

OFFICE OF THE CONTRACTOR-GENERAL

Report on the Investigation

Conducted into the Highway 2000 Concession and Administration Agreement

Ministry of Transport, Housing, Water & Works

EXECUTIVE SUMMARY

In 2006 October, the Office of the Contractor General (OCG) received a formal complaint, by way of a letter, from a group of “Concerned Citizens”, regarding the contractual and administration arrangements of the Highway 2000 Project. Following receipt of this letter, a meeting was convened with representatives of the group of “Concerned Citizens” and the OCG, at which time the group was advised that the OCG would examine the concerns raised.

Pursuant to the powers vested in the Contractor General by Section 15 of the Contractor General Act, the investigation of the Highway 2000 Concession and Administration Agreement was undertaken to decisively conclude, *inter alia*, whether there was impropriety in the award and implementation of the Highway 2000 Project contract. The Terms of Reference for the investigation was impacted upon by the sheer size of the infrastructural undertaking, as well as the concerns which were raised in the public domain regarding the concession agreement for the various phases.

The methodology which was employed in the investigation involved a detailed review and analysis of the documents governing the award and implementation of the Highway 2000 Project. Additionally, all NCC endorsements which were considered material to the investigation were reviewed. All this was done to assess, *inter alia*, the degree of scrutiny to which the award and implementation of the Concession Agreement for the Phases of the Highway were subjected.

Analysis of the information gathered revealed that the development of the Highway was subjected to the scrutiny of the OCG, the National Contracts Commission (NCC) as well as the Cabinet, throughout the various stages of the tendering and implementation processes. The findings also indicate that in instances where there was a re-calibration of the Phases of the Highway, approval was given by the appropriate authorities for such actions to be undertaken. It must be noted that

Cabinet gave approval for the construction of Phase 2A of the Highway to precede the construction of Phase 1B.

The Concession Agreement governing Highway 2000 has various provisions for the Construction of Phases 1 and 2 of the project, which, when prescribed conditions are met by the Developer, Bouygues Travaux, would permit the Developer to continue work on the other phases of the Highway without necessitating any re-tendering activities.

Based upon the findings of the investigation, the OCG has posited its recommendations as they relate to the concerns which were raised by the group of “Concerned Citizens” as well as the conditions which impacted the implementation of the Concession Agreement.

The Investigation has concluded that the initial complaint raised a series of questions, some of which are outside the mandate of the OCG. The questions, which include the consequences of a liquidation of Trans Jamaica Highway to the taxpayers of Jamaica, and the justification for Bouygues to have a monopoly concession, have not been addressed in their entirety in this report. It is the view of the OCG that some of the issues raised would, therefore, require a legal opinion from the Attorney General’s Office. However it must be noted that the awarding of the 35 year concession to Bouygues was the subject of competitive tendering. Hence it is reasonable to conclude that the process which was employed in the awarding of the concession was in keeping with the tenets of the Contractor General Act in that the award was fair, transparent and meritorious.

Having regard to the foregoing, the OCG therefore recommends that the “Concerned Citizens” seek answers to the other questions from the appropriate Agencies of Government which can best proffer the legal opinion and the other interpretations which are being sought.

The OCG will continue to monitor the Highway 2000 Project to ensure that the principles which are embodied in the GOJ Procurement Policy and Guidelines are complied with. Further, and through collaboration with the NCC, the OCG will also continue to monitor the implementation of the remaining Phases of Highway 2000 to ensure that there is due conformance with the terms of the Concession Agreement.

INTRODUCTION

The OCG initiated an investigation into the Highway 2000 project, after receiving complaints from a group of “Concerned Citizens”, regarding whether or not the remaining Phases of the Highway Project should be the subject of competitive tendering. Issues were also raised about the financing of the Project. The initial complaint raised questions regarding Phase 1B and Phase 2, including the legality of the award of the contract to Bouygues Travaux for the construction of Phase 1B and Phase 2, rather than tendering for the construction of Phase 2. The complainants sought justification as to the Government’s claim, that Highway 2000 was largely a private sector investment as well as the right of Bouygues Travaux, through its local company, Trans-Jamaica Highway, to have a monopoly concession for the collection of tolls from the Jamaican taxpayers.

After reviewing the complaint, the Contractor General, through the Office of the Contractor General, took the decision to initiate an investigation into the merit or demerit of the claims made by the complainant. As a result of the decision, the OCG developed a Terms of Reference (TOR) to govern the scope of the investigation, including, *inter alia*, the examination of the tendering, evaluation and award processes for the Concession agreement granted to Bouygues Travaux, for the construction of Phase 1 of Highway 2000. The TOR also sought to determine whether changes and/or proposed changes in the construction of Highway 2000 were in keeping with the terms of the Concession Agreement.

The scope of the investigation also included the current undertaking on the part of the National Road Operating and Constructing Company (NROCC) and Bouygues, as it relates to the design and construction of Phase 1B and Phase 2 of Highway 2000. It is important to note that prior to the formal launch of the investigation, aspects of the award and implementation of the Concession Agreement, governing Highway 2000, were subjected to the scrutiny of the OCG, as part of its ongoing monitoring activities, as well as to the scrutiny of the NCC and the Cabinet.

The OCG’s findings and observations in the investigation have informed the conclusions and recommendations which are set out herein.

TERMS OF REFERENCE

Pursuant to the powers which are vested in the Contractor General by Section 15(1) of the Contractor General Act of 1983, the under- mentioned Terms of Reference were developed:

- a) To examine the tender, evaluation and award processes for the Concession agreement granted to Bouygues Travaux for the construction of Phase 1 of Highway 2000;
- b) To determine whether changes and/or proposed changes in the construction of Phase 2 of Highway 2000 are in keeping with the terms of the Concession Agreement;
- c) To determine whether there was any irregularity or impropriety in the implementation of the Concession Agreement for Highway 2000 in relation to Phase 1B;
- d) To determine whether the Concession agreement should have gone back to Tender for the award and implementation of Phase 2 of Highway 2000; and
- e) To determine whether the pre-requisites for the award of Phase 2A were met by Bouygues Travaux.

The above Terms of Reference excludes some areas of concern, as expressed by the group of “Concerned Citizens”, which would fall outside of the purview of the mandates of the OCG.

BACKGROUND

The investigation of Highway 2000 was undertaken pursuant to Section 15 of the Contractor General Act. The investigation was premised on a complaint which was brought to the attention of the Office of the Contractor General by a group of “Concerned Citizens”.

The initial complaint raised a series of questions which were based upon media reports, including a report in the Financial Gleaner of Friday, 2006 September 29. The concerns raised by the group, for the attention of the OCG included, *inter alia*;

1. The legality of awarding the contract for the construction of Phase 1B and Phase 2 to Bouygues Travaux, rather than tendering for the construction of Phase 2;
2. What justification did the Government provide in its claim that Highway 2000 is largely a private sector investment; what is the justification for giving Bouygues the right, through its local company Trans Jamaica Highway, to have a monopoly concession to collect tolls from Jamaican taxpayers?
3. What is the value of the Contract sum and overrun costs?
4. A call for an investigation into the contract agreement, and the consequences of the liquidation of Trans Jamaica Highway, on Jamaican taxpayers.

The Highway 2000 project was established to address Jamaica's rapidly growing transportation needs. The Highway is intended to be the catalyst for significant economic development and to facilitate the expeditious movement of goods between Kingston, the island's commercial center, and the country's principal population centres and major tourist resorts.

The rationale for the project was to improve Jamaica's transportation infrastructure and to provide a stimulus for economic growth. In September 1999, after more than 18 months of preliminary preparations, the Government of Jamaica (GOJ) decided to proceed with the implementation of the Highway 2000 project. The project had been defined in a pre-feasibility study which was carried out in 1996/7 by Dessau Sophin International, a Canadian engineering consulting firm.

The overall Highway 2000 concept envisaged a length of over 230km of highway, excluding another 40-60km of access sections. The estimated basic construction cost was **US\$830 million**.

The inclusion of other costs, such as design and interest costs during construction, was expected to increase the overall project cost beyond **US\$1billion dollars**.

METHODOLOGY

The following methodology informed the investigation:

1. A detailed review of the Pre-Contract Activities that led to the selection of Bouygues Travaux Publics (Bouygues) as the preferred bidder;
2. A review of the Concession Agreement and other agreements with regard to the obligations of the Grantor and Concessionaire;
3. An examination of the Concession Agreement to determine provisions for Variations and the terms and conditions governing the granting and financing of any such variation; and
4. The solicitation of answers to pertinent questions from the principal officer of the National Road and Constructing Company Limited (NROCC) in regard to the implementation and execution of the project.

The various stages of the Project, as well as a review of the Concession Agreement and other related material documents, were examined in order to fulfill the requirements of the Terms of Reference – this, while objectively presenting findings on the implementation of the various Phases of Highway 2000. The principles of merit and propriety, as are outlined in the Contractor General Act, 1983, were used as a benchmark to determine, *inter alia*, the fairness of the award of the contract and the extent to which the Government Procurement Procedures were complied with.

Terms and Definitions (Concession Agreement)

“BAFO Request” means the request for best and final offer in relation to Phase 1;

“Concession Agreement” means the agreement to be entered into between the Developer and the Grantor setting out the rights and obligations of the Developer in relation to the carrying out of the Project;

“Developer” means Bouygues Travaux;

“Grantor” means the Government of Jamaica;

“Highway 2000” or “Toll Road” means the multi-lane highway to be built between Kingston, Montego Bay and Ocho Rios;

“Phase 1” means Phase 1A and Phase 1B;

“Phase 1A” means Kingston to Sandy Bay including the Portmore Causeway and the Dyke Road;

“Phase 1B” means that part of the Toll Road between Sandy Bay and Williamsfield;

“Phase 2” means Phase 2A and Phase 2B;

“Phase 2A” means all the work concerning the detailed design, specification, construction, completion, operation and maintenance of a toll road extending between Bushy Park, Junction and Ocho Rios;

“Phase 2B” means all the work concerning the detailed design, specification, construction, completion, operation and maintenance of a toll road extending between Williamsfield and Montego Bay, with the exception of the Montego Bay bypass;

“Project” means the development, construction, financing, operation and maintenance of Highway 2000.

FINDINGS

The below stated facts, which are based upon all of the documents which were reviewed by the OCG , have shaped the conclusions of the investigation.

The Interpretation Clause of the Concession Agreement does not explicitly define the ‘Project’ beyond that which is expressed in the preamble to the Concession Agreement. However, in the construction of the definition of the “Project”, reference was made to the ‘Toll Road’ which is defined in the Interpretation Clause as being “the road to be designed, constructed, operated and maintained by the Developer in accordance with the terms of this Agreement.” It is instructive to note, however, that the “Project” was previously defined by the BAFO Request as “the development, construction, financing, operation and maintenance of Highway 2000”, thereby unequivocally expressing the scope of the works to be undertaken by the developer.

Further to the aforementioned, Schedule Three – Design and Construction Specification of the Concession Agreement – categorically states that, “the Highway 2000 Project was conceived to provide a modern multi-lane limited access, divided and grade-separated tolled highway... including the provision of a new 4 lane highway between Kingston and the western and northern parts of Jamaica.” Schedule Three also outlines the phases of the project and the forecasting for further development under Phase 2.

For the purpose of clarity the interpretation of the Phases are included below:

Phase 1A – Kingston to Sandy Bay including the Portmore Causeway and the Dyke Road;

Phase 1B – That part of the Toll Road between Sandy Bay and Williamsfield;

Phase 2A – All the work concerning the detailed design, specification, construction, completion, operation and maintenance of a toll road extending between Bushy Park Junction and Ocho Rios;

Phase 2B – All the work concerning the detailed design, specification, construction, completion, operation and maintenance of a toll road extending between Williamsfield and Montego Bay, with the exception of the Montego Bay bypass.

The scope of the project encompasses approximately 230 kilometers of a modern multi-lane highway network, which is expected to dramatically improve surface transportation and provide significant solutions to the chronic road transportation problems. The project is expected to be the major trans-island highway link and will provide the main overland route between Kingston and the country's two (2) major Tourism centres of Montego Bay and Ocho Rios.

Highway 2000 was designed to operate under a tolling system, with expected tolls being set at internationally acceptable levels, whilst maintaining affordability.

Pre -Construction Activities

Selection of Consulting Team

According to the documents which were reviewed by the OCG, the GOJ undertook preliminary consultations on the best means of advancing the process in light of the highly complex nature of the project and its large size and associated cost. The GOJ sought and received advice to assist them in the process, which resulted in the GOJ retaining several specialist international advisory firms with known experience in the field.

Dessau Soprin of Canada conducted a prefeasibility study on behalf of the GOJ in 1996/1997, and was subsequently retained, in or about October 1999, as Technical Consultant. Dessau Soprin was charged with the responsibility “to design and complete the preliminary technical specification of the whole Project and the detailed technical specification for certain sections of the project.”

Dessau Soprin, the engineering consultant, was retained because of its familiarity with the project and was considered to be the most capable of taking the project from pre-feasibility study to preliminary design stage, in order to allow a call of tender within a defined timetable. Dessau's

retention included the preparation of an illustrative design and specification over a period of nine to ten months.

The GOJ appointed UBS Warburg as its financial advisor because it was considered to have had the requisite experience in major toll road concession projects. CFAS Ltd. was also appointed as financial advisor along with UBS Warburg, given its past record of financial advisory support to Jamaica.

UBS and CFAS Ltd., together, prepared a short list of internationally-reputed advisors, and through competitive tendering, selected Steer Davies Gleave to act as traffic advisors to the GOJ for the project. A similar process was adopted for the selection and appointment of Allen & Overy as legal advisors to the GOJ for the project.

Pre- qualification

On 1999 October 20, the GOJ issued a Preliminary Information Notice (PIN) describing the project and formally requested expressions of interest from suitably qualified firms capable of undertaking the project. This was supported by international advertising of the project, with the main elements of the PIN, coupled with the circulation of the details to all Embassies in Jamaica and Jamaican High Commissions and Embassies overseas.

Expressions of interest were received from Sixty-seven (67) companies. The 67 companies were requested to supply concise details of their activities for pre-qualification evaluation by the end of November 1999. Seventeen (17) submissions were received and considered at a formal meeting held on 1999 December 17.

The evaluation of the submissions was conducted in accordance with a pre-determined set of criteria, to qualify for the next stage of the tender process.

The criteria included:

- a) Financial size and capacity of the bidder to undertake a project of this type and size;

- b) Satisfactory audit and profitability; and
- c) History and suitable construction experience.

Three (3) bidders - JC Cartellones, the Downer Group and OH - were rejected because they did not demonstrate adequate capabilities.

Three (3) bidders - Intertoll, Iibau and 21st Group/Axor - were considered doubtful, but possible candidates.

Seven (7) bidders were invited to the next phase of the evaluation. Another seven (7) were accepted to participate, although they did not qualify as suitable candidates for the overall project because they were potentially useful Jamaican or foreign subcontractors to be kept informed of the project's progress.

Four (4) bidders, Bouygues, Dragados, Cintra and LTA, were accepted as suitable candidates having demonstrated the requisite capabilities. Cintra, at this stage, opted not to move forward with the project.

After a detailed analysis of the bidder's qualification submission, the list of potential stakeholders was reduced to three (3) Firms, namely:

- 1) Bouygues of France
- 2) Dragados of Spain
- 3) LTA of South Africa

In the months leading up to the final stages of the evaluation process, Dragados and LTA held discussions between themselves, resulting in the formation of a Joint Venture for the purpose of bidding. This formation eventually reduced the shortlist of bidders to two (2), namely:

- 1) Bouygues
- 2) Dragados/LTA

Bid Submission and Evaluation

The two (2) short-listed firms, Dragados and Bouygues, were requested to submit bids for the concession by 2000 December 15. An extension of time was requested by the bidders because of the amount of detailed work required, and the volume of data to be reviewed. An extension was granted to 2001 February 15.

Bid submissions were received and formally opened at 5:00p.m. on 2001 February 15, at a ceremony in Kingston. Bids were thoroughly examined, evaluated and assessed over a two-week period.

Bidders were each invited to attend a series of full-day clarification meetings at the offices of UBS Warburg in London between 2001 March 6 and 9. Attending these meetings were representatives of the Bidders, Government of Jamaica (GOJ) representatives and members of the Government of Jamaica (GOJ) Advisory Team. The purpose of the clarification sessions, and subsequent BAFO request, had to do primarily with matters which were related to the financial background and scope to the project. According to the GOJ Technical Advisors, the size of the highway was too large a single project for the financial markets to digest. Hence it had to be re-organized into Phases.

The Advisory Team subsequently carried out an assessment of the responses from the bidders, which resulted in a decision to call for a further final round of submissions (the BAFO request).

Following meetings with Dragados/LTA and Bouygues, the final round of submissions was launched, with a revised request for best and final offers (BAFO) in relation to Phase 1 and data book on 2001 May 3, with final closing date of 2:00p.m. on 2001 May 18.

Project Structure

The project was structured as a mixed public/private sector partnership. Due to the financial complexity, the bidders would require not only equity, debt and export credit agency support, but their commercial bank lending would need to be complemented with funding from multi-lateral sources.

It was found that both bidders approached the Inter-American Development Bank's (IADB's) Private Sector Department which had indicated an interest in the principle of the project. However, it was reported that the IADB was unable to put work in earnest on the proposals until the preferred bidder was selected. Additionally, the preparation of IADB's dossier would delay the start of work on the highway until late 2002. Due to this scenario, one of the bidders accordingly proposed a structure for Phase I, which broke the first section into two parts.

The GOJ Advisory Team assessed this proposal and determined that there was a general preference, for many reasons, for an early start, which was also agreed to be conducive to a better response from the multi-lateral funding agencies.

In view of the uncertainty of the timing of the participation of the IADB, the project was re-scoped to call for bidders to put forward revised proposals for Phase I, which was eventually split into two parts (Phase 1A and Phase 1B).

The split of Phase I was re-defined by the Technical Advisors in conjunction with other project officials, in order to create a coherent scope for the First Section - Kingston to Sandy Bay - together with a new Hunts Bay Bridge and an enlarged Portmore Causeway.

The Second Section - Sandy Bay to Williamsfield – was intended to start-up as soon as further funding was agreed with IADB, and which was expected to have been on stream between nine to sixteen (9-16) months after financial close for Phase 1A.

Evaluation of Bids and Recommendation

To allow for a more thorough and comprehensive assessment of the bids submitted by the two qualified bidders, the evaluation process was broken down into six (6) categories:

- 1) Technical
- 2) Traffic
- 3) Legal
- 4) Economic
- 5) Financial
- 6) Bidders Approval

The GOJ comparable estimated project cost was:

- Clients' Estimate - Construction Cost for Phase I - US\$320M

The project costs submitted by the bidders were as follows:

- Bouygues' Construction Cost for Phase I - US\$390M

- Dragados' Construction Cost for Phase I - US\$380M

A comprehensive and detailed analysis of the bids was conducted by the GOJ Evaluation Team (NROCC acting on behalf of the GOJ), taking into consideration the Grantors' principal objectives and the evaluation criteria in the BAFO request.

The Project Evaluation Team was coordinated by UBS Warburg and was comprised as follows:

UBS Warburg and CFAS	-	Financial Advisors
Halcrow	-	Technical Advisors
Steer Davies Gleave	-	Traffic Advisors
Allan & Overy	-	Legal Council

The bids were evaluated in accordance with the established evaluation criteria as outlined in the BAFO Request and which are stated below:

“The Bidders will be evaluated by reference to what is the most economical and advantageous offer to the Grantor as judged by reference to the following criteria. This will be assessed over the full Phase 1. Certain evaluation criteria will be applied to each bid as a whole. Further criteria will be applied specifically for the Phase 1A and Phase 1B elements as indicated below:

Whole Bid

- (a) Optimum design, construction and operation and maintenance costs (lowest NPV of the sum of construction costs and operation and maintenance expenditures over term of Concession Agreement)*
- (b) Optimal risk profile, in particular, treatment of those issues described in Part B of section 8.*
- (c) Maximisation of Grantors share of net cash flows after operation and maintenance expenses and debt service from the upside-sharing mechanism.*
- (d) Ability to complete the Project successfully within budget and timetable and capability of developing and managing a successful highway business.*
- (e) The lowest possible net present value of the Grantors financial contribution (including GPD, development costs, repayment of these sums and PSC) TO BE PAID BY THE Grantor over the term of Concession Agreement in respect of Phase 1.*

Phase 1A

- (f) Ability to achieve Financial Close in shortest possible time and in any event before the end of 2001.*
- (g) Commitment to implement Phase 1 A works in the most expeditious manner.*
- (h) Maximisation of fully funded scope of work to be carried out in Phase 1A in compliance with the Core Requirements.*
- (i) Lowest NPV of Grantor’s financial contributions to achieve Phase 1A, in the context of the scope of the Bidder’s proposal for Phase 1A.*

Phase 1B

(j) Commitment to completion of Phase 1B including:

- *commitment to a fixed turnkey price with respect to the construction of Phase 1B*
- *strength of financing proposals including optimization of multi-lateral/bi-lateral (government to government) funding that can be made available for the Project and level of equity commitment of the shareholders.*
- *strength of proposal for the implementation of Phase 1B in the absence of Multinational Funding.”*

The Evaluation Team concluded that on the entire Phase 1, Bouygues had offered a more economically advantageous offer. The Development Bank accepted the recommendation of the Evaluation Team, and sought, by letter dated 2001 June 06, the approval of the National Contracts Commission through its Sector Committee, hosted at the UDC.

The National Contracts Commission, by letter dated 2001 June 13, endorsed the recommendation of the Sector Committee for the award of the contract to Bouygues Travaux. The NCC, in the letter of the same date, further stated that, “the Commission endorses the selection of Bouygues on the basis that it provided the most economically advantageous offer to the Government of Jamaica.”

According to the BAFO, “Following evaluation of the bids, it is the intention of the Grantor to proceed to pursue negotiations with a single preferred Bidder for the concession. The nominated preferred Bidder will be invited to enter into negotiations with the Grantor leading to the signature by the appropriate parties of the agreement.”

The selected concessionaire, after negotiation, was required to provide the major portion of the financing for the project. The Concession Agreement, which was to be finalized with the preferred bidder, stipulated a deadline for financial close, in which time, all the Financing Equity, Commercial Debt, Export Credit Agencies, Supported Debt and Multi-lateral Institutional Debt should be in place.

The total financing to be secured by the Concessionaire was approximately US\$303M - without any guarantee of the Government of Jamaica. This represented 78% of the total project cost for Phase I. The other 22% or US\$87M was to be raised with guarantees by the Government of Jamaica through Infrastructure Bonds issued locally and internationally.

The Cabinet, by way of Decision 22/01, dated 2001 June 18, approved the recommendation of Bouygues as the preferred bidder, ratified the development work of the DBJ and approved the appointment of Halcrow as Technical Advisors.

Cabinet, at its meeting of 2001 June 25, approved the operationalization of NROCC as the company which would be responsible for the granting of the concession.

Contractual Agreements

Bouygues established a company by the name of Trans Jamaica Highway Limited to carry out the construction of the Highway, while NROCC was established by the Government of Jamaica to provide general oversight for the project.

On 2001 November 21, the Government of Jamaica, through NROCC (the Grantor), and Bouygues, through its subsidiary company Trans-Jamaica Highway Limited (the Developer), signed the Concession, Implementation Agreements and the Shareholders Equity Undertaking for the Highway 2000 project. All three (3) Agreements contained all the legal obligations of both the Government of Jamaica and the Developers for the Project.

The Concession period commenced on the Concession Award Date, 2001 November 21, and was for a **Thirty-five year** period, unless terminated by mutual agreement. The terms of the Concession Agreement Period were subject to an extension in accordance with the conditions specified in the agreement.

Concession Agreement

The Concession agreement is a comprehensive document that outlines the various financial and operational obligations of the Grantor (Government of Jamaica) and the Concessionaire. As a legally binding agreement, the Concession Agreement also establishes the financial obligations as it pertains to Grantor Variations and Developer Variations.

Clause 6 of the Concession Agreement, between the Government of Jamaica and the Bouygues Travaux, includes an agreement for the Right of First Refusal in the construction of Phase 2 of Highway 2000. The terms of the Concession Agreement as specified in Clause 6 - Phase 1B and Phase 2 - Right of First Refusal, indicate that once the Developer meets the conditions precedent for the completion of Phase 1 of Highway 2000, it is incumbent upon the Developer, within a certain time frame, to declare an intention to undertake the construction of Phase 2.

Allegation

On 2006 September 29, the Financial Gleaner published an article pertaining to the refinancing arrangement between the Government of Jamaica and the Developer of the Highway 2000 project. As a consequence, the OCG, by letter dated 2006 October 19, requisitioned NROCC to clarify whether such an arrangement would be a breach of the Concession Agreement, amongst other issues.

NROCC, by letter dated 2006 November 7, posited answers to the questions posed by the OCG, with specific reference to the refinancing of the project and the implications, if any, on the terms of the Concession Agreement. NROCC posited the following answer.

“The fact that the Government of Jamaica is considering the refinance of the existing loans to the Developer is not a breach of the Concession Agreement and would be done with the Developer’s concurrence. The lowering of the interest costs of the project is in the interest of both the Developer and the GOJ whose returns are subordinated to that of the senior lenders.”

“Both the Developer, Trans Jamaica Highway Limited (TJH) and NROCC, the Grantor company, had obtained financing on commercial terms earlier, which was considered inappropriate for a

project of this nature and so the decision was taken to seek and obtain more appropriate financing. This was achieved through a loan of US\$260 million which was negotiated between the Development Bank of Jamaica Limited and BANDES, a state-owned bank, of the Government of the Bolivarian Republic of Venezuela on terms which were more appropriate.”

“The proceeds of the loan to the DBJ, which is not guaranteed by the Government of Jamaica, is intended to be used as follows:

- (a) (US\$ 130 million to refinance loan obtained by NROCC from Wachovia Bank which benefited from a Parliamentary Guarantee (US\$75 million), repay short term liabilities of NROCC (US\$40 million) and to provide working capital financing for NROCC (US\$15 million); and
- (b) US\$130 million to replace loan obtained by the Developer from RBTT Merchant Bank of a similar amount.

The loan from the DBJ to TJH would be on terms and conditions similar to those applicable to direct loans of the DBJ to other private sector companies in the productive sector of Jamaica.

This refinancing of the Developer’s Loans is subject to the agreement of both parties as to the terms and conditions which will apply and as such no decision has yet been arrived at”.

NROCC was also requested to provide the OCG with the following information:

1. Original contract sum for the construction of Phase 1A of the Highway 2000 project;
2. The actual construction cost of Phase 1A; and
3. The original vs. actual cost of the Portmore section of the highway.

NROCC, by way of letter dated 2006 November 7, indicated that, “The Concession Agreement dated 21st November, 2001 between the Grantor - National Road Operating and Constructing Company Limited (NROCC) and the Developer – Trans Jamaican Highway Limited is the principal agreement governing the Highway 2000 project. This Agreement is not a construction contract and does not have a contract sum or bills of quantities.”

Contract Variation

Questions surrounding the permissibility of the proposed changes in the construction of Highway 2000, and whether such changes were in keeping with the terms of the Concession Agreement, are two-fold in nature.

1. The pushing forward of Phase 2A before the construction of Phase 1B
2. The Change/ Variation Order assigned to the construction of Phase 2A

Pushing Forward of Phase 2A

According to a letter from NROCC, dated 2006 December 20, and addressed to the NCC, it was stated that Cabinet had approved the commencement of negotiations to bring forward the section of the roadway from Spanish Town to Ocho Rios. This, in effect, authorized the going ahead with a variation to Phase 2A, which would also now precede the commencement of Phase 1B.

An important reference point concerning the commencement of Phase 1B is that the Developer was required to exercise the option to submit the Phase 1B Commencement Notice by March 2007. However, on 2006 March 20, Cabinet gave approval for the commencement of negotiation with the Developer to bring forward the implementation of the Spanish Town to Ocho Rios segment of Phase 2 of the Project.

Subsequent to the Cabinet Decision on 2006 March 20, the Developer, by way of letter dated 2006 November 10, issued a Phase 2 Commencement Notice to NROCC.

Clause 6 of the Concession Agreement and, more specifically, Clause 6.1 states that at, “Any time prior to the date falling 36 months after the FC1A Long Stop Date (or by such later date as the

Grantor may agree)(the Phase 1B Long Stop Date) the Developer may issue a notice (the Phase 1B Commencement Notice)”. It is therefore evident that Cabinet exercised the option which is contained in Clause 6 in deciding to extend the submission date for the issuance of the Phase 1B Commencement Notice. The revised timeline for the issuance of the Phase 1B Commencement Notice is now placed at February 2008 as was communicated by NROCC in their letter of 2006 December 20 to the NCC.

The terms of Clause 6.1 of the Concession Agreement allows the Grantor to exercise an option to require the Phase 1B Commencement Notice to be exercised at a later date – an option which, it is apparent, was exercised in regard to the re-calibration of the Phases of Highway 2000.

Phase 2A -Variations for the Design and Construction of Mt. Rosser Bypass

A letter from the Attorney General’s Chambers, dated 2007 April 18, indicates that, “the variations and amendments being contemplated in Part 1 of the current draft are permissible under the 2001 November 21, Concession Agreement... and will not invalidate or otherwise derogate from that Agreement.”

The opinion from the Attorney General’s Office further states that, “the contents of part 2 of the draft variation order are in keeping with the nature of variation and requirements for such variations as contemplated by and permissible under the Construction Contract.”

It is therefore envisaged that the proposed changes and/or modifications to the construction of Highway 2000 were permissible and were in keeping with the terms of the Concession Agreement.

The Ministry of Housing, Transport Water & Works, on 2007 April 26, made a submission to the NCC seeking approval for the variation to the existing Concession under Clause 6 – Rights of First Refusal. The NCC considered the matter on 2007 April 25 and endorsed the variation to the existing Concession Agreement in the sum of US\$ 99.5 Million. The endorsed variation order was “to carry out the design and build contract for the Mount Rosser Bypass to Moneague including building, outline designs and equipment...”

The recalibrations of the Phases of Highway 2000 have been subject to consideration and review by both the Cabinet and the NCC. The approvals which were granted by the Cabinet, as well as the endorsements of the NCC, are indicative of the fact that the current arrangement was subjected to the required scrutiny and due process.

Implementation of Phase 1B

The Ministry of Housing, Transport Water & Works made a submission to the NCC for approval to use the Sole Source procurement methodology to negotiate follow-on contracts for the implementation of Phase 1B and 2 with the following consultants:

- | | | |
|--------------------------------|---|--------------------------|
| 1. Dessau Soprin International | - | Design Services |
| 2. UBS Warburg | - | Lead Negotiators |
| 3. PricewaterhouseCoopers | - | Local Financial Advisors |
| 4. Vacciana & Whittingham | - | Local Attorneys |
| 5. Halcrow Group Ltd | - | Technical Advisors |
| 6. Steer Davies Gleaves | - | Traffic Advisors |

The NCC considered the matter on 2007 January 10 and endorsed the request for Sole Source procurement.

On 2007 April 18, the NCC approved the recommendation from the Ministry of Housing, Transport Water & Works to award contracts to three (3) of the consultants for the implementation of Phase 1B and Phase 2 of the Highway 2000 Project, namely:

- | | | |
|--------------------------------|---|---|
| 1. PricewaterhouseCoopers | - | JA\$5.5M (3 Months Contract Duration) |
| 2. Dessau Soprin International | - | CAN\$1,348,349 (4 Months Contract Duration) |
| 3. Halcrow Group Ltd | - | £688,173 (30 Months Contract Duration) |

Bouygues Travaux, the Developer, under the terms and condition of the Concession Agreement, is required to issue the Phase 1B Commencement Notice by February 2008.

CONCLUSION

A review and analysis of the various files and documents pertaining to the award and implementation of the Concession Agreement for Highway 2000 revealed that the project has been the subject of competitive bidding in accordance with the Government Procurement rules, and the necessary approvals have been granted by the relevant agencies, inclusive of the NCC.

The Cabinet, on 2001 June 18, approved the recommendation of Bouygues as the preferred bidder, ratified the development work of the DBJ and approved the appointment of Halcrow as Technical Advisors.

Cabinet, in March 2006, gave approval to bring forward Phase 2 of the Highway 2000 Project. The approval given by Cabinet made it permissible for Phase 2 of the Highway to precede development of Phase 1B. Subsequent to the Cabinet Decision, the Developer issued a Phase 2 Commencement Notice to NROCC by way of letter dated 2006 November 10.

It must be noted that construction of Phase 1B of Highway 2000 has not yet been undertaken. However, the NCC has endorsed the recommendations for the contracting of the Consultants to be engaged for the implementation of Phase 1B and Phase 2 of the Highway 2000 Project.

NROCC, in an attempt to ensure compliance with the terms of the Concession Agreement, solicited legal advice from the Attorney General. The Legal Opinion received from the Attorney General's Chambers, dated 2007 April 18, asserts that the Variation Order for the Design and Construction of the Mt. Rosser Bypass is permissible under the Concession Agreement.

Re-calibration of the Phases of the Highway 2000 project has resulted in Bouygues Travaux being given an extended timeline to issue the Phase 1B Commencement Notice. Bouygues is now required to submit the Phase 1B Commencement Notice by February 2008 to declare their intention to undertake the development of that particular Phase of the Highway.

There is no evidence of impropriety or irregularity in the award and implementation of the Concession Agreement governing Highway 2000. Based upon all of the data and records which were analyzed, the OCG is satisfied that the Highway 2000 project, as well as the variations to the terms of its implementation, have been executed in accordance with established GOJ procurement standards.

The OCG, however, has not seen any evidence which would indicate the methodology by which the Project Advisors USB Warburg, CFAS and Dessau Soprin were initially engaged for the first Phase of the Highway 2000 Project. It would appear that these companies were first engaged via the Sole Source method of procurement. However, it must be noted that Public Body procurement activities at the time would not have been subjected to the Government Procurement Procedures Handbook as it was not yet implemented, but would have instead been governed by the Government Contracts Committee procurement regime which was initiated in 1963.

The Highway 2000 Project Concession Agreement is for the design, financing, construction, operation and maintenance of a primary green-field toll motorway network, under a 35-year Concession Agreement. The question of whether or not the concession Agreement should have gone back to tender for the award and implementation of Phase 2 is contingent on the terms of the agreement. According to the Concession Agreement, “the Grantor wishes to make arrangements for the implementation of the Highway 2000 Project and has invited companies to tender for a single contract to design, construct, operate, maintain and finance the Toll Road (the **Project**)”. However, as with all contracts, there are conditionalities and exit clauses which will impact upon the work undertaken by the Developer.

Consequently, it is important to note that the Concession Agreement also states that, “the Grantor has agreed to enter into this agreement with the developer for the carrying out of Phase I of the project...” In a qualifying statement, the Concession Agreement states that “subject to Clause 6.3 hereof, other phases of the Project will be awarded to such persons as the Grantor in its absolute discretion may select”. Clause 6 of the Concession Agreement governs Phase 1B Construction and Phase 2 Right of First Refusal; Phase 2 is comprised of both Phase 2A and Phase 2B.

The Concession Agreement provides the developer with the following options:

- a. the Developer has the obligation to construct Phase IA (Kingston to Sandy Bay);
- b. An option to construct Phase 1B (Sandy Bay to Williamsfield); and
- c. A right of first refusal to construct Phase 2 (Spanish Town to Ocho Rios and Williamsfield to Montego Bay).

Note: Items (b) and (c) above are laid out in Clause 6 of the Concession Agreement.

It must be noted that Provision is made in the Concession Agreement for 'Step in Rights', which allows the GOJ, in the event that the Concession holder fails to perform according to agreed standards, to exercise an option to operate the toll road. The Concession Agreement also contains a '**Grantor's Proportion Maximum Amount**' which indicates that the total payments under the GPD Loan Agreement shall not exceed US\$87,500,000.00. The GPD Loan Agreement is the loan agreement between the Grantor and the Developer pursuant to which the Grantor agrees to make certain loans available to the Developer on a basis which is subordinated to the rights of the Lenders under the Financing Agreements

Finally, according to NROCC, the Highway 2000 project has incurred approximately US\$38,643,320.00 in additional cost, due mainly to changes to the outline drawings and which were as a result of requests made by the Grantor. These changes were stated as follows:

- Works on feeder and take-off roads including Marcus Garvey Drive, Port Henderson, Passage Fort Drive, and Mandela;
- Realignment of the Portmore Causeway;
- Relocation of the Spanish Town Toll Plaza.

It must be noted that the Grantor was required to pay the additional cost for the above changes. A portion of these costs was stated to have been recovered from the Port Authority of Jamaica Ltd.

These changes and the attendant payments were carried out in accordance with the terms and conditions of the Concession Agreement.

RECOMMENDATION

The initial complaint raised a series of questions, some of which are outside the mandate of the OCG. The questions, which include the consequences of a liquidation of Trans Jamaica Highway on taxpayers, and justification for Bouygues to have a monopoly concession, have not been addressed in their entirety in this report. It is the view of the OCG that some of the issues raised would require address via a legal opinion from the relevant Government authority. The OCG therefore recommends that the “Concerned Citizens” seek answers to these questions from the Agency of Government which can proffer the legal opinion and the other interpretations which are being sought.

The OCG will continue to monitor the Highway 2000 Project to ensure that the principles which are embodied in the GOJ Procurement Policy and Guidelines are complied with. Further, and through collaboration with the NCC, the OCG will also continue to monitor the implementation of the remaining Phases of Highway 2000 to ensure that there is due conformance with the terms of the Concession Agreement.