga Road, via Barrackpore	Forum A & D Architects Ltd	Forum A & D Architects Ltd	Sharoz Enterprises Limited	Construction in Progress	33.99
6	Fanny Village Government Primary School	G-Street via Dam Road, Fanny Village, Point Fortin	Claude A. Benjamin Junior and Associates	Claude A. Benjamin Junior and Associates	Ashana Civil Mechanical Contractors	Site Hoarding commenced	18.84
7	Cap de Ville Government Primary School	Guapo Cap de Ville Road	Claude A. Benjamin Junior and Associates	Claude A. Benjamin Junior and Associates	Ashana Civil Mechanical Contractors	Site Hoarding commenced	15.86
GRAND TOTAL							181.77

Secondary Schools

Of the 74 secondary schools to be constructed, 13 are in various stages of construction. These are presented in Table 3.

Table 3: Status of Secondary School Programme

Item No.	Name of Facility	Address	Design Consultants	Supervision Consultant	Contractor	Comments	Contract Sum Exclusive of VAT (TT \$'mn)
1	Chaguanas North Secondary School	Helen Street, Lange Park, Chaguanas	Bynoe, Rowe, Wiltshire Partnership	EFCL	Moosai Development Construction Caribbean Ltd	Completed	18.51
2	Marabella South Secondary School	Gopaul Lands, Marabella	Reynald Associates Ltd	Consulting Engineers Associates Limited	China Jiangsu International Corporation Trinidad and Tobago Limited	Construction in progress.	126.4
3	Princes Town East Secondary School	East Mathilda Junction, St Julien Village, Princes Town	Reynald Associates Ltd	Reynald Associates Ltd	China Zhejiang Ningbo Construction Group Company Limited	Construction is in progress.	151.3
4	Siparia Secondary School	La Brea Trace, Siparia	Reynald Associates Ltd	Vikab Engineering	China Zhejiang Ningbo Construction Group Company Limited	Construction is in progress.	153.04
5	Couva West Secondary School	Baliser Street, Couva	Reynald Associates Ltd	Consulting Engineers Associates Limited	China Zhejiang Ningbo Construction Group Company Limited	Construction is in progress.	172.81
6	North Aranguez Secondary School	Boundary Road Extension, San Juan	Reynald Associates Ltd	Alpha Engineering Limited	Beijing Liujuan Construction Corporation	Construction is in progress.	130.38
7	Barataria North Secondary School	Third Avenue Extension, Barataria	Reynald Associates Ltd	Reynald Associates Ltd	Broadway Properties Limited	Construction is in progress.	149.32

Table 3 (con'td): Status of Secondary School Programme

Item No.	Name of Facility	Address	Design Consultants	Supervision Consultant	Contractor	Comments	Contract Sum Exclusive of VAT (TT \$'mn)
8	Carapichaima West Secondary School	Mc Leod Trace, Freeport	Reynald Associates Ltd	Vikab Engineering	China Jiangsu International Corporation Trinidad and Tobago Limited	Construction is in progress.	158.95
9	Five Rivers Secondary School	Range Road, Five Rivers, Arouca	Reynald Associates Ltd	Alpha Engineering Limited	Beijing Liujuan Construction Corporation	Construction is in progress.	132.65
10	Mt. Hope Secondary School	Gordon Street, Mt Hope	Reynald Associates Ltd	Reynald Associates Ltd	Envirotec Limited	Construction is in progress.	144.66
11	St Augustine Secondary	Corner Gordon and Warren Streets, St Augustine	Forum A & D Architects Ltd	Vikab Engineering	Kee-Chanona Limited	Construction is in progress.	178.12
12	St Joseph Secondary School	Government Farm Road, St Joseph	Reynald Associates Ltd	Reynald Associates Ltd	China Building Technique Group	Construction is in progress.	134.81
13	Pleasantville Secondary School	200 Collector Road, Pleasantville	Bynoe, Rowe, Wiltshire Partnership	Bynoe, Rowe, Wiltshire Partnership	Broadway Properties Limited	Construction is in progress.	109.55
GRAND TOTAL							1,760.50

IDENTIFICATION OF PROJECT IMPLEMENTATION ISSUES

A number of project implementation issues have been identified by the EFCL in executing the major projects undertaken to date.

Table 4 overleaf presents a summary of the implementation issues encountered by EFCL to date.

Table 4: Summary of Project Implementation Issues

#	Project Implementation Issue	Impact	Primary Schools										Secondary Schools								
			Icosos Govt	Arima West Govt	Arima New Govt	Tranquillity Govt	St. Mary's Govt	Fanny Village Govt	Cap de Ville Govt	Chaguanas North	Marabella	Princes Town	Siparia	Conva	Aranguer	Barataria	Carapichaima	Five Rivers	Mt. Hope	St Augustine	St. Joseph
1.0	Inconsistencies between BQ and Drawings	TC				✓			✓						✓			✓			
2.0	Design Changes during Construction	TC	✓	✓		✓								✓				✓	✓	✓	
3.0	Omissions from BQ	TC							✓		✓		✓				✓				✓
4.0	Late Submission of Construction Details	TC	✓	✓		✓	✓											✓			✓
5.0	Lack of Alternative Accommodation to Decant School during Construction	TC			✓		✓														✓
6.0	Disruptions to Contractors' schedules because of proximity to schools	TC								✓	✓	✓	✓		✓						
7.0	Increase in Cost of Specialist Items	C							✓	✓	✓	✓	✓	✓	✓	✓	✓			✓	
8.0	Omission of Electrical Infrastructure from BQ	C											✓	✓	✓	✓	✓			✓	
9.0	Increase in Cost of NGC Gas Pipeline	C							✓			✓	✓	✓	✓	✓	✓			✓	
10.0	Relocation of Buried WASA Pipeline	C																		✓	
11.0	Expansion of Sewage Treatment Plant	C				✓												✓			
12.0	Inadequate Provisional Sums for Temporary Classrooms	C								✓	✓										✓
13.0	Land Unavailability	T			✓																
14.0	Delays to Connect to Public Utilities (TTEC, WASA)	T	✓		✓																
15.0	Unavailability of Labour during early stages of construction	T		✓					✓	✓	✓		✓	✓		✓				✓	
16.0	Disruption of Works by the Local Community	T				✓															

T Time Impact C Cost Impact TC Time and Cost Impact

**ENQUIRY INTO THE PUBLIC CONSTRUCTION SECTOR,
TRINIDAD & TOBAGO**

Annex 15

Financial account for Government Campus Project (para 23.17)
(ex UDeCOTT's presentation on GCP PK6, MLA Tower, Annex 13)

QES / DC LIMITED
CHARTERED QUANTITY SURVEYORS

GOVERNMENT CAMPUS PLAZA

PROJECTED FINAL ACCOUNT - SUMMARY

31st January 2009

Description of Works	PK-1 - Customs & Excise Building	PK-2 Multi Storey Car Park	PK-3 BIR Tower & Plaza	PK-4 DIR, N&S Plaza & Central Plant Mechanical Works	PK-5 Electrical Works	PK-6 MLA Tower	PK-8 Lifts	PK-9 Plaza, MoE & Landscaping	PK-10 LED Signage	PK-13 Miscellaneous Works	Total
	TTS (Excl VAT)	TTS (Excl VAT)	TTS (Excl VAT)	TTS (Excl VAT)	TTS (Excl VAT)	TTS (Excl VAT)	TTS (Excl VAT)	TTS (Excl VAT)	TTS (Excl VAT)		TTS (Excl VAT)
Contract Amount	99,530,699.00	150,275,848.76	269,800,970.92	122,428,500.00	59,900,000.00	320,772,173.91	34,428,836.52	185,835,034.00	38,500,000.00	10,000,000.00	1,291,472,063.11
Adjustment for PK-7 allocations for PKs-3 & 6		n/a	55,462,544.08	n/a	n/a	46,229,508.00	n/a	n/a	n/a		0.00
Total awarded contracts (excluding PK-10)	99,530,699.00	150,275,848.76	325,263,515.00	122,428,500.00	59,900,000.00	367,001,681.91	34,428,836.52	185,835,034.00	38,500,000.00	10,000,000.00	1,393,164,115.19
Dayworks		(2,530,000.00)	(9,460,000.00)	(6,800,000.00)	(600,000.00)	(8,600,000.00)	(600,000.00)	(2,000,000.00)	0.00		(30,590,000.00)
Provisional Sums		(2,562,351.30)		(8,320,000.00)	(2,424,300.00)	(4,220,300.00)	(454,277.00)	(11,229,539.00)	0.00		(29,210,767.30)
Contingencies	4,500,000.00	(8,000,000.00)	(5,000,000.00)	(5,030,000.00)	(3,239,500.00)	(13,627,000.00)	(2,885,000.00)	(13,185,000.00)	0.00		(55,466,500.00)
Sub-Total	95,030,699.00	137,183,497.46	310,803,515.00	102,278,500.00	53,636,200.00	340,554,381.91	30,489,559.52	159,420,495.00	38,500,000.00	10,000,000.00	1,277,896,847.89
Remeasurement adjustments (net amounts)		0.00	(1,396,851.33)	n/a	n/a	n/a	n/a	5,700,000.00	n/a		4,303,148.67
Adjustment on profit & attendances on Nominated S/C		n/a		n/a	n/a	4,622,950.80	n/a	n/a	1,750,000.00		6,372,950.80
Variations (net amounts)	6,973,301.00	12,630,913.58	7,936,948.75	1,031,541.34	8,511,155.63	2,406,448.60	0.00	23,225,000.00	n/a		62,715,308.92
Anticipated variations (net amounts)	230,000.00	0.00	5,000,000.00	1,000,000.00	1,008,325.00	8,000,000.00	1,300,000.00	3,500,000.00	4,000,000.00		24,038,325.00
Sub-total	102,234,000.00	149,814,411.04	322,343,612.42	104,310,041.34	63,155,680.63	355,583,781.31	31,789,559.52	191,845,495.00	44,250,000.00	10,000,000.00	1,375,326,581.28
Designer's Provisional Sums (to be expended)		0.00			2,424,300.00	4,220,300.00	454,277.00		0.00	0.00	7,098,877.00
Sub-total	102,234,000.00	149,814,411.04	322,343,612.42	104,310,041.34	65,579,980.63	359,804,081.31	32,243,836.52	191,845,495.00	44,250,000.00	10,000,000.00	1,382,425,458.28
Omit: External Work Elements for Re-allocation		n/a	n/a	n/a	n/a	n/a	n/a	(14,000,000.00)	n/a		(14,000,000.00)
Add: External Work Elements for Re-allocation		n/a	23,421,702.96	n/a	n/a	13,500,000.00	n/a	n/a	n/a		36,921,702.96
Sub-total	102,234,000.00	149,814,411.04	345,765,315.38	104,310,041.34	65,579,980.63	373,304,081.31	32,243,836.52	177,845,495.00	44,250,000.00	10,000,000.00	1,405,347,161.24
Residual Dayworks & Contingencies *					720,000.00	3,864,000.00	408,000.00		0.00		4,992,000.00
Reallocation Works Contingencies				n/a	n/a	1,350,000.00	n/a		n/a		1,350,000.00
Sub-total	102,234,000.00	149,814,411.04	345,765,315.38	104,310,041.34	66,299,980.63	378,518,081.31	32,651,836.52	177,845,495.00	44,250,000.00	10,000,000.00	1,411,689,161.24
Costs for extension of time	5,567,000.00	11,335,295.18	22,569,479.81	6,917,194.05	7,017,238.68	34,200,000.00	2,000,000.00	9,713,505.00	0.00		99,319,712.72
Sub-total	107,801,000.00	161,149,706.22	368,334,795.19	111,227,235.39	73,317,219.33	412,718,081.31	34,651,836.52	187,559,000.00	44,250,000.00	10,000,000.00	1,511,008,873.96
Acceleration provision		0.00	6,000,000.00						0.00		6,000,000.00
Price Escalation	5,179,000.00				2,000,000.00						7,179,000.00
Financing Charges	250,000.00		2,500,000.00	400,000.00							3,150,000.00
Anticipated Project Final Cost	113,230,000.00	161,149,706.22	376,834,795.19	111,627,235.39	75,317,219.33	412,718,081.31	34,651,836.52	187,559,000.00	44,250,000.00	10,000,000.00	1,527,337,873.96