

THE NATIONAL CONSERVATION COUNCIL

Promoting and securing biological diversity and the sustainable use of natural resources in the Cayman Islands

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Credibility and Conflict of Interest in the Cruise Berthing Environmental Assessment Process. Part 2 - Good Governance of Government Driven Infrastructure Projects

Acquiring and maintaining credibility with the public is an important factor in environmental and economic assessments of large and complex infrastructure projects.

In Part 1 the National Conservation Council considered continued adherence to the the International Finance Corporation (IFC) Biodiversity, Conservation and Sustainable Management of Living Natural Resources Performance Standards as one means for preserving credibility in the environmental assessment of the proposed Cruise Berthing Facility. The rules of good governance for government driven infrastructure projects are equally relevant to this project.

In recent weeks the Ministry of Tourism appears to have assumed the role of the Project Steering Group and Environmental Assessment Board (EAB), in addition to their role as the proponent of the project and has become the medium for the release of environmental documents into the public domain. The Preliminary Scoping of Possible Mitigation Measures document, was released by the Ministry of Tourism on October 1.

The NCC believes that adherence to international environmental performance standards and good governance go hand in hand. At the recent announcements of Cabinet approval of moving forward with the proposed port, both the Premier and the Deputy Premier committed to a further analysis of the port design with the intention of decreasing the environmental impacts, principally by moving the piers to deeper water. It is therefore vitally important that the EAB continues its role in relation to updates of the Environmental Impact Assessment.

Conflict of Interest Policy - Contractors

The NCC takes the International Federation of Consulting Engineers (FIDIC) conflict of interest policy as an example of a good governance policy that is directly appropriate to this complex infrastructure project both for assessment and execution. In what follows “client” is interpreted as the CI Government.

FIDIC’s policy on conflict of interest requires that consultants provide professional, objective and impartial advice, and at all times hold the client’s interests paramount, without any consideration for future work and strictly avoiding conflicts with other assignments or their own corporate interests.

Consultants shall not be selected for any assignment that would a) be in conflict with their prior or current obligations to other clients, or b) may place them in a position of not being able to carry out the assignment in the best interest of the client.

Specifically, FIDIC policy requires that consultants shall not be engaged throughout the procurement and execution phases of the project, unless the potential conflict has been identified and resolved or managed effectively, under any of the following circumstances:

a. Conflict between consulting activities and procurement of goods, works or services. This means that a firm engaged to provide consulting services for the preparation or implementation of a project, and any of its affiliates, shall be disqualified from subsequently providing goods or works or services resulting from or directly related to the firm’s earlier consulting services. The converse also applies.

b. Conflict among consulting assignments. Consultants, including their personnel and sub-consultants, or any of their affiliates shall not be engaged for any assignment that, by its nature, may be in conflict with another assignment of the consultants.

As an example, consultants engaged to prepare engineering design for an infrastructure project shall not be engaged to prepare an independent environmental assessment for the same project. Similarly, consultants hired to prepare terms of reference for an assignment shall not be engaged for the assignment in question.

c. Relationship with the client's staff. Consultants, including their personnel and sub-consultants, that have a business or family relationship with a member of the client's staff or of the project implementing agency's staff may not be awarded a contract.

Management of the conflict means "resolved in a manner acceptable to the client". In the circumstances where a public body is the client, a duty of transparency and disclosure to the public is clear.

The application of this policy to the CBF means that the contractors who have worked on, or will work on, the terms of reference, the environmental impact assessment, engineering and related evaluations should not be accepted as tenderers in the procurement phase, if the project proceeds to that stage, unless any conflicts that arise are resolved in favour of the public interest and in a fully transparent manner. Indeed, the contractors would be expected to disqualify themselves for the protection of their own reputations, if such a solution could not be reached.

Conflict of Interest Policy – Public Sector

Ensuring integrity of government decisions focuses on whether public officials' private interests in the matter could improperly influence performance of official duties and obligations. The obvious aspects of this rule have been aired in other fora.

Not only should no man be a judge in his own cause, but with a proposal such as that with which the Cayman Islands are now faced, where the Government is cast not only in the role of evaluator but also as a joint proponent in a proposed public private partnership, the question of impaired objectivity must be raised. The commitment to proper procedure in the evaluation of the CBF proposal began with the appointment of a Steering Group and an Environmental Assessment Board (made up of the Department of Environment, National Roads Authority, Department of Tourism, Department of Planning, National Museum, and Port Authority).

It is the NCC's view that if the role of the Ministry of Tourism is to act as the Government proponent, then, in order to counter the reasonable apprehension of bias created by a party acting as both investigator and adjudicator, it is important that the Ministry should not, and be seen not to, interfere with or pre-empt the evaluation function of the Environmental Assessment Board.

This commentary is not intended to endorse any other proposed or alternative cruise berthing facility in GTH or elsewhere. For the avoidance of any conflict with their duty as civil servants, Government members of the Council did not participate in the drafting of this statement.