

# **OFFICE OF THE CONTRACTOR-GENERAL**

## **Report of Investigation**

### **Conducted into the Universal Access Fund Company Limited**

### **Into the Allegation of a Possible Conflict of Interest Regarding a Board Member**

### **Ministry of Mining and Telecommunications (MMT) -Formerly Ministry of**

### **Industry, Telecommunications, Energy and Commerce (MITEC)**

## **EXECUTIVE SUMMARY**

On 2007 January 5, the Office of the Contractor-General (OCG) commenced the investigation into the procurement of legal services by the Universal Access Fund Limited (UAF) and the possibility of a conflict of interest by Board Director, Ms. Minett Palmer.

The Universal Access Fund Company Limited (UAF), a Limited Liability Company, was incorporated on 2005 May 18 in accordance with the Telecommunications Act of 2000, and started operations on 2005 June 1. UAF is a subsidiary of Spectrum Management Authority (SMA), a telecommunications regulator, which collects a levy on incoming international calls to Jamaica.

The revenue to be earned from the charges, projected at JA\$1 Billion, will go towards financing the implementation of the national e-learning project, which is designed to enhance the education process through the use of Information Technology.

Under Sections 38 and 39 of the Telecommunications Act (2000), provision is made for the imposition of a universal service charge to a maximum of five per cent (5%) of

revenues, for the establishment of a fund to provide subsidized access to the telecommunication services. This is under an agreed universal service programme which is geared toward the achievement of defined national developmental objectives.

It was found that the UAF's procurement of the legal services of Ms. Palmer/Palmer & Walters was not done in conformity with the requirements of the Government Procurement Procedures and Guidelines. The following breaches were noted:

- Awarding of a contract to a Director of the Board without competitive tender;
- Utilization of the Sole Source procurement methodology without prior approval from the NCC;
- Payment for services without the existence of a contract.

Additionally, the engagement of legal services by the UAF was substantially based upon the need to provide responses to the U.S. Federal Communication Commission's (FCC's) Notice of Inquiry. The UAF needed to act quickly based on the limited response time.

If such responses had not been forwarded to the FCC, it could have caused serious repercussions for Jamaica and compromised certain objectives of the UAF. The UAF required the necessary expertise to respond immediately to the Notice of Enquiry.

The decision was therefore taken by the Board, to engage Ms. Palmer/Palmer & Walters, based upon their intimate alleged knowledge of the Telecommunications Act, and the fact that they were the authors of the Telecommunications Policy.

Notwithstanding the peculiar demands of the situation, it must be noted that the procurement of Ms. Palmer/Palmer & Walters, via the Sole Source method, was in contravention of Section 2.1.3.4 of the GPPH.

The records indicate that Ms. Palmer was not present at the Board Meeting of 2005 August 16, when the Board decided to engage the services of her firm to prepare the responses to the FCC.

Based upon the aforementioned, it is concluded that the services of Ms. Palmer/Palmer & Walters were engaged irregularly. However, the engagement of these services was based upon a situational need and was not as an act of impropriety.

It is also concluded that there is, *prima facie*, a conflict of interest with the role of Ms. Palmer (of Palmer & Walters) as a Director of UAF and Ms. Palmer as a Contractor providing legal services to UAF.

It is the OCG's view that the UAF Board and its then Chairman, Mr. Colin Campbell, were full participants in the decision to award the contract to Ms. Minett Palmer on an uncompetitive basis and in violation of the GPPH.

This decision was taken in violation of the Government Procurement Procedures, and as such they did not act with due care in the performance of their duties.

Perusal of the UAF Board Minutes reveal that the Board was the authority that initiated and approved the procurement of the legal services of Palmer & Walters, even as they sought clarification on the relevant laws that governed the engagement of Ms. Palmer (Palmer & Walters Ltd).

In light of the foregoing, and having regard to the Findings and Conclusions detailed in this report, the OCG has made the following Recommendations:

1. It is incumbent on the Ministry of Energy, Mining and Telecommunications (MEMT - formerly MITEC) to ensure that UAF personnel, who are involved in the procurement of goods, works and services, abide by the principles and

- requirements of the Government Procurement Procedures and Guidelines. Efforts should be made to ensure that there is full compliance with the Contractor General Act and the GPPH and any other relevant Government circular;
2. MEMT should take immediate steps, to ensure that directives are addressed to UAF with a view to mitigate instances of conflicts of interest with regards to the Board of Directors and Management;
  3. The Cabinet should move to immediately develop and implement a comprehensive and overriding policy, that is applicable to all Public Body Boards, to govern, restrict or prohibit, as the case may be, the award of Government contracts (or the divestment of publicly-owned assets), by a Public Body, to members of their respective Board of Directors, or to any entity in which a Board member or a close family relative may have a pecuniary interest;
  4. Finally, we would recommend that the Permanent Secretary take a more proactive and aggressive role in developing, implementing and enforcing effective risk management systems, checks and balances and other appropriate management systems at the UAF, in an effort to mitigate against any possibility of deviations from the GPPH by the institution's management and board.

## **INTRODUCTION**

On 2006 December 1, the then Leader of the Opposition, Mr. Bruce Golding, made representations to the Contractor General via a telephone conversation, in which he adverted to the possibility of a conflict of interest involving Ms. Minett Palmer, a Board Director at the UAF, who had also provided legal services to the UAF at a cost of JA\$25 Million.<sup>1</sup>

The OCG, under the instructions of the Contractor General, commenced an investigation into the UAF on 2007 January 5, pursuant to Section 15 (1) and 16 of the Contractor General Act regarding the possibility of a conflict of interest in relation to one of its Board Directors, Ms. Minett Palmer.

## **TERMS OF REFERENCE**

The following objectives led the focus of the investigation:

1. To determine whether there was any irregularity and/or impropriety in the award of contracts to Ms. Minett Palmer in respect of the Universal Access Fund.
2. To determine whether the award of contracts to Ms. Minett Palmer was in keeping with the Government Procurement Procedures Handbook.

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<sup>1</sup> Internal OCG File Note dated, Friday December 1, 2006 from Greg Christie

## **BACKGROUND**

On Friday, 2006 December 1, Mr. Bruce Golding, then Leader of the Opposition, made an enquiry to the Contractor General regarding the procurement of legal services and whether such procurement was subject to the requirements of the Government Procurement Procedures Handbook<sup>2</sup>.

Mr. Golding was advised in the affirmative and subsequently stated that there was a possibility of a conflict of interest at the UAF, in that Ms. Minett Palmer, a Director on the UAF Board, had provided legal services for UAF and had been paid approximately JA\$25 Million.

Mr. Golding also alleged that the billings for these services showed one-line bill items. In addition, it was also alleged by Mr. Golding that Ms. Palmer was a close friend of, and advisor to, Minister Phillip Paulwell and was also a close friend of the former Minister of Information and UAF Chairman, Mr. Colin Campbell.

Further, Mr. Golding alleged that the UAF Chairman, Dr. Herbert Thompson, had discovered an outstanding bill for legal services rendered by Ms. Palmer in the amount of US\$75,000.00. He advanced that the referenced payment had been put on hold by the Chairman, pending the Board's deliberation.

Pursuant to Section 15 (1) and 16 of the Contractor General Act, a formal investigation was initiated on 2007 January 5, to ascertain the veracity of the allegation of a possible conflict of interest regarding UAF Board Director, Ms. Minett Palmer.

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<sup>2</sup> Internal OCG File Note dated, Friday December 1, 2006 from Greg Christie

## **METHODOLOGY**

The following methodology informed the Findings, Conclusions and Recommendations of the investigation:

- Review of the signed contract between Ms. Minett Palmer and the Ministry of Industry, Commerce, Science and Technology, relating to pre-incorporation activities to establish the UAF;
- Review of the invoices relating to the payment of JA\$23 Million and the unpaid invoice for US\$74,250 to Board Member, Ms. Minett Palmer, as well as a copy of UAF's letter terminating Ms. Minett Palmer's legal services;
- Review of the documents relating to the Responses by UAF to the Auditor General's queries;
- Review of the Minutes of Board Meetings since the inception of the UAF;
- Interviews with Mr. Hugh Cross and Dr. Herbert Thompson, the Managing Director and the Chairman, respectively, of the UAF;
- Formal requisitioning of information from Mr. Colin Campbell in accordance with Section 18 of the Contractor General Act and the Voluntary Declarations Act;
- Sworn Form of Declaration, dated 2007 July 19, from Ms. Minett Palmer.

## **FINDINGS**

Ms. Minett Palmer was originally contracted by the Ministry of Commerce, Science and Technology as a Specialist Legal Advisor to the Minister, in the areas of telecommunications and related matters, for a period of twelve (12) months. The period commenced on 2005 September 1 and expired on 2006 August 31. This contract was a renewal of a previous agreement which had expired on 2005 August 31.

The Scope of Works under the agreement was as follows:

### “2.1 Routine /On-going Legal Services

- (a) Provide legal advice to the Minister in the dealings especially with telecommunications and energy matters.
- (b) Participate in meetings dealing especially with telecommunications and energy companies at the request of the Minister and provide advice on miscellaneous matters from time to time.
- (c) Review correspondence particularly from telecommunications and energy companies and other documents and prepare briefing notes on relevant issues for the Minister in preparation for meetings on the various issues;
- (d) Meet with the Minister at his request and brief him on relevant issues;
- (e) At the request of the Minister, prepare responses to firms, media, Cabinet and other stakeholders on telecommunications and energy issues requiring such responses; and
- (f) Attend to any matter, which the Minister requires to be addressed by the Legal Advisor.”

A review of the 2005 September contract agreement revealed that there was no specific rate (hourly or daily) for the particular services provided. The one exception was for a retainer fee of JA\$75,000.00, per month, for an average of approximately 15 hours per month of services rendered.<sup>3</sup>

The procurement of the services of Ms. Minett Palmer (of Palmer & Walters) as legal advisor to the UAF, in the first instance, for the pre-incorporation activities to establish the Universal Access Fund, was not done via a competitive process. A review of the manner in which the services of Ms. Minett Palmer was procured yields the view that it is akin to the use of the Sole Source Procurement Methodology.

According to Section 2.1.3.4 of the Government Procurement Procedures Handbook (GPPH), it is required, *inter alia*, that “All Sole Source or Direct Contracting greater than \$1M must receive prior written approval from the NCC through the Accounting Officer.”<sup>4</sup>

According to the UAF records, the first invoice, dated 2005 June 20, that was paid to Ms. Palmer amounted to JA\$1,962,500.00<sup>5</sup> which, at a minimum, would constitute a breach of the referenced section of the GPPH.

Additionally, the records revealed that prior to the second contract period of 2005 September to 2006 August, Ms. Palmer was appointed to the Board of Directors of UAF in early 2005 by the former Minister, Mr. Phillip Paulwell.

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<sup>3</sup> Copy of signed Contract between Ms. Minett Palmer and the Ministry of Commerce, Science and Technology provided by Mr. Hugh Cross, Managing Director , UAF in a letter dated 2007 January 8 addressed to Mr. Percival Griffiths, Former Director of Licences and Permits, OCG

<sup>4</sup> Section 2.1.3.4 of the Government Procurement Handbook

<sup>5</sup> Copy of invoice from Palmer & Walters, Attorneys-at-Law to The Ministry of Commerce Science & Technology, dated June 20, 2005

The OCG found no evidence of a formal contractual agreement between Ms. Palmer and the UAF for legal services, and, as such, it is not clear whether the arrangement to provide these services to the UAF was based upon the previous contract with the Ministry.

However, in the Minutes of 2006 September 27, Dr. Jean Dixon, the Permanent Secretary in the then Ministry of Industry, Technology, Energy and Commerce (MITEC), indicated that, “as a Director she was aware that work was undertaken in relation to establishing the UAF, but it could not have been assumed that this work would have been paid for by the Ministry from monies received from the Consolidated Fund as the Ministry had no such resources.”

Payments totaling US\$328,875.00 were also made to Palmer & Walters, on the submission of seven (7) other invoices for the period September 2005 to June 2006, as per the table below:

	<b>Invoice Date</b>	<b>Invoice Amount (USD)</b>
1.	2005 June 20	\$41,750.00
2.	2005 October 20	\$43,025.00
3.	2005 November 30	\$33,750.00
4.	2005 December 14	\$68,000.00
5.	2006 February 13	\$22,000.00
6.	2006 March 14	\$75,000.00
7.	2006 June 1	\$45,350.00
	<b>Total</b>	<b><u>\$328,875.00</u></b>

Table 1: Listing of submitted invoices.

The invoices that were submitted by Palmer & Walters for the period 2005 June 20 – 2006 June 1, included work carried out in relation to the FCC’s Notice of Inquiry. The signature of approval on six (6) of these invoices is apparently that of the former Chairman of the UAF, Mr. Colin Campbell.

The invoice which was dated 2005 December 14, in the amount of US\$68,000.00,<sup>6</sup> had no approval signature, while the other invoice which was dated 2006 June 1, in the amount of US\$45,350.00<sup>7</sup>, was approved on 2006 June 2, by Mr. Hugh Cross, Managing Director, UAF for payment.

The invoice which was dated 2006 October 2, in the amount of US\$74,250.00<sup>8</sup>, was paid by the UAF, after clarification which was sought by the Board was obtained from the Solicitor General. Palmer & Walters’ services, as legal advisor to the UAF, were terminated via a letter dated 2006 October 20.<sup>9</sup>

### **Responses to Queries Raised by the Auditor General**

According to the Minutes of the Board Meeting, dated 2006 September 27, the Auditor-General’s Office had advised that, “they had not seen any evidence of a contract, and were concerned about the quality of the invoices which were not sufficiently detailed. The former Chairman approved all invoices during his tenure.”

The MITEC/UAF “RESPONSES TO QUERIES RAISED BY THE AUDITOR GENERAL REGARDING UNIVERSAL ACCESS FUND LTD” dated 2006 November

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<sup>6</sup> Copy of invoice from Palmer & Walters, Attorney-at-Law to Mr. Colin Campbell, UAF Ltd dated December 14, 2005.

<sup>7</sup> Copy of invoice from Palmer & Walters, Attorney-at-Law to Mr. Hugh Cross, UAF Ltd dated June 1, 2006.

<sup>8</sup> Copy of invoice from Palmer & Walters, Attorney-at-Law to Mr. Hugh Cross, UAF Ltd dated October 2, 2006.

<sup>9</sup> Letter dated 2006 October 20 from Mr. Hugh Cross, Managing Director, UAF addressed to Ms. Minett Palmer, Attorney-at-Law

13, acknowledged that “the UAF ought to have sought permission for procuring the services and should have prepared a contract with agreed terms and conditions.”

The Report further indicated that, “the Board recognized the potential of conflict of interest, not only as this relates to Ms. Palmer, but also to the involvement of representatives of carriers on the Board”. Among the decisions in the “RESPONSES TO QUERIES RAISED BY THE AUDITOR GENERAL”, was that the Chairman, on the instruction of the Board, was to meet with Ms. Palmer to:

- Outline concerns pertaining to the absence of a written contract;
- Request more and better particulars in respect of the work performed in relation to the invoices, and
- Advise that, going forward, legal services will be procured through a competitive process.

### **Minutes of Board Meetings**

The Minutes of the Board Meeting of 21 June 2005 indicated that the UAF Board agreed that, “Effective 2005 June 1, the Board will decide on how to treat with legal services.

With respect to the provision of services to the UAF by Directors, in particular legal services, it was agreed to obtain advice as to what obtains within similar government Boards and to advise the Board.”

The records of the Minutes indicated that Ms. Palmer, who was present at the meeting, excused herself prior to the commencement of discussions on the matter of the procurement of legal services by UAF.

The Minutes of the Board Meeting of 2005 August 16, indicated that Palmer & Walters was to be engaged to provide legal services to the UAF, although the Board had agreed in

the meeting of 2005 June 21 to seek clarification on services and, in particular, legal services, to be provided to the UAF by its Directors.

The OCG has seen no evidence to suggest that such clarification was sought and/or was given. Ms. Palmer was not present at this particular Board meeting.

The records of the Minutes of 2005 August 16 reflect that in respect of drafting a response to the FCC, “The Chairman is to ask the legal firm Palmer & Walters, to prepare an appropriate response. This would be discussed and finalized with other stakeholders in government and the Private Sector. A fee would be incurred for same. Ms. Cameron said that the person preparing the response should be experienced and have historical information in formulating responses as it relates to FCC issues. Director Mitchell recommended that the services of a US Based Attorney be retained. The Chairman expressed reservation with regard to incurring US legal fees. Director Dixon asked that Palmer & Walters draft response with the assistance of external counsel... The Chairman stated that a response would be drafted within 30 days.”

Accordingly, based upon the records which were reviewed by the OCG, Palmer & Walters was engaged, primarily, to provide a response to the FCC’s Notice of Inquiry regarding the allegations that Jamaican carriers used circuit disruptions to force U.S. carriers into the settlement of rate increases.

The United States Federal Communication Commission (FCC) Notice of Inquiry was released on 2005 August 15 and comments were to have been sent by Jamaica within 30 days.

The Notice of Inquiry sought comments on ways to improve the process available to the FCC to protect U.S. consumers from the effects of anti-competitive or “whipsawing”<sup>10</sup> conduct by Jamaican Carriers.

The settlement rate increases by the Jamaican carriers on the U.S. carriers, was brought about by the imposition of a levy by the then Ministry of Commerce, Science and Technology, in accordance with the Telecommunications Act 2000.

If it was found that “whipsawing” had occurred, the FCC could have taken the following actions: direct the U.S. carriers to (1) renegotiate, (2) withhold payments to Jamaican carriers, or (3) restrict U.S. carriers from paying a specific rate. The Commission could also reinstate the requirements of the International Settlement Policy (ISP) on a route from which it had been lifted.

Additionally, in the event that the FCC determined that significant and immediate harm to the public interest was likely to occur, which could not be addressed through the aforementioned remedies, the FCC could impose temporary requirements on the Jamaican carriers.<sup>11</sup>

The Minutes of the Board Meeting of 2006 September 27 indicated that the Board, under the chairmanship of Dr. Herbert Thompson, “was unsure at what stage the demarcation could be made regarding the establishment of the company and other services performed thereafter. They needed to ascertain the quantity of work Director Palmer performed outside of the pre-incorporation of the UAF and the Response to the Federal Communications Commission Notice of Inquiry (FCC NOI), and whether it was always within the contemplation that she would continue her services to the UAF under the Ministry Contract. There was uncertainty as to the stage at which the arrangement would

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<sup>10</sup> Refers to a broad range of anticompetitive behaviours by foreign carriers that possess market power, in which the foreign carrier or a group of foreign carriers exploit that market power in negotiating settlement rates with competitive U.S. telecommunications carriers.

<sup>11</sup> United States Federal Communication Commission Notice of Inquiry dated 2005 August 15

be concluded as the Board was not aware of the extent to which any agreement was previously documented.”

Additionally, the Minutes of the said meeting indicated that Cable & Wireless Jamaica and Digicel had objected to Ms. Palmer acting as the Attorney for the Fund prior to and after the establishment of the Board. Objections were previously recorded in the Minutes dated 2005 June 21, and 2005 July 19.

The Minutes also recorded that concerns had existed about a conflict of interest regarding Ms. Palmer’s role as industry versus Government representative. An objection was also raised by one of the Directors of the UAF Board, with supporting documentation to the Permanent Secretary, regarding Ms. Palmer’s appointment as Attorney for UAF, as well as Chairperson of the Carrier Relations & Compliance Sub-Committee.

The UAF Board also raised concerns about the expansion of Ms. Palmer’s role, the assumed continuity of the arrangement and the quantum of fees paid.

The records indicated that “the Directors were not disputing the fact that legal work was carried out nor that monies was earned, but rather that the work was performed without the cover of a contract and without Directors having the opportunity to approve her engagement in providing the relevant service.”<sup>12</sup>

The Board, at the same meeting of 2006 September 27, enquired into the value of the work done during the incorporation period of the UAF, and was informed that Spectrum Management Authority had paid JA\$1.9 million to Ms Palmer before the UAF had the ability to pay.

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<sup>12</sup> Minutes of Board Meeting dated 2006 September 27. Item # 5.2.6

It was revealed that most of the work for the balance of monies paid to Ms. Palmer related to services which were provided in respect of issues arising from the FCC and the Request for Proposal for Nationwide Broadband Area Network LAN/WAN Service.

The Board requested that Ms. Palmer give a more comprehensive description of her work, by revising previously submitted invoices, incorporating clearly what was done, indicating the date when it was completed, how much time was expended and the applicable rates.

The Minutes further stated that the Board decided that the Chairman, Dr. Herbert Thompson, would meet with Director Palmer pertaining to (1) the contract, (2) request for detailed invoices, (3) conflict of interest, (4) the treatment of outstanding work and (5) the requirement for legal services to be put to competitive tender.

The Board further contemplated the use of the Sole Source procurement methodology to engage the services of Ms. Palmer in matters relating to the FCC's Notice of Enquiry, based upon the history of her involvement and knowledge of the issues. However, it was decided that Ms. Palmer would not be engaged for any other general legal work in the future.

The records revealed that Ms. Palmer subsequently submitted the updated invoices as was requested.

## **Interviews**

### ***Hugh Cross – Managing Director***

During the course of an interview with Mr. Hugh Cross, Managing Director of UAF, on Tuesday, 2007 June 5, he stated that Mr. Colin Campbell had been the Chairman, and also acted as Chief Executive Officer of the UAF from its inception until 2006 April 10.

Mr. Cross further stated that there was no written contract in place between Ms. Palmer and the UAF. He added that he had written a letter addressed to Ms. Palmer, formally indicating the termination of the existing commercial arrangement. This action corroborated the decision which was taken by the UAF to terminate the services of Ms. Palmer<sup>13</sup>, by way of letter dated 2006 October 20, which had been referenced earlier as having been provided to the OCG.

With respect to the issue of the claim for payment regarding legal services, submitted by Ms. Palmer, in the amount of US\$74,250.00, Mr. Cross stated that due to the concerns which were raised by the Auditor General and the Contractor General, the invoice was not initially paid.

Mr. Cross also stated that since the termination of Ms. Palmer's service in 2006 October, the Solicitor General's Department has been providing legal services to the UAF.

***Dr Herbert Thompson – Chairman***

The forthcoming responses of Dr. Herbert Thompson, Chairman of UAF, in an interview at the OCG on 2007 June 13, corroborated the responses that were provided by Mr. Hugh Cross, in respect of the withholding of payment to Ms. Palmer for the invoice in the amount of US\$74,250.00.

***Minett Palmer – Board Director***

By letter dated 2007 May 21, Ms. Minett Palmer was formally requisitioned by the OCG to attend an interview on 2007 May 29.<sup>14</sup>

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<sup>13</sup> Letter dated 2006 October 20 from Mr. Hugh Cross, Managing Director, UAF addressed to Ms. Minett Palmer.

<sup>14</sup> Letter dated 2007 May 21 from the OC-G to Ms. Minett Palmer

Subsequently, Mr. Gordon Robinson, Legal Counsel for Ms. Palmer, wrote to the OCG, by way of letter dated 2007 May 22, in response to the OCG's interview requisition, indicating that Ms. Palmer was unable to attend as she was at home recovering from surgery and also enquiring about the nature of the interview.<sup>15</sup>

The OCG, by way of letter dated 2007 May 24, responded to Mr. Robinson advising, *inter alia*, that Ms. Palmer could attend the interview with her legal counsel, if she so desired.<sup>16</sup>

By way of letter dated 2007 July 11, the OCG wrote to Ms. Palmer's Legal Counsel, Mr. Gordon Robinson, enquiring whether Ms. Palmer was capable to attend an interview on 2007 July 24. This response was to have been forwarded to the OCG by 2007 July 17.<sup>17</sup>

Mr. Robinson responded to the OCG by way of letter dated 2007 July 20, stating that Ms. Palmer was still unable to attend an interview. He also forwarded an affidavit, sworn to by Ms. Palmer, in which the following was stated:

1. *"During my tenure as a member of the Board of Directors of the Universal Access Fund Company Limited, I was not involved in any way in the award of any contract to me and/or the Firm of Palmer and Walters."*
  
2. *"I did not attend any meetings of the Board or of the sub-committee of the Board on any matter concerning such a contract, nor did I take part in any selection or other tender procedure relative to any award or implementation of any such contract."*<sup>18</sup>

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<sup>15</sup> Letter dated 2007 May 22 from Gordon Robinson, Attorney-at-Law to the OC-G

<sup>16</sup> Letter dated 2007 May 24 from the OC-G to Gordon Robinson, Attorney-at-Law

<sup>17</sup> Letter dated 2007 July 11 from the OC-G to Gordon Robinson Attorney-at-Law

<sup>18</sup> Letter dated 2007 July 20 from Gordon Robinson, Attorney-at-Law to the OCG

The OCG, by way of letter dated 2007 July 24, wrote to Mr. Robinson, reiterating the authority with which the OCG was empowered to requisition Ms. Palmer to an interview, and deferred any further action until such time when Ms. Palmer was fully recovered.<sup>19</sup>

Mr. Colin Campbell, the former Chairman of the UAF, by way of a letter dated 2007 December 6, was formally requisitioned by the OCG pursuant to the Contractor General Act, to supply information and documentation in relation to the investigation.

Mr. Campbell, by way of letter dated 2007 December 21, in response to the OCG's requisition, indicated that:

- Advice in relation to the provision of legal services by any Board of Directors to the UAF was sought from the Solicitor General. This advice was subsequently acted upon by the Board. However, the use of Ms. Palmer as Legal Counsel to the UAF, was specific to an ongoing Federal Communication Commission (FCC) Notice of Inquiry (NOI) in relation to the levy that was imposed by Jamaica on rates for the termination of calls to Jamaica.
- The procurement of legal services was not done on a competitive basis, as Ms. Palmer/Palmer & Walters were considered the best available and most knowledgeable Legal Counsel, having worked on the levy for about three (3) years.
- There was no formal contract in place. However, the terms of the engagement of Ms. Palmer were contained in the minutes of the Board Meeting. In relation to payments, Ms. Palmer was told to charge for the hours spent on the job as well as for any US attorney who would have been consulted. He further stated that having checked with the legal fraternity, he ascertained that the use of the convention 'hours worked' was a normal way to charge for such services.

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<sup>19</sup> Letter dated 2007 July 24 from the OC-G to Gordon Robinson, Attorney-at-Law

- All payments were authorized by him (Mr. Campbell), in his capacity as Chairman.
- Ms. Palmer was never present at the meeting which dealt with the engagement of the firm Palmer & Walters to provide legal services.
- The rate at which Ms. Palmer/Palmer & Walters was paid was below market rate. He emphasized that companies such as Digicel and Cable & Wireless paid higher rates for legal representation in relation to matters with the FCC. In addition, the invoices submitted by Ms. Palmer, in relation to the US Government, UAF defence and the structuring of the Fund, were in keeping with the scope of works.

## CONCLUSIONS

The Conclusion are based on the files reviewed, interviews conducted and the Findings unearthed. The UAF's procurement of the legal services of Palmer/Palmer & Walters was not done in conformity with the requirements of the Government Procurement Procedures and Guidelines. The following breaches were noted:

- Awarding of a contract to a Director of the Board without competitive tender;
- Utilization of the Sole Source procurement methodology without prior approval from the NCC;
- Payment for services without the existence of a written contract.

The engagement of legal services by the UAF, was substantially based upon the need to provide responses to the U.S. Federal Communication Commission's (FCC's) Notice of Inquiry.

The FCC's Notice of Inquiry was released on 2005 August 15 and comments were to be forwarded within 30 days of the release. The UAF needed to act quickly based on the limited response time.

If such responses had not been forwarded to the FCC, it could have caused serious repercussions for Jamaica and compromised certain objectives of the UAF. The UAF required the necessary expertise to respond immediately to the Notice of Enquiry.

The decision was therefore taken by the Board, to engage Ms. Palmer/Palmer & Walters, based upon their alleged intimate knowledge of the Telecommunications Act, and the fact that they were the authors of the Telecommunications Policy.

The engagement of Ms. Palmer (of Palmer & Walters), appears to have been carried out in a manner similar to that of the Sole Source method described in the GPPH. However, based on the accumulated total value of the seven (7) invoices, in the amount of US\$328,875.00 which was paid to Ms. Palmer over a one (1) year period (2005 June 20 to 2006 June 1), it would have exceeded the established \$1Million Sole Source threshold.

According to Section 2.1.3.4 of the GPPH, public bodies are required to seek prior written approval, through their respective Permanent Secretary, and subsequently from the National Contracts Commission, before the award of a contract can be made. Hence, the UAF has violated this provision.

Furthermore, the OCG has seen no evidence to indicate where either the NCC and/or the Cabinet were duly informed about this contract. In addition, according to Section 3.5 of the GPPH, contracts valued at J\$15M and above, require approval of the Cabinet.

However, there is no evidence to show that the contract with Ms. Palmer was approved by the Cabinet, and accordingly, the OCG concludes that the contract is in contravention of Section 3.5 of the GPPH.

The records indicated that Ms. Palmer was not present at the Board Meeting of 2005 August 16 when the Board decided to engage the services of her firm to prepare the responses to the FCC.

However, the OCG has seen no evidence contained in the Minutes, or in any other correspondence reviewed, to suggest that Ms. Palmer acted within the provisions of the Companies Act of Jamaica (hereinafter ‘the Companies Act’), particularly as it relates to “disclosing in writing to the company or request to have entered in the minutes of meetings of directors the nature and extent of his interest”.

Section 193 of the Companies Act provides:

*“Section 193 (1) A director or officer of a company who is-*

*(a) a party to a contract or proposed contract with the company;*

*or*

*(b) a director or an officer of any body or has an interest in any body that is a party to a contract or proposed contract with the company; or*

*(c) an associate of a person who is a party to a contract, proposed contract or has an interest in any body that is a party to a contract or proposed contract with the company,*

*shall disclose in writing to the company or request to have entered in the minutes of meetings of directors the nature and extent of his interest.*

*(2) The contract referred to in subsection (1) shall be subject to the approval of the board of directors of the company and, subject to the provisions of the First Schedule, the director concerned shall not be present during any proceedings of the board in connection with that approval...*

*(4) The disclosure required by subsection (1) shall be made-*

*(a) in the case of a director of a company-*

*(i) at the meeting at which a proposed contract is first considered;*

*(ii) if the director was not then interested in a proposed contract, at the first meeting after he becomes so interested; or*

*(iii) if a person who is interested in a contract later becomes a director of the company, at the first meeting after he becomes a director ...*

Additionally, the same Act provides for the following:

*(7) A contract between a company and one more of its directors or officers, or between a company and another body of which a director or officer of the company is a director or officer, or in which he has an interest, is neither void nor voidable-*

*(a) by reason only of that relationship;*

*(b) by reason only that a director with an interest in the contract is present at, or is counted to determine the presence of a quorum at a meeting of directors or a committee of directors that authorized the contract, if the director or officer disclosed his interest in accordance with this section and the contract was approved by the directors and was reasonable and fair to the company at the time it was approved.”*

It is also concluded that there is, *prima facie*, a conflict of interest with the role of Ms. Palmer (of Palmer & Walters) as a Director of UAF and Ms. Palmer as a Contractor providing legal services to UAF.

The UAF has acted appropriately by terminating the services of Ms. Palmer/Palmer & Walters and opting to tender for the provision of legal services. Based upon the findings, it would appear that the UAF was not fully conversant with the provisions of the GPPH.

It is the OCG's view that the UAF Board and its then Chairman, Mr. Colin Campbell, were full participants in the decision to award the contract to Ms. Minett Palmer on an uncompetitive basis and in violation of the GPPH. This decision was taken in violation of the Government Procurement Procedures, and as such they did not act with due care in the performance of their duties.

Perusal of the UAF Board Minutes reveal that the Board was the authority that initiated and approved the procurement of the legal services of Palmer & Walters, even as they sought clarification on the relevant laws that governed the engagement of Ms. Palmer (Palmer & Walters Ltd).

Mr. Campbell, in his Formal Declaration of his responses to the OCG's query about the existence, or lack thereof, of a formal contract, the basis under which payments were purportedly made, stated that there was no formal contract in place. According to his declaration, the terms of Ms. Palmer's engagement were contained in the Board Minutes. However, the OCG's review of the Minutes of the Board Meetings has unearthed no evidence of the terms of engagement to which Mr. Campbell has made reference.

## **RECOMMENDATIONS**

1. It is incumbent on the Ministry of Energy, Mining and Telecommunications (MEMT - formerly MITEC) to ensure that UAF personnel, who are involved in the procurement of goods, works and services, abide by the principles and requirements of the Government Procurement Procedures and Guidelines. Efforts should be made to ensure that there is full compliance to the Contractor General Act and the GPPH and any other relevant Government circular;
2. MEMT should take immediate steps, to ensure that directives are addressed to UAF with a view to mitigate instances of conflicts of interest with regards to the Board of Directors and Management;
3. The Cabinet should move to immediately develop and implement a comprehensive and overriding policy that is to be applicable to all Public Body Boards, to govern, restrict or prohibit, as the case may be, the award of Government contracts (or the divestment of publicly-owned assets), by a Public Body, to members of their respective Board of Directors, or to any entity in which a Board member or a close family relative may have a pecuniary interest;
4. Finally, we would recommend that the Permanent Secretary take a more proactive and aggressive role in developing, implementing and enforcing effective risk management systems, checks and balances and other appropriate management systems at the UAF, in an effort to mitigate against any possibility of deviations from the GPPH by the institution's management and board.