
Office of Utilities Regulation

RESPONSE TO OFFICE OF CONTRACTOR GENERAL'S REPORT OF SPECIAL INVESTIGATION ON THE RIGHT TO SUPPLY 360 MW OF POWER TO THE NATIONAL GRID

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OFFICE OF UTILITIES REGULATION

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DOCUMENT TITLE: RESPONSE TO OFFICE OF CONTRACTOR GENERAL'S REPORT OF SPECIAL INVESTIGATION ON THE RIGHT TO SUPPLY 360 MW OF POWER TO THE NATIONAL GRID

PURPOSE OF DOCUMENT:

This document contains the Office of Utilities Regulation's response to the report entitled "Report of Special Investigation- Right to Supply 360 Megawatts of Power to the National Grid- Office of Utilities Regulation, Ministry of Science, Technology, Energy and Mining" issued by the Office of the Contractor General.

APPROVAL

This document is approved by the Office of Utilities Regulation and becomes effective **September 27, 2013.**

On behalf of the Office:



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Maurice Charvis
Director General

September 27, 2013

**THE OFFICE OF UTILITIES REGULATION'S RESPONSE TO THE OFFICE OF THE CONTRACTOR
GENERAL'S REPORT**

1. On September 16, 2013 the Office of Utilities Regulation (“OUR”) received a report from the Office of the Contractor General (“OCG”) entitled “Report of Special Investigation - Right to Supply 360 Megawatts of Power to the National Grid - Office of Utilities Regulation, Ministry of Science, Technology, Energy and Mining” (the “Report”) which was laid in Parliament on September 17, 2013 the day before the OUR’s Press Conference, which was being held to announce the preferred bidder.
2. On a point of clarification regarding the Report, the OUR did not in the Media Release of February 18, 2013 or at any time thereafter place a limitation on the generation capacity that could be proposed. So the OCG’s nomenclature “Right to supply 360 Megawatts of Power to the National Grid” is incorrect.
3. The OUR has examined the Report and disagrees with the conclusions of the OCG regarding the OUR’s conduct of the procurement of additional generating capacity. The OUR states that the OCG’s adverse findings and conclusions regarding its actions are patently incorrect and unsupported by the requirements of government policy and the law. The OCG in this instance has displayed, at best, a deficit of understanding of how the government’s procurement guidelines would apply to this process or apparently had a preconceived notion of process and therefore found it expedient to redefine an informal process into a formal one to make the case.
4. The OUR states the following conclusions which will be discussed in detail below:
 - (a) The Contractor General applied the incorrect procurement procedure.
 - (b) The Contractor General failed to highlight that the procedure it prescribed that the OUR should follow is one relating to the PROCUREMENT OF CONSULTING SERVICES- EXPRESSION OF INTEREST which would result in the OUR acting in breach of the Public Sector Procurement Regulations, 2008 (“Procurement Regulations”) and the GoJ Handbook of Public Sector Procurement Procedures Revised May 2012 (“Procurement Handbook”).
 - (c) The OUR must adhere to the legislative provisions governing procurement of works and be guided by the attendant policy set out in the Procurement Handbook. Therefore, it is contrary to law and government policy for the OUR to apply the procurement procedures applicable to consulting services to the procurement of works.

- (d) The applicable provisions of the Procurement Regulations and the Procurement Handbook to the procurement process by the OUR are those relating to the procurement of works.
- (e) The content of the Media Release of February 18, 2013, and contrary to the Contractor General's findings, **does not** in any way qualify as the required bidding document/request for proposals relative to the procedures outlined for procuring additional generating capacity (works).
- (f) The National Contracts Commission (NCC) used the term 'expression of interest' only in relation to the outcome of the OUR publicized unsolicited proposals process that is, the failure of the proposals to meet the standard required for qualification to be unsolicited proposals since it could not have intended for the OUR to act in breach of the procurement rules.
- (g) The Contractor General's conclusions regarding the effect of the March 15 deadline that it was the termination date for a formal procurement process, which should be strictly adhered to, is completely erroneous and is predicated on the unlawful application of a procurement procedure applicable to consulting services.
- (h) Further, the OUR's position that it was in an informal process is supported by the NCC which was of the view and understanding that the formal process would commence after the unsolicited proposals had been evaluated and a shortlist finalised.
- (i) Based on the informal nature of the process in which the OUR was engaged in, it could lawfully and in accordance with the procurement guidelines accept and consider EWI's bid for inclusion in the shortlist of proposers.
- (j) None of the shortlisted proposers offered firm proposals with fuel and financing agreements. Hence all shortlisted proposers were given an opportunity to "resubmit a second proposal" pursuant to the Instruction For Final Proposals (IFFP) which was a formal selective tendering process. The IFFP leveled the playing field as proposals could be judged on the common criteria including, a detailed evaluation criteria.
- (k) EWI's proposal was assessed by the OUR's Technical Team for inclusion in the subsequent selective tender process.
- (l) The OUR did not adopt the simultaneous negotiations approach it had proposed, which was endorsed by the NCC because it determined that simultaneous negotiations would place it at too much of a risk of being accused of a lack of transparency, given

the number of proponents involved and the difficulty of ensuring that no particular proponent was given an unfair advantage during those negotiations.

- (m) The Contractor General has misquoted the facts since there is no evidence to support the Contractor General's claim that the Minister of Science, Technology, Energy and Mining ("Minister") made any request whatsoever of the OUR. The request for consideration of EWI's proposal came from Cabinet for which the OUR sought the guidance of the NCC to assist in its decision making.
- (n) The independence of the OUR's decision-making process from political pressures has been firmly established by a landmark case determined by the highest appellate court of Jamaica that is, the Judicial Committee of the Privy Council, London. At all times, the OUR has acted independently in its decision making from all political as well as other lobby pressures from stakeholders and the public.
- (o) The Minister's statement in Parliament did not compromise the process or undermine the OUR's independence.
- (p) The OUR disagrees that there was a dereliction of duty which resulted in the OUR falling short of ensuring and maintaining the integrity of the process.

5. The OUR reaffirms its adherence to the rule of law, and its commitment to diligently uphold the integrity and transparency of the procurement process, in the face of external pressures from all stakeholders.

BACKGROUND

6. In December 2010, the OUR issued a Request for Proposals ("RFP") inviting applicants to submit proposals to provide new generation capacity amounting to 480MW net to the national grid of Jamaica on a Build Own and Operate ("BOO") basis to replace approximately 292 MW of inefficient aged plants with the remainder to provide for load growth. The Jamaica Public Service Company Limited ("JPS"), the sole bidder submitted four bids. The initial evaluation of the bids submitted concluded that the bids were below the pass standard specified in the evaluation criteria to finalize the project with JPS. In December 2011, the OUR after securing guidance from the National Contracts Commission, negotiated with JPS to arrive at an acceptable bid for 360MW of generation capacity.
7. The plant was to use the natural gas that should have been procured by the Government of Jamaica ("GoJ") under the fuel diversification policy. The implementation of the project was therefore dependent on the finalization of the gas supply. The GoJ later abandoned the

procurement of natural gas and indicated to JPS that they should secure their own fuel supply.

8. From December 2011 to January 2013, the OUR sought to have JPS finalize the project agreements for the implementation of the project but was unsuccessful. On January 30, 2013, the last day of what was the third (3rd) extension to the bid validity period, JPS requested a further thirty (30) day extension to clarify “fuel source and supply and the viability of the current plant configuration if that fuel source is not forthcoming”. JPS did not supply any further details that would have allowed the OUR to assess whether an extension would have provided any greater certainty as to the future of the project.
9. Further, JPS also indicated that it was unable and/or unwilling to immediately fulfill the requirement of providing a current bid security given the uncertainty of the gas supply, constraints of its loan covenants and the consequences of a default in the finalization of the project agreements. On February 1, 2013 the OUR advised JPS that the RFP process for the procurement of 360 MW of generation capacity was terminated by reason of effluxion of time.
10. Immediately following the termination of the 360 MW RFP process, a number of other entities, including JPS expressed interest in providing a solution for Jamaica’s electricity needs. The intention of the OUR was to go back to the market and re-issue another RFP to procure additional generation capacity. However, the OUR being cognizant of the need to finalize a solution in the shortest possible time, the uncertainties regarding the level of participation and the outcome of a new open competitive process, gave a commitment to review JPS’ and any other proposal to supply additional generation capacity to the national grid submitted to it by March 15, 2013.

THE MEDIA RELEASE

11. Hence on February 18, 2013 the OUR issued the following Media Release,

“MEDIA RELEASE

FOR IMMEDIATE RELEASE: Monday February 18, 2013

“(KINGSTON, Jamaica): By the end of March 2013 the Office of Utilities Regulation (OUR) will complete its review of the current proposal and other expressions of interest before it for the addition of new generating capacity. This gives all entities which have expressed an interest, including Jamaica Public Service (JPS), a window of opportunity for a review of their proposals before the OUR returns to the market, if necessary.

Following the completion of this review, the OUR will formulate an opinion as to the feasibility of the offers and advise the Government whether it is worthwhile to proceed to finalize negotiations with any of these companies – including JPS.

The OUR will then await government’s decision whether to sole source the project, which seems most feasible by way of readiness and also achieves the overall objective of reducing electricity prices in the shortest time. If such a project cannot be identified, then the OUR will go back to invite public tender. The OUR as advised the responsible Minister of this process and he is in concurrence.

The OUR has given JPS until Friday, March 15, 2013, to submit details of an alternative proposal for provisioning of electricity generation capacity. This was in response to a letter, containing a broad summary of its latest offer, sent on Thursday, January 31, 2013 by the JPS. The JPS and its stakeholders had missed its deadline of Wednesday, January 30, 2013, to complete the requirements under the Request for Proposal (RFP) for the 360MW project, and so the alternate proposal could not have been considered within the context of the RFP.

Several other companies have also expressed interest in providing electricity (generation capacity) since the termination of the RFP process. Those companies have also been given until March 15, 2013 to concretise their unsolicited submissions into firm proposals.

A meeting was held with JPS following which the OUR informed the company that it would be allowed to submit the details of what is now considered an unsolicited proposal. The OUR will only entertain firm proposals in a state of readiness to be finalized with minimal negotiations. The proposals must be to provide electricity only and must be accompanied by the relevant fuel supply and other financing agreements...”

12. The OCG commenced investigation after an article appeared in the Jamaica Gleaner newspaper that the OUR had selected a preferred bidder. The OUR submitted all information to the OCG pursuant to the various information requests. Further, the Director General, Maurice Charvis and Deputy Director General, Hopeton Heron accompanied by General Counsel, Cheryl Lewis appeared in the quasi-judicial proceedings held at the OCG on the 28th and 29th of May, 2013 (“the quasi-judicial proceedings”).
13. The OUR will address the adverse findings/conclusions of the Contractor General as follows:

PROCESS ADOPTED BY THE OUR CONCERNING THE RECEIPT AND CONSIDERATION OF UNSOLICITED PROPOSALS

13. In the Report, the Contractor General stated the following:

“The OCG is of the considered view that the process can be better characterized as an Expression of Interest, and therefore should have been guided by Volume 3, Section A2.1- Expression of Interest, which states that: “The Head of the Procuring Entity may decide that under the circumstances of the particular procurement, a request for an expression of interest would better serve to test the market”...The information requested must be the minimum required for the Procuring Entity to make a judgment on the firm’s suitability...”(OCG’s Emphasis)”¹

14. The Contractor General concluded that the process adopted by the OUR can best be characterised as an Expression of Interest, which had an explicit deadline of March 15, 2013. The Contractor General further stated that the process which was utilized by the OUR was inconsistent with government policy. The Contractor General was of the view that “the OUR did publicly advise prospective investors as to the basic requirements, which should be submitted by an explicitly defined date, in the form of an Expression of Interest”². The process was not informal because the procurement procedures relating to Expressions of Interest applied hence the OUR was engaged in a formal process. In other words, by accepting EWI’s proposal the Contractor General considered that the OUR did not adhere to the detailed processes and guidelines embodied in the Procurement Handbook applicable to Expressions of Interest. Therefore, the Contractor General concluded that, “*it is reasonable to conclude that the OUR ascribed the term “informal” to the process, which it had been undertaking, in an effort to justify its facilitation of EWI’s proposal and to include the said entity on the shortlist*”.³

THE OUR’S RESPONSE

15. The OUR maintains that the process it adopted prior to the issuance of IFFP was an informal process consistent with the law and government policy for the following reasons:

(i) The Contractor General applied the wrong procurement procedure to the process undertaken by the OUR.

¹ Paragraph 7.3.3, pg. 40 of the Report

² Pg. 20 of the Report

³ Final paragraph, pg. 25 of the Report

16. The Public Sector Procurement Regulations, 2008 (“Procurement Regulations”) promulgated pursuant to the Contractor General Act, provide that tendering procedures for prospective government contracts (in this case, the grant of licence to generate electricity) must be conducted in accordance with the procedures outlined in the Procurement Handbook.
17. The procurement of additional generation capacity, in the context of the procurement guidelines falls undisputedly within the category of the procurement of works. Regulation 2 of the Procurement Regulations defines ‘works’ as *“all work associated with construction, reconstruction, demolition, repair or renovation, which include civil, electrical, mechanical and other related engineering works. This could also include supply installation of the equipment and specialized engineering incidental services that are related to the works”*.
- Volume 2 of the Procurement Handbook entitled “Procedures for the Procurement of Goods, Works, and General Services” defines ‘works’ in identical terms.
18. However, the Contractor General applied the procedures relating to **procurement of Consulting Services (Vol. 3 of the Procurement Handbook)** rather than the procedures relating to the procurement of infrastructure works. This is contrary to the provisions of the Procurement Regulations and the Procurement Handbook.
19. Regulation 16(2) of the Procurement Regulations, which is reflected in Vol. 3 of the Procurement Handbook, prescribes the procurement methods for consulting services. The Procurement Handbook (Vol. 3) to which the Contractor General adverted stipulates that *“The process of selecting a consultant is based on obtaining limited number of proposals from a short-list of consultants who have expressed an interest and possess relevant qualifications.”*⁴
20. Thus, Appendix 2 of Vol. 3 of the Procurement Handbook which was prescribed by the Contractor General reads:

⁴ Procurement Handbook, Vol. 3-Section 1

“APPENDIX 2

PROCUREMENT PROCEDURE FOR CONSULTING SERVICES

A2.1 EXPRESSION OF INTEREST

*The Head of the Procuring Entity may decide that under the circumstances of the particular procurement, a request for an expression of interest would better serve to test the market **for suitable consulting services.** The information requested must be the minimum required for the Procuring Entity to make a judgment on the firm’s suitability, **and not be so complex as to discourage potential consultants from expressing interest.** Potential respondents must be given not less than 14 days from the date of circulation of the notice. After reviewing the responses, a shortlist of suitable firms must be prepared and their representatives invited to participate in the full procurement process.” (Emphasis added)*

The emphasised portions of the quotation were not included in the Report.⁵

21. It is clear and obvious that the provisions of the Procurement Handbook explicitly indicate the subject matter to which the Expression of Interest provision set out in Appendix 2 would apply and this manifestly does not include works. Therefore based on the provisions of the Procurement Handbook, any reasonable body/authority correctly applying the principles of law and provisions of the Procurement Handbook would not have concluded that the OUR acted in breach of government policy.
22. In the circumstances articulated above, the following are inescapable conclusions:
- (a) The Contractor General whether deliberately or inadvertently, applied the incorrect procurement procedure.
 - (b) The Contractor General has failed to highlight that the procedure it prescribed that the OUR should follow is one relating to the **PROCUREMENT OF CONSULTING SERVICES- EXPRESSION OF INTEREST** which would result in the OUR acting in breach of the Procurement Regulations and the Procurement Handbook.
 - (c) The OUR must adhere to the legislative provisions governing procurement of works and be guided by the attendant policy set out in the Procurement Handbook. Therefore, it would have been contrary to law and government policy for the OUR to apply the procurement procedures applicable to consulting services to the procurement of works.

⁵ Paragraph 7.3.3 page 40 of the Report

(ii) THE APPLICABLE PROCUREMENT PROCEDURE

23. Regulation 8(2) & (3) of the Procurement Regulations provides:

*“(2) The following procurement methods apply to the procurement of general services, goods and **works** -*

- (a) open tendering (the default method);*
- (b) selective tendering;*
- (c) limited tendering;*
- (d) direct contracting or sole source.”(Emphasis added)*

24. Open tendering is the procurement opportunity that is open to any interested party. Limited tendering obtains where a specific number of entities are invited to bid. Procurement offered through limited tender is not advertised and require that a Request for Proposals be sent to the specific number of entities. Selective tendering is a form of limited tendering. All these forms of tendering processes require the publication of a Request for Proposals (RFP) to initiate the process.

25. In addition to the tendering procedures listed immediately above, the Procurement Handbook sets out a procedure for direct contracting or sole source meaning only one contractor is invited to participate and the consideration of unsolicited proposals. Section 1.2 of the Procurement Handbook (Vol. 2) states that *“the GOJ’s preferred method of procuring goods, services and works, is by Competitive Bidding. However from time to time entities may receive unsolicited proposals and these should be dealt with in a transparent manner.”*

(iii) DOES THE MEDIA RELEASE OF FEBRUARY 18, 2013 QUALIFY AS A BIDDING DOCUMENT UNDER THE PROCUREMENT PROCEDURES FOR THE PROCUREMENT OF WORKS?

26. All the procurement procedures applicable to the procurement of additional generation capacity (works) except for direct contracting and unsolicited proposals require the preparation and publication of Bidding Documents (A request for proposals which would include an Invitation to Bid, Instructions to Bidders, Bid Data Sheet)⁶.

27. The OUR’s Media Release of February 18, 2013 reads in part:

“The OUR has given JPS until Friday, March 15, 2013, to submit details of an alternative proposal for provisioning of electricity generation capacity...”

⁶ See A7.4 .2 p. 48 of the Procurement Handbook and www.mof.gov.jm

Several other companies have also expressed interest in providing electricity (generation capacity) since the termination of the RFP process. Those companies have also been given until March 15, 2013 to concretise their unsolicited submissions into firm proposals.

A meeting was held with JPS following which the OUR informed the company that it would be allowed to submit the details of what is now considered an unsolicited proposal. The OUR will only entertain firm proposals in a state of readiness to be finalized with minimal negotiations. The proposals must be to provide electricity only and must be accompanied by the relevant fuel supply and other financing agreements...

28. The content of the Media Release and contrary to the Contractor General's findings, **does not** in any way qualify as the required bidding document/request for proposals relative to the procedures outlined for procuring additional generating capacity (works).
29. Further, the OUR explicitly stated that it would be examining unsolicited proposals to see if any one, or a combination of offers, provided a basis to engage the entity or entities in negotiations to supply the required capacity. The OUR's position, which has been repeatedly emphasized was to see whether this approach would have eliminated the need to engage in, a full blown competitive tender which would be protracted and the outcome uncertain, given the track record of Jamaica receiving responsive bids over the years.
30. Apart from that stated in the Media Release, evidence of the OUR's position is found as early as February 28, 2013. By letter dated February 28, 2013, the OUR in responding to a query by JPS wrote as follows,

***“The OUR has been careful to underscore in all discussions on this matter that it wishes to avoid any impression that it is inviting bids at this time and establishing applicable conditions. Our position remains that the Office will examine all submissions presented to us by March 15, 2013 with a view to determining if, given considerations regarding firmness of the offers, the overall costs and the time period for delivery, there is a basis for recommending to the Government that it should consider any option other than competitive tender to address the country's electricity needs. The matter of what constitutes the best offer that will lead to such a recommendation is entirely for the judgment of those electing to make submissions.*”**

***In the circumstances, we are unable to accede to your request for guidance as to an acceptable level of agreement to be provided for both the financial and fuel agreements. This is the position that we have taken with regard to similar requests from interested parties...*”** (Emphasis added)

31. Similarly, in letters to the Contractor General and the NCC, and later in quasi-judicial proceedings before the Contractor General, the OUR reiterated the evidence pertaining to the clear intention of the process prior to May 22, 2013 being an informal process. The OUR's position is supported by the fact that its actions did not fall within the ambit of any of the established procedures outlined for the procurement of works in the Procurement Handbook and the Procurement Regulations. Therefore, the OUR considered the receipt of proposals which it was careful not to solicit to be the informal process of "unsolicited proposals".

(iv) NCC'S DESIGNATION OF THE "UNSOLICITED PROPOSALS"

32. The Contractor General correctly indicated in the Report that the NCC was of the considered view that the proposals received could be regarded as expressions of interest. The OUR's understanding, which is supported by the Provisions of the Procurement Regulations and the Procurement Handbook, is that this designation was applied only in relation to the outcome of the OUR publicized unsolicited proposals process that is, the failure of the proposals to meet the standard required for qualification to be "unsolicited proposals".

33. It is clear that the NCC was not speaking of Expressions of Interest within the context of procurement procedure as defined in the Procurement Handbook since it is unlikely that the NCC would have applied or intended to apply the procedure for the procurement of consulting services to the procurement of works.

34. Further, as acknowledged by the Contractor General, the NCC was of the view and understanding that the **formal process would commence after the proposals had been evaluated and a shortlist finalised**. This supported the OUR's position that legally, it was not in a formal process prior to that juncture especially since the provisions of the Procurement Handbook the Contractor General has sought to rely on, are inapplicable and unlawful.

(v) THE ACCEPTANCE AND CONSIDERATION OF EWI'S PROPOSAL

35. The Contractor General has stated as follows:

"The OUR submitted that the process, which was adopted prior to the close of the receipt of the proposals, on May 21, 2013, was informal. The CG found that the OUR

used this justification in an effort to legitimise the disorganised approach which was taken by it concerning, specifically, the receipt of EWI's proposal.”⁷

“...the consequent acceptance of the EWI's Proposal by the OUR, was unfair and compromised the integrity of the process.”⁸

OUR'S RESPONSE

36. The OUR rejects the assertions set out above. Further, it is evident that the Contractor General erred when he arrived at these conclusions/findings because he failed to properly apply the provisions of the Procurement Regulations and the Procurement Handbook. The OUR maintains that the Contractor General's conclusions in this regard is completely erroneous and is predicated on the unlawful application of a procurement procedure applicable to consulting services. Further, the legal underpinnings, documentary evidence, and oral evidence presented at the quasi-judicial proceedings and the NCC's guidance which it gave consistent with its statutory mandate, supports the OUR's position that it has never treated the proceedings up to May 23, 2013 as part of a formal bidding process and that it was reasonable and prudent to accept and consider EWI's proposal give the objective of the exercise. The assertion that the designation of the process as “informal” was to justify the OUR action is therefore completely unfounded and inconsistent with the evidence placed in front of the Contractor General.

37. The NCC is established pursuant to the Contractor General's Act. The principal objects of the NCC as set out in the Contractor General's Act are: *“the promotion of efficiency in the process of award and implementation of government contracts and ensuring transparency and equity in the awarding of such contracts”*. The NCC, pursuant to its general powers, provides guidance to government entities such as the OUR, consistent with its principal objects.

38. The OUR's approach was articulated by OUR's Director General, Maurice Charvis at the quasi-judicial proceedings before the Contractor General. Director General Charvis stated,

“When this whole thing of unsolicited proposal outside the formal process that existed before, in January 30 we ended the formal process. As far as we are concerned we ended the formal process. All we are doing now is assessing whether or not there is sufficient merit in the proposals to go forward and what is the procedure to going

⁷ Paragraph 17, pg. 12 of the Report

⁸ Paragraph 3(3) pg. 20 of the Report

forward. We are always careful when we are unsure of things or especially when you have a lot of interest [who] can claim bias or lack of transparency, we seek the guidance of the National Contracts Commission. We did so in the 360 process. When the initial assessment, the JPS proposal did not come up to sufficient standard for us to accept, we went to the Contracts Commission...

So in this process we have some as far as we[re] are concerned they aren't even bids, they are unsolicited proposals. We have been at pains to let everybody know that these are not bids we have set out [in] a bidding process. People have come to us and said I have something that will prevent you from going out back to the market. So we treat these things and as an informal process. Our purpose in going to the Contracts Committee since they are the statutory body that oversees, although it is not a contract to [purchase] anything from anybody, we are just overseeing a purchasing process between JPS and the independent power producers, but still it is a permitting process we think it is prudent to seek the advice of the National Contracts Commission and they advise us how to put everybody on a level playing field and start what would be now a formal process. So as far as we are concerned the informal process, the NCC has advised us how to get this thing into a formal process and we are proceeding along that line.”⁹

39. The OUR throughout the process, and in the discharge of its mandate and its overarching duty to the public and national interests, has sought to act in a manner to preserve the integrity and transparency of the process. As such, the OUR sought the advice of the NCC at the most appropriate time and received same. Pursuant to the advice from the NCC, the OUR adopted the most suitable approach which would preserve the integrity of the process whilst trying to obtain efficient generating capacity at the lowest cost.
40. The Contractor General has acknowledged that the OUR's posture was guided by the NCC, the statutory body established to promote efficiency in the process of award and ensure transparency and equity. ¹⁰

(vi) THE MARCH 15, 2013 DEADLINE

41. The Contractor General in his Report states,

“Based on the documentary evidence which was reviewed, it is clear that the “goal post” kept moving to facilitate EWI's proposal, and that the process in its current form could not

⁹ Excerpt from transcript of quasi-judicial proceedings (May 28, 2013) pg.126-128

¹⁰ Paragraph 1.12, pg. 6 of the Report

stand up to review, given, inter alia, that an extension was allowed after the expiration and the evaluation had already concluded. In this regard, “the playing field was not level” as preference was given to facilitating the receipt of one other proposal from EWI.”¹¹

OUR’S RESPONSE

42. The OUR denies that it did not provide a level playing field and that it kept on moving the goal post to facilitate EWI’s proposal.
43. To reiterate, the Contractor General’s conclusion is based on the application of the incorrect procurement procedure to the OUR’s process that is, the application of the procedures pertaining to procurement of consulting services. The OUR was not engaged in any of the tendering procedures (open tendering, limited tendering, or selective tendering) prescribed by the Procurement Handbook or the Procurement Regulations. The only other two options are unsolicited proposals, which the OUR explicitly stated was being utilized and direct contracting which was not applicable in the circumstances.
44. Therefore, in the context of the unsolicited proposal process, the initial timeline of March 15, 2013 was at best merely an indicative date to see if the JPS proposal and any other proposal to supply additional generation capacity submitted to it, was worth pursuing before returning to the open market.
45. Given that the initial “unsolicited proposals” fell woefully short of qualifying as such - the evaluation report revealed that they were not firm with the requisite fuel supply and financing agreements. The OUR considered that it would not be harmful to accept and consider EWI’s proposal or for that matter any other proposal that we had not received earlier, by March 15th since it would be embarking on a formal selective tender process where all the proposers would be allowed to submit a bid based on specific instructions. Mr. Charvis stated as follows:

Mr. Beresford: Thank you, Chairman. Mr. Charvis, you had said that you had always known that this was a process whereby there wouldn’t be any selection until the formal process.

Mr. Charvis: Let me go back where we started. I hope I had given it before but I am not quite sure. When we terminated the bid, the previous process, our intention was to go out again. When JPS said that it had an alternative proposal which according to the licence, we had authority to accept, condition 18 of the licence; we could accept it

¹¹ Pg. 23 of the Report

unilaterally and they said they need time for clarification of this alternative [proposal] process. To be fair to everybody we announced, we kind of announced to everybody that JPS, we are looking at a proposal and any proposal that is before us on March 15 we will take into consideration, look at it, not just the one that JPS would be giving to us now. So, in effect we were telling the world that if anybody is ready for us not to go out, then we will look at these proposals and see if there is merit in these proposals to go out. If it was only JPS, then JPS alone would, we would have to look at JPS alternative proposal and decide whether or not it had sufficient merit for us to go out there.

When we had a number of proposals at that time we have to look at them and decide, because we didn't give any criteria so you have to start give an overall total score. You only can rank them in terms of economic ranking and that would have to be a clarification to be had- their technical proposal, their financial proposal. So during that time we wouldn't have felt that we are selecting anybody to go. Our thing was to start to negotiate with people and to ask the process, how do we get the best out of what is in front of us? How do we go forward?"¹²

46. Later on, Mr. Charvis confirmed that none of the five proposals were firm proposals which had the requisite financing or fuel supply agreements.

"Chairman: So none of the five you are saying has a perfect slate in terms of fulfilling all the criteria that have established.

Mr. Charvis: No"¹³

47. The OUR's concern was and still is the imperative to reduce the real cost of electricity to Jamaican consumers. Its objective therefore is to obtain the best deal for the country while adhering to the rule of law.

(vii) NCC's GUIDANCE

48. Following the receipt of preliminary results from the evaluation of the "unsolicited proposals", the OUR sought NCC's guidance. The NCC, in its letter dated May 09, 2013 among other things, recommended the following:

¹² Excerpts of Transcript from quasi-judicial proceedings at OCG (May 28, 2013) pg. 112

¹³ Excerpts of Transcript from quasi-judicial proceedings at OCG (May 28, 2013) pg. 140

“In respect of other proposals

- *Advise the Cabinet Office of a final “cut-off” date for receipt of any other detailed proposals (including the promised one from a company based in Hong Kong)*
- *Carry out an evaluation of any other proposal received before the final “cut-off” date on the same basis and in the same manner as the previous evaluation exercise.*
- *Inform the proponent(s), the NCC and any other involved parties of the results of the preliminary review and evaluation.*

Prior to conducting the proposed “simultaneous” negotiations with the short-listed proponents, the OUR should undertake the following:

- *Advise the proponents of the procedures to be used in conducting negotiations including the methodology/scoring of final proposals and that the OUR is not obliged to award a contract any proponent if it is deemed disadvantageous so to do.*
- *Indicate to each proponent the significant weaknesses, deficiencies or other aspects of the proposal to be addressed during the negotiations; and*
- *Provide details of the time schedule to be followed, composition of negotiation team and any invited observers to the negotiations (e.g. OCG)*

In respect of the evaluation criteria, the NCC recommends the inclusion of a criterion for the assessment of the track record of each proponent.”

49. In accordance with the evidence presented to the Contractor General, subsequent to the receipt of NCC’s letter, the OUR determined that the simultaneous negotiations it had proposed, which was endorsed by the NCC would place it too much at the risk of being accused of lack of transparency, given the number of proponents involved and the difficulty in ensuring that no particular proponent was given an unfair advantage during the simultaneous negotiations. Consequently, the OUR decided that instead of pursuing negotiations and exposing itself to the inherent risks thereto, it would issue the Instructions For Final Proposal (“IFFP”) (a formal document akin to a RFP) to shortlisted persons pursuant to the selective tendering procedure outlined in the Procurement Handbook and effectively start a formal process, and to level the playing field. It should also be noted that the OUR also took the decision to forego the NCC’s recommendation that it indicate to proposers weaknesses or deficiencies in their proposal as it determined that this would conflict with the OUR’s position that in the formal process none should be given an advantage.

50. The OUR by letter dated May 20, 2013 advised Cabinet of the final cut-off date (May 22, 2013) for the receipt of proposals that is, two days before EWI submitted its proposal.
51. Upon the receipt of the EWI's proposal on May 22, 2013, it was assessed by the OUR's technical team for inclusion in the shortlist of persons who would be invited to submit final proposals, and forwarded to Mott McDonald for evaluation as set out in the NCC's letter.

(viii) The Instructions For Final Proposal (IFFP) Procedure

52. The Contractor General in his Report states,

“Optimal Energy, which was previously excluded from the process, was given an opportunity to resubmit a second proposal.”¹⁴

OUR'S RESPONSE

53. The Contractor General's statement is misleading and appears designed to highlight his allegation of the “disorganised approach of the OUR.” However, this statement in the proper context demonstrates that Optimal Energy **and all the other shortlisted proposers** were given an opportunity to “resubmit a second proposal” pursuant to the selective tender/IFFP process.
54. The Contractor General in his Report completely omitted to deal with the IFFP process - the formal RFP process in which the OUR invited the potential bidders to participate, of which he was well aware. Director General Charvis and the Deputy Director Heron gave oral evidence in the proceedings before the Contractor General that the OUR had hoped that it would have received proposals that were relatively firm and which would provide a basis for entering into negotiations for an award. As it turned out however, none of the submitted proposals, including the initial three selected, afforded that opportunity.
55. Taking into consideration the guidance provided by the NCC, the OUR proceeded to draw up what it designated IFFP which would allow all the selected entities a common basis for submitting proposals and which would clearly set out the OUR's requirements. The IFFP would level the playing field as proposals could be judged on the common criteria including, a detailed evaluation criteria.
56. Further there was evidence before the Contractor General which was not included in his Report indicating that Optimal Energy in a letter dated May 16, 2013 copied to the

¹⁴ Paragraph 27, pg. 14 of the Report

Contractor General protested its exclusion from the formal IFFP process. After reviewing the appeal from Optimal Energy, based on the fact that the process that preceded the IFFP was not a formal process, the OUR thought it would enhance competition since that entity had indicated in its letter that it was now in a position to address a critical drawback that was cited by the evaluation.

57. In conclusion, Optimal Energy and all five shortlisted entities were invited to submit proposals pursuant to the requirements of the formal IFFP process.
58. The Contractor General also asserted that Optimal Energy was only included in the final five shortlisted entities to justify the inclusion of EWI.¹⁵ The chronology of events does not support this conclusion. The letter to Optimal Energy advising it of its inclusion was dispatched on May 21, 2013, before the OUR's receipt of EWI's proposal. The OUR finds such statement from the Contractor General baseless, speculative, devoid of the facts and not representative of the information presented to it in the exchange of communication between Optimal and the OUR which was copied to the Contractor General. The OUR would expect that the Contractor General in the exercise of his statutory powers to act reasonably and to refrain from imputing motive and bad faith without adducing evidence in support of his conclusions.

(ix) OUR'S INDEPENDENCE

59. In his conclusions, the Contractor General stated as follows:

“As to the independence of the OUR, the CG is aware that the Office of the Cabinet has an administrative relationship with the OUR, however, though not provided for and explicitly stated in the said Act, the OUR by virtue of its regulatory function should not be subject to the direction of any person or authority.

What is more alarming is that the Director General, of the OUR, at no time cautioned the Minister that his pronouncements served to compromise the process and undermine the independence of the OUR. Instead of asserting his independence, the Director General, during Judicial Proceedings, attempted to legitimise the OUR's actions by explaining that the Minister only made a request, despite the glaring, material to the contrary.”¹⁶

¹⁵ Final paragraph, pg. 25 of the Report

¹⁶ Pg. 26 of the Report

OUR'S RESPONSE

60. Firstly, the Minister's statement in Parliament did not compromise the process and undermine the independence of the OUR.
61. Secondly, the Contractor General has misquoted the facts. There is no glaring material or evidence to support the Contractor General's claim. There is no documentary evidence and at no time did the Director General or the Deputy Director General implicitly or explicitly state that the Minister made any request whatsoever of the OUR. The evidence is that Cabinet had given the OUR verbal notice that it would be directed to review another proposal, that is the EWI's proposal. The request for consideration of EWI's proposal came by letter dated April 26, 2013 under the hand of the Cabinet Secretary.
62. Thirdly, the OUR is an independent public body established by the Office of Utilities Regulation Act and it functions and acts within the ambit of the duties and powers accorded to it pursuant to the various pieces of legislation governing the regulated sectors. At the quasi-judicial proceedings, the Director General and Deputy Director General correctly pointed out to the Contractor General that they could not be directed by Cabinet or Ministers generally. Cabinet and Ministers responsible for regulated sectors can direct the OUR only in so far as it relates to matters of policy.

"Chairman [Contractor General]: Even though you indicate that you update Cabinet as to what happens, my question is, can the Minister, say the Minister of Mining and Energy tell the OUR, to include say, for example, the Hong Kong group? Could they direct you- sorry, use instruct, I don't want the word direct there- could they instruct you to include the Hong Kong group?"

Mr. Heron: Certainly not.

Chairman: This has not happened in this case?

Mr. Heron: No, this has not happened.

....Mr. Heron: Just to add to what I said that we are not instructed and we do not consider it to be instructive. The OUR has a record of not taking instructions from the very Minister who has taken a case as far as up to the Privy Council where we challenged him on giving instructions that were not his right to give and we were successful at Privy Council. So we are very clear and he makes that very clear

whenever we meet that this is not about him instructing us but we have to solve the problem.”¹⁷

63. The role of the Minister is clear and distinct from that of the OUR. The OUR is well aware of its independence and at all times during this process has acted independently in its decision making process from all political as well as other lobby pressures from stakeholders and the public. The independence of the OUR’s decision making process from political pressures has been firmly established by a landmark case of determined by the highest appellate court of Jamaica that is, the Judicial Committee of the Privy Council, London.¹⁸

64. At the time the OUR was asked to consider EWI’s proposal, it was not in a formal bidding process, so it would not be unfair and prejudicial for the OUR to consider it for inclusion in the selective tendering process that subsequently followed.

(x) ABSOLUTE DISCRETION

65. In his Report the Contractor General states,

“Both Director General and the Deputy Director General are of the view that Condition 18 accords them absolute discretion to add new generating capacity to the grid.”

OUR’S RESPONSE

66. On a perusal of the evidence before the quasi-judicial proceedings and all written correspondence during the process, the Deputy Director General never indicated that the OUR was accorded absolute discretion to new generating capacity. In reference to Condition 18, Mr. Heron indicated that, “It [the provision] gives the Office some discretion”. Director General, Mr. Charvis stated the following during the quasi-judicial proceedings:

“Condition 18, allows the OUR some flexibility and some authority to decide outside of the competitive process and on its own terms to allow new generating capacity to the grid. Our position has been where we have discretion we first look to government policy to operate and would normally seek the advice of Cabinet.”(pg 126)

¹⁷ Excerpts of Transcript from quasi-judicial proceedings at OCG (May 27, 2013) pg. 65

¹⁸ In *Mossell (Jamaica) Limited (T/A Digicel) v The Office of Utilities Regulation, Cable & Wireless Jamaica Limited and Centennial Jamaica Limited*, the Privy Council affirmed the Court of Appeal’s decision in *OUR v Minister of Industry Commerce and Technology & The Attorney General*.

67. Therefore on a total review of the evidence, the finding by the Contractor General was an error of fact because it is inconsistent with, and unsupported by the evidence. In any event, the Report is internally inconsistent because on the one hand the Contract General stated that Messrs Heron and Charvis thought that Condition 18 gave the OUR absolute discretion and in another part of the report stated that “the Director General, during Judicial Proceedings, advised that any process which the OUR adopts must be consistent with Government Policy.”¹⁹

(xi) DUTY TO CORRECT ERRONEOUS INFORMATION

68. The Contractor General concluded that,

“the OUR’s Management had a duty to correct the erroneous information which was being circulated in the public domain. Their inaction constitutes a clear dereliction of their duties and they have fallen short of ensuring and maintaining the integrity of the process.”²⁰

OUR’s Response

69. The OUR disagrees that there was a dereliction of duty which resulted in the OUR falling short of ensuring and maintaining the integrity of the process. The OUR reiterates its position that the Minister’s statement in Parliament did not undermine or in any way compromise the process undertaken by the OUR.

70. The facts are that between May 15 and May 22, 2013 Wartsila, a third party who had no direct connection to the process sought to use the media to market its product. It is noted that the advertisements came after Amourview/Tankweld wrote to the OUR on April 25, 2013 and the OUR on April 26, 2013 responded and advised that “*All relevant entities will shortly be advised on the next steps concerning the 360MW project.*”

71. As Amourview/Tankweld and the other proposers would have noted from the 360MW procurement process that terminated in January 31, 2013 and previous interactions with the OUR, all binding communications regarding the determination or selection of persons for the addition of generating capacity, emanated from the OUR. At no time throughout the unsolicited proposals process did the OUR indicate officially or unofficially for that matter (and which it is not in the habit of doing) that it had selected a preferred bidder or that Amourview/Tankweld was the “number one ranked bidder” or “preferred bidder”. The

¹⁹ Paragraph 3, pg. 20 of the Report

²⁰ Pg.20 of the Report

position of the OUR which we consider to be entirely reasonable is that any person who participated in the unsolicited proposal process would await official correspondence from the OUR, the entity in charge of the process.

72. At the time, the OUR was in the process of consulting with the NCC as to the way forward. It reviewed the matter and took a corporate decision that it should not respond to the media marketing since it had advised Amourview/Tankweld that it would be advised by the OUR.
73. The Contractor General's conclusion that OUR's action constituted a dereliction of duty, does not take into account that Amourview/Tankweld did not await official correspondence from the entity who was in charge of conducting and managing the process.

CONCLUSION

74. The OUR's considered position is that no authority having properly considered the facts in procurement process relative to the addition of generating capacity and applying the relevant rules of law and policy could have arrived at the adverse conclusions as were arrived at by the Contractor General.
75. The OUR reiterates that at every relevant point in this procurement process it has diligently sought to ensure that the process is conducted fairly and equitable. The OUR has also diligently sought to maintain the integrity and transparency of the process. The OUR as a statutory body continues to be guided by the provisions of the Procurement Regulations and the Procurement Handbook in pursuit of the imperative to reduce the real cost of electricity to Jamaican consumers; the need to secure capacity in the shortest possible time; and ensuring that the procurement process is conducted fairly and equitably whilst maintaining our commitment to the rule of law, and transparency and integrity.