OFFICE OF THE CONTRACTOR GENERAL OF JAMAICA

Report of Special Investigation

Right to Supply 360 Megawatts of Power to the National Grid

Office of Utilities Regulations

Ministry of Science, Technology, Energy and Mining

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1.0 INTRODUCTION

1.1 The Office of the Contractor General (OCG) is cognisant of the need for the country to generate and supply electricity at the cheapest possible rate to its legal consumers.

1.2 Further, the CG (Contractor General) is well aware that the generating capacity must be scheduled to meet future demand, but more importantly, solutions must be developed to ensure that value for money and probity is considered a priority and is achievable.

1.3 *A fortiori*, all stakeholders must appreciate the profound fact, that socio-economic factors must always override and dominate political motives.

1.4 The OCG, through its ongoing monitoring activities, as it concerns the Office of Utilities Regulation's (OUR) intent to undertake a project to supply up to 480 megawatts of new generating capacity for Jamaica, has noted that the referenced project has transitioned since 2010.

1.5 The CG must formally place upon the record that it has had **no objection** to the process which has been undertaken, thus far, in regard to the generation of 115 Megawatts of Renewable Energy to the Power Grid. (OCG's Emphasis)

1.6 The OUR invited the OCG to attend the Pre-Bid meeting for the generation of the aforementioned 115 Megawatts of Renewable Energy to the Power Grid, by way of letter which was dated January 16, 2013. The said letter stated, *inter alia*, "*The Office of Utilities Regulation will be hosting a Pre-Bid Meeting which will be held on January 17, 2013. We are extending an invitation to you or a representative from your staff to attend.*"

A similar approach was also adopted by the Ministry of Science, Technology, Energy and Mining (MSTEM) for the "*Auction of the 700MHz Band*", where, by way of letter dated April 4, 2013, the OCG was advised that it was "…*being invited to attend a meeting regarding the proposed auction.*", to discuss "*...attracting a new entrant into the telecommunications market...*"

For these approaches, the OUR and the Ministry must be commended.

1.7 By contrast, the approach which was adopted by the OUR with regard to the 'Right to Supply 360 Megawatts of Power to the National Grid' *(hereinafter referred to as the 360 Megawatt Project)* has resulted in the OCG's current intervention.[1]

1.8 The OCG, by way of letter dated March 27, 2013, addressed to Mr. Maurice Charvis, Director General, OUR, initiated an Investigation into the 360 Megawatt Project.

The said letter requested certain information with respect to an article which was published in the Jamaica Gleaner on March 24, 2013, entitled *"Three other entities submit bids for 360 MW plant".* The said Jamaica Gleaner article reported, *inter alia*, as follows:

"Three entities, including a local/foreign consortium, have joined the Jamaica

[1] The CG exercised the power under the Contractor-General Act when he became aware of the process, but at an advanced stage of the process, which subsequently led to the exchange of various pieces of correspondence.

Public Service Company (JPS) in submitting bids in response to the latest request for proposals (RFP) from the Office of Utilities Regulation (OUR) for the right to supply 360 megawatts of power to the national grid."

1.9 The OUR, by way of letter dated April 5, 2013, responded to the CG's request and advised that the content of the subject Gleaner article was incorrect and that the OUR was not engaged in a tender procurement process for the Right to Supply 360 Megawatts to the National Grid[2]. The OUR advised that it was not in a position, therefore, to provide the CG with the requested information.

1.10 Following upon the publication of another article in the Jamaica Gleaner on April 25, 2013, which was entitled *"360 MW project preferred bidder identified",* the CG, by way of letter dated April 29, 2013, required the OUR to provide details regarding the process utilised to select a preferred bidder, inclusive of particulars of the negotiations and the publicly announced preferred bidder.

The referenced Gleaner article of April 25, 2013, reported, *inter alia*, as follows:

"Energy Minister, Phillip Paulwell says the Office of Utilities Regulation (OUR) has indicated a preferred bidder for the government's 360 megawatt project.

The project is aimed at expanding the supply of energy to the national grid.

Paulwell announced in Parliament yesterday that three local entities and a Hong Kong-based company have submitted bids for the project.

[2] The actions of the OUR to address this error, which was in the public domain, will be dealt with in greater detail in the Issues section of this Report of Investigation.

However, speaking during this morning's Jamaica House Press Briefing he explained that while the OUR has indicated the preferred bidder, the decision was taken to have the regulatory body conduct active negotiations with the bidders and present a recommendation to the government next month"

1.11 In response to the CG's letter of April 29, 2013, the OUR, by way of letter dated May 7, 2013, advised the CG, *inter alia*, that *"You should also be informed that on 21st April, 2013, **the Cabinet endorsed the recommendation to evaluate the proposals from the three (3) shortlisted entities**. The Cabinet also requested the OUR to evaluate a proposal from a fourth entity, received by the Ministry of Science, Technology, Energy and Mining, namely, Energy World International Limited of Hong Kong, to build an LNG receiving terminal, powerplant, and to supply LNG from its own sources. The OUR has not yet received details of this proposal."*[3] (OCG's Emphasis)

In response to the OUR's letter of May 7, 2013, the CG responded by way of letter dated May 21, 2013. Detailed below is a verbatim extract of the referenced letter:

"The Office of Utilities Regulation's (OUR) letter indicated, inter alia, that "The cabinet [sic] *also requested the OUR to evaluate a proposal from a fourth entity, received by the Ministry of Science, Technology, Energy and Mining, namely, Energy World International Limited of Hong Kong…the OUR has not yet received details of this proposal."*

The OCG makes further reference to the OUR's assertion in its earlier correspondence to this Office that it "…gave a commitment to review JPS' and any other proposal to supply additional generation capacity to the national

[3] The OUR, despite advising the OCG and the NCC that it was in need of external technical support to evaluate the bids, interestingly undertook its own evaluation of the bid from EWI and approved same as being fit to progress to the next phase of the bid process. This, and the role of Cabinet, will be discussed in the Issues Section of this Report of Investigation.

grid submitted to it by March 15, 2013, before going back to the open market."

In the foregoing regard, the OCG is of the considered opinion that no other Bid(s)/Proposal(s) should be considered at this time, given (a) the OUR's deadline of March 15, 2013 (b) evaluation of Bids/Proposals, received prior to the deadline date, have already concluded and (c) the consideration and/or evaluation of any Bids/Proposal, at this stage, may compromise the integrity of the process and will be unfair to other Bidders/Proposers, save and except if the current process is aborted and a new Tender Process is undertaken…

Having due regard to the process which had commenced in 2010, and while noting that the successful bidder from same had failed to satisfy the OUR's deadlines, the OCG would like to place upon record its concern that the current process for a project of this nature and which is of such significant national importance was not better structured with adequate prior disclosures as to all the OUR's specific requirements and the basis upon which proposals would have been evaluated."[4]

1.12 The OUR did not accept the OCG's recommendation, but instead continued to seek the counsel of the National Contracts Commission (NCC) to guide its actions[5].

1.13 Consequently, the CG, acting pursuant to Sections 15 (1) and 16 of the Contractor General Act, initiated an Investigation into the circumstances surrounding the invitation, evaluation and acceptance of proposals for the right to Supply 360 Megawatts of Power to the national grid.

[4] OUR's 'silence' on the matter will be addressed further in this Report of Investigation.
[5] The response of the NCC has guided the OUR's posture. Same will be addressed further in the Report.

2.0 TERMS OF REFERENCE

2.1 The primary aim of the Investigation was to ascertain whether there was fairness, merit and propriety in the acceptance and evaluation of proposals, and the circumstances surrounding the announcement of a 'preferred' bidder.

2.2 The OCG's Investigation sought to address the following questions:

(a) The circumstances surrounding the public pronouncement by the Hon. Phillip Paulwell, Minister of Science, Technology, Energy and Mining, on Wednesday, April 24, 2013, regarding the preferred bidder;

(b) The fairness of the process which was utilised by the OUR, up to, and including May 22, 2013, as it regards the acceptance and evaluation of "*Unsolicited bids for Base Generating Capacity*"

(c) The particulars surrounding the receipt of the proposals, in particular from Energy World International (EWI);

(d) What impact, if any, has and/or will the following have on the OUR's ongoing process:

i. The announcement of a preferred bidder;
ii. The advertisements which were placed in the local print media by Armorview;
iii. The involvement of the Honourable Minister in the process; and
iv. The acceptance and evaluation of the proposal from EWI.

3.0 METHODOLOGY

3.1 The CG has made every attempt not to disclose material which is sensitive to the process of selecting a preferred bidder for the 360 Megawatt Project, but has sought to discuss issues which had arisen with respect to the OUR's conduct of the process, given that the process is ongoing..

3.2 The Terms of Reference of the CG's Investigation into the Right to Supply 360 Megawatts of Power to the National Grid, were primarily developed in accordance with those of the mandates of the Contractor-General which are stipulated in Section 4 (1) and Section 15 (1) (a) to (d) of the Contractor-General Act.

3.3 The Requisitions/Questionnaires, which formed a part of the OCG's Investigative methodology, were sent from the CG to the following Public Officials/Officers and other persons of interest:

1. The Hon. Phillip Paulwell, Minister, MSTEM
2. Mr. Maurice Charvis, Director General, OUR
3. Mr. Raymond McIntyre, Chair, NCC
4. Ambassador Douglas Saunders, Cabinet Secretary

3.4 The following persons were required, by way of Summons, to appear, and did appear, before the Contractor General pursuant to Section 18 of the Contractor General Act.

1. Mr. Maurice Charvis, Director General, OUR
2. Mr. Hopeton Heron, Deputy Director General, OUR
3. Mrs. Hillary Alexander, Permanent Secretary, MSTEM

4.0 FINDINGS

Misrepresentation of Information regarding a preferred Proposer

1. The OUR had advised the Honourable Minister Phillip Paulwell, prior to his Budget Presentation, that Armorview/Tankweld was ranked No. 1 **based on economic and financial terms ONLY**.(OCG's Emphasis) *(Reference: Pages 33 and 34, 7.1.6, 7.1.7 and 7.1.9)*

2. The Draft Report which was submitted to the Honourable Minister was a '*progress report*' and it was qualified as such, as the OUR had not yet been in receipt of a final Report. *(Reference: Page 35, 7.1.12)*

3. The Honourable Minister, in his 2013/2014 Budget Presentation, advised Parliament and the Nation that the OUR had determined and detailed that three (3) proposals were worth pursuing "***in this order***", naming Armorview/Tankweld as No. 1. (OCG's Emphasis) *(Reference: Page 30, 7.1.1)*

4. At least one (1) proposer, Armorview/Tankweld, was of the view, given the Minister's pronouncement, that it was ranked No. 1 in the process which was undertaken by the OUR. Thereafter, an affiliate, Wartsila, published approximately eleven (11) advertisements, declaring their #1 ranking. *(Reference: Page 31, 7.1.2)*

5. The OUR, at all material times, maintained that no preferred bidder/proposer was identified, and that any information which was published to the contrary was inaccurate. *(Reference: Page 35, 7.1.11)*

6. The OUR made no attempt to correct the inaccuracy which was published by Armorview's affiliate in the print media, or following upon the receipt of an e-mail

from Armorview/Tankweld soliciting information on 'next steps'. *(Reference: Page 32, 7.1.4 and 7.1.5)*

7. The OUR, was questioned by the CG at Judicial Proceedings regarding the Minister's pronouncement, and his use of the words **"*in this order*"**. The mischief that the use of these words had caused, lead the OUR by way of Media Release dated June 11, 2013, to make it abundantly clear that the listing which it was now providing was in **alphabetic order**. (OCG's Emphasis) *(Reference: Page 36, 7.1.14)*

Established Process for the Addition of Generating Capacity

8. **Condition 18: Competition for New Generation, of the Amended and Restated All-Island Electric Licence, 2011** prescribes that, once the OUR agrees, a competitive process, managed by said Office, should be undertaken pursuant to the Guidelines for the Addition of Generating Capacity to the Public Electricity Supply System June 2006. *(Reference: Page 37, 7.2.1, 7.2.2 and 7.2.3)*

9. Both the Director General and the Deputy Director General **are of the view** that Condition 18 accords them with absolute discretion to adopt any approach to add new generating capacity to the grid. (OCG's Emphasis) *(Reference: Pages 38, 7.2.4 and 7.2.5)*

Accepted GoJ Policy – Unsolicited Proposal and Expression of Interest

10. The CG found that the proposals which were received by the OUR did not meet the established threshold to be considered as Unsolicited Proposals, given that (a) the OUR had detailed its requirement in a Public Notice, following upon which at least two (2) new prospective investors responded and (b) a similar tender process had been advertised from as early as 2010, albeit, the previous process had explicitly required gas as the fuel source.

EWI, by way of letter dated April 21, 2013, to the Honourable Minister, outlined its *"...**interest in investing and developing an energy project in Jamaica**"*. Further, EWI's proposal was sent to the OUR following upon a letter signed by the Honourable Minister and dated April 29, 2013, to EWI's CEO, which stated, *inter alia*, that ***"…please be advised that you must submit to the OUR at the earliest, a detailed and firm technical/commercial project***".

The foregoing would suggest that **the proposal was influenced or otherwise initiated by the Honourable Minister Paulwell** (OCG's Emphasis) *(Reference: Pages 39 and 40, 7.3.2, 7.3.3 and 7.3.4)*

11. The CG found that the process which was adopted can be best characterised as an Expression of Interest, which had an explicit deadline of **March 15, 2013**. The view that the process can be described as such, was also shared by the NCC and Mr. Heron, Deputy Director General, OUR. (OCG's Emphasis) *(Reference: Page 40, 7.3.3 and 7.3.4)*

Process which was adopted by the Office of the Utilities Regulation (OUR) concerning the receipt and consideration of "Unsolicited Proposals"

12. The OUR had given potential proposers a window of opportunity until March 15, 2013, to submit proposals concerning the addition of new generating capacity to the national grid. *(Reference: Page 41, 7.4.1)*

13. At least two (2) of the requirements which were attendant to the submission of proposals, was that **said proposals must be firm, in a state of readiness to be finalised with minimal negotiations, and must be accompanied by the relevant fuel supply and other financing agreements**. (OCG's Emphasis) *(Reference: Page 41, 7.4.1)*

14. By the OUR's own admission, in a letter to the Chairman of the NCC dated March 20, 2013; stated that there was some degree of urgency which was associated with concluding the process in the shortest possible time. *(Reference: Pages 42 and 42, 7.4.2 and 7.4.3)*

15. At the close of business on **March 15, 2013**, the OUR had received five (5) "*unsolicited proposals"*, **with the exception of EWI**. (OCG's Emphasis) *(Reference: Page 43 and 44, 7.4.3)*

16. The OUR, by way of letter dated May 21, 2013, had advised four (4) bidders that upon the issuance of the referenced letter, the OUR considered that it had begun a formal process. *(Reference: Page 44, 7.4.5)*

17. The OUR submitted that the process which was adopted, prior to the close of the receipt of 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. *(Reference: Page 46, 7.4.8)*

Engagement of Specialist Consultant to evaluate the "Unsolicited Proposals"

18. The OUR, by way of letter dated April 5, 2013, to the CG, had explicitly stated that **they required expert and technical skill to assess the viability of each proposal which includes the assessment of electric power systems, network analysis, current conditions in the international power market and the efficacy of financial proposals.** (OCG's Emphasis) *(Reference: Page 48, 7.5.1)*

19. The OUR, in the said letter, also advised that the specialised technical skill sets required by the OUR to conduct the evaluation of the proposals was extremely

limited in the Jamaican jurisdiction and not readily available. *(Reference: Page 48, 7.5.1)*

20. Mott MacDonald was engaged for the purpose of assessing the proposals and to **recommend the proposer which the OUR should engage in Direct Contracting. It was expected that the OUR was to make a final recommendation to the Government by April 15, 2013.** (OCG's Emphasis) *(Reference: Page 48, 7.5.1)*

21. Mott MacDonald's Contract of Consultant's Services outlined that its scope of works will be an examination, *inter alia*, of; **(a) the firmness of Proposals (b) the timelines for implementation (c) the overall price and expected impact on electricity costs (d) the overall feasibility of each proposal and (e) a comparative analysis of the Proposals to determine ranking.** (OCG's Emphasis) *(Reference: Page 48, 7.5.2)*

22. Mr. Charvis, during Judicial Proceedings, advised the OCG, *inter alia*, that if the evaluation were to have been conducted by the OUR, it would have taken approximately six (6) months. *(Reference: Page 49, 7.5.4)*

Evaluation of "Unsolicited Proposals" received

23. The OUR had received a copy of the draft Evaluation Report dated April 12, 2013, and a finalised copy of the Evaluation Report which was dated May 13, 2013. Both reports outlined the results of the detailed assessment which was undertaken. *(Reference: Page 50, 7.6.1)*

24. Evaluation was undertaken of five (5) entity's proposals, in both the draft and finalised reports as follows; Armorview Holdings Limited, Azurest-Cambridge, Jamalco, JPS and Optimal Energy. *(Reference: Page 50, 7.6.2)*

25. **The OUR advised Cabinet that as at May 22, 2013, it will not review anymore "*unsolicited offers*" for the supply of new generating capacity.** (OCG's Emphasis) *(Reference: Page 50, 7.6.3)*

26. **The OUR, not the designated and engaged Consultant, took one day to undertake a preliminary evaluation of the EWI's proposal, to make a determination as to the substance of the proposal, and the shortlisting of the said proposer.** (OCG's Emphasis) *(Reference: Page 50, 7.6.4)*

27. Optimal Energy, which was previously excluded from the process, was given an opportunity to re-submit a second proposal. *(Reference: Pages 50 and 51, 7.6.4 and 7.6.5)*

28. The scope of Mott MacDonald's Contract was to evaluate proposals which had been received as at March 15, 2013. *(Reference: Page 52, 7.6.7)*

29. Mott MacDonald commenced the evaluation of the EWI proposal, without a formal contract and/or variation being in place. *(Reference: Page 52, 7.6.7)*

30. **As at June 12, 2013, the Consultant had not concluded the evaluation of the EWI proposal**, and the OCG was advised by the OUR that the Consultant's contract would have to be amended, prior to same being completed. (OCG's Emphasis) *(Reference: Page 52, 7.6.7)*

The Role of the Honourable Minister Phillip Paulwell

31. The Honourable Minister confirmed that he was in receipt of a "*letter/proposal*", from EWI, on April 21, 2013, which was presented to him on even date. *(Reference: Page 54, 7.7.3)*

32. There was a pre-arranged briefing meeting between EWI and GOJ Representatives, where a Power Point presentation was delivered by EWI, reportedly on an overview of its worldwide operations, capabilities and its interest in investing in Jamaica. *(Reference: Pages 56 and 57, 7.7.4)*

33. Present at the meeting were; Mrs. Hillary Alexander, Permanent Secretary, Ministry of Science Technology, Energy and Mining, Dr. Carlton Davis, Ambassador and Special Envoy in the Office of the Prime Minister, Dr. Vin Lawrence, Chairman of Clarendon Alumina Partners Limited, Mr. Christopher Cargill, Chairman of PCJ, Mr. Patrick Atkinson, Q.C., Attorney General, Mr. Stewart Elliot, Chairman and Chief Executive Officer of EWI accompanied by Mr. Conrad Kerr, Vice President of Pacific LNG. *(Reference: Pages 55 and 56, 7.7.3)*

34. The Permanent Secretary, MSTEM, Mrs. Hillary Alexander, advised that she only spent ten (10) minutes, in the meeting, as she had to attend another meeting. (*Reference: Page 57, 7.7.5)*

35. The meeting which was held with EWI Representatives was not minuted. *(Reference: Page 56, 7.7.3)*

36. The Honourable Minister, by way of letter dated April 29, 2013, confirmed that a meeting was held with EWI on April 21, 2013. In the said letter he stated that he had requested that EWI send a detailed and firm technical/commercial project proposal to the OUR.

    The said letter also advised EWI of a 30 day window which the OUR had to assess proposals, undertake negotiations and submit a recommendation to the Government. *(Reference: Pages 53 and 54, 7.7.2)*

37. Cabinet took the decision that an evaluation of the EWI proposal should be done by the OUR. *(Reference: Page 54, 7.7.3)*

38. It had been the practice of the MSTEM, that upon the receipt of any unsolicited proposal(s)/letters of Interest, that same is referred directly to the OUR, without any interface with anyone from the Ministry. *(Reference: Page 58, 7.7.9)*

39. The Ministry does not take an active role in seeking someone to provide information or provide a proposal. *(Reference: Page 57, 7.7.8)*

Acceptance of an "Unsolicited Proposal" from EWI and the NCC's Instructions

40. The OUR advised the NCC on April 23, 2013, that it was given verbal notice by Cabinet that it would be directed to review another proposal. *(Reference: Page 61, 7.8.1)*

41. The NCC was of the considered view that the proposals received were not 'unsolicited' as defined by the GoJ Handbook of Public Sector Procurement Procedures, but could be regarded as Expressions of Interest. *(Reference: Page 61, 7.8.2)*

42. The OUR, by way of letter dated May 7, 2013, confirmed that it had only received a letter from the Cabinet Secretary dated April 26, 2013, confirming the instructions to the OUR, together with a **letter** from Stewart Elliott of Energy World International, dated April 21, 2013. (OCG's Emphasis) *(Reference: Page 61, 7.8.3)*

43. **The NCC, by way of letter dated May 9, 2013, advised the OUR that it should carry out an evaluation of any other proposals received before the final 'cut-off' date on the same basis and in the same manner as the previous evaluation**

exercise, before finalising a shortlist. (OCG's Emphasis) *(Reference: Pages 62 and 63, 7.8.4)*

44. **The NCC also advised the OUR that it should, upon the conclusion of the evaluation, indicate to each proponent the significant weaknesses, deficiencies or other aspects of the proposal to be addressed during the negotiations.** (OCG's Emphasis) *(Reference: Pages 62 and 63, 7.8.4)*

45. The OUR, by way of letter dated May 20, 2013, advised the OCG, that although it was made aware of the EWI proposal, as at that date, it was not in receipt of the detailed information to undertake a preliminary evaluation. *(Reference: Page 63, 7.8.5)*

46. All proposals were to be evaluated by Mott MacDonald on the same basis and in the same manner, prior to the finalising of a shortlist. The Director General, OUR, by his own admission, advised the OCG that "*...a full assessment had not taken place...*", of the EWI proposal prior to said company being shortlisted. *(Reference: Pages 63, 64, and 65, 7.8.6 and 7.8.7)*

47. The NCC was of the view and understanding that the formal process would commence after all proposals had been evaluated and a shortlist finalised. *(Reference: Pages 65 and 66, 7.8.7)*

Office of the Utilities Regulation's Independence

48. Cabinet had instructed the OUR to undertake an evaluation of EWI's proposal. *(Reference: Pages 68 and 69, 7.9.1, 7.9.2, 7.9.6 and 7.9.7)*

49. Both the Director General and the Deputy Director General were of the view that they could not be directed by Cabinet, and that the instruction constituted a request. *(Reference: Pages 68 and 70, 7.9.3 and 7.9.8)*

5.0 CONCLUSIONS

Based upon the documentary evidence, inclusive of the responses to CG's Requisitions and Section 18 Judicial Proceedings, the CG has arrived at the following considered conclusions:

1. The CG concludes that certain statements which were made by the Honourable Phillip Paulwell, in his 2013/2014 Budget Presentation, were inaccurate, misleading and thereby formed the basis of confusion amongst relevant parties, inclusive of the 'Persons of Interest' from whom the OUR had received proposals.

   The foregoing inaccuracy was as a result of the use of the words '*in this order*', which formed a part of the Minister's speech, where he formally announced the 'Persons of Interest' who submitted proposals to the OUR.

   The CG also accepts that the OUR did not advise the Minister of any Proposer being ranked number one on all bases.

2. The OUR was willing to advise the CG of the inaccuracies of the print media advertisements, by Armorview's agent, but failed to provide similar clarification to the general public as it regards:

   (a) being engaged in an ongoing process; and

   (b) the advertisements which were placed in the public domain by an affiliate of Armorview, representing that they were the preferred bidder, was incorrect. Also, having received an e-mail from an Armorview representative, the OUR again did not correct the inaccurate assertions which were made in said e-mail.

The CG concludes 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.

3. The CG is of the considered view that the absolute discretion which the OUR is of the belief that it is accorded when undertaking transactions concerning the Nation's business, could never have been the intent. Also, any transaction which is being undertaken must be consistent with Government Policy and/or premised on certain fundamental tenets and underpinnings, which will secure transparency, **fairness** and probity.

   Further, the OCG, during Judicial Proceedings, was advised by the Director General, OUR, that he was of the view that **any process which the OUR adopts must be consistent with Government Policy.**

   The CG is of the view that the process which was utilised by the OUR is inconsistent with Government Policy.

   Further, **the improper intervention of the Minister, and the consequent acceptance of the EWI Proposal by the OUR, was unfair and compromised the integrity of the process.** (OCG's Emphasis)

4. A Competitive Tender is defined, as a general process where a company acquires goods or services by extending to suppliers an invitation to tender a proposal. Given this definition, the CG finds 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.

However, the Proposals received cannot be considered as Unsolicited Proposals, given that:

(a) in some instances the proposals were solicited; and

(b) the current process bears stark resemblance to a previous tender process which was undertaken in 2010.

In the circumstance, the CG is in agreement with the NCC that the process which was adopted was seemingly an Expression of Interest, which, similarly, requires a strict return deadline date to that of a Request for Tender. (OCG's Emphasis)

5. The OUR initiated a competitive process pursuant to **Condition 18: *Competition for New Generation, of the Amended and Restated All-Island Electric Licence, 2011* and *the Guidelines for the Addition of Generating Capacity to the Public Electricity Supply System June 2006***, although 'the process' should have been better structured with clear requirement definition and instructions.

Notwithstanding the foregoing, the following was evident to have taken place during the process which was undertaken by the OUR:

(a) There was a Public Notice which was issued on February 18, 2013, advising the Public and Prospective Investors to submit proposals by an explicitly defined date of **March 15, 2013**;

(b) Indeed, all proposals, excluding the EWI's proposal, were submitted to the OUR by the defined date of **March 15, 2013;**

(c) Since the OUR's Public Notice that it had received Unsolicited Proposals, **at least two new prospective investors, Azurest and Optimal**, had their first interaction with the OUR on March 6, 2013 and March 15, 2013, respectively, and submitted Proposals by the defined date of **March 15, 2013;**

(d) The deadline date should not have been extended after the close and opening of proposals, and only could have been done prior, in the event that such an action was necessitated; and

(e) The proposals received were duly evaluated, by the engaged Consultant, Mott MacDonald, and a final issue of the Evaluation Report was signed and dated May 13, 2013.

Without prejudice to the foregoing, by way of a Public Media Release dated May 22, 2013, the OUR formally announced an extended deadline to the same date of May 22, 2013, **the same day that the EWI proposal was submitted, and a day after OUR had advised all the proposers, except EWI, that the process had formally commenced.**

If such a Public Notice were to have been published, similar to the one which was published on February 18, 2013, with a deadline of March 15, 2013, to submit proposals, it may have allowed for more active participation from other prospective investors.

In this regard, only one other prospective investor, EWI, submitted a proposal.

However, the previous Public Notice on February 18, 2013, allowed for two (2) other proposers, Azurest and Optimal, who made first contact with the OUR on March 6 and 15, 2013, respectively, to submit proposals.

Based upon 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 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**. (OCG's Emphasis)

6. Without prejudice to the findings that no extension was granted to the deadline date for the receipt of Expressions of Interest by the OUR, the following is evident:

(a) the intervention of the Minister by meeting with EWI representatives was inappropriate and irregular, as a process was being undertaken and the evaluation was underway.

(b) the documentary evidence shows that other prospective investors were not accorded with a similar opportunity to meet with the Minister, within the context of the ongoing process. The CG stands to be corrected.

Other bidders were correctly directed to the OUR, given that it was that entity which had responsibility for receiving proposals; and

(c) there was no meeting minutes or material available to indicate the substance of the discussions which were held between the Minister, other GOJ Officials and EWI representatives.

Given the perceived notion of bias, the receipt of EWI's Proposal should not have been entertained. More importantly, the meeting between the Minister, GOJ Officials and EWI Representatives, should not have occurred and is highly irregular, particularly during an on-going process. (OCG's Emphasis)

7. Without prejudice to the findings that no extension was granted to the deadline date for the receipt of Expressions of Interest by the OUR. The NCC's instructions were not adhered to, *a fortiori*, given that the EWI's Bid was not evaluated prior to the deadline date, on the same basis and in the same manner as the previous evaluation exercise, prior to it being shortlisted.

It can be argued that the NCC's instruction could have been more lucid. However, based upon a reading of the instructions **and a common sense approach being adopted concerning the shortlisting of proposers for further evaluation, no other meaning could have been ascribed than the fact that the EWI proposal should have been evaluated in the strict sense**. The CG has concluded that all proposals should have been evaluated on the same basis, prior to shortlisting.

Additionally, it is clear, based upon the OUR's own admission, that it only conducted a **preliminary review** of EWI's proposal, **in one day**, and that said proposal was not subjected to the similar rigours of approximately two (2) months of analysis and assessment, as those which were received prior to the March 15, 2013 deadline.

In the circumstance, it is evident that there were two (2) separate 'yard sticks', one for all other bidders and the another for EWI. (OCG's Emphasis)

8. The OUR argues that the process which was undertaken by it, prior to May 22, 2013, was informal. However, the OUR, by its own admission, and by way of its Public Notice which was issued on February 18, 2013, required that proposals

should be **firm, in a state of readiness to be finalised with minimal negotiations**, and should be submitted by a prescribed date. Consequently, a Specialist Consultant was engaged for the sole purpose of evaluating the proposals received, so that a recommendation could be made to Cabinet.

Further, and without accepting the description which the OUR accorded to the process which it adopted, both the receipt of Unsolicited Proposals and Expressions of Interest have attendant detailed processes and guidelines, which are embodied in the GoJ Handbook of Public Sector Procurement Procedures, which is a formal document.

To further strengthen the OCG's point, **the Director General, during Judicial Proceedings, advised that any process which the OUR adopts must be consistent with Government Policy.**

It is therefore of grave concern to the CG, that the OUR, while conducting business on behalf of the People of Jamaica, and given the importance and magnitude of the undertaking, would ascribe a description such as '*informal*' to any component of the referenced transaction.

In the circumstance, it is reasonable to conclude that the OUR ascribed the '*informal*' term 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. Further, the CG is of the view that Optimal Energy's proposal was only re-introduced into the process, as a result of the acceptance of EWI's proposal, so that there would be no appearance of bias on the part of the OUR. (OCG's Emphasis)

9. 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 subjected 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 legimitise the OUR's actions by explaining that the Minister only made a request, despite the glaring material, to the contrary. (OCG's Emphasis)

6.0 RECOMMENDATIONS

Section 20 (1) of the Contractor-General Act mandates that "*after conducting an Investigation under this Act, a Contractor-General shall, in writing, inform the principal officer of the public body concerned and the Minister having responsibility therefor of the result of that Investigation* ***and make such Recommendations as he considers necessary in respect of the matter which was investigated***." (OCG's Emphasis)

In light of the foregoing, and having regard to the Findings and Conclusions that are detailed herein, the CG now makes the following Recommendations:

1. The OUR should exclude the EWI Bid from the current process, given:

   (a) that its Proposal was not sent within the timeframe as publicly established by the OUR;

   (b) the irregular and improper intervention of the Minister and other GOJ Officials, by meeting with a prospective bidder, during an ongoing process;

   (c) that it was unfair to other prospective investors who submitted their proposals within and by the established deadline;

   (d) that any other prospective investor did not have a similar opportunity to submit a proposal given that there was no notice of the extension of the previously stated deadline, prior to the actual deadline date of May 22, 2013, which was publicised the same day; and

   (e) that the NCC's instructions were not followed as per its dictates.

In this regard, the OUR should move to commence immediate negotiations with the prospective investors that submitted proposals by the previously established March 15, 2013 deadline date, and consistent with the result of **the Final Issue of the Evaluation Report which is dated May 13, 2013**.

2. Public Officials should be careful when making public pronouncements which have the ability to potentially undermine legitimate processes concerning a GOJ opportunity, while these processes are ongoing.

   Further, should it be necessary that a public pronouncement is required, then Public Officials need to be appropriately and sufficiently informed, prior to making same. Public Officials must keep an arm's length during the course of the process.

3. Given the disclosures which were made by the OUR representatives at the Judicial Proceedings, the OUR needs to exercise the discretion accorded to it, in the decision making process as a regulator. The rules needs to be made clear whether the OUR can adopt any method or process, wherein it is inconsistent with GOJ Policy and/or the provisions of the Contractor-General Act, when transacting business for and on behalf of the People of Jamaica.

   Further, it is recommended that the OUR document entitled "*Regulatory Policy for the Electricity Sector – Guidelines for the Addition of Generating Capacity to the Public Electricity Supply System*" be amended, in short order, to take into consideration any possible emergency or urgent situations which may arise as a consequence of unforeseen external factors. The referenced procedures should be similar to those which are embodied in the GoJ Procurement Guidelines, with the appropriate checks and balances, and detailed procedures to secure probity and transparency.

The OUR must take due care, for all other future undertakings, when managing processes of this significant national importance, to ensure that same is properly structured so that the transaction can stand up to public scrutiny. Importantly, time must be of the essence.

4. Independent Regulators and Regulating Bodies should be mindful of their regulatory functions and the importance of preserving their independence at all times. Further, all associations and interventions must be appropriately managed, and all transactions should be undertaken at 'arms length'.

It is therefore recommended that Parliament move to initiate the necessary legislative action and develop an appropriate Framework with attendant mechanisms, to preserve the independence of Regulatory Bodies.

The referenced mechanism should include appropriate sanctions which can be applied by an established Bi- partisan Parliamentary Committee in instances when Public Officials are found to have compromised the independence of their respective Offices.

7.0 ISSUES ARISING FROM THE OCG's INVESTIGATION

7.1 Misrepresentation of Information regarding a preferred Proposer

7.1.1 In his 2013/2014 Budget Presentation, which was delivered on April 24, 2013, the Hon. Phillip Paulwell asserted the following:

> *"Mr. Speaker, five entities presented unsolicited proposals for 14 discrete projects. This is a big turnaround from 2010, when there was a sole bidder, signifying confidence in this Administration, its policies and regulatory framework.*
>
> *The OUR has engaged the services of international consultants Mott McDonald* [sic] *in evaluating the proposals, and considered a number of factors including:*
>
> - *The firmness of the proposal;*
> - *The overall price and expected impact on retail electricity rates;*
> - *The timelines for implementation;*
> - *The overall feasibility of the project.*
>
> *According to the evaluation report, of the 14 projects submitted, four were rejected because the information was incomplete. Ten were screened for detailed technical and comparative economic analysis. Of those ten, the OUR determined that the following entities,* ***in this order***[6]*, had proposals worth pursuing by negotiations:*
>
> 1. ***Amorview/Tankweld*** [sic], *which presented a 232 MW project proposed for Old Harbour and a 122.4 MW project proposed for Caymanas*

[6] This particular assertion is dealt with in the Findings and Conclusions sections as a material issue.

2. ***JPS**, which presented proposals for a 323 MW and a 350 MW Combined Cycle plant, both proposed for Old Harbour*

3. ***Azurest/Cambridge**, which presented a proposal for a 388 MW plant mounted on a barge*

All three propose the use of natural gas." (OCG's Emphasis)

7.1.2 Consequent upon the Honourable Minister's pronouncement in the Parliament of Jamaica, Wartsila, which seems to be associated with at least one proposer, Armorview/Tankweld, published approximately eleven (11) full page advertisements in both the Jamaica Gleaner and the Jamaica Observer, between the dates May 15, 2013 to May 22, 2013. The referenced advertisements declared, *inter alia*, in some instances, that "***Wartsila is elated with the news that the Armorview/Tankweld submission to the Office of Utility Regulation (OUR) for 360 MW of power generating capacity (based on Wartsila's multifuel Flexicycle™ technology) has been ranked No. 1 in the adjudication process carried out by the OUR and the well known international engineering consulting firm, Mott McDonald*** [sic]." (OCG's Emphasis)

7.1.3 Having had sight of the aforementioned advertisements, the CG found it prudent to ascertain whether a preferred proposer was selected. In response to the CG's requisition, the OUR, by way of letter which was dated May 24, 2013, stated as follows:

"Regarding your request for a clear statement as to whether a preferred "Bidder" has now been identified, the OUR advises as follows:

*(a) The position regarding the selection of a preferred proposer as indicated in our letter of May 7, 2013 to you has not changed. **In other words, the OUR has not yet identified a preferred bidder. A preferred bidder, if***

there is one, would be identified only after Final Proposals have been submitted and evaluated by the OUR.

(b) *Further,* ***to the best of our knowledge, we do not know where Amourview/Tankweld*** [sic] ***would have received/gleaned published information. We go further and without reservation state that the information published is inaccurate, and you will see from the correspondence that the said information certainly was not obtained from the OUR.****"* (OCG's Emphasis)

7.1.4 Mr. Maurice Charvis, Director General, OUR, during Judicial Proceedings on May 28, 2013, was asked why he did not advise Armorview/Tankweld Group that the substance of their advertisements was incorrect. In response, Mr. Charvis stated that "*Wartsila is not Armorview/Tankweld; Wartsila is a third party that advertised, we have no connection with Wartsila at all. We wait until we are advising all players, all who have submitted proposals to us. We don't react to advertisements in the papers."*

7.1.5 Mr. Charvis further stated that "*It is a third party doing this thing.* ***If it was Armorview getting up and making statements they would be subject to almost disqualification because they would be kind of tampering with the whole process****. A third party can say anything. If OUR were to react to all pronouncements in the press, we would be forever issuing press releases, we don't react to the third party.* ***It is debatable where in hindsight, say, we could put out a release and say these people talking foolishness but that would be kind of indicating where we are in the process. We are still to complete the process with Mott MacDonald giving us our final report and we are to advise the players properly of the next procedure. Also we needed to go to the NCC to seek guidance as to how to treat with these things. So I don't see the kind of PR where you could say you want to quiet that person and stop the advertisement but as far as I am concerned, a third party can put out anything."*** (OCG's Emphasis)

7.1.6 As a follow-up question, Mr. Charvis was asked "*You engaged Mott MacDonald and I am asking you along that line, don't you think that there is a responsibility on the part of the OUR to indicate, based on the OUR's name being brought into this ad every day for eight or nine days and the consulting firm, there is a duty, a responsibility to submit?*"

Mr Charvis responded "*What are you going to – a third party puts out an advertisement based on – what can we say?* ***We had actually told the Minister in the ranking financing in economic terms that they had ranked, so we could not go out and deny that we had never told anybody that they were ranked in economic terms No. 1 because we had actually told the Minister that at that time in economic terms they were No. 1. So it is kind of almost like you are fighting a futile battle in the press to split hairs.***" (OCG's Emphasis)

7.1.7 Mr. Charvis was asked if he would agree that, at the date of the Minister's speech to Parliament on April 24, 2013, Armorview was ranked No. 1 in economic terms. In response, Mr. Charvis stated "***At the time of the Minister's speech we gave the Minister the report just before he made his speech, this draft report and I emphasise again, just before he made his speech at that time we indicated in economic terms, financial economic terms that at that time Armorview was ranked No. 1.***" (OCG's Emphasis)

7.1.8 Based on his answer, Mr. Charvis was asked whether he could "*...say when it changed that they were no longer ranked No. 1*?" In response, he advised that "***The final report came in May, I think, and as I have tried to explain, ranking at this stage is academic in the report because we were not choosing at this stage somebody to run and be compliant***. ***It was almost like a screening process. People would have put the proposal on a different basis; some were incomplete, some wanted additional information, so at this stage all we consider that process to be was screening to ask them to do a final proposal.*"** (OCG's Emphasis)

7.1.9 Mr. Hopeton Heron, Deputy Director General, OUR, during Judicial Proceedings on May 28, 2013, was also asked about the Minister's announcement *"…that the OUR determined that the following entities in this order had proposals worth pursuing by negotiations – 1, Armorview/Tankweld; 2, JPS and 3, Azurest/Cambridge*". In response, Mr. Heron stated that "**Th*ere was no preferred bidder,…in doing the evaluations, there are different kinds of rankings. Let me answer it like this. There is financial ranking, there is economic ranking, in other words, based on the numbers you have given to us, this is your number, this is your economic ranking. In terms of financial ranking, it is your financial strength; your overall ranking is a combination of financial ranking, economic ranking, your security checks and other things that would make you a fit and proper person with the resources to do the project.***

What was being commented on here is just the economic ranking and in discussions with the Minister, without giving him a copy of the report or without telling him what numbers they were, there could have been an indication that Armorview's project was looking good from an economic ranking perspective." (OCG's Emphasis)

7.1.10 The OCG noted an e-mail dated April 25, 2013, which was sent by Mr. Nigel Davy of Armorview Holdings Limited to Mr. Hopeton Heron, Deputy Director General and copied to, Ambassador Peter Black, Secretary of the OUR, Miss Cheryl Lewis, General Counsel, Mr. Ansord Hewitt, Director, Regulation, Policy, Monitoring and Enforcement and Mr. Maurice Charvis, Director General. The referenced e-mail stated, *inter alia*, "***We have noted where the Minister of Energy has announced the top 3 ranked bidders with the Armorview/Tank Weld*** [sic] ***consortium being highest ranked.***

In light of the tight 30 day window given to complete this round of the process, we are seeking a formal correspondence that outlines your process and the expected deliverables during this 30 day period."

Having regard to what was embodied in the aforementioned e-mail, Mr. Charvis, during Judicial Proceedings on May 28, 2013, was reminded that earlier in the session **he had indicated that he did not listen to the Minister of Energy when he made his Budget Presentation in Parliament**. However, as it concerns the comments in said e-mail that the Minister of Energy had announced the top three ranked bidders with Armorview Consortium being the highest ranked and whether this would constitute a correct statement. (OCG's Emphasis)

7.1.11 In response, Mr. Charvis stated that "*We treat the letter as somebody trying to get indication of what is the next step from us and we think that we needed to….go to the NCC to see if there is any process at all before we start telling people yes, you are ranked or no, you are not, any kind of ranking. So in our minds until we got guidance from the NCC, we would not indicate to anybody whether they are ranked, they are in or they are out because* ***it would be premature to indicate to anybody whether yes, they are ranked 1 or 2 or 3 because we had not finalised the process with National Contracts Commission.***"[7] (OCG's Emphasis)

7.1.12 Mr. Charvis was then asked whether it was not premature to have told the Minister at the time of the Budget Presentation that Armorview, based on the *informal* assessment, was ranked No. 1 economically.

In response, Mr. Charvis stated that "***We are committed to a process informing – remember we had gone to Cabinet to tell Cabinet that we had terminated the previous process so we had indicated we would report publicly on the progress and the process so far****. What we gave the Minister was a preliminary review on what had happened so far. It was a progress report we gave the Minister.* ***It was in draft and it was qualified that we had not yet got the final report, so to our mind we were giving the Minister a progress report on what happened so far.***" (OCG's Emphasis)

[7] This matter will be addressed in the Findings and Conclusions sections.

7.1.13 The Permanent Secretary, MSTEM, Mrs. Hillary Alexander, during Judicial Proceedings on May 31, 2013, was asked whether she was of the view that the brief, as prepared by the OUR, had "*…ranked Amorview/Tankweld* [sic] *as number one in all categories which were utilized to rank the persons who were considered persons of interest…*". In response, the Permanent Secretary stated that "***I cannot speak to that, sir, this was a report from the OUR and in the valuation*** [sic] ***process we certainly do keep an arm's length, I can only speak to what was in the report…***" and that she "*…can only quote what was written in their report, their draft report to us…*" (OCG's Emphasis)

7.1.14 Having regard to the questions posed and concerns which were raised during the Judicial Proceedings concerning the issue of a preferred proposer and the Minister's pronouncement in Parliament, the CG is of the view that the OUR, in an effort to ensure that there was no further misunderstanding, issued a Media Release dated June 11, 2013, entitled "*OUR makes Amendments to Instructions for Unsolicited Proposals*" which made clear, the new timeline for submission of bids and listed, "***in alphabetical order*"**, the names of the five (5) shortlisted entities. (OCG Emphasis)

7.2 Established Process for the Addition of Generating Capacity

7.2.1 The context within which the OUR undertook this process is governed by **Condition 18: Competition for New Generation, of the Amended and Restated All-Island Electric Licence, 2011**, which empowers the Licensee, "*Save to the extent the Office* [Office of the Utilities Regulations] *agrees, or as provided for in this Licence, the Licensee shall not contract for new capacity other than pursuant to a* ***competitive tendering procedure managed and administered by the Office in accordance with the Guidelines for the Addition of Generating Capacity to the Public Electricity Supply System June 2006 and amended by the Office from time to time.***" (OCG's Emphasis)

7.2.2 Additionally, an OUR document, which was dated June 2006, and published on its website, entitled "*Regulatory Policy for the Electricity Sector – Guidelines for the Addition of Generating Capacity to the Public Electricity Supply System"* Section 7.1, provides that "*In keeping with the framework provided in the Licence and in order to ensure that the competitive process achieves the objectives of reasonable prices and productive efficiency, the Office has separated the competitive bidding process into two categories:*

(i) Tendering without JPS as a bidder

(ii) Tendering with JPS as a bidder…"

Further, Section 7.1.2, Competitive Tendering with JPS as a Bidder, states that*, "In the event that JPS is tendering for the new capacity addition,* ***the Office*** **[Office of the Utilities Regulations]** ***will be responsible for establishing the project team to undertake the tendering and evaluation of bids***..." (OCG's Emphasis)

7.2.3 During Judicial Proceedings on May 28, 2013, and having regard to the provision as provided for in the **Amended and Restated All-Island Electric Licence, 2011**, Mr. Heron was asked whether he was aware that there was a requirement for a competitive

tendering procedure. **Mr. Heron advised that he was of the view that some discretion is accorded to the OUR**, given that it is stated that '*Save to the extent the Office agrees*', and the OUR may agree or not agree. He went further to state that "*...the OUR, the Office, may consider other methods if the country is in dire need, it is an emergency or for whatever reason it has to.*" (OCG's Emphasis)

7.2.4 Mr. Heron, in response to a question as to whether the current matter is considered an emergency, stated that "*For the longest while Jamaica has been trying to solve the energy problem but I won't go for the longest while. I will tell you. Since 2010, the Office went through a very formal request for proposal process where it issued a request for proposal and after, I would say, three years - 2011, 2012, 2013 - it was not able to conclude that process.* ***Since then while we are doing that, the price of electricity is moving up, the conditions of the plants are getting worse and we need to get emergency capacity in. So we would consider the situation that we are in urgent. I wouldn't necessarily use 'emergency', I would use urgent****."* (OCG's Emphasis)

7.2.5 Mr. Charvis, during Judicial Proceedings on July 29, 2013, stated that "C*ondition 18, allows the OUR some flexibility and some authority to decide outside of the competitive process and on its own terms how 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.*** *If a sole source such as JPS come and say I want to put in a 60 megawatt, that would be outside the competitive process. Even though we have the authority to agree if the government process says do these things by competitive tender we would go to Cabinet and ask Cabinet advice or guidance or permission to grant a sole source to JPS or not and that is that how we get involved with Cabinet* [sic]*....****The Act actually allows us, as I said before, almost without any discretion, with absolute authority to award one of these permits to – once we agree, if JPS comes to us with a proposal and we agree with the proposal we could conceivably have awarded the proposal – the licence, beg you pardon****."*

7.3 Accepted GOJ Policy - Unsolicited Proposal and Expression of Interest

7.3.1 Given the description that was accorded by the OUR, to the process by which proposals were received, the OCG sought to ascertain the Legal and Business definitions of Unsolicited Proposals, and also to detail those provisions embodied in the GOJ Handbook of Public Sector Procurement Procedures concerning Unsolicited Proposal and Expressions of Interest.

The Legal definition of an Unsolicited proposal[8] is "*a written proposal for **a new or innovative idea that is submitted to an agency on the initiative of the offeror for the purpose of obtaining a contract with the Government, and that is not in response to a request for proposals**, Broad Agency Announcement, Small Business Innovation Research topic, Small Business Technology Transfer Research topic, Program Research and Development Announcement, or any other Government-initiated solicitation or program.*" (OCG's Emphasis)

While the Business definition states that an Unsolicited Proposal[9] is a "*Written but informal bid, proposal, or quotation **submitted on the initiative of the submitter and not in response to any formal or informal request**.*" (OCG's Emphasis)

7.3.2 The Government of Jamaica – Handbook of Public Sector Procurement Procedures, Volume 2, Section 1.2, Unsolicited Proposals, states that:

> "*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 shall be dealt with in a transparent manner. **The proposals should not have been influenced or otherwise initiated by the Procuring Entity**; and the Entity is NOT obliged to entertain them.*

[8] Source: USLEGAL.com
[9] Source: Business Dictionary.com

An unsolicited proposal may be considered by a Procuring Entity if it:

(a) ***demonstrates a unique and innovative concept, or demonstrates a unique capability of the contractor****;*

(b) offers a concept or service not otherwise available to the Government; and

(c) ***does not resemble the substance of a recent, current or pending Competitive Tender****…"* (OCG's Emphasis)

1.2.1 Treatment of Unsolicited Proposals

"When a Procuring Entity receives an unsolicited proposal it has ***three*** *(3) options:*

(a) to elect not to consider it and, therefore, to return it immediately;

(b) to engage the Competitive Bidding process by means of a price test; or

(c) ***to enter into the direct negotiation with the proponent.***" (OCG's Emphasis)

7.3.3 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 serve better 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)

7.3.4 Mr. Heron, by his own admission, during Judicial Proceedings on July 28, 2013, when asked a question about the process, responded as follows, "…***the proposals received were at best strong expressions of interest*** *with enough to encourage further negotiation with the entities…*" (OCG's Emphasis)

7.4 Process which was adopted by the Office of the Utilities Regulation (OUR) concerning the receipt and consideration of "Unsolicited Proposals"

7.4.1 The OUR, on February 18, 2013, issued a Media Release entitled "*OUR gives window of opportunity to firm proposals for electricity generation*", which stated that;

> *"By the end of March 2013 the Office of Utilities Regulation (OUR) will complete its review of the current proposals 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 has 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."*** (OCG's Emphasis)

7.4.2 The OUR, by way of letter which was dated March 20, 2013, to the Chairman of the NCC, and captioned "*Unsolicited Bids for the Supply of Base Generating Capacity on a Build, Own and Operate (BOO) Basis*", advised the NCC, *inter alia*, of the following:

7. "On January 31, 2013 JPS submitted a broad summary of an alternative proposal for the provisioning of electricity generating capacity which could not be considered in the RFP process. Immediately following the termination of the RFP process, a number of other entities also expressed interests in providing a solution for Jamaica's electricity needs.

8. ***Given the need to finalise a solution in the shortest possible time, uncertainties regarding the level of participation and the likely outcome of a new open competitive process, the OUR 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, before going back to the open market. *The OUR also indicated that all such submissions would be treated as unsolicited proposals.*

9. The OUR has indicated publicly that the objective of its review will be to determine if any of the submissions provide a sufficient basis for a recommendation to the Government of Jamaica that as a matter of policy, it ought to consider other options than competitive tender to satisfy the country's electricity needs. The deadline for providing this advice is March 31, 2013.

*10. **At close of business on March 15, 2013, the OUR received five (5) unsolicited proposals. It is imperative that the OUR conduct the relevant evaluation expeditiously since time is of the essence.***" (OCG's Emphasis)

7.4.3 Having regard to the urgency which was accorded to the Project by the OUR, in its referenced letter to the NCC, the CG, during one of its Judicial Hearings which was held on May 29, 2013, requested the OUR to provide information concerning the mode and date of receipt of initial letters expressing interest/proposals from all the entities. By way of a letter which was dated May 31, 2013, addressed to the CG and entitled "*Right to Supply 360 Megawatts of Power to the National Grid*", the OUR advised of the following concerning its Receipt of Expressions of Interest and Proposals:

"*(a) **Jamaica Public Service Company Limited – Initial proposal by letter dated January 31, 2013 & OUR-received proposals, hand delivered hard copy, CD and a link to a website, on March 15, 2013…***

*(b) Azurest visited with us and made a presentation on March 6th 2013; **they were referred to us by MSTEM**. Appointment to meet with Azurest was made by telephone appointment. The submission was delivered by hard copy and email on March 15, 2013*

(c) ***Optimal's first contact with us was at the submission of their proposals on March 15, 2013...***

(d) *Amorview's* [sic] *initial contact was by letter dated February 15, 2013 addressed to Mr. Charvis. The OUR met with Amourview* [sic] *on February 22, 2013.* ***The submission was made by hard copy and a link to Dropbox on March 15…***

(e) *Jamalco:* ***The OUR met with Jamalco initially after a reference by MSTEM to discuss their expansion plans. The cover letter of the hard copy submission dated March 8, 2013 was addressed to the Hon. Phillip Paulwell and copied to a number of persons including Mr. Maurice Charvis and Mr. Hopeton Heron and received by the OUR on March 15, 2013….***

(f) ***Energy World International was referred to us by the Cabinet Secretary and submitted its proposal by a link to Dropbox on May 22, 2013 and later by hard copy received on May 29, 2013…"*** (OCG's Emphasis)

7.4.4 Mr. Heron, during Judicial Proceedings on July 28, 2013, sought to provide the CG with an account of the process which was adopted by the OUR. He advised that "*We made recommendations to NCC, they considered it at one meeting, they invited us to a subsequent meeting and we talked about how we could do it and they sent to us a written framework. Having gotten the framework, we sat down and piecened it together to say if we are going to proceed, we must do these things and that was the framework that is put in place and thereafter we call it a formal system, moving from an informal to-ing and fro-ing to a formal system.*"

7.4.5 Mr Heron was thereafter asked whether it was reasonable to assume that the OUR would not be accepting any proposal during the formal stage, and he responded "*Certainly not.*" **Having regard to Mr. Heron's response, his attention was directed to a letter which**

was dated May 21, 2013, which was sent to all proposers, including Optimal's Mr. Wayne McKenzie, but excluding EWI, which stated, *inter alia*, "*With issuance of this letter the OUR considers that it has begun a formal process.* " (OCG's Emphasis)

7.4.6 In justifying the acceptance of EWI's proposal on May 22, 2013, subsequent to the issuance of the aforementioned letter, Mr. Heron stated that "*I can tell you how the 22nd came about. The 23rd was a holiday, the 24th we had set that as a hard date when we are going to meet all the entities. We sat with them in a room and we explained to them the process going forward and we said it wouldn't be practical to set it for the 23rd because the 23rd we were not at work, so we set the 22nd.* ***So if we did on the 21st write that to Wayne McKenzie, it is one of those things, you know, when you are not trying to set anything, you are maybe not thinking.***" (OCG's Emphasis)

He further stated that "***…maybe it should not say 'on receipt of this letter'. It should maybe say 'As of the 22nd we will consider no more'; we should have used the same language that we used in the Cab. Sec. letter, in the letter to the Cab. Sec. that we used in the letter to Cabinet, that would have been crystal and abundantly clear.***" (OCG's Emphasis)

7.4.7 Mr. Charvis, during Judicial Proceedings on July 28, 2013, was also asked to give an account of the process which the OUR had adopted, and he stated that "*When we terminated the bid, the previous process, our intention was to go out again. When JPS said that they had an alternative proposal which according to the licence, we had authority to accept, condition 18 of the licence; we could accept it unilaterally and they said they need time for clarification of this alternative process.* ***To be fair to everybody concerned, since we were in the terms of unsolicited at this time now, we said, 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 have 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 to give an overall total score. You only can rank them in terms of economic ranking and that would 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?" (OCG's Emphasis)

7.4.8 Mr. Charvis, during Judicial Proceedings on July 29, 2013, was asked to give a further account of the process, and he stated that "*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 these proposals to go forward and what is the procedure to going forward.* ***We are always careful when we are unsure of things or especially when you have a lot of interest can claim bias or lack of transparency, we seek the guidance of 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 and said look here we had one proposal, the only proposal to get new power to Jamaica and this proposal had some defects, what are we to do? They wrote back and said, look here, give them forty-five days and negotiate back with them to see if you can carry them up to a standard that is acceptable to you then you can go forward and we did, negotiated with JPS for 45 days and they satisfied us and then we awarded JPS the right to procure the 360 megawatts of capacity.*

So in this process we have some as far as were [sic] *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 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 overseas*** [sic]***, although it is not a contract to purpose*** [sic] ***anything from anybody, we are just overseeing a purchasing process between JPS and the independent power producers, but still because it is a permitting process we think it was prudent to seek the advice of the National Contracts Commission and they advised 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."*** (OCG's Emphasis)

7.5 Engagement of Specialist Consultant to evaluate the "Unsolicited Proposals"

7.5.1 The OUR, by way of letter which was dated April 5, 2103, to the CG, and captioned "*Right to Supply 360 Megawatts of Power to the National Grid*", advised the CG, *inter alia*, of the following:

> *11. "**Notably this review process required expert technical skill to assess the viability of each proposal which includes the assessment of electric power systems, network analysis, current conditions in the international power market and the efficacy of financial proposals…***
>
> *12. **The specialized technical skill sets needed to conduct such an evaluation are extremely limited in our jurisdiction and not readily available**. Given this reality, the considerations set out at Item 11 above and the qualifications, background and expertise of Mott MacDonald, the OUR has contracted the company…*
>
> *13. … **the engagement of Mott MacDonald and our election to assess the merits of the said proposals so as to identify whether any of them provide a sufficient basis for a recommendation to engage in direct contracting.***
>
> *14. **It is expected that the OUR will prepare and make its final recommendations to the Government by April 15, 2013.**" (OCG's Emphasis)*

7.5.2 The CG, having recognized that the OUR sought to, and had engaged a Specialist Consultant, directed its attention to a copy of the signed Contract for Consultant's Services between the OUR and Mott MacDonald Ireland Limited. The referenced Contract, which was dated March 20, 2013, with a contract sum of US$50,625.00, stated that the analysis post March 15, 2013, will involve an examination of, *inter alia*, (a) the firmness of Proposals (b) the timelines for implementation (c) the overall price and expected impact on electricity costs (d) the overall feasibility of each proposal and (e) **a comparative analysis of the Proposals to determine ranking**. (OCG's Emphasis)

7.5.3 Mr. Charvis was therefore asked, during Judicial Proceedings on July 28, 2013, about the purpose of engaging Mott MacDonald. In response, Mr. Charvis stated that "***We engaged Mott MacDonald – well, it was a tight time-frame that we had because we were thinking of March 15th thing so we thought we needed help to process these, and it was 14-or–so different large proposals: 1) we needed the help, and 2) to see if there was merit in these; to have an idea of the quality of these proposals.***" (OCG's Emphasis)

7.5.4 Mr. Charvis was further asked if the OUR could have undertaken this type of evaluation, and he stated that **it could be done over a six-month period**. He further stated, **"I just say six months but a longer time we would have to take to do the analysis."** (OCG's Emphasis)

7.6 Evaluation of "Unsolicited Proposals" received

7.6.1 The OUR, by way of letter dated May 7, 2013, provided a copy of the Draft Evaluation Report dated **April 12, 2013**. The referenced Draft Report indicated that Proposals were received from five (5) entities as follows; Armorview Holdings Limited, Azurest-Cambridge, Jamalco, JPS and Optimal Energy. The Report further indicated the results of its detailed assessment and ranked the proposers in several distinct categories. (OCG's Emphasis)

7.6.2 In an effort to scrutinize the content of the final Report, the CG, wrote a letter dated May 21, 2013, requesting, from the OUR, a copy of the finalised Evaluation Report. The OUR, by way of letter dated May 24, 2013, responded to the OCG appending, among other things, a copy of the said Evaluation Report. The referenced Evaluation Report, dated May 13, 2013, indicated that it was the Final Issue, and that Proposals were received from five (5) entities as follows; Armorview Holdings Limited, Azurest-Cambridge, Jamalco, JPS and Optimal Energy. The Report further outlined the results of its detailed assessment and ranked the proposers in several distinct categories.

7.6.3 Further, the OUR, by way of a Media Release dated May 22, 2013, advised the public that it will "*...from May 24, 2013, begin to meet with the short-listed entities from the recent unsolicited proposals it received from interested parties to provide new generating capacity.*

***The OUR has advised Cabinet that as of May 22, 2013 it will not review any more unsolicited offers for the supply of new generating capacity. The regulatory body is now in the process of advising all relavant parties of the formal process it is adopting to select any final offer(s).*"** (OCG's Emphasis)

7.6.4 As it concerns the evaluation of EWI's Proposal, the OUR advised the CG, by way of

letter dated May 31, 2013, that "***On the morning of May 22, 2013*** [it] *received by electronic e-mail notification of the submission of an unsolicited offer by way of an electronic drop box.* ***Following an internal review and a discussion of the merits of the submission it was determined that it met the thresholds established for consideration. It was also sent off to the consultant for a full review which would then feed into the review of their final proposal****. Given that the submission met the established thresholds and that it was submitted prior to the cut off time the decision was taken to include this entity among those to be invited to make final submissions and be notified of the process on the 24th of May, 2013.* ***EWI would therefore be given the same start date of the formal process to avoid staggered submission and evaluation****.*

Notably, the OUR also took the decision on May 20, 2013 that if Optimal, which was previously excluded, should make any further submission by the cut-off date, which took them over the thresholds, they would be included. Optimal in a letter of protest to the OUR indicated that it was in a position to source its own supply of natural gas. *The OUR technical staff therefore determined that they too were now over the established threshold and were therefore included in the list of those invited to make final submissions.*"

7.6.5 The OUR, by way of letter(s) dated May 21, 2013, and entitled "*Unsolicited Bids for the Supply of Base Generating Capacity on a Build, Own and Operate (BOO) Basis*", sent to; Armorview Holdings Limited, Azurest Partners and Jamaica Public Service Company Limited, it advised, *inter alia*, "*Having reviewed the proposal set out in your unsolicited proposal dated … we are pleased to advise that your firm has been chosen as one of the entities the OUR is inviting to submit final proposal with a view to being awarded the right to supply the requisite electricity capacity.*" As it concerns Optimal Energy, the firm was advised, *inter alia*, following upon it making certain protest to the OUR, that "*…the OUR is now prepared to extend an invitation to you to submit a final proposal with a view to being awarded the right to supply the requisite electricity capacity.*"

7.6.6 In all letters which were sent to the shortlisted bidders, on May 21, 2013, the OUR advised "***With the issuance of this letter the OUR considers that it has begun a formal process.***"[10] (OCG's Emphasis)

7.6.7 On June 12, 2013, in an e-mail correspondence captioned "*Evaluation of EWI Proposal*" the CG made reference to a discussion between an OCG Official and Mr. Hopeton Heron of the OUR, as follows "*Reference is made to our discussion of even date regarding the matter at caption.* ***During said discussion I was advised that the Evaluation Report for EWI was not completed, as the Consultancy Contract will have to first be adjusted****. In this regard, the OUR will be seeking audience with the NCC.*" By way of response of even date, via the said e-mail conduit, the OCG was advised that "*Just by way of clarification.* ***Mott MacDonald was initially contracted to evaluate the proposal that came in on March 15th and a contract was completed for this****. The decision to engage them to examine the Energy World international's* [sic] *(EWI's) proposal was taken subsequent to this and is by way of a different contractual arrangement. Since we have also determined that that* [sic] *it will be necessary to engage their services to also do the final assessment we have indicated to them and have had their consent to treat both the preliminary evaluation of EWI's offer and the final evaluation as part of one contract. It is this arrangement on which we will need to engage the NCC to ensure that we do not run afoul of the procurement rules.*[11]

In the meantime Mott MacDonald has commenced the initial evaluation but we would not expect them to provide us with a report until all the terms of this contract are signed off on." (OCG's Emphasis)

[10] A critical component which guided the OUR's posture was a reliance on the NCC's instruction.
[11] It is evident that as a result of the inclusion of the EWI offer, there will be an additional cost to taxpayers

7.7 The Role of the Honourable Minister Phillip Paulwell

7.7.1 The Honourable Phillip Paulwell, Minister of Science, Technology, Energy and Mining, during the 2013 Budget Debate Presentation, on April 24, 2013, advised Parliament, *inter alia*, that "*Subsequent to the OUR receiving and assessing those proposals* (Armorview/Tankweld, JPS, JAMALCO, Optimal and Azurest/Cambridge), *the Government has since received another unsolicited proposal from a Hong Kong company, proposing to build a LNG receiving terminal, power plant and to supply LNG from its own gas field. The company has proposed a combined cycle gas-fired 360 MW power plant adjacent to the LNG hub terminal.*

Based on the fact that this company owns its LNG and the attractive price quoted, ***Cabinet has taken a decision that this proposal should also be considered along with the three, and it will be referred to the OUR for assessment.***" (OCG's Emphasis)

7.7.2 It is instructive to note that by way of a letter dated April 29, 2012, to the Chairman/CEO of Energy World International (a Hong Kong company), from the Minister, the Honourable Phillip Paulwell, stated the following:

"*I acknowledge receipt of your letter of April 21, 2013, outlining your company's interest in investing and developing an energy project in Jamaica.*

Since our meeting of April 21, 2013, *Cabinet has referred your project to the Office of the Utilities Regulation (OUR) for consideration and assessment.* ***In this regard, please be advised that you must submit to the OUR at the earliest, a detailed and firm technical/commercial project proposal.***

The OUR has a deadline of 30 days to complete its assessments and negotiations and to present the Government with a recommendation.

***Thank you for preparing this proposal at such short notice and for your interest in investing in Jamaica.*"** (OCG's Emphasis)

7.7.3 Having regard to the foregoing letter which was penned by the Honourable Minister, the CG, by way of a requisition dated May 31, 2013, and captioned "*Right to Supply 360 Megawatts of Power to the National Grid*" to the Honourable Minister, asked certain questions of him, and responses were received on June 7, 2013, accordingly, as follows:

"*Question 3: Were/Are you in receipt of a proposal from the EWI on April 21, 2013, prior to the said date or any date thereafter? If yes, was this proposal forwarded to the OUR, by you or MSTEM?*

Answer: I was not in receipt of a proposal from EWI prior to April 21, 2013. On April 21, 2013, I received a letter/proposal dated April 21, 2013 which was presented by me to Cabinet at the Cabinet Retreat on even date. The Cabinet took a decision that an assessment of EWI's proposal should be done by the OUR. That decision was communicated to the OUR by the Cabinet Office.

Question 4: Did you make the initial contact with EWI or were you approached by EWI? Please provide details relating to same inclusive of; the date(s), place(s) and context within which initial contact(s) was/were made.

Answer: EWI made contact with Christopher Cargill, Chairman of the Petroleum Corporation of Jamaica (PCJ), indicating interest in presenting a possible energy (gas) solution and requested a meeting. The meeting with EWI was facilitated on April 21, 2013.

Question 7: *With reference to the meeting of April 21, 2013 which was referenced in your letter dated April 29, 2013, please advise of the following:*

(a) *State whether EWI was invited by you, and/or any representative acting on your behalf to attend this meeting.*

(b) *The purpose of the meeting.*

(c) *The name(s) and title(s) of all persons who were present at the referenced meeting.*

(d) *Was the meeting minuted? If yes, please provide a copy of the minutes and/or any other documentation that captures what was discussed.*

(e) *Whether or not a powerpoint presentation had been delivered by representatives of EWI. If the response is in the affirmative, please advise (i) whether said presentation was requested to be delivered by you or whether same was done based upon EWI's own volition (ii) of the substance of the presentation and (iii) whether you are in possession of the said PowerPoint presentation.*

Answer: *(a)* *Mr. Christopher Cargill, Chairman of PCJ was requested by EWI to facilitate a meeting with me as Minister of Science, Technology, Energy and Mining to make a presentation on their ("EWI's") worldwide operations and to express their interest in investing in Jamaica.*

(b) *There was a pre-arranged briefing meeting on April 21, 2013, which was scheduled to commence in the morning in preparation for the Cabinet Retreat of even date, to deal with another aspect of our portfolio. A power point presentation by EWI was facilitated prior to the commencement of this meeting.*

(c) ***In addition to myself, the persons at that meeting were: Hillary***

Alexander, Permanent Secretary, Ministry of Science, Technology, Energy and Mining, Dr. Carlton Davis, Ambassador and Special Envoy in the Office of the Prime Minister, Dr. Vin Lawrence, Chairman of Clarendon Alumina Partners Limited, Mr. Christopher Cargill, Chairman of PCJ and Patrick Atkinson, Q.C., Attorney General.

(d) ***The meeting was not minuted****.*

(e) ***I am not in possession of the power point presentation. The mode and method of the presentation was determined by EWI. The substance of the presentation was an overview of EWI's worldwide operations, capabilities and its interest in investing in Jamaica."*** (OCG's Emphasis)

7.7.4 The CG, by way of a follow-up requisition, dated June 10, 2013, posed the following question to the Honourable Minister, who, by way of response dated June 12, 2013, stated the following:

"***Question:***

Particular reference is made to question #7 of the OCG's Statutory Requisition which was dated May 31, 2013 wherein the OCG requested, inter alia, that "…The name(s) and title(s) of all persons who were present at the referenced meeting." In response to the OCG's question, you only provided names of the Jamaican Officials who were in attendance at the referenced meeting, however, no details were provided for other persons, including Energy World International Limited agent(s) or representative(s) acting on the behalf of said company. In the circumstances, kindly provide the OCG with the name(s) and

title(s) of all persons who were present at the referenced meeting, whether physically or virtually, who were representing and/or acting on behalf of Energy World International Limited, including any other observer(s) in their own substantive capacity. For each person represented, kindly indicate whether they were physically or virtually present, and their specific role(s).

Answer:

For clarification, the overseas persons who were present at the said meeting were Mr. Stewart Elliot [sic]***, Chairman and Chief Executive Officer of EWI accompanied by Mr. Conrad Kerr, Vice President of Pacific LNG. Mr. Elliot made the presentation. There were no other participants.***" (OCG's Emphasis)

7.7.5 During Judicial Proceedings on May 31, 2013, the Permanent Secretary was asked whether she personally made verbal or written contact with Mr. Stewart Elliott or any representative of the Hong Kong Group, and she advised the CG that she made no contact. The Permanent Secretary also advised that she only spent "*…about ten minutes...*" in the meeting, as she had left to attend another meeting.

7.7.6 In making a determination as to whether it was appropriate for the Ministry to interface with prospective bidders, the following question was asked "*Do you in your professional opinion, if you are able to answer you can, if you can't – Are you aware of an instance where the Minister or the Ministry would be interfacing with a possible bidder to provide information in respect of proposal* [sic] *to be submitted?*"

7.7.7 In response, the Permanent Secretary outlined her understanding of the question as follows, "*If I am understanding you, you are asking whether the Ministry or whether I am aware of the Ministry taking an active role in seeking someone to provide information or provide a proposal…"* to which she responded "*No.*"

7.7.8 The Permanent Secretary was further asked whether she would "…*consider it rather unusual for the Minister to be communicating with a possible bidder…*" pursuant to a letter of interest and/or a proposal, specifically with respect to the 360MW Project. In response, the Permanent Secretary advised that "***The Ministry*** *has basically maintained a position where, when we are contacted and we often are contacted with* [sic] *people who want information on Jamaica or so (inaudible) we,* ***as has been the practice, we refer them to the OUR****. As has been the case here."* (OCG's Emphasis)

7.7.9 Pinochet Ugarte definition of bias and the appearance of bias

The Pinochet Ugarte case and the issue of bias and the appearance of bias is relevant as it concerns the involvement of the Honourable Minister given his meeting with EWI Represenatives:

(1999) 6 BHRC 1

R v Evans and others, ex parte_Pinochet Ugarte;R v Bartle and others, ex parte_Pinochet Ugarte (Amnesty_International and others_intervening)

HOUSE OF LORDS

LORD BROWNE-WILKINSON, LORD GOFF OF CHIEVELEY, LORD NOLAN, LORD HOPE OF CRAIGHEAD AND LORD HUTTON

17 DECEMBER 1998, 15 JANUARY 1999

Fair trial – Natural justice – Bias – Judge holding office of director of charity allied to and sharing objects of party intervening in extradition appeal – Whether judge's relationship with party intervening in appeal and having non-pecuniary interest to achieve particular result automatically disqualifying him from hearing appeal.

Spain sought the extradition of the petitioner, who was the ex-president and head of the state of Chile. Consequently a metropolitan stipendiary magistrate issued a provisional

warrant for the arrest of the petitioner under s 8(1) of the Extradition Act 1989. The warrant specified five offences, including committing acts of torture contrary to s 134(1) of the Criminal Justice Act 1988 and hostage taking contrary to s 1 of the Taking of Hostages Act 1982. The petitioner was arrested and he immediately applied to the Queen's Bench Divisional Court for judicial review against the decision to issue the provisional warrant, contending that he was entitled to sovereign immunity. The Divisional Court found in favour of the petitioner but the quashing of the warrant was stayed to enable an appeal to the House of Lords on the question of the proper interpretation and scope of the immunity enjoyed by the petitioner as a past head of state in respect of the crimes against humanity for which his extradition was sought. Prior to the main appeal hearing, there was an interlocutory decision granting Amnesty International (AI) leave to intervene in the appeal. At the appeal hearing AI made written submissions and was also represented by counsel supporting the appeal. The House of Lords allowed the appeal, finding that the acts of torture and hostage taking with which the petitioner had been charged fell beyond the scope of his functions as head of state and that he therefore had no immunity. Subsequently the petitioner discovered that one of the Law Lords in the majority was a director and chairperson of Amnesty International Charity Ltd (AICL), which had been incorporated to carry out AI's charitable purpose, and petitioned the House to set aside the order, contending that those links with AI were such as to give the appearance of possible bias.

Held – **The fundamental principle that a man may not be a judge in his own cause was not confined to a cause in which he was a party but also applied to a cause in whose subject matter he had a relevant interest. Once it was shown that a judge was himself a party to the cause, or had such an interest, he was automatically disqualified without any investigation into whether there was a likelihood or suspicion of bias; the mere fact of his interest was sufficient to disqualify him unless he had made sufficient disclosure. Accordingly, for the absolute impartiality of the judiciary to be maintained, a judge who was involved, whether personally or as a**

director of a company, in promoting the same causes in the same organisation as was a party to the suit, was automatically disqualified. In the instant case the judge was a director and chairman of AICL, a charity wholly controlled by a party to the suit and sharing its object of procuring the abolition of crimes against humanity. Accordingly AICL plainly had a non-pecuniary interest in establishing that the petitioner was not immune from prosecution. It followed that the Law Lord was automatically disqualified from hearing the extradition appeal and the matter would be referred to another committee of the House of Lords for rehearing. (OCG's Emphasis)

7.7.10 It must be categorically stated that the CG has found no evidence nor does he claim that the GOJ, MSTEM or Minister Paulwell, by their action, had acted with malicious intent. However, the meeting between EWI Representatives and Representatives of the GOJ, where is it is reported that EWI provided an overview of its worldwide operations, capabilities and its intent to invest in Jamaica, raises certain concerns for the CG.

7.8 Acceptance of an "Unsolicited Proposal" from EWI and the NCC's Instructions

7.8.1 The OUR, by way of letter which was dated April 23, 2013, addressed to the Chairman of the NCC, and captioned "*Unsolicited Bids for the Supply of Base Generating Capacity on a Build, Own and Operate (BOO) Basis"*, advised the NCC, *inter alia*, that *"In the interest of transparency, we should also advise that at the time of the presentation of our preliminary findings to the Cabinet**, the Office was given verbal notice that it will be directed to review another proposal that has been presented to the Government for consideration**. We may therefore need to revert to your good office for further guidance **in the event that we receive such a directive.***" (OCG's Emphasis)

7.8.2 In response, the NCC wrote a letter to the Cabinet Secretary, dated May 2, 2013, advising, *inter alia*, that "*The NCC further considered the matter at its meeting held on 2013 May 01 when a letter from the Director General at the Office of Utilities Regulation seeking the NCC's permission, following the Consultants' initial review of the proposals and short listing of three (3) entities, to proceed with engaging the shortlisted entities in simultaneous negotiations to see which proposal(s) would best serve Jamaica's needs. The OUR also requested the NCC's advice on how to proceed in the event that the approach proposed was not approved.*

Based on the information provided in the letter dated 2013 April 23, the Commission is of the opinion that the proposals received are not 'unsolicited' as defined in the GoJ Handbook of Public Sector Procurement Procedures, but could be regarded as expressions of interest." (OCG's Emphasis)

7.8.3 The OUR, by way of letter dated May 7, 2013, and captioned "*Unsolicited Bids for the Supply of Base Generating Capacity on a Build, Own and Operate Basis*", advised the NCC, *inter alia*, that, "***Except as stated in our letter of 24 May, 2013*** [sic]***, we are unable to provide any further information as to the circumstances regarding the***

request for the review of the additional proposal. We have, however, provided for the attention of the NCC, a letter from the Cabinet Secretary dated 26 April, 2013, confirming the instructions to the OUR, together with a letter from Stewart Elliott of Energy World International, dated 21 April, 2013." (OCG's Emphasis)

7.8.4 Of great importance, in response, the NCC by way of letter which was dated May 9, 2013, and captioned "*OUR – Bids for the Supply of Base Generating Capacity on a Build Own and Operate (BOO) Basis*", advised the Cabinet Secretary, *inter alia*, of the following;

> "*Having carefully considered the matter, the NCC wishes to advise that whereas it has no objection in principle to the process as outlined in the 2013 May 07 letter from the OUR and in accordance with best practices, the OUR should undertake the following:*
>
> - *notify the unsuccessful proponents of their non-selection for short-listing, and*
>
> *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 proposals 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 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 to 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 the negotiation team and any invited observers to the negotiations (e.g. OCG).*" (OCG's Emphasis)

7.8.5 To further place the series of events in context, the OUR, by way of letter dated May 20, 2013, to the CG, concerning the "*Right to Supply 360MW to the National Grid*", advised, *inter alia*, "*…the OUR will begin negotiations with the three shortlisted entities on May 24, 2013. You will recall that we had also advised that the Cabinet had requested the OUR to also evaluate a proposal from a fourth entity, Energy World International Limited.*

To date, ***despite being appraised of a request to that company from the Ministry of Science, Technology, Energy and Mining to provide the detailed information necessary for a preliminary evaluation****, no submission has been received.*" (OCG's Emphasis)

7.8.6 The CG must emphatically state that given the instructions which were detailed in the NCC's letter, dated May 9, 2013, to the Cabinet Secretary, concerning, *inter alia*, how the process should proceed, it was important to ascertain clarification from the NCC regarding said instructions so as to remove any doubt and ambiguity.

The clarification was also required as a result of the representations which were made by OUR representatives during Judicial Proceedings, that they had perceived that the spirit and context permitted them to accept proposals up to, and on the new final deadline date.

In the circumstance, the CG, by way of letter dated May 31, 2013, asked the Chairman of the NCC to respond to the following questions:

1. "*As it regards the assertion that the Office of Utilities Regulation (OUR) should "…carry out an evaluation of any other proposals received before the final 'cut-off date'…", does it mean that (a) the OUR should carry out an evaluation of any other proposal received* ***prior*** *to the 'cut-off' date, to determine if the proposer is shortlisted? or (b) the OUR can evaluate any other proposal, before shortlisting proposers, once same is received on, or prior to the 'cut-off' date?*

   If neither (a) or (b) above adequately covers the substance of your assertion or the specific meaning of what was embodied in the referenced letter, please clearly and explicitly articulate your and/or the NCC's meaning of what was communicated to the OUR.

2. *As it regards the assertion that proposals should be evaluated "…on the same basis and in the same manner as the previous evaluation exercise.", does it mean that (a) any other proposal received prior to the 'cut-off' date should be evaluated by the duly contracted Consultant, Mott MacDonald, utilizing the same criteria and the same form which were used to evaluate the other proposals? or (b) any other proposal received prior to the 'cut-off' date can be evaluated by the OUR, or any other competent person or authority, based upon its/their knowledge of what constitutes a firm and serious proposal?*

If neither (a) or (b) above adequately covers the substance of your assertion or the specific meaning of what was embodied in the referenced letter, please clearly and explicitly articulate your and/or the NCC's meaning of what was communicated to the OUR.

3. *Please indicate whether it was your or the NCC's understanding that an evaluation, on the same basis and in the same manner, was to have been conducted prior to a proposer being shortlisted and/or the formal process commencing.*

4. *What was your and the NCC's meaning of the term on the same basis and in the same manner?*

5. *Was there a specific reason for the inclusion of the term on the same basis and in the same manner?"*

7.8.7 In response to the CG's Statutory Requisition, the Chairman responded by way of letter dated June 3, 2013, as follows:

1. *"The intention was for the OUR to evaluate all proposals that were received on or prior to the 'cut-off' date,* ***<u>before finalising the short list</u>.***

2. *In order to ensure fairness and transparency, the same criteria and the same forms that were used to evaluate the original proposals should be utilized, using the services of the contracted consultant, Mott McDonald* [sic] *if considered necessary.*

3. ***<u>It was the NCC's understanding that the formal process would commence after all proposals had been evaluated and a short list finalised</u>***.

4. *Refer to 2. above.*

5. *Refer to 2. above."* (OCG's Emphasis)

7.8.8 Mr. Heron, during Judicial Proceedings on July 28, 2013, was asked about his understanding of the NCC's instruction that the OUR should "*...carry out an evaluation of any other proposals received before the final 'cut-off' date on the same basis and in the same manner as the previous evaluation exercise*." and whether or not such an evaluation was carried out on the bid or proposal for Energy Worldwide International.

In response, Mr. Heron stated that "*The proposals were received. We contacted immediately our international consultants; we forwarded the document to the international consultants; they are going through the document but the evaluation is done by both teams, both OUR and the international consultants.* ***<u>We combed through the document ourselves and on the basis of what was presented have included them.</u>***" (OCG's Emphasis)

7.8.9 Having regard to Mr. Heron's response, the CG advised him that the instructions were not carried out as per the NCC's requirement, as "***<u>Once it is being done, it means that it is continuous, it is still going on, so it was not done before as per the NCC dictates</u>***" In response, Mr. Heron indicated that "***<u>It depends on how literal you read it…</u>***" and "***<u>…It does not say it should be done before the final date; 'received"</u>***" (OCG's Emphasis)

7.8.10 Mr. Heron was asked whether the Evaluation Report for EWI was completed. In response Mr. Heron advised that they expected that it would be completed within a week

or two. He was further asked on what basis they were shortlisted given that the Evaluation Report was not complete. Mr. Heron advised that "***…they were screened, meaning we looked at the proposal that was sent...They had the ingredients there***. *For example, they had a fuel supply, they had a fuel supplier, they had a fuel source, they named their capital cost, they named the details that we were looking for that were absent in others.*" (OCG's Emphasis)

7.8.11 **He was further asked if any other company was given the privilege in terms of going ahead with any process while awaiting the completion of a formal evaluation. In response he stated that "*It is a matter of not delaying the process. It is a matter of finalizing the process in the best way we can.*" Mr. Heron did not answer the question and was not pressed for a response, given that the facts were abundantly clear.** (OCG's Emphasis)

7.8.12 Mr. Charvis, during Judicial Proceedings on July 29, 2013, was asked whether the OUR had gone ahead with the process to shortlist EWI without completing the evaluation. In response, Mr. Charvis stated that "*...I was travelling last week, but **my understanding is that the OUR did a prima facie assessment of this proposal and that preliminary assessment**, and the fact is that if we were to wait until we would have assessed Mott, we would have to put off the other three until the assessment of the Hong Kong group as you say, would have be* [sic] *completed before we could proceed on the other four because we wanted one cut off date and want to give everybody the same amount of time to get to that cut of* [sic] *date and the view was taken that in the end, any preliminary, **it would do no harm to include them in the process although a full assessment had not taken place because in any event at the end of twenty-one days that work that Mott is doing in assessing the thing would feed into that end of the twenty-one days assessment and so the decision was taken to invite them to be a part of the group that we are going forward with.***" (OCG's Emphasis)

7.9 Office of Utilities Regulations Independence

7.9.1 The Honourable Minister Phillip Paulwell, during his Budget Debate Presentation entitled "*Fuelling Our Own Growth*" on April 24, 2013, advised Parliament, *inter alia*, "*Subsequent to the OUR receiving and assessing those* [referring to the proposal worth pursuing – Armorview/Tankweld, JPS and Azurest/Cambridge] *proposals,* ***the Government has since received another unsolicited proposal from a Hong Kong company****, proposing to build a LNG receiving terminal, power plant and to supply LNG from its own gas fields. The company has proposed a combined cycle gas-fired 360 MW power plant adjacent to the LNG hub terminal.*

Based on the fact that this company owns its LNG and the attractive price quoted, ***Cabinet has taken a decision that this proposal should also be considered along with the three, and it will be referred to the OUR for assessment.***" (OCG's Emphasis)

7.9.2 During Judicial Proceedings on July 29, 2013, Mr. Charvis was asked to confirm or deny that the Bid from EWI was received by the OUR through Cabinet. Mr. Charvis responded stating, "*I can confirm. Well two things, the indication that there was a proposal came through the Cabinet and* ***the directive to consider the proposal came through Cabinet.*** *The details of the proposal came straight to the OUR.*" (OCG's Emphasis)

7.9.3. Mr. Charvis was asked to clarify the word '*directive*', and he stated that "***I think it is more in terms of a request from Cabinet to consider the proposal.***" He was asked what his reaction to Cabinet's request was, and he advised "*To seek the guidance of the National Contracts Commission*" (OCG's Emphasis)

7.9.4 However, interestingly and quite contradictorily, in support of the foregoing, by way of letter which was dated April 23, 2013, signed by Mr. Charvis, with the subject "*Unsolicited Bids for the Supply of Base Generating Capacity on a Build, Own and*

Operate (BOO) Basis", and addressed to Mr. Raymond McIntyre, Chairman of the National Contracts Commission, Mr. Charvis advised the Chairman, *inter alia*, "*In the interest of transparency, we should also advise that at the time of the presentation of our preliminary findings to the Cabinet,* ***the Office was given verbal notice that it will be directed to review another proposal that has been presented to the Government*** *for consideration*". (OCG's Emphasis)

7.9.5 The referenced letter went further stating that "*…We may therefore need to revert to your good office for further guidance* ***in the event that we receive such a directive.***" (OCG' Emphasis)

7.9.6 Further, by way of letter which was dated May 7, 2013, to the Chairman of the NCC, signed by Mr. Charvis, with the subject "*Unsolicited Bids for the Supply of Base Generating Capacity on a Build, Own and Operate Basis*", sub-captioned "*The circumstances and documentation regarding the review of another proposal that has been presented to the Government for consideration*", he stated, *inter alia*, "*Except as stated in our letter of 24 May, 2013, we are unable to provide any further information as to the circumstances regarding the request for the review of the additional proposal.* ***We have, however, provided for the attention of the NCC, a letter from the Cabinet Secretary dated 26 April, 2013, confirming the instruction to the OUR,*** *together with a letter from Stewart Elliott of Energy World International, dated 21 April, 2013.*" (OCG's Emphasis)

7.9.7 It is also of particular interest to note that by way of response to a question which was posed to the Honourable Minister Paulwell, in an OCG requisition dated May 31, 2013, regarding the receipt of a proposal from EWI, the Minister responded as follows, "***The Cabinet took a decision that an assessment of EWI's proposal should be done by the OUR. That decision was communicated to the OUR by the Cabinet Office.***" (OCG's Emphasis)

7.9.8 During Judicial Proceedings on July 28, 2013, Mr. Heron was asked if he was of "*...the view that a Minister of Government, the Cabinet or the Government as a whole can direct the Office as it concerns ...operational matters?*" in response, he stated that "***They cannot***" and that "***…The OUR reports to Parliament…administratively through the Cabinet Office.***" However, he also asserted that "*I am not of the view that we have been directed.*" (OCG's Emphasis)

7.9.9 Mr. Heron was directed to a letter which was dated April 23, 2013, written to the Chair of the National Contracts Commission and signed by the OUR's Director General, Mr. Maurice Charvis, which stated, *inter alia*, "*In the interest of transparency, we should also advise that at the time of the presentation of our preliminary findings to the Cabinet,* ***the Office was given verbal notice that it will be directed to review another proposal that has been presented to the Government*** *for consideration*", and was asked whether, in his opinion, same constitutes a directive from the Cabinet. (OCG's Emphasis)

7.9.10 In response, Mr. Heron advised "***It depends on how high an order you put on a verbal notice if you see it as a directive. It is a verbal notice that we have seen another proposal that we think we should look at and we said when you send it we will have a look at it or we will seek guidance as to how we do look at it which is what we did.***" (OCG's Emphasis)

7.9.11 Mr. Heron further advised that "*If I did not come across enough, having seen the expressions out of Cabinet, the verbal discussions in Cabinet,* ***we weren't there in Cabinet, we were concerned, like you are now concerned, and we thought that we would consult with the National Contracts Commission to see, being the independent regulator that we are, Cabinet is what it is, we report to Parliament, how do we proceed***." (OCG's Emphasis)

8.0 Current Status Update of the Project

8.1 By way of a letter which was dated July 25, 2013, addressed to the Chairman of the NCC, and signed by the Deputy Director General, which was e-mailed to the CG on even date, the OUR stated the following as it concerns the "*Proposals for new generating capacity*", "*I am writing to inform you that the Office of Utilities Regulation, in response to requests from entities that were selected to submit offers to provide additional generating capacity to the national grid, and after consultations with a number of stakeholders, has decided that it is prudent to extend the deadline for the submission of offers, and to remove the need for a Proposal Security to be submitted with the bid.*

Accordingly, the OUR has issued a third Addendum to the Instructions for Final Proposals. The Proposal Security will now be required fifteen days after notification of the preferred bidder, and ***the new date for the submission of final proposals is Thursday, 8 August, 2013, at 3.00 pm****. The proposals will be opened on the same day at 3:15 pm.*

The OUR now expects to complete its evaluation of the proposals by 9 September, 2013, and to finalise negotiation of the project agreements by 2 December, 2013. Construction of the plant is expected to begin by 30 January, 2013, and the anticipated commissioning date remains January, 2016." (OCG's Emphasis)

8.2 The OCG noted certain public pronouncements, attributed to the President and CEO of Jamaica Public Service, in particular assertions which were made in a Jamaica Observer article, dated August 9, 2013, which asserted that "*While JPS is not submitting an independent bid, we are pleased to partner with other bidders to ensure that new power generation is added to the grid. We also plan to work with our partners to continue to bring much needed fuel diversity to Jamaica.*"

8.3 Having regard to the pronouncements which were made, the CG, by letter dated August 9, 2013, to the Director General of the OUR, requested that he provides "*...the OCG with a listing of the names, titles, nationalities and contact particulars of all Beneficial Shareholders and Directors of all Entities which submitted proposals in response to the OUR's request, and for each Beneficial Shareholder and Director, please detail the respective share allocation.*"

On August 12, 2013, the OUR provided the OCG with the required response, and the CG will treat with the information in the appropriate and applicable manner.

8.4 The OUR, by way of letter which was dated August 12, 2013, formally advised the CG that consequent upon the close of bids on August 8, 2013 at 3:00 p.m., that it had received five (5) proposals from four (4) entities for the supply of base-load generating capacity to the national grid, and that the opening of the proposals took place at the OUR on August 8, 2013 at 3:15 p.m.

The OUR also advised that it expected to complete the evaluation of proposals by September 9, 2013 and finalise negotiation of the related project agreements by December 2, 2103. Further, construction of the plant is expected to begin January 30, 2013 and the anticipated commissioning of the plant will be in January 2016.

8.5 On August 23, 2013, the CG had need to pen the following letter to the OUR:

> "*Reference is further made to a Gleaner article dated August 16, 2013, entitled "Azurest talks up bid for 360-megawatt plant", in which it was reported that Azurest Cambridge Power LLC had hosted a media briefing at the Terra Nova Hotel on August 15, 2013.*
>
> *The OCG notes that the company had made certain public pronouncements regarding, inter alia, details of its proposal which was submitted to the Office of Utilities Regulation (OUR) on August 8, 2013.*

Reference is further made to a Judicial Proceeding held on May 28, 2013, at the OCG, in which you, responding to a question from the OCG relating to public pronouncements/advertisements which had been made by a Company affiliated with a respondent, indicated that if any person directly involved in the process were to make public statements, "…they would be subject to almost disqualification because they would be tampering with the whole process".

Based upon the foregoing, please indicate whether or not the public pronouncements being made by Azurest Cambridge Power LLC may be considered tampering with the process.

Further, please provide the OCG with an indication of how the OUR will/has responded, along with supporting documentation, to the public pronouncements being made by the Bidder.

Please submit the foregoing information to this Office by ***September 6, 2013.***"

8.6 The CG has since received a response from the OUR, dated September 6, 2013, of which the relevant section of said response is detailed hereunder:

"Generally, the Office of Utilities Regulation (OUR) has taken note that the proposers had granted several media interviews regarding the contents of their bids and had made statements relating to the value of their bid offers against that of other bidders. It is further noted that the referenced media briefing hosted by Azurest came late in the day, that is, after the other media interviews by the other bidders.

We have examined the contents of the Gleaner article, as well as another article which was published in the Observer of August 21, 2013. We are of the opinion

that the alleged statements in the articles could not be considered as tampering with the process. In any event, we would consider them to be more material were they made prior to the submission of offers. In this regard, we are constrained to point out that the OUR is not aware of any provision in the existing laws and rules governing procurement that prevents a bidder after submitting a proposal from making public comments. We would however welcome any guidance your Office might be able to offer in this regard.

The OCG should note that as a precautionary measure, and taking into consideration the OCG's queries, the OUR has advised all the bidders that it would appreciate if so long as it is in the process of evaluation of the proposals, they would refrain from making public statements about the content, status and relative attractiveness of the bids."