

Report of the Auditor General
on the
Consolidated Fund of the
Government of Bermuda
for the Financial Years
March 31, 2010, March 31, 2011 and March 31, 2012

December 2014

Response

The Hon. Derrick V. Burgess, JP, MP
Former Minister of Works and Engineering

February 2016

I INTRODUCTION

This response has been prepared to address a number of inaccurate and misleading statements in the Auditor General's Report which affectively question decisions by me as Minister, and other specific Ministry decisions. It is important to set the record straight, with all relevant facts and not merely selectively presented information designed to assert a particular narrative. The work of the office of the Auditor General is a critical part of good governance and their reports carry significant weight. As a consequence, their responsibility to remain objective, non-partisan and driven by best practices is a fundamental pre-condition.

The stated Mission of the Office of the Auditor General is as follows:

“The mission of the Office of the Auditor General, derived from its legislative mandate, is to add credibility to the Government's financial reporting and to promote improvement in the financial administration of all Government Ministries, Departments and all other entities for which the Government is accountable to Parliament”.

As a Bermudian, trade unionist and long serving Member of Parliament, I associate myself unreservedly with the expectations set out in the above Mission Statement. At the same time, I am obliged to state my belief that in order for that Mission to be fulfilled, it is essential that the affairs of the Office of the Auditor General be conducted without bias and with diligence, fairness, integrity and thoroughness. I also believe that the affairs of the Office of the Auditor General must be carried out with full compliance with all relevant statutes and Regulations.

The 13th November, 2014 Media Release with respect to the December 2014 **Report of the Auditor General on the Consolidated Fund of the Government of Bermuda for the Financial Years March 31, 2010, March 31, 2011 and March 31, 2012** [the 2014 Report] states, inter alia: *The key issue relates to serious deficiencies in internal control over the management of various capital projects. In her Audit Opinion, (the Auditor General) explains that these deficiencies led her to question the appropriateness of certain transactions and the underlying value of assets.* Whilst the Auditor General is undoubtedly correct with respect to many of her conclusions, it is my submission that some, as they relate to the Ministry of Works and Engineering where I served as Minister from December 2007 to November 2011 reflect bias, a lack of fairness, careless preparation, inaccuracy and resulting ill-founded or altogether erroneous conclusions.

I shall address a number of areas where, in my estimation, the 2014 Report does not meet the required standard.

II MATTERS OF SPECIAL IMPORTANCE [P.7, 2014 REPORT]

The following is an excerpt from **2.1 Qualification of the Auditor's Report**:

In 2009, a Special Report of the Auditor General detailed the reasons for the qualification on the financial statements of the Consolidated Fund for the year ended March 31, 2008. That report documented a high level of unsupported payments as well as override of controls at the highest levels of management in the construction of the Magistrates' Court Building and the Hamilton Police Station. Among other concerns we found:

- *Insufficient appropriate documentation or approvals to support payments;*
- *Compromised internal control systems;*
- *A \$6.5 million payment unsupported by verification to receipted invoices;*
- *Concerns expressed by the Project Manager about some costs being claimed by the recommended contractor and*
- *Refusal by the certifying architect to certify \$2.7 million in payments requests submitted by the recommended contractor.*

It seems that the Auditor General makes reference to the qualification on the financial statements of the Consolidated Fund for the year ended March 31, 2008 merely to point out that a recommended independent valuation of the Magistrates' Court/Hamilton Police Station Building [now the Dame Lois Browne-Evans Building] was carried out and that the qualification was subsequently lifted.

In a further effort to set the record straight, I offer the following additional observations with respect to the construction of the Dame Lois Browne-Evans Building.

Landmark Lisgar Construction Ltd. [LLC] submitted the lowest tender of \$72.9 million at a public bid opening for construction of the new Magistrates' Court/Hamilton Police Station Building. Work commenced in late 2007; shortly thereafter the Government engaged the services of a local engineering company to deal with unanticipated surface conditions. The Contract between the Government of Bermuda and LLC was for what was considered a base building. It was later agreed to incorporate into the Contract the interior fit-out of the building in order to accommodate the Government Departments scheduled to move into the building. The additional cost was added to the Contract's sum. I have repeatedly offered this explanation to the current Government and to the Auditor General who continue to reject it, although they have been provided with documentation that clearly supports this explanation.

That said, on 13th March, 2009 I tabled in the House of Assembly a comprehensive response to the then Auditor General's observations as set out in paragraph 2 above. The then Auditor General had also expressed concern about an advance payment of \$600,000 to LLC and some \$665,000 which he asserted had been paid outside the terms of Contract.

Following is an excerpt from my 13th March, 2009 reply to the Auditor General's Special Report of February 2009.

“The Auditor General appears to be greatly exercised regarding an alleged failure in the new contract in terms of how it manages the general contractor’s monthly requests for payment [Page 9].

The new contract does not ‘fail’, as both the old and new contracts use the AIA A201 General Conditions of the Contract for Construction. The old contract uses the 1997 version and the new one the 2007 version. Both define in clear language in Article 9 how payments are managed and the method of progress payment deployment in place is contractually compliant.

Furthermore, it is misleading in the extreme to state in any form or fashion that invoices are an apt or best means of validating a payment request, as there would be an unacceptable risk to either a public or private sector project of this size being managed retroactively on the ‘cost-and-charge’ basis implied by the ‘payment on invoice’ terms type of contract suggested. For most construction projects, especially large ones, fixed costs are defined at the start by way of lump sum competitive bids for each element of the work and the work and values implemented into the project each month are drawn down against these fixed costs. Cash flow, product and resource allocations are all dependant on this and contractual paperwork support is provided for each monthly payment request. For the Auditor General to state in this section that \$6.5M under the new contract has been certified without validation is simply wrong, as the project record reflects that all certified requests for payment have been supported by work and or material in place and or material stored off site and dedicated for the project.

In addition to the ‘paperwork’, the real and arguably best test, as is being applied, is the validation of a payment request and its supporting documentation by physical site inspection. To this end, the Ministry has installed the following system of checks and balances:

- The Owner’s Designated Representative is on site daily and is fully engaged in the works, particularly in terms of how the contractors’ element of work payment schedule becomes bricks and mortar. He can speak with absolute real-time information about what is and is not valid on the payment requests.*
- Conyers & Associates Ltd. are on site and viewing the progress daily and are able to draw conclusions about the validity of a payment request before testing it against that of the Owner’s Designated Representative.”*

“The Auditor General repeats his unsubstantiated and factually incorrect allegation regarding the alleged inadequacy of the monthly payment requests and their supporting documentation [Page 10]. Although I have addressed this matter in detail earlier in my Reply, I am obliged to reiterate the fact that invoice support

is both inconclusive and inappropriate as a control mechanism to the extent suggested in the Special Report on this type of project. Invoices can be corrupted and I maintain that the system of checks and balances now in place provides a proven and accountable means to validate the monthly payment requests.”

“The Auditor General’s statement to the effect that more than \$665,000 was paid outside the terms of the contract [Page 10] is misleading and needs to be corrected. As an overview, it is regrettable that the Auditor General did not take the time to exercise due diligence and interview the key stakeholders to obtain an understanding from them on the matters covered by this section of the Special Report.

With respect to the \$665,000, the math here is inconsistent with the factual project record math in that the payment request for November 2008, Payment Certificate No. 8, has no line item titled Administration Fees and there is no line item amount for \$665,000 anywhere in the entire financial support information. On that basis, I am unable to comment on what point he is attempting to be made. I certainly cannot support the conclusions arrived at based on any incorrect math and am surprised at the level of subjectivity being applied to such an important Special Report on the basis of such inaccurate information.”

“At the risk of being repetitive, but to drive the point home I confirm, yet again, that progress payment support was of course supplied and, where compliant, the contractor was paid, and where not compliant, payment was not made.”

It is significant to note that the Auditor General of the day in his Special Report on the Dame Lois Browne-Evans Building failed to make any mention of Payment Certificate No. 14, signed on 12th August, 2008 by the Chief Architect, a payment of \$167,268.00 to Carruthers Shaw & Partners [CS&P] of Toronto on a Contract totaling \$3,467,565.08. The referenced Contract was not approved by Cabinet and the Payment Certificate was signed by the Chief Architect on behalf of Government without the knowledge or approval of the Permanent Secretary. Significantly, the Auditor General of the day failed to mention or include this in his Special Report. The question is, why?

III AUDIT OBSERVATIONS AND RECOMMENDATIONS [P. 19, 2014 REPORT]

3.1.2 Commercial Courts/Ministry of Finance Renovations

The Report states: *A contract for the construction of the Commercial courts and renovation of the Ministry of Finance Headquarters was awarded to a company (“the successful bidder”) without the prior approval of Cabinet and the related tender process was compromised.* The Report goes on to list a number of alleged regularities regarding the award of this contract.

My Response: Upon receiving a Contract Award Recommendation that the construction of the new Commercial Courts and the renovation and expansion of Ministry of Finance and Economic Development Headquarters be approved for \$2,334,000, I did 'interfere'. I believed that the 'Rolls Royce' refurbishment proposed was too elaborate and directed that the tender documents be modified and the job re-tendered. I did not wish to see unwarranted spending of Government funds. As a result of my 'interference', Cabinet approved a Contract Award Recommendation in the amount of \$1,696,553.18, thereby effecting a savings of some \$637,446.82 to the Bermuda taxpayer.

As Minister of Works and Engineering I was committed to a reduction in spending, given the existing economic environment. I therefore offer for consideration by Honorable Members other instances where my 'interference' resulted in significant savings for Government.

(1) Demolition of Former Club Med Hotel, St. George's

Upon learning of the \$20,000,000 TAF for the demolition of the former Club Med, St. George's, I did 'interfere'. I recommended that the building be removed via implosion rather than via the more traditional means. As a result of my 'interference', the demolition of the facility on 25th August, 2008 cost approximately \$13,000,000, thereby effecting a savings of some \$7,000,000 to the Bermuda taxpayer.

(2) Cockburn Bridge, Ireland Island, Sandy's

There have been repeated suggestions that Ministers, including myself, were guilty of interfering in areas that fell outside their remit as Ministers or that might be contrary to certain provisions of Financial Instructions. Let me state clearly that upon hearing that Ministry of Works and Engineering technical officers had projected that the cost of a replacement Cockburn Bridge would be in the region of \$8,000,000, I did 'interfere'. As a result of my 'interference', the replacement bridge in 2009 cost \$1,184,994.99, thereby effecting a savings of just under \$7,000,000 to the Bermuda taxpayer.

(3) General Contractor Services – Interior Fit Out and Relocation of Environmental Health Laboratory, Lolly's Well Road, Smith's FL05

Upon receiving a Contract Award Recommendation that general contractor services for the interior fit out and relocation of the Environmental Health Laboratory from 7 Point Finger Road, Paget to Lolly's Well Road, Smith's FL05 be approved for \$1,290,000, I did 'interfere'. I expressed the view that far too much money would be expended for the three-year occupancy of a building that Government did not own and recommended that the facility be relocated to a

BLDC-owned building at Southside instead. I subsequently directed that the tender documents be modified and the job re-tendered. As a result of my ‘interference’, Cabinet approved a Contract Award Recommendation in the amount of \$974,500 for the laboratory to be relocated to Building 322, Southside, thereby effecting a savings of some \$316,500 to the Bermuda taxpayer. More importantly, the improvements would be made in a Government-owned facility.

(4) Veritas Place, Court Street Hamilton – Accommodation for Senior Command of Bermuda Police Service

The Architects Section within the Ministry of Works and Engineering, headed by Chief Architect Mr. Lawrence Brady, submitted an estimate of \$1,258,000 for the project to prepare the building for the Bermuda Police Service team. Surprised by the size of the estimate, I met with two independent contractors on site to provide them with the plans prepared by the Architects Section and asked that they provide bids for the same work. Submissions of \$317,000 and \$287,000 respectively were received, with the latter bid being accepted. Some would call this ‘Ministerial interference’; however, I would like to consider this saving the taxpayer from financial abuse.

(5) Fort Knox Building, 14 Wallers Point Road, Southside, St. David’s – Ministry/Department of Education

I had sight of plans prepared by the Architects Section to modify the Fort Knox Building, Southside in order that it might accommodate the Ministry/Department of Education [MDOE] which required consolidation and relocation from sites at Dundonald Street, King Street and the former Bishop Spencer School on Glebe Road. The estimate for this job was \$1,800,000 with a projected relation date of September 2011.

I forwarded the plans to the BLDC who confirmed, after review, that the job could be completed for just under \$800,000 and that the MDOE could move in by 1st June, 2011. Instances such as these caused me grave concern as we had no idea how long this apparent overpricing practice had been going on. Such overpricing of jobs is totally unacceptable.

All of the above-mentioned projects were time-sensitive and following my ‘interference’ realized significant savings for the taxpayer.

IV BERMUDA LAND DEVELOPMENT COMPANY LIMITED:

**REPORT OF THE PARLIAMENTARY STANDING COMMITTEE ON
THE PUBLIC ACCOUNTS FOR THE FINANCIAL YEARS ENDED 31ST
MARCH, 2009 AND 31ST MARCH, 2010 AND ON THE SPECIAL
REPORT OF THE AUDITOR GENERAL ON THE MISUSE OF PUBLIC
FUNDS**

The captioned Report, attached at Annexe 9 of the 2014 Report, addresses, inter alia, concerns about the Bermuda Land Development Company [BLDC] whereby the BLDC's Chairman and Deputy Chairman entered into a paid consultancy agreement with the Company to investigate and report on certain BLDC matters.

The Media Release of 26th January, 2012 captioned 'Auditor General Issues Special Report on the Misuse of Public Funds' is attached for ease of reference at Appendix 2 to my response. The following is an extract from that Media Release: *The Special Report reveals that the former Chairman and the Deputy Chairman of the Board of Directors of the Bermuda Land Development Company Limited entered into a consultancy arrangement with the Company while they served on the Company's Board. This arrangement resulted in them being paid \$160,000 in consultancy fees. The Auditor General concluded that "the consultancy arrangement put both the Chairman and the Deputy Chairman, who actively participated in overseeing the activities of the Company, in a fundamental conflict of interest. The actions of the Chairman and the Deputy Chairman clearly represented a breach of their fiduciary duty."*

I vigorously dispute the conclusion of the Auditor General in this regard.

In her Special Report on the BLDC, the Auditor General totally disregarded the reports by KPMG and Trott and Duncan which stated that BLDC's decisions were in accordance with the byelaws of the company and the Companies Act 1981 and did not involve a breach of fiduciary duty on the part of the BLDC Chairman and Deputy Chairman. There is glaring omission of these reports in the Special Report of the Auditor General on the Misuse of Public Funds.

As Minister of Works and Engineering, I was responsible for the BLDC. I offer below an explanation of my decision to initiate an internal investigation of the BLDC to be carried out by the BLDC Chairman and Deputy Chairman. A number of concerns about inefficiency and a lack of accountability in the operation of the BLDC led to that decision. In particular, I had become aware that the BLDC's accounts receivables were in excess of \$2,000,000 and that no steps were being taken to collect these outstanding monies. Within seventy-two hours after requesting the investigation, I informed the Premier that I had initiated it. My Permanent Secretary at the time was aware that I had informed the Premier.

Let me state here that the question of remuneration for the Chairman and Deputy Chairman was not raised when I asked them to carry out the investigation. The BLDC Board operates within the byelaws of the Company. This gives the Board the

power/authority to be self-governing. That is to say, the Board does not require the approval of the Ministers/shareholders to make policy or to spend money. By way of example, in 1997 or thereabouts the BLDC set the rate for its salaries and also approved bonuses for staff. The Board at that time spent hundreds of thousands of dollars and wrote off thousands dollars in bad debt at its own volition. The approval of the Ministers/shareholders was not required.

During the investigation, the Chairman and Deputy Chairman soon uncovered serious lapses in efficiency and accountability and potential abuse of power. Following are some of the concerns identified:

1. The BLDC's accounts receivable stood at approximately \$2,400,000.
2. BLDC staff who purchased BLDC-owned homes received a 10% discount, as a result of the decision taken by a previous Board.
3. The BLDC had purchased a Toro lawnmower for \$20,000. Research at Sears revealed that the same machine would have cost approximately \$9,310 landed in Bermuda.
4. There was overpayment to a contractor who had installed doors at the telecommunications building on Corregidor Road.
5. A tenant was found occupying 4,000 square feet of a supposedly vacant building.
6. A second tenant was found occupying yard space for which he was not paying.
7. There was lack of governance in the Leasing Department.

The Chairman and Deputy Chairman immediately set about addressing the accounts receivable situation. Companies/individuals with the highest debt were called in; collections staff was tasked with preparing for civil proceedings if required. Some \$600,000 was collected within six months.

As you will read in the KPMG Report and the Auditor's Report, it is stated that I gave directives that were not in accordance with the by-laws of the Company. It appears that the Auditor and KPMG were so anxious to write a damning report that they did not ask the Chair and Deputy Chair what were the so-called directives that I allegedly gave. Also, the Public Accounts Committee states that "your committee took note of four other ministerial directives in the preceding year which were not complaint with the Act. Let me make it unequivocally clear, that I as a Minister did not have to appear before the Public Accounts Committee; in fact it was I who requested to appear. I was never questioned about this at the PAC meeting. The above as written by the Auditor, I cannot answer to it as it is a fallacy or a fairy tale. I have never given a directive to anyone at BLDC that was against policy, rules or law.

In December 2010, I was advised by the Premier and Minister of Finance, the second BLDC shareholder [the Minister of Works and Engineering was the other] that the Chairman and Deputy Chairman must be relieved of their duties immediately as they were receiving payment for the work that they were carrying out. Let me reiterate that at the time that I asked the Chairman and Deputy Chairman to carry out the investigation,

the question of remuneration was never raised. Persons who know my background as a trade unionist will be aware that I will never terminate anyone's services without finding out all the facts. I subsequently met with the Chairman and Deputy Chairman, received confirmation that they were being paid and asked that they secure a legal opinion regarding the Board's decision to pay them for their consultancy services.

Law firm Trott & Duncan advised that BLDC byelaws [paragraph 5.2 of clause 19, sub-clause (1)] permit any director or directors to act for the BLDC in a professional capacity. The byelaws further state that any such director, firm, partner or company is entitled to be remunerated for professional services as if the director was not in fact a director. Thus, the Board was acting within BLDC byelaws by remunerating the Chairman and Deputy Chairman for services rendered in this regard.

As a result of concerns raised by the Auditor General in her December 2010 letter to the BLDC Chief Executive Officer, Mr. Andrew Swan, the Premier and Minister of Finance commissioned KPMG to carry an independent review of the BLDC's operations. The KPMG final report states under 'Related Party Transactions' that "*...the BLDC's byelaws allow directors to provide professional services to the Company and to be remunerated for those services.*"

It should be noted that the BLDC Board's decision to remunerate the Chairman and Deputy Chairman for services provided is not without precedent. When the West End Development Corporation [WEDCO] was in difficulty some years ago, WEDCO Chairman Christopher Astwood and later Walter Lister, JP, MP, were remunerated for services provided to the organization.

It is inexplicable that the Auditor General should question the BLDC Board's decision to remunerate the Chairman and Deputy Chairman for services provided when such remuneration is explicitly allowed in accordance with BLDC by-laws.

V REPORT OF THE PARLIAMENTARY STANDING COMMITTEE ON THE PUBLIC ACCOUNTS ON THE SPECIAL REPORT OF THE AUDITOR GENERAL ON THE MISUSE OF PUBLIC FUNDS

The captioned Report of the Parliamentary Standing Committee on the Public Accounts on the Special Report of the Auditor General on the Misuse of Public Funds, is attached at Annexe 10 of the 2014 Report. That Special Report addresses concerns about the alleged misuse of public funds by the Premier and the Minister of Works and Engineering via payments to an overseas law firm. Public funds were used for the engagement of an overseas law firm that was assisting the Government in the matter of the discovery of bogus cheques in the files of the Ministry of Works and Engineering and related allegations of corruption on the part of the then Premier and the then Minister of Works and Engineering.

The Media Release of 26th January, 2012 captioned 'Auditor General Issues Special Report on the Misuse of Public Funds' is attached for ease of reference at Appendix 2 to my response. The following is an extract from that Media Release: *"In another instance of misuse of public funds, the Auditor General found that a private legal action on behalf of the former Premier and the Minister of Public Works was funded by public money in direct violation of Financial Instructions."* The Auditor General concluded: *'In this case, where the fundamental rules which govern all civil servants have been blatantly disregarded at the highest levels of Government, appropriate sanctions should be applied including appearance before the Public Accounts Committee.'*

Again, I vigorously dispute the conclusion of the Auditor General in this regard.

In her Special Report, the Auditor General is highly critical of the fact that her request to inspect legal files held in the Attorney-General's Chambers was refused on the grounds of legal professional privilege. The Privy Council has agreed that legal privilege was a fundamental condition upon which the administration of justice rested.

The letter of 19th December, 2011 from the Permanent Secretary, Ministry of Justice, to the Auditor General is attached as Appendix 1 to my response.

In her letter, the Permanent Secretary writes as follows: *"The funding of the Ontario Action by Government was, in the judgement of the Government, an appropriate course to follow in the interest of the Government, the Country and Bermuda's international reputation and in this regard, we considered the funding of this action to be for a government purpose in that the personal action was the only means by which the government could take action against those responsible for essentially attacking the Government via its Ministers. These very serious allegations of corruption made against the then serving Premier of Bermuda as well as a present senior Minister, went to the heart of Government and therefore the funding of the action was justified as being for a Government purpose."*

The Permanent Secretary writes further: *"The Government's position is that, based on legal advice received internally within Chambers, which was supported by independent legal advice received externally, it had no option but to refuse the Auditor General's request (to have access to legal files held in the Attorney-General's Chambers). The Government notes with regret that the Auditor General not only rejected the claim to legal professional privilege but indeed, in doing so, referred the Acting Solicitor General and Chambers' internal counsel to the provisions in the Auditor General Act 1999, referring to fines and imprisonment for non-compliance with her request, as being provisions which it was her intention to revoke. It is also to be noted that the Auditor General was asked by Chambers to identify with provision the specific provisions in Financial Instructions which she had alleged had not been complied with. When serious charges are leveled that is not a surprising request. The question was never answered with the precision it merited."*

It is in my view regrettable that the Public Accounts Committee [PAC] rejected the opinion of the Attorney-General's Chambers and agreed with the Auditor General's submission that she should have been granted access to the legal documents that she requested. The PAC's position in this regard seems to have been reached without the benefit of legal advice. I do believe that had the PAC asked the Minister of Justice for any correspondence or communications with the Auditor General on this matter, the requested information would have been provided and the PAC would have reached a different conclusion.

Significantly, the current Ministry of Finance writes in its response to the PAC Report: *"While the Government supports the PAC's recommendation that the Auditor General should have access to any information requested in accordance with section 14 of the Audit Act 1990 ("the Act"), the Government, having taken legal advice from the Attorney-General, does not accept that such information includes documents or information which is protected by legal professional privilege. The suggestion by the PAC in paragraph 5(b) of its report that the withholding of legal professional privileged documents or information gives the impression that there is something to hide fundamentally fails to comprehend why it is important to protect from disclosure to the public legal professional privileged information."*

The referenced Office of the Auditor General Media Release of 26th January, 2012 attributes the following statement to the Auditor General: *"...where the fundamental financial rules which govern all civil servants have been blatantly disregarded at the highest levels in Government, appropriate sanctions should be applied..."*

The Auditor General seems to have forgotten that when she assumed office as the Accountant General in 1994, she recognized and reported to the Minister of Finance that Stamp Duty revenues were not being administered and collected properly and that a significant amount of Government revenue was being lost. In fact, the 1998 Audit Report stated that the Accountant General collected some \$10,000,000 in Stamp Duties on land and property transfers in 1998. A review of the Land Valuation Office records indicated that Stamp Duties of \$16 million should have been collected, marking a shortfall of some \$6,000,000. The 1997 shortfall was almost \$10,000,000. The 1998 Audit Report goes on to state that no records were maintained by the Accountant General to identify the land transfers on which the \$10,000,000 was collected. Consequently, the transfers on which Stamp Duty was not collected could not be identified.

The Auditor General commented that "these revenues may never be collected" rather than something to the effect that every effort must be made to secure the outstanding revenue. Approximately \$16,000,000 is an extraordinary amount to write off without a proper review of the losses and how they occurred. She seems to have resigned her role when she indicated that "these revenues may never be collected". Maladministration on collection of these funds dates back to the early 90s when the then Accountant General issues her first Report on the Consolidated Fund. Her attempts to rectify the matter were feeble; in fact, there was a three-year wait before a consultant was engaged to assist in the

matter. It was found that Stamp Duties had been adjudicated at less than market value and there is no evidence of an investigation into who was responsible for such false accounting. Consequently, those who conducted such transactions were possibly allowed to continue unfair assessments and continue to be unaccountable for such actions. The Government lost millions of dollars in revenue during this timeframe. Therefore, the matter should have been investigated, as there was the possibility that false accounting, breeches of Financial Instructions and even theft even occurred.

No records, no control, no Police investigation. \$16 million of Government tax revenue uncollected or gone missing. The Accountant General responsible for this gross mismanagement is later promoted to Auditor General. Now she recommends the sanction of others. Shameful!

VI DAME LOIS BROWNE-EVANS BUILDING: SETTLEMENT OF CLAIM SUBMITTED BY CARRUTHERS SHAW & PARTNERS OF TORONTO

For ease of reference, Hon. Members' attention is drawn to the Memorandum of February 2012 entitled **CS&P v. Minister of W&E – Background Strategic Overview** from Trott & Duncan and Conyers & Associates to the Acting Financial Secretary and the Premier, such Memorandum attached as Appendix 4 to my response.

By way of background, during the late 1990s, Canadian architectural firm Carruthers Shaw & Partners [CS&P] were engaged by the Government of Bermuda as design consultants for the Magistrates' Court/Hamilton Police Station Building and a lab to be constructed at the Marsh Folly. Construction of the Magistrates' Court/Hamilton Police Station finally commenced in late 2007, with CS&P working on the site through most of 2008. However, during that period, the Ministry of Works and Engineering identified a number of concerns about the work being carried out by CS&P. Additionally, there were numerous challenges in the working relationship between the Ministry of Works and Engineering and CS&P, with the result that by a letter of 2nd December, 2008, the Government terminated the services of CS&P with respect to the Magistrates' Court/Hamilton Police Station Building project. Construction of the lab at Marsh Folly never commenced.

CS&P subsequently claimed breach of contract and damages in the amount of \$1,291,412 with respect to the Magistrates' Court/Hamilton Police Station Building project and \$119,000 with respect to the Marsh Folly lab project, a total of \$1,410,412. These amounts, CS&P asserted, were calculated on the basis that a total of \$1,410,412 would have been earned had the firm not been terminated from the Court project and had the firm been paid for design work that it had carried out for the Marsh Folly lab. The Ministry rejected CS&P's claim in this regard and filed a counter claim in the amount of \$6,063,992.07,

In their Memorandum, Trott & Duncan and Conyers & Associates note with concern that the Government's Chief Architect had not provided them [lawyers acting on Government's behalf!] information that they had requested in order to address comprehensively the CS&P claim. In their Memorandum, Trott & Duncan and Conyers & Associate make the observation that Bermuda's Immigration policies dictate that an overseas architect cannot practice architecture in Bermuda.

You will read that about a quarter of the amount claimed by the Government against CS&P was on solid ground. However, the Attorney General, the Hon. Mark Pettingill, JP, MP, settled with CS&P for \$700,000. He made the settlement without any consultation or communication with the lawyers and technical people representing Government in this case. The Attorney-General seemed to be unaware of the counterclaim and factual information that was available to him. Also, he seemed to be unaware that the team representing Government had filed documents in court for the counterclaim and that CS&P had not filed a defense to Government's counterclaim.

The Attorney-General's Statement in the House of Assembly provided as follows:

“After a careful, objective review of the case by a number of senior attorneys, the conclusion was reached that CS&P's claim was valid and would succeed whilst the Defence and Counterclaim filed by the Ministry in response to CS&P's claim was considered to be without merit, lacking any factual foundation or evidential support.”

In light of this statement, will the Attorney-General respond to the following questions relating to the the decision to enter into the \$7,000,000 settlement of the claim CS&P;

1. Was the Attorney-General aware that a previous Minister of Works and Engineering had been advised in 2009 by way of letter of advice from Conyers Dill & Pearman that CS&P's claim against the Government included claims for damages that were not recoverable in law (e.g. CS&P were not entitled to claim damages for travel expenses not incurred and future anticipated fees and future earnings);
2. Was the Attorney-General aware that in that same advice, Conyers Dill & Pearman advised the previous Minister that CS&P was required, as a matter of law, to take steps to reduce its losses?
3. Did the Attorney-General, the Minister Public Works and the Cabinet consider the advice given to the previous Minister by the technical experts hired by the Government [Conyers & Associates, Woodbourne Associates, EnTech Limited and Spectrum Consulting Limited] that (firstly) CS&P had committed a number of significant design errors and omissions costing the Government millions of dollars to rectify; and (secondly) that the Government had reasonable grounds to launch a counterclaim against CS&P for their negligent work?

4. Did the number of senior attorneys the Attorney-General relied upon to settle this matter consider the advice given to the previous Minister by the technical experts hired by the Government [Conyers & Associates, Woodbourne Associates, EnTech Limited and Spectrum Consulting Limited] that (firstly) CS&P had committed a number of significant design errors and omissions costing the Government millions of dollars to rectify; and (secondly) that the Government had reasonable grounds to launch a counterclaim against CS&P for their negligent work?
5. Which aspects of the advice regarding the counterclaim given to the Minister of Public Works produced by Government's team of technical experts [Conyers & Associates, Woodbourne Associates, EnTech Limited and Spectrum Consulting Limited] did the Attorney-General, the Minister of Public Works and the Cabinet find to be without merit, lacking in factual foundation and/or evidential support?
6. Which aspects of the advice regarding the counterclaim given to the Minister of Public Works produced by Government's team of technical experts [Conyers & Associates, Woodbourne Associates, EnTech Limited and Spectrum Consulting Limited] did the number of senior attorneys the Attorney-General relied upon to settle the matter find to be without merit, lacking in factual foundation and/or evidential support?
7. When the decision was made to settle the claim, did the Attorney-General advise the Minister of Public Works and Cabinet of a meeting that took place on 20th February, 2012 at the offices of Conyers & Associates, attended by all the experts hired by Government together with CS&P, their local legal representatives and overseas insurers, at which the technical experts for the Government explained to CS&P the basis for the Government's counterclaim of approximately \$6,000,000?
8. When the decision was made to settle the claim, did the Attorney-General advise the Minister of Public Works and Cabinet that during the course of the meeting of 20th February, 2012, the technical experts hired by the Government informed CS&P of examples of significant deficiencies in the work produced by CS&P, two of which are as follows:
 - a) That due to negligent errors in the design of the Dame Lois Browne- Evans building, CS&P designed the foundations of the building on four feet of adjacent land without permission of the owner;

- b) That CS&P designed the emergency power supply in the building without taking into account the impact of power failures on the security of the Police holding cells.
9. Did the Attorney-General inform the Minister of Public Works and the Cabinet that, in light of the counterclaim based upon the advice Government received from its technical experts, CS&P never filed a Defence to the Counterclaim. [This means that the Bermuda Government paid out \$700,000 to settle a case when the official court documents filed in the Supreme Court of Bermuda demonstrate that no defence was ever filed to the claim by the Bermuda Government for \$6,000,000.]
10. The Attorney-General asserts that CS&P's claim against Government would succeed. Did the Attorney-General, the Minister of Public Works and Cabinet consider taking this view in light of the advice received from Conyers Dill & Pearman in 2009?
11. Did the Attorney-General, the Minister of Public Works and Cabinet consider that CS&P's claim consisting of a claim for approximately \$182,000 for anticipated change orders which had never been incurred was invalid in light of the advice received from Conyers Dill & Pearman in 2009?
12. Did the Attorney-General, the Minister of Public Works and Cabinet consider that CS&P admitted that over \$1,000,000 of the claim in respect of the Dame Lois Browne-Evans Building project was in relation to anticipated future earnings which were not due and owing in light of the advice received from Conyers Dill & Pearman in 2009?
13. Did the Attorney-General, the Minister of Public Works and Cabinet consider that approximately \$206,000 of CS&P's claim against Government related to an invoice that was paid by Government in December 2008, nearly two years prior to CS&P's writ and 4.5 years prior to the settlement? Payment was made on Certificate Number 16 to CS&P's account at the Bank of Nova Scotia.
14. Did the Attorney-General inform the Minister of Public Works and Cabinet that the settlement includes payment for incomplete plans for the Marsh Folly lab project?

I look forward to the Auditor General's views on these matters.

VII ADDITIONAL OBSERVATIONS REGARDING THE AUDITOR GENERAL

(1) Accommodation for Auditor General and Staff

The Auditor General seemed to believe that she, rather than the Estates Section of the Department of Lands and Buildings, Ministry of Works and Engineering, had the authority to select and rent accommodations for the Office of the Auditor General. In accordance with long established practice and policy, the Estates Section had identified suitable accommodations for the Office of the Auditor General in a Government-owned building which the Auditor General initially agreed would be suitable for her office. About four weeks later, she came to my office at the Ministry of Works and Engineering and stated that she did not want that building. The Estates Section then located another Government-owned building for her consideration.

I received the following e-mail from the Auditor General at 7:56 a.m. on 6th November, 2010: *“Good morning Minister, with all due respect this debacle regarding my accommodation has gone on far too long and as of today this conversation is over. Please be advised that I do not answer to you or take direction from you. My Parliamentary Committee has spoken pursuant to section 45 of the Bermuda Constitution Order, so has the Cabinet and the Minister of Finance now in power. I will today be contracting with Reid Hall to relocate at the end of the month.”*

Having received such a discourteous e-mail, I immediately requested a meeting with His Excellency the Governor who agreed to meet with my Permanent Secretary and me at the earliest convenient time in order to discuss the matter. During our meeting, I shared with the Governor my concern about the Auditor General’s attitude and her apparent wish to do as she pleased on the accommodations issue without the involvement of the Estates Section. The Governor promised to discuss the matter with the Auditor General. In his letter of 24th December, 2010, the Governor wrote: *“I talked the Auditor General through her accommodations issue. I said to her that in the Bermuda context she was not going to have the autonomy she desired in choosing Office space and that she should rely on your team and the Minister of Public Works. She accepted this.”*

Despite the direction that the Auditor General had received from the Governor, she, -with the approval of the Premier, secured accommodation in Reid Hall, a non-Government-owned building.

