

MEDIA RELEASE

OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS

The Office of the Director of Public Prosecutions (DPP) received a Report from the Contractor General (OCG) on September 13, 2010 pertaining to its investigations into the **Award of a Multi-Million Dollar Consultancy Contract to Mr. Aubyn Hill and/or his company, Corporate Strategies Ltd.**

I have reviewed the Contractor General's Report and its attached documentation and hereby give my findings with reasons:

Issues for Determination

The issues for determination are as follows:

1. Do the actions of Mr. Aubyn Hill, Consultant, Dr. Christopher Tufton, Minister of Agriculture and Fisheries, and Mr. Donovan Stanberry, Permanent Secretary in the Ministry of Agriculture and Fisheries, amount to a criminal act under any applicable laws in light of the fact that documents submitted by your office indicate that each had described the two relevant contracts awarded to Mr. Hill by the Ministry of Agriculture and Fisheries (MAF) as employment contracts?
2. Is there any criminal liability on the part of any of the persons involved regarding the contracts awarded to Mr. Aubyn Hill?

Findings in Respect of Issue 1

I considered the provisions of Section 29 (a) of the Contractor General's Act, and section 8 of the Perjury Act. Section 29 (a) of the Contractor General's Act provides:

“Every person who –

- a. Wilfully makes any false statement to mislead a Contractor-General or any other person in the execution of his functions under this Act; ...*

Shall be guilty of an offence and shall be liable on summary conviction before a Resident Magistrate to a fine not exceeding five thousand dollars or to imprisonment for a term not exceeding twelve months or to both such fine and imprisonment.”

Section 8 of the Perjury Act provides *inter alia* that,

“Every person who knowingly and wilfully makes (otherwise than on oath) a statement false in a material particular and the statement is made –

- a. In a voluntary declaration; ...*

Shall be guilty of a misdemeanour and liable on conviction on indictment thereof to imprisonment with hard labour for any term not exceeding two years, or to a fine, or to both such imprisonment and fine”

The Prosecution must prove the commission of the act (*actus reus*) as well as the criminal intention (*mens rea*). In *R v. Tolson* (1889) 23 QB 168 Stephen J defines the concept of *mens rea* in the following terms:

“The principle involved appears to me, when fully considered, to amount to no more than this. The full definition of every crime contains expressly or by implication a proposition as to a state of mind. Therefore, if the mental element of any conduct alleged to be a crime is proved to have been absent in any given case, the crime so defined is not committed; or again, if a crime is fully defined nothing amounts to the crime which does not satisfy that definition”

As a matter of law before a court can pronounce on *mens rea* as a part of the element of the offence, the prosecution must discharge the evidential burden of proof *prima facie*. As a matter of common sense and criminal practice and procedure a prosecutor does not embark on a case where it is clear from the beginning that one cannot overcome a no case submission.

It is my considered view that the Prosecution would face an insurmountable hurdle in proving the requisite *mens rea* (mental element) beyond a reasonable doubt. I say this for the following reasons:

1. The fact that the relevant contracts clearly outline that Mr. Hill was a consultant and not the servant of the MAF. These contracts were attached by Mr. Hill, Dr. Tufton and Mr. Stanberry in their responses to the OCG in which the erroneous references to ‘employment contracts’ were made. This would tend as a matter of law to undermine any assertion that there was any intention to deliberately or recklessly mislead the Contractor General.
2. The aforementioned is compounded in the cases of Dr. Tufton and Mr. Stanberry in that both subsequently acknowledged that the characterisation of Mr. Hill’s contracts as ‘employment contracts’ was an error. Of note is Mr. Stanberry’s subsequent response to the Contractor General,

“This was a mistake on my part, as in my mind the nature of Mr. Hill’s assignment was consistent with the role of a contract employee of the Ministry. In actuality, however, Mr. Hill’s contract was formatted as a contract for a Consultant, providing short term consultancy service, as against an Employment Contract, in the classic sense. This was a genuine mistake on my part and I, therefore, withdraw all reference to “Employment Contract” in my previous letter of November 19, 2009 to be substituted with “Contract for Short Term Consultancy Services”.

Of note also is Minister Tufton's response to Requisition/Questions from the OCG in a document dated June 2, 2010,

"In my previous response to you I did in fact refer to Mr. Hill's contracts as "Employment Contracts", as in preparing my answers I was so advised by the Permanent Secretary. I have since been advised by the Permanent Secretary that he made an error in so designating the contracts, and this has been communicated to you with an appropriate apology from him."

3. The OCG report indicated that Mr. Hill submitted copies of his invoices to MAF in response to the request of the OCG which refer expressly to 'consultancy services'. In light of the fact that Mr. Hill submitted these invoices in addition to the actual contracts, the prosecution would be hard pressed to prove that he had an intention to deliberately mislead the OCG.
4. There is no material available sufficient to contradict the assertion that this was an honest mistake made because of an oversight. No reason has been advanced which would prevent the acceptance of this explanation which seems quite reasonable on the face of it. **The prosecution would be severely embarrassed to convince a criminal Court otherwise.**

I would decline to refer this matter to the police authorities in light of the specific material already provided. No useful purpose would be served in light of the fact that this material would not be sufficient to mount a viable prosecution because of the absence of the requisite mental element. It goes to the mental element of the questioned parties Stanberry, Tufton and Hill to commit an offence. Police investigation could not in anyway advance it or diminish it given the particular circumstances of this case.

Findings in Respect of Issue 2

Section 40 of the Public Sector Procurement Regulations provides *inter alia*,

"A person who-

(a) Contravenes these Regulations...

Commit an offence and is liable upon summary conviction in a Resident's Magistrate Court, to a fine not exceeding one thousand dollars or to imprisonment for a term not exceeding three months or to both such fine..."

On the face of it though this section may appear to have been contravened in relation to the contract dated March 30, 2009, I decline to refer this matter to the police authorities with a view to the possible prosecution of Mr. Donovan Stanberry. It has been held by the Privy Council in **Leonie Marshall and the Director of Public Prosecutions** Privy Council Appeal No. 2 of 2006 (a case on judicial review) that where the decision not to prosecute is based on an assessment of the evidence and the prospects of securing a conviction, the courts will still accord great weight to the judgment of experienced prosecutors on whether a jury is likely to convict: ***R v Director of***

Public Prosecutions, ex parte Manning [2001] QB 330, 349, para 41, per Lord Bingham of Cornhill CJ.

In the totality of the circumstances I do not believe that the material would support a viable prosecution and as such I would decline to refer this aspect of the matter to the police. However, I would recommend that a thorough departmental review be taken of the systems in place to avoid any breach of the procurement regulations.

Of course, any citizen of this country can feel free to go directly to the police authorities once they have a complaint of a criminal nature against any other citizen. But the complainant must always be mindful of the fact that the police before they can arrest and charge a fellow citizen, their investigation must reveal evidentiary material that is credible and cogent of a particular quality sufficient to form the basis of a viable prosecution. Criminal law and practice would have it no other way.

As usual I also wish to commend the Office of the Contractor General for the thoroughness and attention to detail in the investigation and preparation of their report.

Paula V. Llewellyn, Q.C.
Director of Public Prosecutions