

4x6 = 262

SPECIAL REPORT:
OMBUDSMAN'S OWN MOTION INVESTIGATION
Into Governance at The Corporation of Hamilton

December 2013





December 13, 2013

The Speaker, The House of Assembly
The Hon. K. H. Randolph Horton, JP, MP
Sessions House, 21 Parliament Street
Hamilton HM 12

Dear Honourable Speaker,

I have the honour to present a Special Report of my Own Motion Investigation into Governance at The Corporation of Hamilton particularly with respect to the development of the waterfront.

This Report is submitted in accordance with sections 5(2)(b) and 24(2)(a) of the Ombudsman Act 2004.

5(2) Subject to this Act, the Ombudsman may investigate any administrative action taken by or on behalf of an authority

(b) on his own motion, notwithstanding that no complaint has been made to him, where he is satisfied that there are reasonable grounds to carry out an investigation in the public interest.

24(2)(a) Where any administrative action that is under investigation is in the opinion of the Ombudsman of public interest;... then the Ombudsman may prepare a special report on the investigation.

Yours sincerely,

Arlene Brock
Ombudsman for Bermuda

OMBUDSMAN FOR BERMUDA

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“Even the most benevolent of governments are made up of people with all the propensities for human failings.

The rule of law as we understand it consists in the set of conventions and arrangements that ensure that it is not left to the whims of individual rulers to decide on what is good for the populace.

The administrative conduct of government and authorities are subject to the scrutiny of independent organs.

This is an essential element of good governance.”

Nelson Mandela

*2000 Conference of the
International Ombudsman
Institute: South Africa*

TABLE OF CONTENTS

INTRODUCTION2

PRE-REQUEST FOR PROPOSAL6

Democracy Trust6

Prior Initiatives regarding the Waterfront Development 13

REQUEST FOR PROPOSAL PROCESS 18

2012 Decision to Move Forward 18

RFP Advertisement..... 19

RFP Submission Process23

RFP Evaluation Meeting26

Shortlist Interviews29

POST-REQUEST FOR PROPOSAL31

Resolution31

Verification of Criteria31

Existing Docks33

Public Disclosures.....35

Environmental Impact Study36

CONCLUSION.....41

FINDINGS44

RECOMMENDATIONS47

APPENDICES51

I Corporation of Hamilton Committees

II Industry Opinions of RFP

III Best Practices Comparisons

IV Responses to RFP

V RFP Evaluation Criteria

VI Public Participation in Committee Meetings

VII Tendering and Quote Policy

COVER: “4x6=262”

The Corporation of Hamilton’s Request for Proposal advertisement measured 4 inches by 6 inches and resulted in a Waterfront Lease of 262 years.

INTRODUCTION

By March 2013, a number of concerns had come to my attention from individuals, taxpayers, one Corporation Councillor¹, and via the media about decision-making and other governance problems at the Corporation of Hamilton (“the Corporation”)². Questions were raised about:

- arbitrary decisions made without regard for the technical advice of staff
- questionable expenditures³
- \$30,000 incurred costs for dismissal of the previous auditors without proper notice
- the initial refusal of some members to sign the June 2009 Code of Conduct
- potential conflicts of interest
- marked increase in retroactive and unsigned resolutions
- unstructured meeting agendas
- meetings held without the legal notice period (meetings called “at the drop of a hat”)
- city business being conducted in secret “Caucus” meetings.

If proven, these allegations would constitute “maladministration”. Most of these concerns were identified as significant departures from practices of previous city administrations. The allegations largely relate to activities of the new city administration elected as a slate “Team Hamilton” on 10 May 2012, led by Mayor Graeme Outerbridge

(“the Outerbridge Administration”).⁴ By the end of this investigation, it became clear that there was an Inner Core of three members⁵ who knew and seemed to agree on everything. An additional two members⁶ who were

Section 2 of the Ombudsman Act 2004 – Maladministration:

“maladministration” means inefficient, bad or improper administration and, without derogation from the generality of the foregoing, includes

- (a) unreasonable delay in dealing with the subject matter of an investigation;
- (b) abuse of any power (including any discretionary power); or
- (c) administrative action that was
 - (i) contrary to law;
 - (ii) unfair, oppressive or improperly discriminatory or based on procedures that are unfair, oppressive or improperly discriminatory;
 - (iii) based wholly or partly on a mistake of law or fact or irrelevant grounds;
 - (iv) related to the application of arbitrary or unreasonable procedures; or
 - (v) negligent;

¹ L. Scott (who identified himself to the media during the course of this investigation).

² The Corporation of Hamilton is comprised of a Mayor, three Aldermen (one of whom has been designated as the Deputy Mayor) and five common City Councillors (collectively, the “Corporation”). [I use the spelling of “Councillor” that is in the Municipalities Act.]

³ Such as: retroactive roaming charges for cell phones, contrary to existing policy (*VOTE: entire Council present, Deputy Mayor excused himself because vote was in response to his roaming charges, unanimous vote*); the purchase of copies of a video produced by the daughter of the Deputy Mayor of the “Installation / Inauguration” ceremony of the new Corporation held in June 2012; (*VOTE: Alderman G. Rawlins not in attendance, unanimous vote*). Note: the new Corporation passed a resolution that there should be installation ceremonies for all future incoming administrations (*VOTE: Entire Council present, unanimous vote*); and the purchase of at least two business suits, shirts and ties for the Mayor (at a cost of \$2,319) (*VOTE: Alderman G. Rawlins, Councillors L. Scott, G. Scott and R. Edwards not in attendance*) – justified at a Restricted meeting of 5 December 2012: “the suits are just like the I-Pads and cellphones, they are tools which are needed to carry out the job properly”.

⁴ The Deputy Mayor is of the belief that the complaints are racially biased: “people who are complaining are coming from a certain quarter. I personally think that there are certain people who feel that we should not be in these halls”. There may well be people who think so, but the racial mix of people who express concerns or support to me regarding this investigation is about 50 / 50%.

⁵ The Mayor, Deputy Mayor and Councillor Keith Davis.

⁶ Alderman Simmons and Councillor G. Scott.

informed about most matters and usually voted with the Inner Core constituted the Core members. The remaining four members of the Corporation were more or less informed and sometimes dissented depending on the subject matter and which meetings they attended.

The allegations regarding meetings were particularly noticeable because a major change in transparency in this regard had been launched in 2009. The prior city administration led by Charles Gosling (“the Gosling Administration”) opened certain meetings to the public. Some of the city’s business continued to be conducted in Restricted meetings in line with the policy established November 2011 regarding which matters may be reserved for Restricted meetings:

“ *Restricted information is considered, but not limited, to be:*

- *Receiving of advice that is subject to solicitor-client privilege*
- *Security of the property of the municipality*
- *Acquisition or disposal of land*
- *Considering personal information about an identifiable individual*
- *Labour relations or employee negotiations*
- *Litigation or pending litigation, including matters before administrative tribunals*
- *Any other matter permitted or required.*”

All matters other than those listed above should be deliberated and decided in public meetings. However, the Outerbridge Administration introduced a third type of meeting – closed “caucus” meetings – that

- excluded staff
- some members of the Corporation were sometimes not notified about
- were not properly minuted.

Interviewees question the legality of such meetings where decision-making (rather than just socializing or sharing of ideas) seemed to be taking place.⁷ The minutes of a Special Corporation meeting of 30 November 2012 reveal that the Mayor himself was concerned: “*the Council has done most of its business meetings around Caucus meetings and in the New Year would like to shift and have business done in their regular business meetings*”.

There are no laws in Bermuda against non-public meetings in municipalities. However, it is important to know that transparency standards for municipal administrations worldwide are evolving in the direction of open public meetings with strictly limited exceptions.⁸ One long established standard is that senior staff relevant to issues being decided upon should attend Restricted meetings. Further, such meetings should be properly minuted. The inclusion of staff in meetings is not just for the purpose of obtaining technical advice. Their presence has the effect of assuring the public that governance is above-board and in keeping with proper procedures.

⁷ In the view of a couple of members of the Corporation, some proponents of ideas seemed to arrive at restricted meetings with pre-drafted resolutions, likely decided on in prior caucus meetings.

⁸ For example, as the Ontario Ombudsman notes in investigations of backroom meetings of municipal councils: the public has a right to observe municipal government in process. There is a legitimate expectation of having input and of being assured of integrity when councilors come together for the purpose of exercising power or authority or for the purpose of doing the groundwork necessary to exercise that power or authority. “Closed-door meetings are inimical to the democratic process. This is a cautionary tale for municipal governments, underscoring the risks of so-called social gatherings that are really a shield for clandestine meetings to further city business away from public scrutiny”. [“*Don’t Let the Sun Go Down on Me*”, April 2008; “*In the Back Room*”, October 2013]

Relations between the Outerbridge Administration and staff were poisoned early on when a senior staff accused the new Corporation of conducting a “witch hunt” after they asked for details about daily operations. Staff reported feeling intimidated, reticent to take initiatives and threatened with discipline when they questioned or offered suggestions about instructions from members of the Corporation. On the other hand, some members of the new Corporation felt that the staff resented their presence – as a black, non-traditional, non-business-priority administration. They believe that staff was determined to undermine them from the very beginning by failing to provide adequate information, challenging them through the Bermuda Public Services Union, and suspected leaks to the media.⁹

By a resolution of 5 September 2012 staff responsibilities and discretion were reduced:

*“Be it resolved that all delegated powers outside of the employees’ job description, that the former Council granted the Secretary and other Managers through the Secretary are rescinded forthwith. In addition, any matters with a Third Party, Business or Persons who are not Corporation of Hamilton employees that shall cause a lease, contract, license or permit shall be submitted to the Council for final approval.”*¹⁰

The Council’s rationale for removing staff powers was to “get a better understanding of what happens on a day to day level at the Corporation”. That is, rather than ask each department head (e.g. engineering, accounts, events) to provide an overview and orientation about their delegated powers, the Council decided to rescind all delegated powers with a view to re-delegating at a later date. By resolution of 21 September 2012, the Corporation re-delegated to senior staff only the authority to issue licenses and permits.¹¹ To date, there are no resolutions that re-delegate any other responsibilities.

The 2 June 2009 Code of Conduct stipulates that it is the Corporation’s responsibility to set policies and the staff’s responsibility to implement them. The powers previously delegated to staff by the Gosling Administration were intended to augment their capacity to implement Corporation policies. As a result of their day to day powers being rescinded, the business of the Corporation has become protracted and inefficient. For example, senior staff used to be able to negotiate relatively small or simple leases and contracts themselves. Now, they act as shuttle messengers between the vendors or tenants and the Corporation. The staff and BPSU launched litigation against the Outerbridge Administration regarding union recognition and protection of staff. These issues are not addressed in any detail in this report although the consequences of failures to heed technical advice are noted.¹²

In addition to general governance issues, many of the concerns and suspicions alleging maladministration centered on the Request for Proposal (“RFP”) process for the Front Street Waterfront Development (“the Waterfront Development”). There were allegations of deficiencies, unfairness and possible abuse of power in the RFP process.

⁹ The tenor of relations with the staff have not improved to date:

a) The minutes of the restricted meeting of 1 February 2013 record the views of a Councillor: “any utterances in the minutes from the staff be redlined and then vote to have them removed and struck from the minutes. The staff should not have a say in the Council’s meeting and when they speak, the Council should ask to have the recorder turned off [the Secretary] should not have a seat or a voice as it is not his meeting, it is the Council’s”. The decision was to refer this suggestion to the Governance Committee for decision. Alderman G. Rawlins and Councillors T. Symonds, L. Scott and R. Edwards not in attendance

b) A 7 November 2013 directive requires that, prior to leaving City Hall premises, all senior staff must inform the Mayor of the nature of and expected duration of off-site appointments (except for lunch and doctors’ visits)

¹⁰ *Alderman G. Rawlins not in attendance, unanimous vote*

¹¹ *Aldermans C. Simmons and G. Rawlins and Councillor T. Symonds not in attendance, unanimous vote*

¹² Personnel matters are beyond my jurisdiction to investigate. However, I may review the extent to which alleged questionable management impacts on the delivery of services to the public.

Allegations that a project of such magnitude was not properly launched and that the subsequent development contract and lease were improperly entered into cast further shadows that warranted the light of scrutiny.¹³ The Waterfront Development purports to be the most significant construction project ever in Bermuda's modern history. It is projected to take some 12 to 20 years to complete and would be the largest single creator of jobs in history. At an estimated cost of at least \$200 to \$300 million,¹⁴ this project would be of importance not only to the City of Hamilton, but to Bermuda as a whole.

However, the RFP for this project consisted entirely and solely of an advertisement in the local newspapers measuring 4" x 6".¹⁵ This brevity – so completely contrary to normal practice for RFPs – was odd enough to warrant my systemic investigation.¹⁶

As the evidence began to pour in, it became apparent that a single report covering both general governance concerns and the Waterfront Development would become unwieldy. Once I had the opportunity to review and assess some of this evidence, the Waterfront Development seemed to illustrate the general allegations of poor governance. Therefore, I decided to carve this project out as a possible illustration of governance issues. A more general governance report was intended to follow. However, the highly irregular refusal of the Mayor and Deputy Mayor to comply with my Summons' to attend investigation interviews required our office to expend considerable time away from the investigation in order to apply to the Supreme Court to consider my Certification of their Contempt of Court.¹⁷ Accordingly, I will be able to complete only one report focused on the Waterfront Development. This should provide some insight into the overall governance issues brought to my attention. I am confident that my recommendations will be of general relevance.

This investigation has entailed extensive interviews of some 48 stakeholders and witnesses, documentary review of over 1,000 pages; consultation with eleven waterfront development experts (in the US, Caribbean and Canada); as well as legal review.

Our best practices research canvassed RFP processes in Bermuda and overseas. Significantly, we reviewed the Corporation's own template guideline for procurement of goods, services and contracts. A sampling of similar RFPs and interviews with development authorities for waterfronts overseas confirmed the basic elements that ought to comprise a RFP for a development of this magnitude. (*See chart: Best Practice Comparison of Elements and Information contained in a Request for Proposal Appendix III*)

The remainder of this report is organized into five broad sections: Pre-Request for Proposal • Request for Proposal Process • Post-Request for Proposal • Conclusion • Findings • Recommendations.

¹³ The Corporation is within my jurisdiction as a "corporation established by an Act of the Legislature" under s. 3(d)(i) of the Ombudsman Act 2004.

¹⁴ This may be a rather conservative estimate, but no valuation of the whole project has been submitted to me.

¹⁵ By contrast, recent communication by the Corporation for a Christmas window display competition set out two pages of rules and application that set out purpose, rules, evaluation criteria and voting procedures.

¹⁶ Systemic Ombudsman investigations are usually done when: (a) issues are complex, sensitive and high profile spanning the legislature, media and several Ministries and (b) informal resolutions not possible; issues require fact-finding and best practices review; and recommendations are likely to affect the larger society.

¹⁷ The Supreme Court of Bermuda upheld our certification: "When the Ombudsman issues a summons, it has the same legal force as a court order, and cannot be ignored by the summonsed parties at their own whim". Re Office of the Bermuda Ombudsman [2013] SC (Bda) 72 Civ

PRE-REQUEST FOR PROPOSAL

Democracy Trust

It is neither the RFP nor the current Corporation that begin the story of the redevelopment of Hamilton Harbour.

On 26 June 2009 the then Government Minister Without Portfolio issued a Ministerial Statement that: (1) the Municipalities Act 1923 should be repealed; (2) operations of the Municipalities would be transitioned into Government; and (3) a Request For Proposal for an organization to oversee the transition, was placed in the Official Gazette. Such reforms would change centuries of the old business formula and white power base for governing the City of Hamilton.

Some six months later, the Government selected consultants to advise on its proposed reform of the municipalities. On 19 January 2010 the Gosling Administration met with the Consultants to advocate that various options for governance of the city be considered and to argue against the Government abolishing the Corporation and assuming operational control of the assets. The Gosling Administration requested clarification of the Consultant's mandate and the Government's specific intentions. The Government's eventual responses did not quell their concerns.

On 4 February 2010 the Gosling Administration sought assurances from the Government that it was no longer pursuing the municipality reforms announced on 26 June 2009. The Government replied on 17 February 2010 that it was indeed "committed to repealing" the Municipalities Act 1923. On 26 April 2010 the Corporation wrote to the Government and asked to meet with the Cabinet. A meeting was eventually held on 1 June 2010.

The Gosling Administration feared that the intended reforms would abolish the Corporation's traditional control of the management of its property. It was the Corporation's view that any Government action to take over the property without compensation would be for purposes that were "*repugnant to the principle of elected city Government, contrary to the rights of the Corporation as a body with perpetual succession rights whose mind and management rests with elected members of city Government, and contrary to the original intention and purpose for which the property was acquired*".¹⁸ The Government, on the other hand, was motivated by a view, informed by considered opinion, that the waterfront is a national asset which should be developed nationally.

The Gosling Administration was not confident that the Government intended to respect the Corporation's authority.¹⁹ The Gosling Administration took the unprecedented step, by a resolution dated 30 April 2010, of transferring ownership of leases for most of the city's properties to Democracy Trust ("the Trust"). The settlor of the Trust was the Corporation of Hamilton – that is, the elected members acting in their collective capacity. The Trustees were the elected members of the Corporation, acting in their individual capacities. The beneficiaries of the Trust were the beneficial owners of the leases – the electors and ratepayers of Hamilton.

¹⁸ According to the 30 April 2010 Restricted Meeting Resolution, the \$1 million was set aside to seek redress from the Courts "*for any breach or anticipated breach of the Corporation's rights and to uphold the lease as they see fit including using the retainer to act for the Trustees if so requested by the Trustees or any elected member or past member of the Corporation.*"

¹⁹ In part, this was due to the fact that even many months after the rental by the Government of the Fire Station property from the Corporation had been approved in the Government's budget, the lease was not yet signed (and therefore no rent had been received).

Democracy Trust Conditions

The power to create the trust was derived from s.20 of the Municipalities Act 1923 to *“purchase, take, hold, receive and enjoy, and to give, grant, release, demise, assign, sell, mortgage or otherwise dispose of and convey by deed under the seal of the Corporation, any land in Bermuda, in fee simple or for a term of life or lives or years or in any other manner”*

The minimum number of trustees could be one and the maximum fifteen (15). Trustees could be automatically removed or cease to hold the position if they were: to die; become mentally incompetent; bankrupt; dissolved/wound up; entered into liquidation; surrenders or loses its right to act as trustee; did not have Bermudian status. The trustees could add or remove persons as beneficiaries or remove beneficiaries of the Trust without having to inform them.

The **beneficiaries** were persons lawfully registered under the Municipalities Act as municipal electors in the municipal register as at 1 Jan. 2010.

Essentially, the Gosling Administration leased some \$ 500 million worth of properties to the Trust.²⁰ The Trust then leased back all of this property to the Corporation for a period of 20 years, renewable for another 20 years but with an option for the Trust to purchase the properties in 40 years' time. The Corporation would control the assets for at least 40 years. Their thinking was that a 20 year period in the first instance would guard against the immediate politics of the day. The intention of the Trust was to create a legal knot that would forestall an asset grab by the Government. It was hoped that the Government would be incentivized to enter into negotiations regarding the Corporation's continued and central role in dealing with City assets.

Further, the Gosling Administration believed, and had received a legal opinion, that the creation of the Trust was in keeping with its fiduciary duty²¹ to protect the interests of the electors and tax payers. They did not envision any risks of city property falling into private hands given the several Trust instructions to manage the leases for the benefit of the electors and taxpayers. Also, they felt that the prohibitive amount of stamp duty that would be triggered (never mind government and public outrage) would prevent the Trustees from being able to buy the City's property.

However, in anticipation of a possible legal battle from the Government regarding the creation of the Trust, the Gosling Administration also set aside \$1 million of Corporation money to fund a retainer with its lawyers – the “Defense Fund”. Evidence was submitted to me that the Gosling Administration felt that it was within their fiduciary duty not only to create but also to defend Democracy Trust. Accordingly, this amount was based on an estimate of how much would be required to fight a case up to the level of the Privy Court.²¹ Without the retainer, neither the Corporation nor the Trust would have had access to enough funds for a legal fight against the Government. (Later, members of the Outerbridge Administration characterized this as an improper use of Corporation funds by the

²⁰The Trust would not own any City property, but rather short term leases.

²¹That is, to manage the properties in the best interest and for the benefit of the electors and taxpayers. Under the Municipalities Act, the Corporation does not have the power to dispose of assets for less than market value. The Gosling Administration was concerned that to do so would be a breach of their fiduciary duty that can attract both civil and criminal penalties.

Trust – which is legally a separate entity.) This retainer was non-refundable as long as there was a risk of litigation expenses.

The Trustees could argue that there was never any risk to city assets given the leaseback of the properties to the Corporation's control. Notwithstanding that the immediate harm of creating a Trust was negligible; this was an unprecedented co-mingling of the members of the corporation in their collective corporation capacity with their individual capacities as Trustees. Despite its name, the existence of Democracy Trust seems to upend the very concept of democracy that the Trust was intended to defend – as it was no longer the elected body but rather persons acting in their individual capacity who would ultimately own the leases to the bulk of the city's assets.

The Gosling Administration had in mind a modest phased approach to development of the waterfront. As of February 2010, they had planned that the first step would be to create a transport hub at Albouy's Point (the eastern end of the harbour) and the second phase would be to develop detailed design work and an extensive Request for Proposal for land reclamation.²² However, the Gosling Administration did not get very far in conceptual negotiations with the government.²³

XII. Duty in Regard to Property Interests Acquired From the Corporation of Hamilton

Notwithstanding any other Article or Schedule in this Deed, the fundamental duty of the Trustees is to defend, preserve and safeguard any property that the Trustees may lease from the Corporation of Hamilton or acquire an interest in which is owned by the Corporation of Hamilton and to do so for the benefit and welfare of the City of Hamilton and the present and future ratepayers and electors until such time as the Trustees may determine in their absolute discretion that the City of Hamilton is and will continue to be governed by a city government (with power to own and manage land) which is duly elected in a democratic process here the electoral base is no less in terms of number of votes eligible to be cast than that which currently exists under the Municipalities Act 1923, and which city government is substantially self governing. Where the Trustees have made such a determination, they may either assign their rights under any lease or option to the city government or any affiliated corporation, or may (if appropriate) terminate any lease or option if the rights and essential personality of the Corporation have been satisfactorily reaffirmed or restored.

On the morning after the 10 May 2013 election, former Mayor Gosling requested a meeting with the new Mayor that day. At this hour-long meeting Mayor Gosling and the Trust's legal counsel informed Mayor Outerbridge of the existence and intent of Democracy Trust. They discussed various options including (a) winding up the Trust or (b) the new Corporation taking over as Trustees. Mayor Gosling offered to meet with the new Corporation and begin the process of transferring or dissolving the Trust, depending on the decision of the new Corporation. The afternoon after the election, Mayor Outerbridge had prescheduled travel for two weeks. The evidence is that he wanted time to

²² This is similar to the approach in Gibraltar (see *callout*, pg. 20)

²³ Any development of the waterfront would require the collaboration of the Government – if only because land reclamation and construction work must involve the seabed – the "Queen's Bottom" which is owned by the Crown. Apparently, the creation of the current docks decades ago required approval by the Governor. In April 2007, the Government introduced taxes on docks built over the seabed throughout Bermuda.

understand the implications of the Trust. He instructed the Secretary not to discuss the matter with anyone during his absence. The Senior Alderman who acted as Mayor in his absence was not informed about the Trust.

It was not until the 4 July 2012 Restricted meeting that the whole Corporation was told that most of the City's properties were leased to the Trust and leased back to the Corporation.²⁴ The two Mayors had another meeting (at the request of Mayor Outerbridge) on 14 June 2012 at which the Secretary was present. They discussed both the Trust and waterfront matters. A month later (16 July), a meeting invitation was circulated to all members of both the Gosling and Outerbridge Administrations for the following afternoon. Four members of the Gosling Administration met with members of the Outerbridge Administration to explain the details of the Trust. They also suggested collaborative lobbying of the Government to formally recognize the Trust and to transfer all of the City's property into it.

At a Restricted meeting on 5 September, one Councillor proposed a resolution that the members of the new Corporation continue as Trustees. The decision was deferred. There are no minutes of when the Trust was next discussed. There is no resolution to document the decision to request that the Trust be dissolved. On 20 September, Mayor Outerbridge telephoned former Mayor Gosling to request that the Trust be dissolved and the \$1 million retainer funds be returned to the Corporation. Mayor Gosling instructed the lawyers to do so the same day.

On 12 October 2012 the Treasurer (as acting Secretary) contacted the lawyers to indicate that Mayor Outerbridge wanted to know why the retainer had not been returned. The lawyers responded on that same day that the process of winding up the Trust would have to be completed first. By 14 November 2012 the Trust had been dissolved and the final Deed of Surrender relating to the Corporation's property was signed by a quorum of the Gosling Administration. By 7 December substantially the full retainer was returned to the Corporation.²⁵

While establishment of the Trust was based on legal advice that this action was fully within the authority of the Gosling Administration under s.20 of the Municipalities Act, the public disclosure about the Trust was somewhat brief. It is the evidence of Mayor Gosling that the creation of a Trust could be incendiary in some quarters – “a bombshell”. They wanted to avoid publicity and believed that public focus on the Trust would undermine negotiations with the Government.

There was only a brief note about the Trust in the 2011 Audited Financial Statements. I cannot make a finding of maladministration due to a lack of transparency. However, the note was not self-explanatory and unlikely to be scrutinized by the electors, taxpayers, broader public or even the media. This is the archetypical distinction between legality and maladministration. The disclosure of Note 1 in the 2011 Audited Financial Statements was perfectly legal and adequate from an audit point of view. However, the note should have been informative enough to be readily

Ongoing Consultants

(taken from the CoH's Quotes and Tendering Policy)

Often, for ongoing consultations, it is not practical to obtain a quote for the work, or the ultimate price is subject to substantial variation. In these instances, where a consultant does not already have 'preferred' status; the choice of consultant must be presented to and ratified by the Finance Committee.

(see footnote 26)

²⁴ Although apparently some of the Corporation members had already heard about the \$1 million retainer.

²⁵ Approximately \$996,000 was returned (i.e. \$1 million less \$8,400 legal fees; plus interest of \$4,800)

understood by the Corporation's clients – the residents and taxpayers. Although it met all legal and accounting thresholds, it is understandable that the Outerbridge Administration did not consider the Gosling Administration's public disclosure about the structure, purpose and operation of Democracy Trust was to be insufficient.

The auditors met with the newly elected Members of the Finance Committee to present the 2012 audit [at a meeting on 21 November 2012]. During the course of the meeting KPMG was asked to explain the rationale for the accounting treatment and disclosure of the Trust. KPMG explained that there was full transparency from their perspective as they had been given access to all documentation and to legal advisors. They clarified that the Financial Statements appropriately consolidated the properties leased to the Trust because the Corporation maintained control of the assets and the Corporation and Trustees were the same persons.

Soon after that meeting, the Outerbridge Administration resolved after considerable discussion not to follow the Finance Committee's suggestion to wait until after the 2012 audit to change auditors. Due primarily to the erroneous belief that the auditors had advised or otherwise "participated" in creation of the Trust, the Core members held the view that the auditors had colluded with the Gosling Administration to minimize disclosure of the Trust. This fed at least one Councillor's concern that the Treasurer had "too close" of a relationship with the auditors. By a resolution dated 28 December 2012,²⁶ after an open tender process (of one day) the Outerbridge Administration selected new auditors who set out a more detailed and informative disclosure note about the existence and impact of the Trust. Ultimately, the primary cost of changing auditors without the required 30 days contractual notice – and after the auditors had already begun groundwork for the next audit – was \$30,000 (paid 23 May 2013).²⁷

CORPORATION OF HAMILTON

Notes to the Financial Statements

December 31, 2011

1. General

These consolidated financial statements include the accounts of a related trust (the "Trust") with which the Corporation has entered into lease and purchase option agreements in respect of its properties. All transactions and balances between the Corporation and the Trust have been eliminated on consolidation.

²⁶ The auditors were on a "preferred vendor" list and therefore the work did not need to be tendered each year. However, the Corporation is perfectly free to re-tender – in this case, the only question was what would be the appropriate timing in order to avoid delay and a penalty for failure to give proper notice. The Finance Committee was concerned that audit preparation had already begun and certain work such as the inventory count needed to be done shortly. Vote: *Alderman G. Rawlins and Councillor G. Scott not in attendance, unanimous.*

From the CoH's Quotes and Tendering Policy: *The Corporation may, from time to time, declare certain vendors as 'preferred'. These vendors may be reviewed annually based on their ability to continually provide value for money, efficient services and quality product relative to competitors. Such a review must be clearly documented. A vendor may only receive 'preferred' status once the case has been presented to and ratified by the Finance Committee. In such instances purchases need only comply with the Purchase Order Policy and, with the exception of this term, need not comply with the terms of the Policy for Tendering and Quotes.*

²⁷ Or even the statutory 21 day notice in accordance with s.89 of the Companies Act 1981.

I have no evidence of collusion. It appears that the former auditors presented the Financial Statements fully within their professional standards and legal advice. However, given the stark difference in the extent of the disclosures in the 2011 and 2012 Financial Statements, I do not find evidence of maladministration in the Outerbridge Administration's insistence on more extensive disclosure about the Trust.

The only question of maladministration is whether their failure to give adequate notice to dismiss the former auditors – contrary to the contract and technical advice of senior staff – resulted in unnecessary costs to the taxpayers including the incurred costs by the former auditors as well as legal and other costs.

CORPORATION OF HAMILTON
Notes to the Financial Statements
December 31, 2012

14. Related party transactions

On 2010, persuaded that the intention of the Government of Bermuda (the "Government") to repeal the Municipalities Act 1923 could result in the direct or indirect confiscation, without payment, of the Corporation's properties if the said properties remained in its name, the Corporation was desirous to lease its properties for 20 years (with an option to renew for a further 20 years and an option to purchase) to a trust, the sole purpose of which was to preserve and protect its properties from expropriation by the Government and to hold the properties in trust for the benefit of the City of Hamilton, present and future electorates.

The then elected council of the Corporation of Hamilton established an irrevocable trust, known as The Democracy Trust ("the Trust") and entered into a lease agreement with the Corporation for its properties in accordance with the terms noted in the preceding paragraph.

The Trust, by various subleases, leased the property back to the Corporation on the same terms as the originating lease.

Hence, the net effect of the lease payments under the originating and subleases is Nil.

In addition, the Trust retained legal counsel for the potential legal battle with the Government with funding of \$1 million provide by the Corporation. This amount is presented as funds held in escrow in the balance sheet (See Note 15).

The Trust was dissolved in November 2012 with all lease agreements terminated and the remaining funds held in escrow being returned to the Corporation.

All transactions and balances between the Corporation and the Trust were eliminated on consolidation in the 2011 consolidated financial statements (See Note 2).

15. Restatement of prior year consolidated financial statements

As discussed in Note 14, the Trust retained legal counsel for the potential legal battle with funding of \$1 million provided by the Corporation. This amount was previously included in cash and cash equivalents.

Management has restated the prior year consolidated financial statements to adjust the \$1 million and recorded it as funds held in escrow.

The effect of the Government's municipalities' reform on revenues convinced the Gosling Administration of the propriety of its actions in establishing the Trust. Both the prior and current city administrations are crippled by the loss of wharfage revenue. The June 2010 Municipalities Reform Act repealed the power of the Corporation to levy wharfage and port dues. At a public meeting in December 2010 the Corporation announced that it would be allowed a one year grace period to continue to collect wharfage.²⁸ In February 2011, however, the Corporation was shocked to

²⁸ In 2009 wharfage fees generated about \$7.5 million in revenue for City Hall, roughly 35% of its budget (information on pg. 13 taken from audited Financial Statements).

Backdrop re Hamilton Harbour

Since at least 2005, successive City Councils have had ambitions of developing the Hamilton waterfront. The waterfront begins at one end with the docks where all of the sea cartage to Bermuda is unloaded and is operated by a private company, Stevedoring Services Ltd.¹ At the other end of the waterfront is a privately owned hotel with a marina. Much of the waterfront is owned by the City of Hamilton, punctuated by a few private parcels toward both ends. City of Hamilton assets include a ferry terminal and two wharfs for cruise ships. Private retail and commercial businesses line Front Street facing the harbour. These have constituted the city skyline for about a century, with the Cabinet Office backed by the House of Parliament facing the docks. Any redevelopment would likely have to take the existing skyline into consideration.

The question of whether or not the redevelopment should include cruise ships also requires careful analysis and consultation. There have long been differences of opinion about the appropriate mix of cruise versus air/hotel visitors for Bermuda. In a prolonged period of declining tourism, Hamilton merchants, who pay the lion's share of city taxes, welcome the proximity of cruise ships in the harbour. However, the newer, mega-sized cruise ships required two terminals to be built at the Dockyard to better service them. City administrations must also consider which elements of redevelopment would bring economic value for all of Hamilton, including residents, as well as for Bermuda in general.

In 1998 a black dominated labour party was voted into Government for the first time since party politics began in 1964. Thus the City Council was viewed as the last bastion of white oligarchic rule in Bermuda.² Until 2012 the City's revenues came from land taxes from owners and businesses; leases of property; parking lot fees; as well as some \$6-9 million in wharfage fees. Government passed the Municipalities Reform Act 2010 ("Reform Act") which authorized it to levy wharfage and port dues. This appropriation of city revenue soured the relationship between city administration and the Government.

Elections for the City Council are held every three years. Until 2012, City Councils (9 persons in total) have been almost entirely dominated by white business persons. Over the decades, the mayorship was determined by informal succession agreements and practice. Significantly, the Reform Act also changed the voting base from business owners, property owners and city residents to city residents only, leaving most tax-paying business and property owners (unless city residents) to feel disenfranchised. With this new voting base, a non-oligarchic City Council was voted into power on May 10, 2012.³

¹ The docks are the lifeline for Bermuda. At only 21 square miles with a high population density of 67,000, Bermuda imports almost all food and supplies needed to sustain life.

² Given our legacy of slavery and unique population mix of 56% black and 44% white, much of Bermuda's history, structure and dialogue are still contextualized with racial dynamics.

³ This was considered so historic that the Deputy Mayor gifted Queen Elizabeth II and the Governor with copies of the "Installation" video.

learn – through the Budget debate – that the wharfage fees of more than \$6 million that it had expected to earn would instead be replaced with a \$5 million grant from Government. Both the Gosling and Outerbridge Administrations were in the hunt to increase revenues and reduce expenditures. Both viewed the waterfront property as a critical component of any new revenues.

Prior Initiatives regarding the Waterfront Redevelopment

The dream of developing Hamilton Harbour goes back even further than the Gosling Administration. For several decades successive Corporations have wanted to leave a legacy of having developed a mini-version of Sydney in Australia or Baltimore in the US – comparable in iconic identity and importance. In this century, the idea of a bustling harbour with a distinct skyline took flight in the form of episodic activities: taking off with a privately organized concept competition in 2004; to at least three discussion concepts (2006-2009) by a consulting firm hired by the Corporation; to preliminary re-visioning by Bermuda First in 2012; and finally landing with a bit of thud in October 2012 with the selection of a local development partner.

2004 Private Competition

In 2003-04, Sir John Swan, a former Premier of Bermuda whose first career was as a highly successful real estate developer, sponsored a waterfront design competition with prizes for professional, amateur and youth submissions. The stated purpose of the competition was to bring the dream of redeveloping the waterfront to the forefront and to inject visually into the public mind the idea that such development is possible and desirable. There is evidence that some professionals did not bother to enter the competition in the cynical belief that the winner would end up being Sir John's preferred architect (they were right).

Sir John is widely suspected to have a legacy and/or financial interest in the development of the waterfront. His private competition was viewed in some quarters as a bid to control any development. A decade later, his evident passion and investment in the concept continue to fuel considerable angst that he is intent on usurping the redevelopment and legacy, leaving the Corporation of Hamilton to be “a bit player at best”.²⁹ On the other hand, it is fair to say that his interest is wholly consistent, not merely with his own profession, but also with the impulse of former leaders (in any country) to inject their visions into national dialogue about major issues. Sir John is open about having strong views but denies any personal financial or legacy intentions. Interestingly, he did not make a strong push for his ideas during the Gosling Administration when his own son was a Councillor.

In any event, the 2004 competition was not a formal Corporation process. There were no specifications regarding area, scope and vision or other guidance for this competition that would be similar to a RFP. It was conceptual only and cannot under any scenario be regarded as a substitute for a proper RFP issued by the property owner – the City. Nevertheless, Sir John's longstanding interest underlies substantial suspicion in several quarters and has motivated strong, perhaps kneejerk, reactions spanning a number of Corporation administrations.³⁰

²⁹ People's suspicions are buttressed by recent (some have complained – aggressive) publicity of his vision. One witness summarized his interest over the years: “*he did; (then) he didn't; (now) he does*”.

³⁰ At least three members of the current Corporation are adamant that Sir John is intent on usurping the development of the waterfront. Their evidence is that he made statements to this effect directly to them, including in one private meeting held at his signature building on Front St.

Development Consultants

In 2003, the then Corporation asked a local architectural firm to produce a preliminary sketch for the waterfront. Later the firm was asked to make more sketches. The only specification was that there should be an iconic building. Apparently, this firm was approached precisely because it had not participated in Sir John's private competition. In 2005, the Corporation was introduced to Sasaki, a Boston-based interdisciplinary planning and design firm that has previously worked on a (publicly tendered) project in St. David's. The Corporation initially engaged Sasaki to provide architectural services in collaboration with the local firm.

The original idea was that the waterfront would be developed as a private / public partnership. Therefore, Sasaki was intended to take the Corporation to the point of clarifying both vision and parameters that could then be tendered through a request for proposal to select a development partner.³¹ This engagement morphed into Sasaki assuming the role of a master planner. Neither the Bermuda firm nor Sasaki were hired as a result of an open process. There were no RFP's, no publicized specifications or other processes consistent with competitive procurement. The Sasaki plan cannot be described as a considered choice from amongst a range of competitive concepts.

Although the standards for good governance and fairness have evolved significantly just in the past decade, the then Corporation hired both the local and overseas companies without competitive selection processes for such a major project. By 2005, new standards for corporate governance had begun to permeate and change the way that not only corporate but also public and not for profit entities are run.³² Today, no credible organization ignores basic governance standards of fair process and due diligence.

From 2005 - 2009, Sasaki produced at least three iterations of concepts for the waterfront. The Corporation and Sasaki held public information meetings (at city and church venues). The first two plans were dismissed by local

professionals, Government officials and members of the public as too elaborate, grandiose, unrealistic, out of all reasonable proportion for Hamilton, "unbecoming to the established skyline" and far too expensive. What appears to have been the final scaled down plan in 2009 was less elaborate but still considered by some key business stakeholders to be questionable. This plan included a large parking area to be built on the edge of the water as well as significant land reclamation by a process never before used in Bermuda.³³

The various roles of Sasaki and the Consultant:

- Master planner
- Architectural / Concept plans
- Environmental Impact Statement author
- Coordinator and leader of visits to overseas waterfronts
- Liaison with the Department of Planning re approvals
- Vetting of applications in response to the RFP (invoice specifies: "*spend 6 days in Bermuda, attend many meetings with CoH, review proposals, short list three firms and interview each. Make a final recommendation to the waterfront development committee and assist in the preparation of a resolution*")

³¹ This would be similar to the approach taken for the new hospital – which developed a clear broad concept of what it wanted prior to hiring lead developers. In many of its elements, the hospital project is considered by industry experts to be a rigorous model of best development practice.

³² This would be similar to the approach taken for the new hospital – which developed a clear broad concept of what it wanted prior to hiring lead developers. In many of its elements, the hospital project is considered by industry experts to be a rigorous model of best development practice.

³³ The first plan, estimated at \$600 million with 11 acres of land reclamation; the second: \$400 million plan with 7.7 acres of land reclamation; and the third \$200 million plan: 3.9 acres of land reclamation.

The involvement of Sasaki with the Corporation spanned five different Mayors. Today, a single consultant (“the Consultant”) maintains the relationship; having retired from Sasaki in 2010 and – by its agreement – transferred the Corporation as a client to his own (new) boutique design firm. It appears that both the Gosling and Outerbridge Administrations decided to maintain the relationship with the Consultant in order to leverage, rather than waste, the approximately \$1.5 million of work already done over the years by Sasaki and the Consultant. There is no resolution by either the current or prior Corporations to actually adopt and move forward with Sasaki’s third plan.

Soon after the Gosling Administration was elected in 2009, they engaged the Consultant to produce an Environmental Impact Statement (“EIS”) based on Sasaki’s reduced third plan. Later that year, the Consultant presented a draft Scoping document (to set out parameters of what the EIS should cover) to the Department of Planning for preliminary, pre-application consultation and feedback. On 8 October 2009 the Department of Planning returned a list of 15 comprehensive questions and concerns. There was some back and forth communication early in 2010 between the Government and the Gosling Administration which was seeking Government’s support with regard to the land reclamation phase. By September 2010, the Consultant had drafted an EIS. However, until the elections in 2012, the EIS and the Consultant’s involvement fell into limbo (no doubt eclipsed by the Municipalities Reform Act, loss of wharfage revenue and creation of Democracy Trust).

One of the first decisions of the Outerbridge Administration – proposed by the Mayor on 6 June 2012 – was a resolution to complete the EIS as a prelude to moving forward with the City’s development of the harbour. The Mayor had previously been a member of the Corporation approximately from 2004 - 2006. He was aware of the prior interests and work on redevelopment of the harbour. Despite the fact that development of the waterfront was not a part of Team Hamilton’s election platform, this early request indicates that the redevelopment of the waterfront was a priority, at least for the Mayor.

The minutes of the 6 June meeting 2012 reflect that several members of the Corporation wanted to first understand the purpose of the EIS. Accordingly, the Corporation resolved to “*complete the EIS subject to the approval of the Infrastructure, Development and Future Committee (“Infrastructure Committee”) or in the alternative the submission of a new recommendation to the board by the next general meeting*”. The 6 August 2013 Infrastructure Committee meeting recommended that the Board should resolve to “*defer the Environmental Impact Study*”.³⁴

Bermuda First

Meanwhile, the private competition and hiring of the Consultant by the City were not the only actions afoot regarding redevelopment of the waterfront. In 2009 Bermuda First – a public / private group (with significant business representation) – was established as a think-tank for the purpose of assessing Bermuda’s overall economic position and proposing ideas to ensure the Island’s continued prosperity. Late in 2011 the then Premier convened a Waterfront Development Steering Committee (“WDSC”) comprised of two prominent businessmen from Bermuda First, Mayor Gosling and herself to consider steps to be taken in redeveloping Hamilton Harbour.

³⁴ As noted later in this report, there was no subsequent resolution to complete the Environmental Impact Study.

This WDSC hosted a two-day retreat on April 4- 5, 2012, just five weeks before upcoming Corporation elections. Members of the business community, Government and the then Corporation were invited to brainstorm immediate and long-term visions for administrative structure and development concepts for the waterfront as well as revitalization of Hamilton generally. Amongst other issues, this retreat explored: the sites to be developed; the desirability of cruise ships in Hamilton Harbour; iconic structures; financial feasibility; and caps on costs.³⁵ A draft summary of the retreat was prepared by 11 April 2012.

The WDSC met three times with Mayor Outerbridge regarding the deliberations of the retreat, including the broad proposals for moving forward to create a structure to oversee development of the Waterfront. The retreat had concluded that there should be a permanent entity for the duration of the project that would not change with each change in Government or city administration. By a letter dated 27 June 2012 the current Mayor thanked the WDSC for updating him. At the second meeting on 30 July 2012 with Mayor Outerbridge, the WDSC proposed a three level administrative structure:

- An Executive Committee – decision making entity mirroring the existing WDSC (that is, the Premier, Mayor and two Bermuda First representatives)
- Management Committee – seven to eight persons to make recommendations to the Executive Committee comprised of key Ministers and Corporation members as well as representatives from the private sector
- Operating Committee – 10-11 members with relevant technical expertise who would be responsible for getting work done, comprised of two to three representatives each from the Government (at the Permanent Secretary and Director levels) and the Corporation’s technical staff as well as technical expertise from the private sector.

This structure also envisioned the appointment of an Executive Director with experience in developing multiple international waterfronts. The Executive Director would act as the key liaison between the Operating Committee and the Management Committee.

The minutes of the third and last meeting on 20 August 2012 of the WDSC and the Mayor, record the then Premier noting that *“in the absence of legal reform a waterfront authority may be the way to go but that the legal structure would require expenditure. The national economy must take priority over municipality and the waterfront is a national priority that must move forward.”* Notwithstanding whether or not the minutes accurately reflected the words or tone of the government, the Outerbridge Administration interpreted this as a warning of the Government’s intention to control the development.

Also at this meeting, the Mayor had suggested that the committee should visit waterfronts overseas. The business members of the WDSC suggested that such visits should be at a later stage. Instead, the first step should be establishment of a structure with a clear mandate such as a waterfront authority. Then there ought to be discussions

³⁵ There was some consideration about the status of White’s Island. In 1971, after years of negotiations between the Corporation and the Government, the island was conveyed to the government in exchange for the properties on which the Fire Station and City Hall car park are located as well as the right of way from Woodlands Rd. to Laffan St. This agreement also included the Corporation constructing the current Bus Terminal in Washington St. (to be repaid by the government over 10 years). In 2010 White’s Island became subject of a lease to a charity for 20 years and 364 days (one day short of the lease having to be submitted to Cabinet for approval).

with financiers regarding the feasibility of public / private partnerships. After groundwork on feasibility and scope, then visits to other waterfronts may be useful to concretize the vision appropriate for Bermuda.

This meeting was of considerable concern to the Mayor. The Inner Core members feared that the Government was poised, imminently, to take control of the redevelopment of the waterfront with only a token role for the Corporation. The fear was that under the structure proposed by the WDSC, the Mayor's voice would be only one – subordinate – out of four. Accordingly, the Inner Core and Core members felt compelled to move immediately to seize the initiative. The role of the WDSC fizzled.

In some ways, it could be said that the motivation of the Outerbridge Administration to move swiftly on securing a development contract for the Waterfront Development within just six months of taking office was similar to that of the Gosling Administration in creating the Democracy Trust. Both administrations aimed to protect the future revenue source that a re-developed waterfront would bring and also to remove the city's most valuable properties from the reach of the Government.

The degree of potential harm, however, is quite different. In the case of the Trust created by the Gosling Administration, the Corporation retained effective control of the assets for at least 40 years. Former Mayor Gosling contends that, in purpose, operations and restrictions, the Trust upheld the fiduciary duty of the Corporation to control the assets of the City for the benefit of the electors and ratepayers. The essential characteristic of a fiduciary relationship is that the interest of the beneficiaries is the reason for and priority of all actions taken by the Trustees.

In the case of the Development Agreement (“the Agreement”) and Ground Lease entered into by the Outerbridge Administration, the Corporation relinquishes legal and financial claims and control of its most valuable assets to a private developer for some 262 years. In fact, as a consequence of the Agreement and especially of the Ground Lease with the private developer in December 2012, the Corporation must now pass to the developer for his review, all new and renewals of leases and other contracts that may impact the waterfront.

The differences between the actions of the Gosling and Outerbridge Administrations are that the agreements entered into by the Outerbridge Administration are (a) not reversible (b) do not impose fiduciary duties on the developer to protect the waterfront for the benefit of the electors and ratepayers, and (c) are not subject to the supervision of the Court³⁶ in the same way that Trusts are.

³⁶ Contracts, on the other hand, are interpreted by the Courts in the case of disputes.

REQUEST FOR PROPOSAL PROCESS ³⁷

2012 Decision to move forward with RFP

The intention of the new Corporation to move forward with the Waterfront Development was raised for the first time at the public session of the 5 September 2012 Corporation meeting. A recommendation of the Infrastructure Committee was accepted that members of the Corporation, technical staff and the Consultant should visit overseas waterfront developments in order to “*get a better understanding of potential waterfronts*”. At the 10 September Infrastructure Committee meeting the Secretary was instructed to draft a travel itinerary for such visits.

The Consultant was advised that, while there was no further development or design work at that time, the Corporation would like to engage him to recommend and facilitate visits to waterfronts overseas. Between 27 September and 3 October, the Mayor, one Alderman, one Councillor and the Secretary met the Consultant to tour approximately nine US East Coast waterfronts in five States.³⁸ However, these visits could not have actually informed the RFP process as they occurred after the advertisement for the RFP was published.

Although there is no record, it appears that there was a caucus meeting on 24 August 2012 that determined that there should be a RFP to select a development partner. It is unclear exactly what was discussed or decided but there was initial talk of issuing a Request for Interest (“RFI”), not a RFP. There are no records or other evidence to show that, prior to issuing the RFP advertisement, the Corporation had:

- informed itself about any assumptions or details in the prior Sasaki plans
- taken into consideration the deliberations of the WDSC retreat
- questioned whether or not a RFP is even the most appropriate or best practice first step for a development of the magnitude of the waterfront
- reviewed the Corporation’s own existing procurement guidelines for goods and services (*Appendix III*)
- determined the actual area to be developed.³⁹

It is not merely the Corporation’s own existing procurement guidelines that should have been taken into account. The Corporation of Hamilton is within the jurisdiction of the Office of Public Management and Procurement (established by the Good Governance Act 2011). This Office is required to issue a Code of Practice for Project Management and Procurement. Although the Code of Practice is still in draft form, it will be in force during the entire effective life of the Waterfront Development project. Good administration must take all relevant grounds into account when making decisions. Given that the final Code of Practice will govern the Waterfront Development, the draft Code of Practice is surely a relevant consideration at the critical stage of procuring a development partner and agreeing a 262 year Lease.⁴⁰

³⁷ An RFP for consulting services is a tender by another name. “Tender” is usually issued for procurement of specific goods and services. “RFP” is usually issued for procurement of consulting services and projects that are not tightly defined at the beginning (responders are expected to respond to broad parameters with design concepts). Otherwise, the elements to be publicized are similar.

³⁸ Massachusetts (Boston), New York; Connecticut, New Jersey, Rhode Island (at a cost of \$18,680).

³⁹ It was not until a Special meeting of 30 November 2012 that the Corporation considered that there was no existing survey and defined description of the waterfront property to be developed (from Barr’s Bay to Marine and Ports).

⁴⁰ The Office of Management and Procurement is intended to operate independently and free from political interference. Once Regulations are in place, it will be an offence for any person to fail to comply with the Code of Practice (liable to a term of imprisonment up to 12 months for such failure).

RFP advertisement

The 5 September 2012, Restricted meeting was rather busy. The Corporation also unanimously resolved to direct the Secretary to publish a RFP advertisement.⁴¹ In fact, Councillor Davis (later informally designated as the “Point Person” for the Waterfront Development due to his detail-oriented approach) arrived with and dictated the text of the advertisement:

“The Corporation of Hamilton formally invites Requests for Proposals from all parties interested in the Front Street Waterfront Project. The successful candidate will be expected to partner with the Corporation of Hamilton and other interested agencies on an agreed /final concept. Interested parties should submit their proposals no later than 4.00pm Friday 12th October 2012 and addressed to: The Secretary, Corporation of Hamilton, 17 Church Street, Hamilton HM 11.

The minutes of this meeting reveal that the City Engineer advised that the RFP must be concise and that the technical team would need to agree with the Corporation on what should be included. In response to a question from another Councillor about timing, Councillor Davis responded: *“This is not full blown: this is an expression of interest”*. The Corporation decided that the City Engineer’s questions should be referred to the next Infrastructure Development and Future Committee (“Infrastructure Committee”) meeting of 10 September 2012. At this meeting, the City Engineer expressed concerns that the text dictated five days earlier seemed more like a RFI than a RFP. The next day, he emailed a list to the Infrastructure Committee requesting input:

“Can you please answer the following questions:

- *Define what you are seeking from an RFP.*
- *How will the RFP be distributed / circulated?*
- *Who are [you] looking to attract with the RFP?*
- *What information can we give the respondent?*
- *Timelines*
- *Constraints*
- *Narrative of the project – scope*
- *Drawings*
- *What information do we require that respondents to provide in the RFP?*
- *What is the selection criteria?”*

He did not receive any replies. One member of the Infrastructure Committee recalls that the Mayor told them that they need not bother respond. The City Engineer was not subsequently included in any actions or meetings regarding the RFP advertisement, submission or evaluation process. Two other senior staff also tried unsuccessfully to impress upon the Infrastructure Committee and/or the Mayor that far more substance was required than the dictated text of the advertisement. However, they were not heeded. Indeed, technical and senior staff were effectively side-lined from the most significant project that the City proposed to undertake in decades.

The advertisement, 4” by 6”, constituted the entire RFP. There were no supporting specifications, guidance or other scope, parameters and documents that would typically accompany a RFP. The evidence of the Deputy Mayor is that *“this was a RFP because we called it a RFP”*.

⁴¹ *Vote: Alderman G. Rawlins was not in attendance, Councillor L. Scott was not in the room during the vote*

The Model of Gibraltar

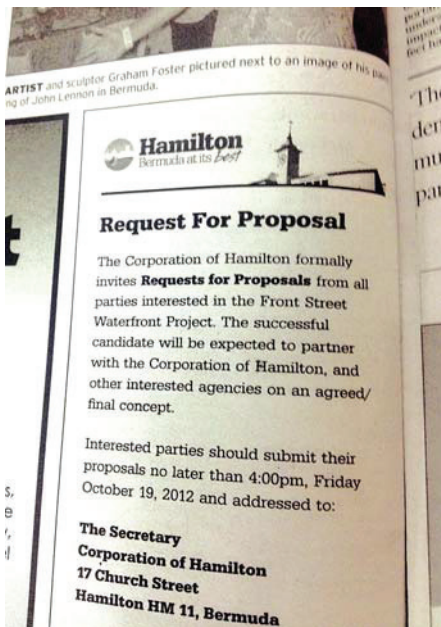
In 1991 Gibraltar undertook the most massive development in its history (other than the airport and fortress). Given a chronic shortage of housing and very little of “The Rock” left for development, the government undertook to reclaim some 300 thousand square meters of land. The vision was to create a land bank that would be used for a mix of housing, industrial and recreational development. The government retains ownership of the reclaimed land and then leases parcels to developers. The recruitment processes for developers for the land reclamation stage and for the subsequent leases of parcels were similar:

- First, the government requested Expressions of Interest including qualifications and preliminary concepts. The government provided brief, broad parameters: geographical area, needs of the market, and a generic wish list of government priorities. There was no commitment to give contracts to any of the responders (if the field of responders was not deemed competitive enough, then the government intended to re-advertise)
- Second, the Expressions of Interest received were vetted by a Selection Board who evaluated professional qualifications, institutional capacity, financial backing and preliminary concepts
- Next, the government took the preliminary concepts from the qualified companies to the public for feedback
- With the benefit of public input, the government then issued the Request for Proposals to the pre-qualified companies with more detailed parameters: vision, specifications, evaluation criteria, and so on. This tender process followed a rigorous process established by the European Community
- Once the development partners were selected, the comprehensive Environmental Impact Assessment process (including Health and Safety impacts) began. Again, following European Directives, this entailed robust public consultation, in particular, engagement with the environmental lobby.

For a development of the magnitude and projected years to complete as Bermuda’s Waterfront Development purported to be, a RFP would not normally be the first stage of procurement. In terms of best practices, waterfront developments often begin with the establishment of a structure such as a Waterfront Authority (along the lines suggested by the WDSC). A Waterfront Authority would usually first develop the parameters of the vision and identify consultation stakeholders. If land reclamation is desired, this could be a separate project even prior to identification of development partners (as Gibraltar did).

Thereafter, the stage of soliciting the interests and vetting the qualifications of relevant partners would begin. Such partners could include a mix or team of master planner, project manager, public / private liaison, quantity surveyor, engineer, architect, economic and environmental consultants. Typically, Requests for Expressions of Interest and/or Requests for Qualifications would achieve the preliminary task of scrutinizing experience, relationships, design concepts and initial quotations. Only after this would RFPs be issued to qualified applicants.

The RFP process includes initial circulation of materials such as submission guidelines, evaluation criteria and parameters of the project. These documents and parameters stipulate the broad vision, critical features, area to be developed, qualification criteria, possible site visits, deadlines for submitting proposals and any transparent bid opening process to which responders may be invited. Importantly, RFPs usually clarify the evaluation criteria so that all potential responders would be on a fair and level playing field and know beforehand how they would be evaluated.



Almost always, there would be opportunities for interested parties to ask questions. These questions and the Corporation's responses must then be circulated to all interested proposers - so that they each know exactly what their competitors have learned.

This was all absent in the case of the RFP for the Corporation's Waterfront Development.

The Best Practices comparison (APPENDIX III) sets out typical elements and stages of a RFP process. I have compared five overseas waterfront projects, two Bermuda Government RFPs (including WEDCo); a Corporation of St. George's project for Ordinance Island, three recent Corporation projects and the Corporation's own guidance for tendering. A cursory comparison will show that the Corporation's 4" x 6" RFP advertisement bears no resemblance to a true RFP. Calling it a RFP does not make it so.

However, the 4" x 6" advertisement was all there was. A total of four advertisements were placed in the local daily and weekend newspapers from 24 - 26 September 2012. The due date for proposals to be submitted was 19 October 2012. Industry wide, this is a relatively short period for a development of this magnitude. Several witnesses noted that complex proposals could entail up to several months of preliminary design and engineering work, negotiations with specialist partners and contractors, and financial analysis and costing. The 2012 RFP advertisement was the first ever open solicitation by the Corporation of Hamilton for a waterfront development designer, master planner or partner. Unfortunately, the advertisement was inadequate and not in accordance with normal – never mind best – practices.

This is somewhat surprising as the Corporation was certainly aware of the importance of proper procurement guidelines. Each new member of the Corporation had been previously oriented via (a) 3 inch wide binder of Corporation procedures within a week after their election and (b) later meetings to walk through the contents of the binder. The four-page tender process which elucidates the principles and steps for transparent procurement was included. Moreover, proper procurement practice was very much "on their radar". In the weeks prior to the

Specialty of Waterfronts *(from overseas expert)*

Waterfront development is a very specialized area. Historically there have been two separate jurisdictions – one for land and one for sea. However, the distinction between land and sea is rather fluid given that there is more or less of each depending on the tide. Generally money is made off the uses of land, yet these uses are increased through the uses and amenities of the water.

Financing of waterfront developments is equally as complex due in part to the potential increase in sea level and resulting decreases in land mass. It is difficult to get funding for waterfront developments unless the lowest aspect of the development will be unaffected by the highest potential sea level rise. This dynamic between land and sea becomes even more multifaceted as water cannot be privately owned, but is instead owned and, in some instances, taxed by the government. Due to these risks, typical leases of waterfront property can range from 30 -100 years. A lease of 262 years is unusual by industry standards.

RFP advertisement, they had been involved in several discussions on acquiring an electronic tendering software system.⁴² They discussed the principles of fairness and transparency in procurement.

The argument that technical advice from staff and the Corporation's own procurement guidelines were of no consequence is unpersuasive. One Councillor stated: "*there is nothing that governs the city to do an RFP in a certain way*". That is simply not the case. The Good Governance Act 2011 does govern the Corporation's procurement activities. One would expect a minimum of due diligence – such as consultation with the Office of Procurement and review of the Corporation's own procurement guidelines before embarking on a project of the magnitude and complexity as the Waterfront Development.⁴³

I am convinced that this was not a matter of ignorance, but rather of choice. The Mayor's evidence is: "*We were aware of the process, but we needed to get it out right away... I believe that was the advice from Civil Engineer that we needed certain things...from my memory I did say that we do not have the time to go through these certain things. It wasn't an option of taking up to three months.*"

Councillor Davis said: "*we recognized we didn't give scope and technical information at the start but we also recognized that the waterfront process from the Corporation had enough legs that we didn't have enough time to provide that – we were threatened with a takeover... when the engineer said it would take a long time to put the RFP together, we weighed the time it would take against the threat at hand... We had an environment that we were doing it in. And the environment superseded the framework that many others would have liked us to have used.*"

This seems to be a classic case of haste making waste.

The Corporation (at least the Infrastructure Committee that took the lead in this project) felt pressed to protect against the possibility that the government was proceeding immediately to take control of the Waterfront Development. They felt that they just did not have time to develop a more substantive RFP. This is not substantially different from the motivations and reasoning of the Gosling Administration in creating Democracy Trust: that the extra-ordinary imminent threat of a Government takeover of Corporation assets required extra-ordinary responses.

RFP Submission process

Preliminary contacts for more information

Although the advertisement stipulated responses to be addressed to the Secretary, neither he nor any other staff were given instructions about what to inform callers who requested further information or how to handle receipt and storage of submissions. At least two industry persons indicate that their calls to the Corporation of Hamilton confirmed that the Corporation was looking for Expressions of Interest. Staff cannot be faulted for this response given (a) they were not otherwise instructed; (b) the audio record of the 5 September meeting records Councillor

⁴² The winning bidder for the contract to provide and customize the electronic tendering software was a Councillor. This was raised at the onset of this investigation as a possible conflict of interest. His evidence is that the Secretary told him that the Corporation is not in the practice of tendering unique ideas that are pitched to the Corporation and that are not readily available from other vendors. After an initial direct track discussion, his concept was put out to tender. His proposal won because it was demonstrably the best proposal at the lowest price.

⁴³ Especially as the Mayor and Deputy Mayor both admit to not knowing much about RFP best practices.

Davis as saying that this is an EOI/RFI; and (c) their own prior experience that RFPs must be accompanied by specification documents while RFIs need not be.

At the initiative of staff, a press release was drafted to provide to people who requested additional information: *“The City of Hamilton is looking for proposals from developers who have an interest in working with us on the development of the waterfront. The ad in the newspapers provides an opportunity for companies, large and small, to step forward to indicate their interest and capabilities in providing the infrastructure necessary to successfully complete this project.”* This language supports interpretations of the advertisement that the Corporation was looking for Expressions of Interest, not full blown proposals. However, it was not agreed that the press release be disseminated.

Prior to the deadline of 19 October 2012 several people called the Corporation expecting to be able to collect additional documents as is the norm for RFPs. They received a variety of responses. (*see Chart of Responses Appendix IV*). One person who asked for additional information was given a Powerpoint presentation that Sasaki had presented some years before. Another – the team that did not intend to submit a development proposal – was given an opportunity to meet with Infrastructure Committee (prior to the advertisement) and with the Mayor after the advertisement to present their idea for a community center. The proper procedure is that responders should all be circulated the information and opportunities to present given to any one – so that they are all treated fairly.

Submission logistics

The Corporation’s own “Tendering and Quotes Policy” requires:

- providing interested parties with tendering packages
- including an invitation to the bid opening
- holding a pre-tender meeting to go through the documents during which interested parties may ask the Corporation questions
- any questions are asked outside of such open meeting must be in writing and these questions will be answered to all parties in writing
- if during the bid process any addenda are issued, all parties will receive and sign for them to acknowledge receipt
- all bids to be deposited by the parties into a locked box on the counter in the office of the Corporation. The box will be labeled to confirm the protect and bid closing time.

Approaches to RFPs: (from overseas investor)

Before responding to a RFP, due diligence would be to consider:

- who is behind the project
- is there a reasonable timeframe to respond
- are the goals and technical specifications clear?

If the request is unreasonable or if the expectations are unclear, firms may decline to respond.

For public projects in most jurisdictions, it is necessary to have at least three qualified respondents or the project must be retendered. An Expression of Interest (“EOI”) and a RFP are fundamentally different in terms of the scope, schedule and deliverables. An EOI is simply used to generate interest in industry generally. This also provides an indication whether the firms to whom you intend to issue a RFP will be likely to respond. Although there is an assumption that EOIs will be followed by a RFP, this is not always the case as the questions generated by the industry can make the client realise that a particular project is more complex than they thought. In any event, it is highly unusual to select the successful bidder based solely on an EOI.

Usually, responses to tenders are placed directly by the responders themselves into a locked wooden box that is kept in the open area on the reception desk of the Corporation. However, the evidence is that in this case the responses were kept in a simple manila file on the desk of the Administrative Assistant. The Secretary recalls opening one envelope in error on 19 October 2012. This envelope was addressed to him but did not indicate on the outside that it was in relation to the Waterfront Development. He immediately gave it to the Administrative Assistant to file. He claims not to be aware of how many other submissions were received.

Often, but not always, tenders and RFPs are unsealed in an open process to which responders are invited. This eliminates any suspicion of bias or improper process - responders are assured that their submissions will be considered on a level playing field. There was no such open process to unseal the submissions in the case of the Corporation's RFP. Three members of the Corporation recall that on the afternoon of Friday, 19 October the Deputy Mayor unsealed the envelopes in their presence (except for the one that was already unsealed). The Deputy Mayor does not recall being a part of this process.

Two people provided evidence that on 19 or 20 of October, the eventual successful contractor contacted the Deputy Mayor to confirm that the Corporation had received his submission. This responder had submitted half a dozen copies of his response in shallow boxes. While his cover letter and drawings were included in the manila file at the unsealing on 19 October 2012 the file did not contain the boxed copies. Suspicious, three members of the Corporation went into City Hall (on the weekend and in the absence of staff) to search for the boxed documents. They did not find them. On Monday morning the shallow boxes were found in the Secretary's office (which is locked on weekends). The Secretary does recall the shallow boxes but cannot confirm how they appeared in his office. His evidence is that he did not open the boxes and did not have sight of the actual submissions inside. The Deputy Mayor does not recall the weekend visit at all.

Submissions received

Experienced witnesses in the development industry both locally and overseas have indicated that the failure of a proper RFP for Bermuda's Waterfront Development would likely (and indeed did) dissuade serious interest from professional highly qualified local and overseas developers. In the absence of specifications, it is difficult to craft a responsive submission. At least one Corporation interviewee was surprised about how few responses were submitted. Industry experts were not surprised: *"do we even know what they need – investment, management, planning, design or anything else, etc.?"*

An overseas developer asked: *"do they know what they are asking for? We would decline to respond if the request for proposal is not clear – we don't have time to bid for unclear projects"*. Another overseas expert stated: *"the ad didn't have a lot to it – so different people could interpret it according to their own expertise"*. A local developer asked: *"what EOI language are others responding to? Without an understanding of what the work involves, how does one know if what one does matches what the Corporation needs – for instance law or management or finance or planning or any other set of expertise?"* Yet another local developer claimed: *"I've had the opportunity to hear from various people who did submit or chose not to submit...they view the CoH's process with scorn."* No one we received evidence from would assert that the RFP was adequate.

Yet the refrain from some members of the Corporation is that the notion of developing the harbour had been around

so long, that prospective responders would know what was involved: “it has been put out before”.⁴⁴ This is a curious assumption. Actually, no specifications had ever before been issued by the Corporation:

- the 2004 private competition was not a city initiative; sought conceptual ideas only; and, had not issued any specifications
- the 2005 engagements of the local architect and of Sasaki were not the result of an open process – again, no specifications were ever publicized.

I have no earthly idea what information informs this assumption. The fact that one or two firms may have been involved in initiatives almost a decade ago does not justify the view that all other firms, local and overseas, would have insight into current vision and specifications. The fact that there has been general talk for at least a decade about developing the waterfront is certainly not the basis on which a RFP can be issued. I find this approach to the groundwork that was required for the first step in a project of this magnitude to be cavalier at best.

By 19 October 2012, the Corporation had received nine responses, one of which was correctly marked as “not a proposal”. However, several that were obviously marked as expressions of interest were treated and evaluated as legitimate proposals. Four submissions were unequivocal in text and form (number of pages; focus on qualifications) that they were consistent with the industry norm of Expressions of Interest only rather than true responses to a RFP.

One submission was emphatically explicit that it was an expression of interest only. Indeed, it is difficult to comprehend how an evaluation committee of six persons together could reach a conclusion that a subject line: “Expression of Interest” could be considered to be anything but just that. Further, the text of the letter stated: *“it is our understanding from this office’s subsequent meetings with you that this RFP is in fact not an RFP but is an Expression of Interest open to all who may have any interest in the Development including the providing of services. We understand a simple letter of response is sufficient at this time. Please let us know if our understanding is incorrect so that we may resubmit in some other more appropriate form”*. No answer or clarification was ever provided.

Ghost Submission

The most mysterious of all of the documents (“#8”) that was identified as a response to the RFP advertisement was a presentation document and Powerpoint dated March 2010. It was included amongst the responses that were ranked at the evaluation meeting held on 22 October 2012. The authors of the document were puzzled when our office called to schedule an appointment to question them about their experience with the RFP process. They were astounded to learn – from me – that this document was included and evaluated as a response to the RFP.

This team had indeed authored this document on their own initiative – but in 2010. They made a Powerpoint presentation in order to put their credentials in front of the Corporation and to test the appetite for development of the waterfront. They also left with the Corporation a 58-page document comprised of their credentials (47 pages) and general approach to determining the feasibility of the Waterfront Development (9 pages).

⁴⁴ Even the successful development partner echoed this sentiment in the media: *“For most people that resubmitted stuff it wasn’t a new project. This has been around a lot of times and there was a lot of people that could have just pulled their stuff off the shelf and dusted it off as it were”*. (2013/ 04/ 02 Royal Gazette). (It is unclear how he would know who else submitted responses and what would have been on their shelves.)

Two years later when the RFP was advertised, they did call to ask for a meeting and were expecting to collect the specifications that would ordinarily be part of a RFP. They did not receive any information. Accordingly, they did not submit a response. At no time between the 24 September 2012 advertisement and the 19 October 2012 deadline did they ever resurrect and submit their 2010 presentation.

It remains a mystery how their 2010 presentation became a part of the 2012 bundle of responses to the RFP. No one has admitted to including it amongst the submissions that were evaluated on 22 October 2012.⁴⁵

RFP Evaluation Meeting

On 19 October 2012 at a Special Meeting, the Corporation resolved to “*engage the services of [the Consultant] to give expert advice on the applications the Corporation has received in response to the request for proposal for the Hamilton Waterfront Redevelopment. It is further expected that [the Consultant] will, upon completion of his review of all submissions, provide to the Board a written report of his recommendations. He would be engaged for the period 21 - 25 October 2012.*”⁴⁶ The Consultant travelled to Bermuda but learned only on 22 October what his task would be. He did express concerns about the RFP advertisement and process which he was not otherwise involved in.

The Consultant did not speak with anyone prior to the meeting of 22 October 2012 about the process to be followed to execute this task. At this meeting, the Mayor, Deputy Mayor (who is an Alderman), a second Alderman and two Councillors met with the Consultant to consider the responses. One very serious problem with the evaluation and interview process is that no staff was present to record who attended and what happened. There are no audiotapes or minutes of this meeting. It is important to know who actually attended meetings where decision-making takes place in order to ensure that acts done and resolutions made are in accordance with the Municipalities Act 1923.

Article 7(7) and (8) of the Municipalities Act states:

- (7) No act or resolution of a Corporation shall be valid unless it is assented to by not less than two Aldermen and by the Mayor.
- (8) The Mayor, two Aldermen, and not less than two Common Councillors shall be a quorum for the transaction of business at a Corporation meeting.

The Deputy Mayor’s evidence is that he absented himself when the successful responder (who subsequently owns much of the Par-la-Ville hotel project in which the Deputy Mayor was previously a senior executive) was being considered and short listed (although he did attend the interview of this responder two days later). If this is the case, then potentially, decisions made (‘act’) during his absence by the remaining attendees regarding other applicants may not have been strictly within the requirements of the Municipalities Act.⁴⁷ In any event, the decision was ratified at a later meeting of the Corporation.

Apparently, the responses were all placed on the table in the Mayor’s Parlour and the Consultant reviewed and commented on each before circulating to the others. The members of the Corporation indicated that they relied

⁴⁵ In January 2013, in response to the Corporation’s letter that their proposal was unsuccessful, this team wrote a letter dated 28 January 2013 notifying the Corporation that they did not submit a proposal.

⁴⁶ *Vote: Alderman C. Simmons and Councillor G. Scott were not in attendance. Councillor L. Scott dissented*

⁴⁷ There are different recollections about who attended which (and which parts of) meetings and interviews. In the absence of minutes, it appears that there may have been one Alderman at some of the meetings and two at others.

entirely on the Consultant's opinions. The Consultant's report of the meeting is the only documentary evidence of what happened. That report does not indicate that anyone raised questions or concerns about the fact that five of the eight submissions were marked as Expressions of Interest. One witness said that the Consultant may have noted that some were expressions of interest. (Notwithstanding this recollection, the Consultant's invoice identifies that he "reviewed proposals".) Further, no one seemed to note that one of the "proposals" was dated 2010.

The meeting proceeded as if all responses, (except #9), were "legitimate proposals" responding to the RFP advertisement. They were all equally evaluated and ranked according to the following criteria produced by the Consultant for the evaluation meeting:

- a. Submitted on time per RFP established deadline*
- b. Completeness of proposal in addressing project issues*
- c. Experience of assembled team and overall organization*
- d. Depth of overall team experience and that of its individual professionals*
- e. Approach and disclosure of project mission and understanding Corporation objective*
- f. Diversity and completeness of each proposed team*
 - i. Technical / planning / design experience*
 - ii. Financial disclosure or limitation thereof*
 - iii. Overall project management capabilities*
 - iv. Construction experience*
- g. Preliminary project budget*
- h. Community participation objective*
 - i. Addressing needs of North Hamilton community*
 - j. Addressing existing port and future in relation to waterfront."*

To reiterate, the normal procurement practice of informing potential responders of the evaluation criteria was not followed in the Corporation's RFP. Even those responders who may have seen the earlier Sasaki plans cannot be expected to guess or presume that this new Corporation shares the same objectives and vision as Corporation administrations of 2006 - 2009. While even Expressions of Interest can make some general assumptions, the industry norm is that submissions are intended to respond to at least broad parameters and priorities set out in the first instance. Therefore, the Corporation RFP should have included not only physical specifications such as number of hotels and function of an iconic structure (if that is what they desired) but also goals regarding the existing commercial docks, the future of cruise ships in Hamilton Harbour and the impact on commercial Front Street and North Hamilton. Without such specifications, it is unfair to expect responders (most of whom were merely expressing their interest) to submit details regarding these criteria. Accordingly, I find that five of the above criteria were fair (a. c. d. f. and h.) and five were unfair (b. e. g. i. and j.). See Appendix V.

The successful Responder – Allied Development Partners Ltd. ("Allied") – actually did address most of the criteria a - j, in relatively broad terms. His evidence is that, for example, his inclusion of North Hamilton is derived from his own research and understanding of the importance of North Hamilton as set out in Team Hamilton's election platform. Reviewing that platform when no one else did indicated commendable diligence on his part. It is his evidence that Allied "*carried out a prior study of Team Hamilton's 2012 election platform (which was repeatedly and clearly communicated to the public)*" These public domain contents informed Allied of the possible areas to address in developing its proposal for the Waterfront Development and the linkage to North Hamilton.

However, there is widespread suspicion both within the development industry and amongst the public that this responder was given inside information about what would constitute an acceptable proposal. One industry insider captured a common sentiment: *“the pessimistic streak in me, went: I didn’t believe a word of it. I thought it was window dressing – that they already had someone lined up, they were just going through the motions, it was to look transparent”*.

There were also suspicions that the successful bidder had been a very recent business partner of the Deputy Mayor⁴⁸ on the only other large upcoming construction project in the city. In fact, I have learned that, while the Deputy Mayor was previously involved with the Par-la-Ville hotel project, he and the successful bidder were not partners on this project. Indeed, it is the evidence of the successful bidder that he never had a prior business relationship whatsoever with the Deputy Mayor. The Deputy Mayor resigned as Vice-President and Director of the hotel project on 12 July 2012. The principal of Allied acquired shares and became a Director on 25 July 2012.

Allied absolutely denies that it was the recipient of inside information about what would constitute an acceptable proposal. I have no proof of inside information or of untoward action in this regard on the part of the developer. The weekend visit noted earlier to a closed City Hall by the Deputy Mayor and others to confirm that Allied’s boxed submission was received remains a concern.

At a public meeting on 28 January 2013 Allied informed the public that the company was *“established for the sole purpose of partnering with the Corporation of Hamilton to redevelop the Hamilton Waterfront.”* The shortlist interview was held three months earlier on 22 October 2012. The Corporation resolution to select Allied as the development partner was passed on 24 October 2012.

However, Allied’s request to reserve the name Allied Development Partners Ltd. was made to the Registrar of Companies on 16 October 2012. The corporate resolution to change the name of M&M Carpentry Ltd. to Allied was certified and registered on the same day – 22 October 2012. Perhaps the partners were optimistic about their chances of being selected or merely wanted the new name regardless of whether or not they were selected. The timing of the name change does not assist me to alleviate the suspicions.⁴⁹

It is Allied’s evidence that the decision to change the name was indeed *“an anticipatory and necessary action in that it was possible that Allied would succeed in its bid, despite there being no guarantee that it would.”* Moreover, *“the same option was available to any other interested bidder for the project at the material time. After considering the amount of money and time that was spent by Allied in putting together its proposal, it would only be prudent to enter the process having the benefit and protection of a corporate vehicle, the company name of which mirrors the name of the bidder, being ‘Allied Development Partners Ltd.’ as per an 84 odd page development proposal.”*

⁴⁸ In fact, the evidence of the Deputy Mayor is that he removed himself as Vice President of the hotel project – not to avoid an appearance of a conflict of interest in his municipal role (as he does not perceive any conflict) – but rather due to changes in the project structure.

⁴⁹ It is apparently not unknown for bidders to incorporate new companies in anticipation of successful proposals.

Shortlist Interviews

The Responses to RFP chart (*Appendix IV*) shows the rankings of the responders at the evaluation meeting. Three of the responders (pseudo numbers 1, 2 & 3) were shortlisted for interviews. They were given only one day's notice to attend. No presentation or materials were required. In one interview, a responder asked what the Corporation was looking for and was told that the Corporation was looking for a team to quickly pull together design, planning, construction, finance and that North Hamilton should be a part of the Waterfront Development. This seems to be the first time that the Corporation revealed any parameters.

The Consultant's report notes observations of the short-list interviews:

- First interviewee – *“Strength mainly in planning and design. They did not have a complete team such as financial source and post design teaming. No prior experience in complete project delivery A to Z of this size”*.
- Second interviewee – *“Strength in design and construction administration. Team was not complete as they did not identify source of funding and post design construction process. No prior experience in similar scale projects”*.
- Third interviewee – *“Their proposal is the most complete by far. Made a statement that they are ready to produce the financial source and a letter of credit upon selection. Overall team is complete and diverse. Members of this international team have worked on similar scale projects. Produced an overall cost estimate and an estimated project budget”*.

One of the teams short-listed for an interview had clearly identified their response as an Expression of Interest. Had all responders known that their responses would be treated as proposals then they could have, for example, named relevant experience and international partners with similar scale projects. Only Allied did so. This contributed, amongst other reasons, to their submission being judged as the best “by far”.

In any event, the Consultant's report records:

“Pursuant to the above, [selection process] the Committee elected to select the top responded ‘Allied Development Partners’ to proceed with executing an initial ‘Cooperation Agreement’ to move forward. The Agreement will obligate the selected Team to meet at a minimum, the following additional and specific conditions no later than 30, November, 2012 (emphasis added)

- a) *Completing the development team by adding
 - An urban design professional
 - A landscape architect*
- b) *Identify project funding sources and produce a letter of credit commitment / limitation*
- c) *Produce a comprehensive project schedule and project execution timeline*
- d) *Prepare a specific proposal for improvements to North Hamilton Community public realm*
- e) *Articulate a clear process for public participation and community stakeholders*
- f) *Firm commitment to work with the Corporation and the community to author the “preferred development plan” where this process will commence in January 2013 and conclude no later than end of March 2013*
- g) *Prepare a comprehensive project business plan, with schedule, detail financing, project proforma, environmental permitting and approvals including construction phasing*

Upon satisfying the above conditions by the stipulated date, a final and binding agreement will be executed with all necessary legal terms to continue.

Failure to meet the stated conditions by the selected first Team will result in disqualifying them. Should this occur, the Corporation Committee will reserve its full right to halt all contact agreements with Team one (1) and commence negotiation with the Team that was ranked second, with no further obligation to Team one.

Furthermore: the selected team will assume full responsibility of all related financial cost in responding to the conditions specified in this document until the final execution of the “Agreement” is realized. Condition F is the only condition that was to be started and completed in the new year”.

Selection of the development partner for what is billed as the most significant construction project in the island over at least the next decade was clearly unfair, somewhat ad hoc and based on a quicksand of non-disclosed criteria and non-existent competitors.

POST-REQUEST FOR PROPOSAL

Resolution

At a Restricted meeting 24 October 2012, the whole Corporation ratified the decisions taken during the evaluation process by a resolution:

“Following the completion of the review of all submissions received in response to our RFP, and the professional advice of our consultant, the Corporation Board accepts the recommendation of the Infrastructure, Development and Future Committee to select Allied Development Partners Limited as the exclusive preferred Developer of the Municipal Corporation of the Hamilton waterfront area.

*And to proceed with executing an initial ‘exclusive Developer’ Agreement to move forward, subject to the following additional and specific conditions being satisfactorily met, not later than 31 March 2013. This Agreement will obligate ADP to carry out the following [conditions]...”*⁵⁰

This resolution essentially adopted all of the conditions noted above that were recommended by the Consultant and agreed at the selection meeting of 22 October 2012 – except for the 30 November 2012 deadline, the date by which the successful responder must fulfill the conditions before contracts could be entered into. The resolution – written up sometime between 22 October and 1 November – was sent to the Secretary of the Corporation for the record ten days later. This written resolution changed the date that was agreed by the voted resolution – from 30 November to 31 March 2013 (the new date by which the conditions must be met before contracts could be entered into). There is no evidence of a vote to change this date. Due to the difference between what was voted on and what was recorded the question arises whether there is a technical discrepancy or even breach that might impact on the subsequent agreements.

In any event, on 31 October 2012 and one day before the Secretary received the resolution of 24 October 2012, the Corporation and Allied entered into a Cooperation Agreement which set out several additional conditions before final contracts could be entered into.⁵¹ However, just six weeks later, on 21 December 2012 the Corporation and Allied signed a Development Agreement and a Ground Lease.⁵² Apparently, these superceded and dispensed with the conditions set out in the Cooperation Agreement.

A plain reading of the words of both the Consultant’s recommendation and the recorded resolution is that certain conditions must be satisfactorily met before agreements can be signed – whatever date they are signed.

Verification of Conditions set out in Resolution

There is no written evidence that the resolved conditions were all satisfactorily met prior to signing of the Development Agreement and the Ground Lease. It is the oral evidence of Councillor Davis that the Inner Core members met at the

⁵⁰ Councillor L. Scott was not in attendance, unanimous vote

⁵¹ The Cooperation Agreement was a binding (exclusivity) agreement “for the Corporation and Developer to work with each other to transform the character of Hamilton for the betterment of the City of Hamilton and the whole of Bermuda” (see callout, pg. 32).

⁵² It appears that the Ground Lease is actually owned by a trust – Allied Trust – as the company cannot hold leases longer than 21 years.

Cooperation Agreement

“Prior to the final Development Agreement [signed in December] there was a ‘Cooperation Agreement’, which was signed by the Developer and the Corporation on 31 October 2012. This Cooperation Agreement requires the formation of a Development Committee, comprising equal representation of the Developer and the Corporation and numbering no less than four members. This Development Committee would be tasked with six action items before the Development Agreement and the Ground Lease would be signed:

- agree upon the particular work necessary to complete the Waterfront Development*
- commission a valuation of the Waterfront*
- finalise design plans for the Waterfront Development;*
- submit and subsequently obtain Planning Approval for the Waterfront Development*
- on behalf of the Corporation and the Exclusive Developer agree the terms of a Ground Lease and a Development Agreement to; and*
- do all other things as are determined necessary for the Development Committee to do to secure the expeditious start of construction on the Waterfront Development.”*

We have no evidence that this Committee was ever formed or that any of these items were completed before signing the Ground Lease and the Development Agreement. What should be noted is that the Cooperation Agreement was intended to govern the negotiations between the Developer and the Corporation prior to signing the final agreements. Thus, as of 31 October the Corporation and Developer had given themselves up to 3 years to accomplish the above tasks. Yet, less than 2 months later, they entered into the final agreements without accomplishing any of the above list.

premises of Allied on an unknown date and were assured that the conditions were met. The most important condition – indeed the one condition required before the project could move forward – is that adequate funding must be in place. This is also the most sensitive, closely held and proprietary aspect of the entire RFP.

The oral evidence submitted to me is that:

- Condition a) was deemed to have been fulfilled in the original submission in response to the RFP (which begs the question of why the Consultant included this as a condition to be met).
- At the meeting of unknown date, Allied produced a letter of credit and otherwise proved that financing was in place in accordance with Condition b)
- The Inner Core was of the view that conditions c) d) e) f) and g) were fulfilled.

Despite the fact that these conditions could reasonably be set out in writing – for example, a complete business plan with schedules – no evidence was submitted to me that these conditions are documented or, indeed, satisfactorily met. There are no minutes or other evidence to show that the Inner Core members informed the entire Corporation of their conclusion that the conditions had been satisfactorily met. There are no resolutions that the agreements could therefore be executed.

It is not enough that there is a resolution requiring that certain conditions be met prior to entering into agreements. Clearly, there must be some evidence that the Corporation had some proof that the terms of its own resolution were met prior to entering into agreements. For a project of such significance, it is not unreasonable to expect that all of the members of the Corporation be provided with such evidence.⁵³ It appears that only the Inner Core – not even a legal quorum – were privy to and apparently satisfied by evidence that the conditions had been fulfilled.

During his interview with my office on 11 July 2013 when I closely questioned how fulfillment of the conditions had been verified, Councillor Davis offered to go away and write up his notes of the meeting held on an unknown date at the premises of Allied. I asked if the notes were amongst the large briefcase full of documents that he had brought to the interview. Unfortunately they were not. Obviously, any “post-Ombudsman interview production of notes” could hardly be acceptable.⁵⁴

There is no credible evidence that the conditions were fulfilled prior to the Development Agreement and Ground Lease being entered into as required by the resolution of 24 October 2012.

Existing Docks

The conditions set out above must be satisfactorily met by the development partner prior to execution of the contracts. There was also a condition that the Corporation was required to fulfill prior to entering into contracts that impacted on the commercial docks. The Corporation was obligated to consult with Stevedoring Services Limited (“Stevedoring”) which has an exclusive right to operate the commercial docks.

Stevedoring’s Terminal Operator’s Licence (“Licence”) has been renewed several times over the decades. The current agreement expires February 2016 with an option to renew until 2021. The terms and conditions of the Licence permit Stevedoring to use the Corporation’s land to load and handle cargo and to oversee the embarkation and disembarkation of passengers and crew at the docks. Stevedoring does not have exclusive use of the land. Section 4 of the Licence states that Stevedoring, the Corporation “and all others so entitled” have permission to use the lands of the Corporation. However, in light of the possibility that others may use the land the Licence provides at Section 12 that

“...the Corporation shall retain the overriding right in consultation with the Terminal operator to control any and all activity at the Hamilton Docks [emphasis added]. The Corporation shall exercise such authority through its Infrastructure Committee...”

Despite meeting with Stevedoring early in January 2013 about other matters,⁵⁵ the Corporation did not disclose that a Ground Lease was now in existence. Whilst Stevedoring had heard rumours that the Corporation and Developer

⁵³ By contrast, Annual Draft Audited Financial Statements are routinely circulated to all members of the Corporation.

⁵⁴ In my considered opinion and experience as Ombudsman for Bermuda, it was no coincidence that – just as my interviews were focusing on this point regarding verification of the criteria that must be satisfactorily met prior to any agreements being concluded – I received the message that the Mayor and Deputy Mayor would no longer cooperate with this investigation. Given the few days left before the Cup Match holiday and confirmation that both gentlemen would be abroad for most of August, I issued Summons’ for their appearance. They failed to comply and accordingly, I certified their Contempt of Court. This was subsequently upheld by the Supreme Court.

⁵⁵ The Secretary and Treasurer were “evicted” from this meeting.

had signed a lease, it was not until 13 March 2013 that their suspicions were confirmed (by a media article) . The following day, Stevedoring wrote to the Corporation “*we note with obvious interest, the recent information in the press regarding the development of the Hamilton waterfront... the fact that a lease and development order has been signed could seem to be at odds with our Terminal Operators License depending on the time frame for implementation... we are appealing to you for additional information on the development plan and how this may impact our future operations on the Hamilton Cargo Dock.*”

Well after my investigation was underway, the Corporation had still not discussed the matter with Stevedoring even though there has been ongoing contact regarding other operational matters. It appears that the Corporation cannot grant a lease or otherwise enter into agreements giving rights to third parties on the areas of the waterfront that are covered by the Licence without prior consultation with Stevedoring. There are no minutes of any discussions amongst the Corporation that considered that it would be prudent to consult with Stevedoring – not even between the time that Allied was selected and 21 December 2012 when the Ground Lease and Development Agreement were signed.

With respect to the future of the docks, if the Corporation wants to terminate the Licence before the conclusion of the five year term they would have to show that Stevedoring’s actions met one of the seven listed conditions of s.10 of the Licence, which can be broadly described as (1) the failure to comply with any of the Licence’s terms or conditions; (2) being insolvent, in liquidation or being wound up; (3) ceasing to carry out its business; or (4) the appointment of an ‘officer’ over its assets. While it is likely that any discussions to determine the fate of the commercial docks would be quite amicable, there is a risk that should the Corporation decide to terminate the Licence without any of the applicable conditions being met then Stevedoring has the right to take the matter to arbitration.

In this case, the due diligence of consultation that was required on the part of the Corporation prior to signing over rights to a third party is not just a matter of accountability, best practice and courtesy, but rather a legal obligation in accordance with the Licence. In accordance with the definition of Maladministration in s.2 of the Ombudsman Act, I can find that the failure to consult was either contrary to or a mistake of law.

Another issue that ought to have been negotiated or at least discussed prior to signing over rights to any third party is the right of the Queen / Government to the seabed beyond the edge of the existing docks. Any land reclamation, pylons or even construction work on the waterfront would require encroachment on the seabed. The seabed is not the property of the Corporation of Hamilton. There is no evidence of discussions between the Corporation and the Government about the Queen’s Bottom.⁵⁶

Validity of the contracts

It is generally a principle of law that contracts stand alone and are likely to be valid regardless of conditions set out in municipal resolutions. Courts are reluctant to interfere with innocent third party rights. However, in the case of

⁵⁶ Apparently several decades ago the Governor, after consultation with the then Government, granted the Corporation’s application to reclaiming a portion of the seabed in order to build the existing docks.

Bermuda's waterfront there appear to have been certain consultations or conditions that should have been met prior to the contracts being signed. If the consultations were not carried out and the conditions were not fulfilled, there may be legal questions about whether or not the Development Agreement and Ground Lease are entirely valid.

The Corporation's counsel drafted the first agreement, derived from templates originally drafted for the Parl-la-Ville hotel project. The final Ground Lease and Development Agreement are products of many weeks of negotiations and were reviewed and approved by counsel on both sides before they were finally signed.

It is unclear what the level of scrutiny was with respect to fulfillment of the conditions precedents and the general fiduciary duty of the Corporation to deal with the assets for the benefit of the electors and tax-payers. Outstanding questions that ought to be addressed:

- Must the conditions in the resolution of 24 October 2012 be proven to be satisfactorily met prior to the contracts being entered into
- If the conditions were not proven to have been met (and therefore the development partner was not compliant with the resolution) should there have been another, specific resolution to authorize that the contracts may be signed notwithstanding that the conditions were not satisfactorily met.
- Must the consultation – as required by the Stevedoring Licence – have taken place prior to entering the contracts
- Must the rights to the Queen's Bottom have been granted to the Corporation before it may convey or transfer rights to develop the waterfront
- Did the Mayor and one Councillor ⁵⁷ – by themselves – have the right to sign the 262 year Ground Lease and Development Agreement on behalf of the Corporation.

There is apparently no rule regarding who signs which contracts (now that powers delegated to senior staff for small contracts have been rescinded) . Apparently, past practice is based on the premise that “the buck stops at the top”. That is, the larger the value of a contract, the more senior the signatories should be from both the elected and the staff levels (i.e. the Mayor and Secretary who is effectively the Chief Executive Officer of the Corporation) should sign.

Public Disclosures

Unsuccessful responders

After the 19 October 2012 evaluation meeting and the short-listed interviews, the unsuccessful responders heard nothing formally until letters dated 24 January 2013:

“Yours was among several submissions received during the response period, and following a process of thoroughly vetting each response, in accordance with the criteria outlined by our professional international Civil/Waterfront Engineer consultant, we regret to inform you that your proposal was not accepted.

The Corporation of Hamilton has very recently completed a successful due diligence process with the successful candidate, regarding the Waterfront Project, and has entered into a Development Agreement respectively.

⁵⁷ Both were signed by the Mayor and Keith Davis. (The Secretary is not a signatory to the Agreements. He merely witnessed that the persons who were signatories signed the documents in his presence.)

...We sincerely appreciate the time and effort dedicated by your team to the preparation and submitting of your proposal, and would herewith like to inform you that the vast scale and scope of this ambitious plan will undoubtedly afford many opportunities for many levels of participation well into the future. The City of Hamilton and our Development partners will be making several public participation announcements in due course, and shall be keeping all interested parties informed and involved as we progress.”

This letter is misleading at best: as demonstrated earlier the submissions received were not all “proposals” in response to the RFP. Further, each response was not thoroughly vetted (if so, someone might have noticed the “Ghost Submission” dated 2010 and the clear indications that five were really Expressions of Interest). Finally, there is no evidence of an actual due diligence process that confirmed that the conditions precedent to the contracts had been satisfactorily met.

Public Meeting

On 28 January 2013, the Corporation held an informational public reception in the lobby of City Hall to announce the development partner for the waterfront redevelopment that will “glitter, shine and prosper over time”. Others in attendance included: most of the members of the Corporation, the Consultant and representatives of the development partner’s team. Allied displayed a “*very preliminary Master Plan design which communicates how we see the city and the waterfront being developed. It is not a ‘final plan’ but a first step towards developing a scheme which all stakeholders can contribute and provide feedback on*”.

This Plan was an enlargement of the graphic designs that were part of Allied’s proposal in response to the RFP. Presumably, their overall cost estimates and team composition and capabilities were related to their designs. These designs were clearly an integral part of the proposal that was evaluated and selected as “the most complete” of the submissions.

It is interesting that this eventful public meeting did not disclose that the Development Agreement and Ground Lease had already been signed. According to the media:

Asked why plans are proceeding without the blessing of the new Government, the Mayor said: “*There were two time lines, including the time line when the general election occurred and the change of Government. Certain requirements meant that we were required to pay things if we didn’t go ahead with the timelines that were set by our requests for proposals. Without going into specifics, it would require the corporation to pay money out for losses via delay,*”

It is unclear what “the specifics”, “losses” and “things” are that the Corporation was obligated to pay. No one at the Corporation has been able to provide to me a shred of evidence or explanation of what obligations would dictate the need to move forward without delay.

Environmental Impact Study

Meeting with Government officers

As noted earlier, the first action after election of the Outerbridge Administration with respect to the waterfront was consideration of a resolution to complete the EIS. No resolution was passed. The matter was referred to the Infrastructure Committee that decided on 6 August 2012 to recommend that “*the Board resolve to defer the Environmental Impact Study*”.

However, by 2 November 2012, the Consultant confirmed by email: “As per our discussion in Hamilton, I revisited the proposed scope of the work and the associated estimated cost for completing the EIS and securing the approval Stage 1 (in principal) [sic] from DP.⁵⁸” Further, on 8 November 2012 the Consultant indicated that he had “started working on the EIS per email I received from Councillor Keith”. On 12 November 2012, the Deputy Mayor instructed the Secretary: “please issue the PO for the \$35K to be paid.”

The Consultant set out tasks to be done:

1. Contact DP to inform them that we are about to file
2. Revise and update the entire document
3. Respond to DP’s early comments
4. Prepare the application form on the City’s behalf for signature
5. Print and make electronic release file.

There is no record of a discussion, decision or resolution to complete the EIS. The question must be raised about whether the actions taken to move forward without a resolution are in compliance with s.7(7) and (8) of the Municipalities Act. While this may seem to be merely a technical breach, payments cannot legally be made without relevant resolutions of the Corporation. Indeed, one of the general governance issues originally brought to my attention is that there was a marked increase in retroactive resolutions and other anomalies with decision-making that entail payments.

In any event, the Consultant’s EIS is an impressive and thorough compilation of over 500 pages. The key features of the third Sasaki plan included: 3.9 acres of land reclamation; a new ferry terminal facility with berthing for four ferries; a cruise ship pier and terminal for two medium- sized vessels (1,800 passengers); a 1.7 acre waterfront park; and, the relocation of all Front Street surface parking spaces between Court Street and Par-La-Ville Road to an underground parking lot.

The third Sasaki plan and the Allied plan share some common features: both envision a new cruise ship pier and terminal for two vessels, a park and a new ferry terminal. However, there are significant contrasts in the specifications that would likely necessitate different studies and refinement of the Consultant’s EIS. For example, the Allied plan includes a Casino Hotel on White’s Island;⁵⁹ a water taxi terminal; a live and movie theatre complex; and six new piers. Apparently, this plan contemplates significant construction of pylons rather than extensive land reclamation.

In addition, while the Consultant’s EIS did include meetings with various stakeholders in 2007 and 2008, these were simply informational meetings: “This vision plan was presented to the public, key stakeholders, various government agencies and officials, and representatives of utility service providers for consideration and comment.” The EIS Report does not stipulate meetings targeted at the Front Street merchants as a special stakeholder group. The public meetings reported in the Consultant’s EIS informed but did not involve the public in decision-making with the

⁵⁸ DP – the Department of Planning.

⁵⁹ Which no longer belongs to the Corporation.

robust depth that is contemplated by the Privy Council decisions that are binding on Bermuda⁶⁰ as well as by the Principles of Environmental Impact Assessment Best Practice set out by the International Association for Impact Assessment.⁶¹

Public Consultation

Since *Today's Choices: Tomorrow's Costs* was tabled, the argument has been advanced in the UK that the 1998 (in force 2001) Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (known as the Aarhus Convention) may be binding on the UK's Overseas Territories. Originally an agreement amongst the European states, the Aarhus Convention is now available to all nations to join.

Today's Choices: Tomorrow's Costs and my follow-up report *Diligent Development* both demonstrated that Bermuda is legally obliged to comply with its obligations under the 2001 UK Environmental Charter. This is because Bermuda signed the Charter directly with the UK and the ultimate intent of the Charter was to create a type of 'bridge agreement' to ensure that the UK meets its own international environmental obligations. As Bermuda had signed this agreement directly, there was no need to pass separate domestic legislation to validate it. However, multinational agreements that the UK signs do not automatically extend to Bermuda. As a "dualist" legal system, we must pass domestic legislation to join agreements that may be extended to us. An argument has been advanced that perhaps the Aarhus Convention applies to Bermuda by inadvertence. Denmark and the Netherlands specifically declared that it does not apply to certain of their overseas territories. The UK did not make such a declaration.

While it is arguable, my initial view is that Aarhus is not binding on Bermuda. In any event, it imposes on the public authority (not the developers) to ensure early public participation – "when all options are open" – before decisions are made about developments likely to have environmental impacts. Notwithstanding that Aarhus may not be binding on Bermuda, it is at least wise for Bermuda to be aware of, and to consider employing, international standards regarding transparent public consultation. We can trust and find comfort in the standards set out in multinational agreements because many nations have contributed considerable expertise to negotiate, represent agreed basic standards.

The Consultant's EIS is indeed a professional document that does canvass general issues, (such as water flow) that would be germane to any architectural and engineering concept. However, each EIS must relate to a specific architectural and engineering plan – even for "in-principle" approval. The Department of Planning has no notice of which plan is intended to be developed: the third Sasaki plan or the Allied plan?

⁶⁰ *Save Guana Cay Reef Association v R* (2009) UK PC 44: To be proper, consultation must be undertaken at a time when proposals are still at a formative stage; it must include sufficient reasons for particular proposals to allow those consulted to give intelligent consideration and an intelligent response; adequate time must be given for this purpose; and the product of consultation must be conscientiously taken into account when the ultimate decision is taken". Also see pgs. 15 – 20 *Today's Choices: Tomorrow's Costs* for comparative best practices and international guidance.

⁶¹ "The process should provide appropriate opportunities to inform and involve the interested and affected publics, and their inputs and concerns should be addressed explicitly in the documentation and decision-making."

Since at least 2009 the Department of Planning and the Corporation have held discussions regarding the EIS. It seems that the Corporation has tried to meet all of the Department of Planning's requirements throughout. However, the EIS had been effectively shelved for a number of reasons, including the uncertainty of the future of the Corporation as a result of the Municipalities Reform Act. After some two years of no communication on the Waterfront Development project, technical officers from several departments within the Ministry of Environment and Planning and the Ministry of Public Works met with the Corporation, including the Consultant, on 30 January 2013 to discuss the draft EIS for the waterfront.

Department of Planning officers noted that Allied's plan displayed two days before at the public meeting was quite different from the plan submitted with the draft EIS a few years earlier. Some attendees at this meeting recall that the Consultant stated that in his view, it is the final Sasaki plan (that was not a result of a competitive process) rather than Allied's plan that should be reviewed for the purpose of the EIS and "in-principle" approval. The Department has correctly responded that any EIS would have to be associated with the actual architectural and engineering plan that would be developed.

The 30 January 2013 meeting did allow technical officers to raise questions about their particular areas of expertise as well as to hear the Corporation's responses to general questions on matters such as management of traffic, water, waste, cultural spaces and accommodation for construction workers. It seems that the next step was that the Department of Planning would provide comments about the progress of the EIS. Due to other urgent matters the Department of Planning was unable to respond as quickly as the Corporation would have liked.

Subsequent Communication

On 6 and 25 March and 8, 17 and 22 April 2013 the Corporation and/or the Consultant emailed the Department of Planning requesting the timeline for receiving feedback. They did not receive a response other than the fact that there was a delay. Some months later, by an email dated 12 August 2013 (well after this investigation was launched) the Corporation persisted and indicated that, while aware that the draft EIS would not be reviewed until the new wharf in Dockyard was completed, they would still appreciate receiving information from the Department of Planning on the next steps.

By an email dated 14 August 2013 the Department responded that "*such a review would be premature at this time*". Further: "*it is somewhat surprising that several development projects have reached a conceptual design stage and more without the requisite development brief being undertaken as specified in the City of Hamilton Plan 2001...in this case:*

- *The plans upon which the EIS appears to be based do not match the plans promulgated in the public domain*
- *More than half the study area is to be formed through the reclamation of land, which reclamation lies outside the control or purview of the Corporation of Hamilton*
- *There is no market analysis or research...*"

The Corporation was flummoxed with what they considered to be a change in the goal posts. They immediately responded with disbelief (there was even talk of legal action against the Department). It is quite unclear what the Corporation's accusation against the Department is. It appears that the Corporation does not understand the iterative process of preliminary courtesy consultation with the Department of Planning.

In 2009 the Department responded to the Scoping document with detailed questions. In 2013, there is a different plan and once again, the Department is providing valid feedback about what the EIS and other requirements of the development application and approval process would entail. I see no “change in goalposts”. Indeed, in the event that there is a development application for this highly complex project, there will likely (and should) be many more questions. This is appropriate due diligence on the part of the Department. The Department of Planning is unwilling to move forward without clarity about which plan is actually to be the basis of an application for “in-principle” approval.

There seems to be a view in some quarters that an EIS could be generic and would be valid for whatever architectural or engineering plan is eventually adopted. Actually, and obviously, impacts on the natural, built and human environments would be quite different if, for example: there are to be two acres of land reclamation rather than ten; two cruise ship terminals or none; two hotels or one; or ten yacht piers or three, etc. Clearly, each actual plan to be developed requires an EIS that is relevant to its specific engineering and architectural features.

Perhaps far more important than the technical issues with the EIS is the ethical issue. An EIS must be conducted by an independent contractor. That is, the contractor who conducts and drafts an EIS should do that task only. S/he should have no further interest or revenue potential in any other aspects of the project. The reason is quite obvious. An EIS consultant with any additional financial interest in the development might be tempted to downplay adverse impacts.

The Consultant argues that in the US it is the norm for environmental consultants to be a part of the development team. If it is true that private developers are willing to take the risk that may ensue from conflicts of interest, that is their choice. However, for US federal – public – projects, environmental consultants are required to sign declarations that they have no further interest in the development other than contribution of their EIS expertise (*see callout, pg. 43*). This is an established principle throughout the world.⁶²

⁶² Confirmed in an extensive meeting that I had with a senior official of the United Nations Environment Program, September 2013.

Principles of Good Administration (UK 2007)

Good administration by a public body means:

1. Getting it right

- Acting in accordance with the law and with due regard for the rights of those concerned.
- Acting in accordance with the public body's policy and guidance (published or internal).
- Taking proper account of established good practice.
- Providing effective services, using appropriately trained and competent staff.
- Taking reasonable decisions, based on all relevant considerations.

2. Being customer focused

- Ensuring people can access services easily.
- Informing customers what they can expect and what the public body expects of them.
- Keeping to its commitments, including any published service standards.
- Dealing with people helpfully, promptly and sensitively, bearing in mind their individual circumstances.
- Responding to customers' needs flexibly, including, where appropriate, co-ordinating a response with other service providers.

3. Being open and accountable

- Being open and clear about policies and procedures and ensuring that information, and any advice provided, is clear, accurate and complete.

CONCLUSION

If there were only three or four mishaps in governance or just a few technical gaps in the Waterfront Development process, then everyone would readily forgive normal human failings, ignorance, lapses and misconceptions. However, the maladministration that permeated the Outerbridge Administration – especially as reflected in the Waterfront Development – seems to have crept up at every corner in a dazzling, infinite, relentless variety and willfulness of ways.

With this RFP process the Corporation effectively asked responders to enter a game in which not only were the rules of the game not explained to them, but the rules were not created until the game had already begun. In such circumstances, observers cannot help but suspect that the rules were being created to ensure that a certain participant wins. Transparency, accountability and fairness do not seem to be the Corporation's strongest suits.

What would good administration have looked like at the Corporation?

Using the Principles of Good Administration as a guide:

- *GETTING IT RIGHT*: at the very least - following existing procedures (until they are updated or replaced); considering the technical advice of staff; taking proper account of all relevant grounds, including legal obligations to consult
- *BEING CUSTOMER FOCUSED*: prioritizing the fiduciary duties to and the needs of the general public, electors and taxpayers; considering best practices providing proper RFP specifications to potential responders, especially evaluation criteria
- *BEING OPEN AND ACCOUNTABLE*: an end to arbitrary decisions and business being conducted in caucus meetings; minutes that reflect the advice of staff with cogent reasons why such advice was not followed; proper and clear RFP process for submissions and evaluation
- *ACTING FAIRLY & PROPORTIONATELY*: making sound, evidence-based decisions; taking care that fairness / lack of bias or favouritism 'not only be done, but be seen to be done'; comparing apples to apples
- *PUTTING THINGS RIGHT / SEEING CONTINUOUS IMPROVEMENT*: having the insight, integrity, courage and respect for the public to acknowledge mistakes, put things right and learn.

3. Being open and accountable (cont.)

- Stating its criteria for decision making and giving reasons for decisions.
- Handling information properly and appropriately.
- Keeping proper and appropriate records.
- Taking responsibility for its actions.

4. Acting fairly & proportionately

- Treating people impartially, with respect and courtesy.
- Treating people without unlawful discrimination or prejudice, and ensuring no conflict of interests.
- Dealing with people and issues objectively and consistently.
- Ensuring that decisions and actions are proportionate, appropriate and fair.

5. Putting things right

- Acknowledging mistakes and apologizing where appropriate.
- Putting mistakes right quickly and effectively.
- Providing clear and timely information on how and when to appeal or complain.
- Operating an effective complaints procedure, which includes offering a fair and appropriate remedy when a complaint is upheld.

6. Seeking continuous improvement

- Reviewing policies and procedures regularly to ensure they are effective.
- Asking for feedback and using it to improve services and performance.
- Ensuring that the public body learns lessons from complaints and uses these to improve services and performance.

We in Bermuda like to consider ourselves to be a sophisticated model, especially amongst small countries in the Western Hemisphere. The sad truth is that in some ways principles such as due diligence and due process seem to pass us by. The notion of a 4” x 6” RFP advertisement, as the sole piece of information provided to the public for an eventual 262 year lease, was a source of amusement for every almost overseas expert and development official I spoke with.

We simply cannot continue alleged 20th Century practices of anointing winners without fair and open competition. The fact that something wrong may have been (or is perceived to have been) done in the past is certainly no justification for continuing to do so going forward. Each jurisdiction, just like each individual, must grow – learn and aspire to current standards of professionalism and ethics.

Bermuda’s waterfront development is a public project of national interest and unprecedented proportions. The people of Bermuda deserve government and city administrations that are looking after all of our interests. In concept, construction and eventual usage and operations, redevelopment of the waterfront must consider the diversity of all of our needs and the common sense of our actual capacity.

This is not a zero-sum game. For a project of this size, it is likely that most local industry players (developers, contractors, financiers and other professionals) will have opportunities to participate and get a piece of the pie. There is no need to fear and compete. It is unbecoming and ultimately not to the benefit of the country as a whole if everyone flocks greedily over each crumb.

It is possible (as Gibraltar did) to approach this project as a cooperative, whole community endeavour. In doing so, we just might learn lessons to apply to the rest of our community and interrelations. There may well be implications for our national identity and commitment to Bermuda – both for today and for future generations who will have to live with and surely pay the price of unethical antics and maladministration today.

Defined by the UK Parliamentary Commissioner in 2007; now used by Ombudsman worldwide. These Principles are not a checklist to be applied mechanically; rather, they should underlie the understanding and practice that each public body aims to ensure. (See our 2nd, 3rd and 5th Annual Reports: we encouraged public authorities to follow.)

See also: <http://www.ombudsman.org.uk/improving-public-service/ombudsmansprinciples>

EIA Must be independent

EIAs must be done by independent professionals contracted by developers. The reason is obvious. EIAs identify risks, thus, EIAs act as independent, objective checks on the optimistic projections of proponents of developments as well as on the worst case pessimism of detractors. To be credible, EIAs should be produced by independent professional bodies with no financial or other interests in the proposed projects.¹

In the US, for example, professionals who conduct EIAs for federal contracts must sign statements confirming that they will have no other financial benefits from or interests in the developments they are evaluating. **The US National Environmental Policy Act 1969 (NEPA)** requires federal agencies to integrate environmental values into their decision making processes by considering the environmental impacts of their proposed actions and reasonable alternatives to those actions. To meet NEPA requirements federal agencies prepare a detailed Environmental Impact Statement (EIS):

Sec. 1506.5 Agency responsibility.

(c) Environmental impact statements. Except as provided in Secs. 1506.2 and 1506.3 any environmental impact statement prepared pursuant to the requirements of NEPA shall be prepared directly or by a contractor selected by the lead agency or where appropriate under Sec. 1501.6(b), a cooperating agency. It is the intent of these regulations that the contractor be chosen solely by the lead agency, or by the lead agency in cooperation with cooperating agencies, or where appropriate by a cooperating agency to avoid any conflict of interest. Contractors shall execute a disclosure statement prepared by the lead agency, or where appropriate the cooperating agency, specifying that they have no financial or other interest in the outcome of the project.

Sec. 1506.6 Public involvement.

3(f) Make environmental impact statements, the comments received, and any underlying documents available to the public pursuant to the provisions of the Freedom of Information Act (5 U.S.C. 552), without regard to the exclusion for interagency memoranda where such memoranda transmit comments of Federal agencies on the environmental impact of the proposed action.

¹ See pgs. 11-20 *Today's Choices: Tomorrow's Costs* – the Ombudsman for Bermuda's Systemic Investigation into the Process and Scope of Analysis for Special Development Orders 2012

FINDINGS *(except where otherwise noted, Findings relate to the Outerbridge Administration)*

I find evidence of maladministration in:

1. Failure to Get it Right

Not acting in accordance with the law and with due regard for the rights of those concerned:

- (a) No consultation with Stevedoring Services Limited as required by licence
- (b) Agreements with Allied Development Partners Ltd include or imply rights over the Queen's Bottom
- (c) improper execution of contracts without a resolution to do so
- (d) Arbitrary execution of contracts without a resolution to authorize signatories on behalf of the Corporation

Not acting in accordance with the public body's policy and guidance (published or internal)

- (e) RFP not consistent with Corporation's Tendering & Quotes Policy
- (f) RFP not in accordance with Office of Procurement draft Code of Practice and failure to seek guidance from the Office of Procurement

Not taking proper account of established good practice

- (g) No consideration of proper structure for administration and oversight of Waterfront Development
- (h) No vision, guidelines, parameters for RFP
- (i) Failure of the Environmental Impact Study to relate to the specific architectural and engineering plan to be developed

Not providing effective services, using appropriately trained and competent staff

- (j) General failure to consider advice of staff; inefficiencies due to removal of powers delegated to staff; excluding staff from meetings; consideration of suggestion to exclude staff comments from record of meetings
- (k) Ignoring staff advice regarding RFP and appropriate timeline for changing auditors (thereby incurring unnecessary \$30,000 incurred cost)
- (l) Improper exclusion of key staff from RFP evaluation and interview process

Not taking reasonable decisions, based on all relevant considerations

- (n) No clear goals or vision before proceeding with RFP; failure to consider prior Corporation plans and deliberations of the retreat and advice from the Waterfront Development Steering Committee
- (o) Inadequate process to verify compliance with conditions

2. Failure to be customer / public focused

Not informing public what they can expect and what the public body expects of them

- (a) No RFP specifications

Not keeping to its commitments, including any published service standards

- (b) Not following policy to provide adequate notice for public participation in Committee meetings
- (c) Not following Tender and Quotes Policy procedures

Not responding to public needs flexibly

- (d) Groundless assumption that all potential responders had prior knowledge of the goals and parameters of the Waterfront Development

3. Failure to be open and accountable

Not being open and clear about policies and procedures

- (a) Gosling Administration: Insufficient transparency in disclosing the purpose and operation of Democracy Trust (existence of Trust was disclosed)
- (b) Unclear submission process, thereby enabling inclusion of a “Ghost submission”
- (c) Ad hoc, non-transparent bid opening procedure
- (d) No disclosure of evaluation and interview selection process

Not stating criteria for decision making and giving reasons for decision

- (e) Minutes generally do not always disclose clear reasons for decisions
- (f) Arbitrary evaluation criteria not disclosed in RFP in accordance with industry norm
- (g) January 2013 letter to unsuccessful responders did not disclose reasons for decision

Not handling information properly and appropriately

- (h) failure to understand, identify and disclose potential conflicts of interest

Not keeping proper and appropriate records

- (i) retroactive resolutions for engagement of professional and payments
- (j) inefficiency in not properly recording who attended and proceedings of RFP evaluation and selection meetings
- (k) negligence in documenting evidence of conclusion that conditions in resolution to select Allied Development Partners Ltd. were satisfactorily met
- (l) improper failure to inform all member of Corporation of conclusion that conditions in resolution to select Allied Development Partners Ltd. were satisfactorily met
- (m) the failure to record the attendance of and decisions made at caucus meetings which would give those who did not attend an opportunity to read what was decided and thus be informed

Not taking responsibility for actions

- (n) abuse of power in only three persons attending the office Allied Development Partners Limited in order to verify whether the conditions in the resolution were satisfactorily met
- (o) oppressive disempowerment of staff and failure to instruct them – resulting in confusion about proper handling of submissions and appearance of Ghost Submission (as staff were discouraged from acting on their own initiative)
- (p) the Corporation’s failure to acknowledge that certain decisions were not made in accordance with either the Corporation’s policies e.g. (RFP), noncompliance with the public meetings policy in not giving appropriate notice of meetings or agendas; or best standards

4. Failure to act fairly and proportionately

Not treating people impartially, with respect and courtesy

- (a) failure to inform all members of the Corporation about all meetings where business of the Corporation is conducted
- (b) inconsistent responses to people requesting information
- (c) abuse of power and bias in weekend visit to City Hall in the absence of staff to check on submission at the request of one responder

Not treating people without unlawful discrimination or prejudice

- (d) improper deeming of five of the submissions as “proposals” despite being marked as expressions of interest
- (e) unfair evaluation and comparisons of expression of interest submissions as if they were equally all proposals

Ensuring that decisions and actions are proportionate, appropriate and fair

- (f) failure to adequately inform all members of the Corporation about the terms of the Development Agreement and Ground Lease provisions
- (g) decision to rescind all delegated powers previously given to the senior staff was not proportionate to the reasons given i.e. to get a better understanding of what happens on a day to day level at the Corporation in light of the members having a copy of the Corporation’s policies and the offer by senior staff to walk them through the policies
- (h) decision to enter into a 262 year lease with the Developer in order to stave off a possible Government takeover of the Corporation’s assets did not adequately preserve the fiduciary responsibility to the tax or ratepayers by the City of Hamilton.

RECOMMENDATIONS

If development of Hamilton Harbour is indeed a priority of the Corporation of Hamilton, Government and people of Bermuda, then ideally, we should start over. A proper structure should be put in place along the lines of a representative but operationally independent Waterfront Authority with appropriate roles for the Corporation (representing ratepayers and residents) and the Government. The development project could be along the lines of Gibraltar with phased development starting with land reclamation, and then parceled lots and projects developed by various industry professionals. Alternatively, the project could be structured one development. There are other models – but all would ideally involve a waterfront authority which would be in place for the long-term.

The massive hiccup to starting all over is that there are now contracts in place that appear to have bestowed rights on third parties. Courts are loathe to interfere with innocent third party rights. Accordingly, it may first be necessary to establish whether the existing contracts are legally valid, given the outstanding questions about the Corporation's process for entering into them. Recommendations below, subject to this caveat, should be implemented generally and with respect to the development of the waterfront as appropriate. Given the above Findings I recommend that, unless otherwise stipulated, the Corporation of Hamilton should:

1. Getting it right:

Acting in accordance with the law and with due regard for the rights of those concerned

- 1.1 the Government obtain a legal opinion about the validity of the contracts with the developer given the failure of the Corporation to:
 - 1.1.1 verify that the conditions precedent were met
 - 1.1.2 proper resolver or record that the conditions had been met
 - 1.1.3 authorize signatories
 - 1.1.4 consult in accordance with the Stevedoring Licence
 - 1.1.5 establish prior rights to contract with regard to the Queen's Bottom
- 1.2 the Corporation establish by legal or independent industry opinion whether the length of the Ground Lease is appropriate and consistent with Bermuda practice and comparable waterfront developments
- 1.3 if contracts are void or voidable, then a proper waterfront development process be put in place after
 - 1.3.1 considering previous initiatives
 - 1.3.2 public consultation with stakeholders generally and in particular with Hamilton residents and taxpayers
 - 1.3.3 considering best practices for the appropriate governing and operational structures for a waterfront development project
 - 1.3.4 then developing a vision
- 1.4 prior to any new contracts being signed regarding the waterfront, appropriate consultation must be held with Stevedoring as required by the Licence
- 1.5 prior to any contracts being signed regarding the waterfront, obtain approvals with respect to rights impacting the Queen's Bottom

Acting in accordance with the public body's policy and guidance (published or internal)

- 1.6 adhere to existing policies (e.g. Public Participation for City of Hamilton Committee Meetings policy) regarding notice period and agenda circulation for public and restricted meetings rather than current practice of giving notice the evening before or the day of the meeting).

- 1.7 notice of meetings be circulated to all members of the Corporation rather than just to selected members
- 1.8 all known agenda items be listed on meeting notices to enable members to prepare beforehand
- 1.9 attendance of staff at all meetings where Corporation business is conducted
- 1.10 the Corporation of Hamilton request that an independent review by the Office of Procurement prior to signing contracts over a certain threshold (to be determined by the Office of Procurement¹)
- 1.11 the Corporation should request that the Office of Procurement evaluate the appropriateness of its proposed contracts to separately hire members of the team of the developer or other professionals for other City tasks or projects

Taking proper account of established good practice

- 1.12 open tender process for all procurement in which members of the Corporation have a financial and/or personal interest
- 1.13 recusal of members of the Corporation from any and all discussions, decision-making and follow-up about procurement in which they have a financial and/or personal interest
- 1.14 the Environmental Impact Study presented to the Department of Planning for the purpose of in-principle approvals must be in relation to an specific architectural and engineering plan that sets out the basic parameters and features of an actual plan to be developed
- 1.15 if the current Consultant will have further financial interest or revenue beyond the EIS – and therefore effectively becomes a medium or long term member of the Corporation’s (or development partner’s) team – then the Department of Planning must have the EIS reviewed by an independent EIS consultant at the developer’s expense (as is normal practice in many jurisdictions where EISs are submitted by developers – see Today’s Choices: Tomorrow’s Costs)

Providing effective services, using appropriately trained and competent staff

- 1.16 consult with the BPSU to list and re-delegate to staff the powers required to enable them to carry out their daily tasks of implementing the policies established by the Corporation
- 1.17 require and consider technical advice of staff, especially for any decision that entails expenditures.
- 1.18 record technical advice of staff in Committee and Restricted meetings – so that there is clear documentation to show when such advice was or was not followed

Taking reasonable decisions, based on all relevant considerations

- 1.19 any actual architectural and engineering plan that is proposed to be built must entail discussions and agreement with the appropriate Ministries and Departments of the Government of Bermuda
- 1.20 prior to submission to the Department of Planning, the EIS must include a robust public consultation (not just informational sessions) that are consistent with
 - 1.20.1 best practices for public consultation evidenced by guidelines from such bodies as the International Association for Impact Assessment

¹ Although established by the Government, the Office of Procurement is intended to operate without political interference.

- 1.20.2 the elements for public consultation set out in decisions of the Privy Council that are binding on Bermuda and the UK Supreme Court, that are persuasive
- 1.20.3 guidelines set out in the 1998 Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters²

2. Being customer focused

- 2.1 after implementing Recommendation 1.3, any required or further RFPs should be issued in accordance with best practices and the principles set out in the Corporation's existing Tendering policy, as overseen by the Office of Procurement
- 2.2 during the medium term progress of the development, ongoing legal, contractual and other review and consultation should be conducted to ensure that the development does not adversely impact existing rights (e.g. of other users of the harbour, or of taxpayers or residents)

3. Being open and accountable:

Being open and clear about policies and procedures and ensuring that information and any advice provided, is clear, accurate and complete

- 3.1 the Government should finalize the Draft Code of Practice for Procurement (in accordance with s.33 of The Public Treasure (Administration and Payments) Act 1969 as amended by the Good Governance Act 2011; and conduct workshops for relevant entities to clarify expectations during the progress of the development
- 3.2 clarify existing guidelines and establish clear rules regarding signing authority (including types of contracts and monetary limits) of the members of the Corporation to execute the business of the Corporation of Councillors and Alderman

Keeping proper and appropriate records

- 3.3 adequate and transparent minutes (including audio recordings) be kept of all meetings and decisions where Corporation business is conducted

Taking responsibility for its actions

- 3.4 Auditor General to review expenses related to the transition to new auditors over and above the \$30k eventually settled with KPMG as 'incurred costs'

4. Acting fairly and proportionately:

Treating people without unlawful discrimination or prejudice, and ensuring no conflict of interests

- 4.1 that s. 3.4.5 of the current Code of Conduct be amended so that disclosures of all matters that may constitute Conflicts of Interest are registered and not just reported to the Mayor, or (if the Mayor is also conflicted) to the entire Council in a Restricted meeting

Dealing with people and issues objectively and consistently

- 4.2 all proposals above a certain threshold as agreed by the Office of Procurement should be reviewed by the Office of Procurement-whether or not there is a single or unique source/vendor for proposal

² Known as the Aarhus Convention, this multilateral agreement was signed by the UK, not by Bermuda. An argument has been advanced during this past year that this Convention may apply to Bermuda because there was no declaration exempting Bermuda (as the Netherlands and Denmark did with their island territories). I have not researched and analyzed the legal effect of this Convention. However, it is at least wise for relevant local authorities to be aware of and to consider employing the international standards for basic transparent public consultation that have been agreed by a majority of nations after considerable expert review and negotiations.

5. Putting things right:

Putting mistakes right quickly and effectively

- 5.1 immediate cancellation of “caucus meetings” where business of the corporation is done in the absence of staff
- 5.2 for significant matters (emergency, priority or value over threshold recommended by the Office of Procurement) – all relevant information (including drafts of significant contracts) must be circulated to all members of Council

6. Seeking continuous improvement:

Reviewing policies and procedures regularly to ensure they are effective

- 6.1 orientation and training of the Council in what may properly be discussed and agreed and/or resolved in social and informal gatherings of the Corporation (see Ombudsman Ontario)
- 6.2 refinement of the written policies regarding what may and may not be discussed and decided in Public and Restricted meetings in keeping with modern standards and best practices.
- 6.3 given that the Government now provides an annual grant to the Corporations, the Auditor General should determine her authority to
 - 6.3.1 review all documentation pertaining to any properties that are being used by the Corporation or developer as collateral for loans or other purposes
 - 6.3.2 review other financial matters as she sees fit and/or as requested by the Office of Procurement

Ensuring that the public body learns lessons from complaints and uses these to improve services and performance

- 6.4 immediate training and annual updated training in ethics generally and standards of administration for the current and each new incoming Corporation
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-
-

APPENDIX I

CITY OF HAMILTON COMMITTEES

CITY OF HAMILTON COMMITTEES

Finance:

Mayor Graeme Outerbridge (*Chair*)
Alderman Gwyneth Rawlins
Councillor Keith Davis
Gary Edwards
Ed Benevides
Tanya Iris
Nathan Kowalski (*Associate Member*)

Infrastructure, Development and Future:

Alderman Donal Smith (*Chair*)
Alderman Carlton Simmons
Councillor George Scott
Councillor Keith Davis
Patrick Cooper
Danilee Trott
Ed Benevides

Property and Safety:

Councillor Troy Symonds (*Chair*)
Councillor Roseann Edwards
Alderman Carlton Simmons
Patrick Cooper
Steven DeSilva
Danilee Trott
Ed Benevides

Staff, Legislative and Governance:

Councillor George Scott (*Chair*)
Alderman Carlton Simmons
Alderman Gwyneth Rawlins
Councillor Larry Scott
Councillor Keith Davis (*Chair, Staff Committee*)
Lindell Foster
Patrick Cooper
Ed Benevides

Residents Advisory Board Members:

Councillor Roseann Edwards (*Chair*)
Councillor Lawrence Scott
Irvin Hendrickson Jr.
Sarah Thompson
Michael Bradshaw
Roxanne Christopher
Richard Augustus
Tracy Marshall

City of Hamilton staff members:

Ed Benevides
Steven DeSilva
Elbert 'Apples' Richardson

Business Advisory:

Councillor Keith Davis (*Chair*)
Councillor Troy Symonds

City businesses representatives:

George Grundmuller – *Chamber of Commerce*
Leila Madeiros – *Association of Bermuda Insurers & Reinsurers (ABIR)*

John Lang – *Association of Bermuda International Companies (ABIC)*

Erica Smith – *Bermuda Economic Development Corporation*

Cheryl Packwood – *Business Bermuda*
Rick Olson – *Bermuda Bistro, Front Street*
Danielle Riviere – *Centre on Philanthropy*

Paula Clarke – *Gibbons & Co.*

Alan Burland – *BCM McAlpine Ltd.*

City of Hamilton staff members:

Ed Benevides
Tanya Iris
Patrick Cooper
Danilee Trott

Accessed October 29, 2013 from

<http://www.cityhall.bm/about/city-hamilton-committees>

APPENDIX II

INDUSTRY OPINIONS OF RFP

RFP HELP WANTED

More Quotes from Local and Overseas Industry Observers

★ **NOT IN THE KNOW:** “Lucky we had known about this from the past – otherwise we wouldn’t have known what to do.”

★ **ALL SHOW, NO GO:** “The process was just a whitewash.”

★ **NOT TOO MUCH INFO:** “I laughed – you have to be serious...wanted an ad agency and I have 5 pages of guidelines and here’s the Waterfront project with one ad...there’s no new plans, it’s old plans, piecemeal.”

★ **BLIND FAITH:** “If you want to be in the game, you have to respond even though you don’t know what you’re responding to.”

★ **FUZZY LOGIC:** “Need specifics – a defined view of what needs to be done.”

★ **WAITING IN VAIN :** “Expected to receive a full-blown RFP – did not, so thought project was on hold – surprised to hear there had been an appointment.”

★ **NEW NORMAL:** “Was it different from the norm? Yes it was.”

★ **PARTS MISSING:** “Thought there was a package and that I just didn’t get it – so I moved on when the deadline passed.”

★ **RATHER FLAGRANTLY PROBLEMATIC:** “Completely amateurish.”

★ **WHO’S WHO :** “The most you can do when you have an RFP like that is to present your team.”

★ **ROLE MODEL:** “Would have expected an RFP like the Hospital’s – design specifications, financing, specs that lead you from A to Z.”

★ **WHAT’S IN A NAME?** “The ‘RFP’ was really an ‘EOI’ – Expression of Interest.”

★ **LOOSE CHANGE:** “The RFP in its current format is too broad and non-specific.”

★ **RIB-TICKLER:** “We all know that it’s not a real RFP – serious investors anywhere would laugh at this.”

★ **NEED A MAP:** “Don’t even know which part of Hamilton Harbour is intended.”

★ **HELLO?** “Called up and expected to see something like the one in St. George’s or Dockyard. No one seemed to know what I was talking about...I just wanted to find out more about the parameters and then they didn’t have it...was told it was more of an expression of interest.”

★ **CASH TO BURN:** “If I had an endless budget I might have gone out and spent a whole lot of money doing a proposal.”

★ **CUT TO THE CHASE:** “This process was weird.”

★ **EXPRESS YOURSELF:** “I’ve done proposals before. If there had been an RFP package, I would put in more than merely an expression of interest.”

★ **MIND-READER:** “I had no idea what CoH was looking for. There was the John Swan competition and chatter, but I had no real conception of what they wanted. I would have expected a meeting and an information package for a project of this size.”

★ **RUSSIAN ROULETTE:** “You shoot in the dark and try your best.”

★ **SOMETHING FROM NOTHING:** “If people don’t know, how can they submit anything?”

★ **STAB IN THE DARK:** “It is impossible to bid if you don’t know what you’re bidding on.”

★ **DEVIL IN THE DETAILS:** “It gives no idea of the extent of work being talked about – and where. The waterfront is a huge area. What are the terms of reference?”

★ **CRASH DIET:** “This RFP is too thin to give prospective submissions an idea of the challenges.”

★ **UNKNOWN TERRITORY:** “Don’t know how to approach this as an RFP.”

★ **LOOSEY GOOSEY:** “It was the loosest RFP I had ever seen. It was so unspecific, it was a one liner. I know I was not alone – it was very unspecific.”

★ **CLEAR AS MUD:** “The clearer the RFP, the better the response will be.”

APPENDIX III

BEST PRACTICE RFP COMPARISONS

Best Practice Comparison of Elements and Information contained in a Request for Proposal

RFP Elements and Required Responses	BERMUDA				CORPORATION OF HAMILTON				OVERSEAS						
	St George's Development Ordinance Island Marina	WEDCo Marina	Bda Govt W&E Streetlighting Maintenance Services	Barr's Bay	Works Depot	Photovoltaic System for Bulls Head	Waterfront Project	Tender Policy and Bid Template	New London Development Corp (Connecticut)	Breakwater Park (Kingston, Ontario)	Billingham Waterfront Redevelopment (Washington State)	Energy Management Waste Disposal Authority (Baltimore, MD)	Redevelopment Authority E+ Green Building Demo Program (Boston, MA)	San Fernando Waterfront Redevelopment (Trinidad & Tobago)	Granton Waterfront (Edinburgh, UK)
RFP Date:	Mar-12	Jun-06	May-13	Jul-12	May-09	Jan-13	Oct-12		Jun-11	Feb-12	May-13	Apr-13	Mar-11	Apr-13	
Waterfront Authority	✗	✗	✗	✗	✗	✗	✗		✓	✗	✓	✓	✓	✗	✓
Individual Developer	✓	✓	✓	✓	✓	✓	✓	✓	✗	✓	✗	✗	✗	✓	✗
Initial Notice or advertisement instructions for proposals	✓	✓	✓	✓	✓	✗	✓	✓	✓	✓	✓	✓	✓	✓	✓
Additional information e.g. Site Visit/Pre-tender Meeting/ Specifications)	✓	✓	✓	✓	✓	✓	✗	✓	✓	✓	✓	✓	✓	✓	✓
Scope	✓	✓	✓	✓	✓	✓	✗	✓	✓	✓	✓	✓	✓	✓	✓
Preliminary Concept	✓	✓	✓	✓	✓	✓	✗	✓	✓	✓	✓	✓	✓	✓	✓
Terms and Conditions	✓	✓	✓	✓	✓	✓	✗	✓	✓	✓	✓	✓	✓	✓	✓
Business/Experience	✗	✗	✓	✗	✓	✓	✗	✓	✓	✓	✓	✓	✓	✓	✓
Financial	✗	✓	✓	✓	✗	✓	✗	✓	✓	✗	✓	✓	✓	✓	✓
Qualifications	✓	✗	✓	✗	✗	✓	✗	✓	✓	✓	✓	✓	✓	✓	✓
Evaluation Criteria	✗	✗	✓	✗	✓	✓	✗	✓	✓	✓	✓	✓	✓	✓	✓
Timelines	✗	✗	✓	✗	✓	✓	✗	✓	✓	✓	✓	✓	✓	✗	✓
Questions/Responses: articulated to all	✗	✗	✓	✓	✓	✗	✗	✓	✗	✓	✓	✓	✗	✓	✓
resources/Labour	✗	✗	✓	✗	✓	✗	✗	✓	✓	✓	✗	✓	✗	✗	✓
Environmental Impact Assessment (EIA)	✗	✗	✗	✗	✓	✗	✓	✓	✓	✗	✓	✗	✓	✗	✓

No EIA because energy marketing (not construction)

Feasibility Study; EIA not required before planning approval



APPENDIX IV

RESPONSES TO RFP

Responses: information learned prior to submission; what was submitted; ranking

RESPONSE PSEUDO-NUMBER	ASKED FOR INFO BEFORE 19 OCT.	RECEIVED INFO FROM CoH BEFORE 19 OCT.	SUBMITTED EOI OR RFP	NUMBER OF PAGES	RANKED	INTERVIEW
1	Not known	Not known	RFP	84	1	Selected
2	No	N/A	RFP	26	2	Yes
3	Two calls	Told City looking for EOI only, copy of draft press statement	EOI	24	3	Yes
4	No	N/A	EOI	16 (PowerPoint)	4	No
5	No	N/A	EOI	3	5	No
6	One call	Told City looking for EOI only	EOI	6	6	No
7	One visit	Given PowerPoint of 2009 Sasaki presentation by Deputy Mayor	EOI	1	7	No
8	Two calls, requested meeting	No response	Ghost: not submitted in 2013, dated and presented in 2010	47 pgs: qualifications 9 pgs: approach	8	No
9	Visit	Met with Mayor	Noted as not a proposal : letter asking to be informed	1	N/A	N/A
10: Overseas	2 emails: 11th and 23rd Oct to City Engineer	1st email: no response (City Engineer on vacation) 2nd email: response deadline passed	N/A	N/A	N/A	N/A

APPENDIX V

RFP EVALUATION CRITERIA

22 October 2012 Evaluation Meeting: Criteria used to evaluate "proposals"

CRITERIA	FAIR OR NOT	REASON FOR MY CONCLUSION
a. Submitted on time per RFP established deadline	FAIR	Typically, an evaluation process will first measure whether or not submissions are actually responsive to the RFP. That is, are they on time, do they include information requested and address the specifications issued? In this case, as the Corporation did not request information or set out specifications, the only measure of responsiveness is whether or not responders met the deadline.
b. Completeness of proposal in addressing project issues	UNFAIR	No "project issues" were set out in the RFP. Therefore, it is unclear how submissions could be evaluated on how responsive they were to project issues. A response to an Expression of Interest could reasonably be expected to indicate approaches to and experience with such issues as salt water development, sensitivity to existing Front Street and cruise ship docks, but only in general terms.
c. Experience of assembled team and overall organization	FAIR	This would normally be an element in the Expressions of Interest and / or Request for Qualification stages of a procurement process. These relate to the experience and capacity of the responders to be involved in a project "to develop the waterfront". Therefore, the responders can reasonably be expected to include relevant information about themselves and be evaluated on these criteria.
d. Depth of overall team experience and that of its individual professionals	FAIR	Same as c. above
e. Approach and disclosure of project mission and understanding Corporation objective	UNFAIR	No project mission or Corporation objective was set out in the 4" x 6" RFP advertisement. Responders cannot reasonably be expected to guess at the objectives of the current Corporation. Similar to b. above.
f. Diversity and completeness of each proposed team <ul style="list-style-type: none"> I. Technical / planning / design experience II. Financial disclosure or limitation thereof III. Overall project management capabilities IV. Construction experience 	FAIR	Same as c. above
g. Preliminary project budget	UNFAIR	Without specifications, parameters or priorities regarding mix of housing, recreational and commercial usage, it is unrealistic to expect responders to identify amount of land reclamation and constituent elements of a design which are required to project the budget.
h. Community participation objective	FAIR	Community input into large development projects is increasingly a critical part of proposals and practice. It is fair to expect that responders to both an EOI and RFP would indicate its experience, capacity and approach to community participation.
i. Addressing needs of North Hamilton community	UNFAIR	North Hamilton was an element of "Team Hamilton's" platform, but development of the waterfront was not. Responders cannot be expected to guess that the Corporation expects North Hamilton to be a part of the waterfront development rather than a separate plan.
j. Addressing existing port and future in relation to waterfront	UNFAIR	Some waterfront redevelopments retain commercial docks but others do not. Responders cannot be expected to guess whether the RFP anticipated: a) retaining the docks or not; or b) the issue of the docks being treated as a separate precursor project or included in the "development of the waterfront".

APPENDIX VI

PUBLIC PARTICIPATION IN
COMMITTEE MEETINGS



Policy – Public Participation in City of Hamilton

Committee Meetings

In order to introduce public involvement with Corporation Committee meetings the following procedures apply:

NOTIFICATION

- We publish the schedule of all committee meetings of Corporation on our website.
- We will post agendas and associated correspondence to the web 10 business days before meetings.

AGENDAS

- The Secretary and Recording Secretary will finalize all agendas prior to publication and distribution.
- The Recording Secretary will publish on the website the committee agenda and appropriate documentation or records, ten (10) business days prior to the meeting.
- Written Public submissions and requests for presenting or addressing the committee must be received by the Secretary no later than four (4) business days before the meeting. Email with attachments is acceptable.
- Items submitted to the Secretary will be omitted as a result of insufficient information being provided or matters that are of an operational nature and are forwarded to the management team for resolution.

MEETINGS

- All meetings are put into the City Hall meetings calendar on Outlook.
- A committee meeting date or time can only be changed by the Chairman of that committee or by request of the Secretary. At least three (3) weeks notice should be provided to permit public notification.
- Members of the Public will be scheduled to appear and be heard at the beginning of committee meetings.
- Committees may however decide to hear speakers at specific times during their meetings.
- Each speaker is limited to five minutes to address the committee.
- Members of the committee may ask questions of the speaker or request additional information.
- Written comments may also be given or sent without speaking to the committee but must be received four (4) business days prior to the meeting.

- If an organization wishes to address a committee, one person should be chosen to represent the group.
- The Recording Secretary will let the speaker know when Council makes a decision on the issue. The decision may be to defer the issue pending further information or recommend to the Board to reject or approve the proposal at the next General Corporation meeting.

All Members should come to Board and Committee meetings fully prepared with the appropriate meeting documentation to discuss agenda items, after having thoroughly read the supporting documentation.

Committee meetings should be no longer than two hours.

DISCLOSURE

After the Public submissions are completed the deliberations of the Committee will be held in closed session.

All Committee meetings are digitally recorded and all written submissions will be scanned to become part of the digital record of the meeting.

All written submissions as part of the Corporation records and designated as non-restricted may be published on the Corporation website as part of the meeting minutes.

Restricted information is considered, but not limited, to be:

- Receiving of advice that is subject to solicitor-client privilege
- Security of the property of the municipality
- Acquisition or disposal of land
- Considering personal information about an identifiable individual
- Labour relations or employee negotiations
- Litigation or pending litigation, including matters before administrative tribunals
- Any other matter permitted or required by law.

ATTENDANCE AT MEETINGS

Members of the Public scheduled to appear before a committee should contact the offices of the Corporation if they are not attending and extend apologies as soon as possible, this prevents wasting the committee members' time by non-attendance.

For Members of the Corporation, attendance is taken at all meetings by the Recording Secretary and a spreadsheet of attendance is kept on file. If you are unable to attend a meeting that you are required at, you should advise the Secretary.

APPENDIX VII

TENDERING AND QUOTE POLICY



**Corporation of Hamilton
Tendering and Quotes Policy**

A consistent approach to purchasing across the Corporation is essential to achieve value for money with the following objectives:

- I. Fairness, i.e. quotations and/or tenders will be treated equally;
- II. Conduct of business openly and without restrictive practice;
- III. A variety of suppliers are given the opportunity to quote;
- IV. Compliance with internal control directives.

The Process

In all instances:

- I. The signing authority levels referred to in the Purchase Order Policy must be adhered to.
- II. Alternative prices should be sought wherever possible and practical and from as wide a range of suppliers as is practicable.
- III. The same supplier should not be used repeatedly without good reason, e.g. consistently better prices or quality, or a centrally tendered supply, such as photocopy paper.
- IV. Where ever possible preference should be given to suppliers which are located with the Municipal limits.
- V. Employees may be called upon to justify the selection of specific vendors.

Goods and Services below \$20,000

No specific requirements (other than those applying in all instances).

Goods and Services between \$20,000 and \$50,000

- I. Shall be obtained on the basis of at least 3 *written* bids.(where possible)
- II. Employees shall ensure that, over the course of time, the range of suppliers requested to provide quote is as wide as practicable.
- III. The employee initiating the request shall clearly state all the relevant information necessary to secure an accurate price.

- IV. A closing date/time for submission of bids must be stated and strictly observed.
- V. The lowest price must be accepted or reasons for not accepting the lowest price must be documented. The reasons for acceptance of the vendor must be submitted to the executive management upon request.
- VI. Unsuccessful suppliers should not be allowed to re-submit a lower quotation price - the first quotation must be accepted.
- VII. Successful and unsuccessful suppliers should be notified in writing.
- VIII. Where applicable quotations for an annual supply should be sought to obtain quantity discounts.
- IX. When requesting quotations from foreign suppliers, ensure that total landed cost is used to compare to local quotations. Landed cost should include purchase price, foreign exchange, bank charges, freight, duty and all handling costs.
- X. The process must be clearly documented by the employee and all pertinent records retained on file.

Goods and Services between \$50,000 and \$100,000

- I. Goods and services in excess of \$50,000 must be awarded on the basis of sealed bids. Requests for bids must be advertised in the print media and posted on the City Hall Web Site.
- II. The employee initiating the request shall clearly state all the relevant information necessary to secure an accurate price.
- III. A closing date/time for submission of bids must be stated and strictly observed.
- IV. The lowest price must be accepted or reasons for not accepting the lowest price must be documented. The reasons for acceptance of the vendor must be submitted to the executive management team upon request.
- V. Unsuccessful suppliers should not be allowed to re-submit a lower quotation price. The first quotation must be accepted.
- VI. The process must be fully documented and all documents retained.
- VII. The ultimate choice of vendor must be presented to and ratified by the Finance Committee.

Goods and Services in excess of \$100,000

As above, except the ultimate choice of vendor must be presented to and ratified by a full meeting of the Corporation.

Exceptions

Preferred Vendors

The Corporation may, from time to time, declare certain vendors as 'preferred'. These vendors may be reviewed annually based on their ability to continually provide value for money, efficient services and quality product relative to competitors. Such a review must be clearly documented. A vendor may only receive "preferred" status once the case has been presented to and ratified by the Finance Committee. In such instances purchases need only comply with the Purchase Order Policy and, with the exception of this term, need not comply with the terms of the Policy for Tendering and Quotes.

Ongoing Consultants

Often, for ongoing consultations, it is not practical to obtain a quote for the work, or the ultimate price is subject to substantial variation. In these instances, where a consultant does not already have 'preferred' status; the choice of consultant must be presented to and ratified by the Finance Committee.

Emergencies

In the instance of an emergency, vendors may be used without reference to the criteria described earlier in the policy statement. However in such instances Purchase Order signing authorities must be complied with and a written explanation of the reason for the emergency classification must accompany the vendor selection.

Corporation's tendering process:

- I. Initially an RFP is published in both newspaper and website for a minimum of three (3) consecutive business days.
- II. Interested parties must collect tendering information (packages) from City Hall. (packages are signed for)
- III. Bids close on the date and time specified on the tender documents.
- IV. The tender documents will contain the invitation to the bid opening.
- V. A pre-tender meeting may be held to go through the documents this may include a site visit. All information as well as questions and answers will be recorded and distributed to all parties. Any questions submitted outside of this meeting must be in writing. These questions will be answered to all parties in writing.
- VI. If during the bid process any addenda are issued, all parties will receive and sign for them to acknowledge receipt.
- VII. All bids are deposited by the parties into a locked box on the counter in the offices of the Corporation. The box will be labeled to confirm the project and bid closing time.

- VIII. At the closing date and time the box will be opened by the engineering staff in the presence of two officers of the Corporation and any of the bidding parties. Council members will be advised and may attend as observers to the bid opening.
- IX. Bids will be opened and the name of the contractor will be read aloud along with the tender contract amount. This information will be recorded, along with who attended and signed by the Corporation Officers.

Evaluation and Recommendation:

Bids will be evaluated on meeting the requirements as well as due diligence on the team, plant and materials and track record of the contractor, and finally Price. Professional consultants may be used to evaluate bids to provide a third party opinion on the selection.

The selection of the successful bidder will be in compliance with the Tendering policy. Where appropriate the engineering department in conjunction with the Secretary will submit a recommendation to either the Finance Committee or the full board as per the policy for ratification of the selection recommendation.

Disclosure:

All parties will receive a written response to the bid and will include a copy of all the bids and the name of the successful contractor.

Finally, failure to adhere to this policy statement will result in disciplinary action or in an extreme situation, dismissal.

“In the past the Courts were the bulwark of individual rights, but the common law has lost much of its flexibility and is no longer an effective instrument for remedying the wrongs of modern administrative action...The purpose of an ombudsman is provision of a “watch-dog” designed to look into the entire workings of administrative laws...

As an ultimate objective, the ombudsman can bring to the Legislature his observations on the misworking of administrative legislation. He can also focus the light of publicity on his concern as to injustices and needed change. It must, of course, be remembered that the ombudsman is also a fallible human being and not necessarily right. However, he can bring the lamp of scrutiny to otherwise dark places, even over the resistance of those who would draw the blinds. If his scrutiny and observations are well-founded, corrective measures can be taken in due democratic process,

if not; no harm can be done in looking at that which is good.”

OMBUDSMAN FOR BERMUDA

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