



Port Development Project



Office of the Auditor General
Government of the Virgin Islands
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EXECUTIVE SUMMARY

1. In 2007 the BVI Port Authority approved plans for the expansion of the cruise ship pier on Wickhams Cay in order accommodate larger cruise ships that had become commonplace in the industry. The project was put to tender and a contractor was identified and recommended for approval. Approval for the works was not received by Cabinet.
2. In October 2011 the Authority and BVI Government executed Heads of Terms with Disney's Magical Cruise Company for a \$12,000,000 loan facility to expand the pier and construct a welcome center on the 4.1 acre upland. This was subsequently deemed insufficient for envisioned port development and was cancelled by the Government.
3. The pier extension project evolved to include a large scale development of the upland. There was no revised needs analysis, no comprehensive planning, and no public tendering. Three proposals were received for the development with estimated costs up to \$57,000,000. The process through which these were solicited was not documented.
4. Heads of Understanding for the expansion of the cruise ship pier and large scale development of the upland were executed between the Government and Tortola Port Partners in March 2012 for a 49 year public private partnership valued in excess of \$70,000,000.
5. The Port Authority was excluded from the process of reexamination and redefinition of the port development project and was not a party to the Heads of Understanding agreement executed for the proposed development.
6. A review performed by independent legal experts indicated that the legal documents (executed and proposed) for the private public partnership between the Government and Tortola Prot Partners heavily favoured the developers.
7. The Heads of Understanding agreement with Tortola Port Partners was terminated in July 2012.
8. The project for pier extension and upland development was put to public tender in August 2012 in an expedited process. The limited timeframe and the detailed scope of works specified in the invitation may have limited the number of possible responses and provided a schematic advantage for the previously selected developer.
9. The new requirement of a local partner generated a partnership which presents a conflict of interest.

SCOPE AND METHODOLOGY

1. The audit comprised an assessment of the processes employed in procuring and assessing options for the development of the port facilities. It included interviews with key personnel, examination of files, records and documents and a review of other similar developments. The examination focused on compliance and regularity of the processes as they relate to public procurement and transparency.
2. The examination is not intended to assess or examine the merits or otherwise of the contents of the proposals and submissions received for the cruise pier development. This is deemed the role of the procurement assessment team.
3. The examination was restricted in the following ways:
 - i. Files examined at the Ministry of Finance were assessed as incomplete;
 - ii. Former consultant for the Ministry of Communications and Works, who was an integral part of the process from December 2011 to November 2012, was unavailable for audit interview.

BACKGROUND

4. The cruise ship pier located on Wickhams Cay I was officially opened in November 1994. This was constructed 555 feet long with one mooring dolphin which effectively extended its utility by 295 feet to 850 feet. The pier was extended in 1999 to 746 feet with two mooring dolphins (the furthest one situated 267 feet from the extended pier) for a total mooring facility of 1013 feet. The mooring dolphins are significant as they are used to secure larger ships which at times exceed the length of the pier. The facility as completed in 1999 could, it was estimated, service ships up to 265 meters (869 feet) but was being used for ships up to 295 meters (967 feet). The files indicate that even larger ships were at times accommodated at the pier.
5. The surrounding area (upland) comprises of approximately 4.1 acres of undeveloped reclaimed land which is fenced for security purposes. The area is largely without landscaping and lacking amenities.
6. Early in the millennia as cruise lines succumbed to economies of scale by investing in increasingly larger ships, it became clear that the existing pier was no longer adequate to service the industry. The Authority was put under pressure by cruise ship operators to improve the facility or risk losing its market share. As the industry continued to grow in the Caribbean, the territory saw a decline in the number of passenger arrivals from 2007 to 2010.
7. Fully forewarned, the Authority engaged engineers CH2MHILL in 2007 to perform a conceptual evaluation and recommend options for the expansion of the pier. Based on the results of this evaluation, approval was sought and obtained from Cabinet in April 2008 for the lengthening of the pier by 194.6 feet at a cost not to exceed \$7,000,000.
8. The project was put to tender by the Authority in June 2008. With the assistance of CH2MHILL, the Authority selected the lowest bidder Misener Marine Construction Inc. of Florida to be awarded a contract (for \$12,120,891) to extend the pier and perform related

repair works. This selection was forwarded to the Ministry of Communications and Works (the Ministry) to arrange for Cabinet ratification.

9. A paper seeking approval for the contract to be awarded to Misener Marine Construction Inc. was submitted to Cabinet in September 2008. This stipulated an expansion of the pier deck by 84 feet, together with the construction of two additional mooring dolphins and a list of other related works. There was no information in the paper to clarify the significance of the mooring dolphins which together with the pier expansion would extend the functionality of the pier by 207 feet in accordance with the CH2MHILL design. Without this information the proposal was rejected by Cabinet on the basis that 84 feet would be insufficient to service large ships.

10. Cabinet instead called for the establishment of a task force to examine the issues related to accommodating larger cruise ships in Road Town harbour (an alternative site) along with other requirements. In the end, no timeline was established and no definitive solution provided with respect to the urgently required pier extension.

Disney Proposal

11. *The proposal for the expansion of the pier and construction of a welcome center was deemed insufficient for envisioned port development.*

12. Having failed to address the salient issue of the cruise pier's growing inadequacy the Authority continued to receive pressure from carriers about the facility. Proposals were made by both Royal Caribbean and Disney in 2009 for the expansion of the pier and assistance with financing. In 2011 the Authority stepped up its talks with Disney's Magical Cruise Company for a construction loan to extend the pier.

13. The Disney proposal stipulated a \$12,000,000 loan facility which would be used to construct a two span pier extension at the cruise ship pier and a welcome center. The works would be performed by Misener Marine Construction Inc. with CH2MHILL as Project manager. The project duration, as indicated in an appendix to the Heads of Terms, would extend from 28 July 2011 to 14 November 2012. The loan would be amortized over a ten year period at an interest rate of 6%.

14. Upon completion, Disney would have preferential berthing privileges at one of the two berths for a fifteen year period. The company would also have the right of first refusal of any third party for the lease or development of the adjacent 4.1 acres owned by the Authority.

15. Heads of Terms were signed on 11 October 2011 between representative from Disney, the Premier and the Managing Director of the Authority. The financial impact of the agreement was limited to the Authority's ability to repay the loan and to cover any cost in excess of the loan sum incurred during the development.

16. The proposed works were based on advancing the CH2MHILL process that Cabinet had stopped in September 2008. In effect it endorsed the construction of an 84 foot deck extension with two additional mooring dolphins.

17. The nonbinding agreement was subsequently terminated by the Government.

The New Approach to the Development

18. *Pier expansion project evolved to include a comprehensive development of the pier and upland in an arrangement that required long term partnering with private sector entities. No public tendering was performed.*

19. With a change of the political directorate, the proposal presented by Disney was brought under new scrutiny and the process of reexamining possible options commenced.

20. A consultant was engaged by the Ministry of Communications and Works for the purpose of liaising with the Port Authority and advising on port related matters. Through a process that has not been adequately explained three proposals were received by the Ministry. These came from CaribInvest; Trident Development Enterprise LLC; and Tortola Port Partners. The proposals from the latter two included the pier and upland development whereas the former related only to the upland.

21. The submissions differed from the Disney proposal in significant ways:

- i. Major development of the upland;
- ii. Long term commitment by the Port Authority and the Government 49 – 50 years;
- iii. Long term commitment of the associated cruise lines in delivering passengers;
- iv. Amendment of the Port Authority's fees (passenger tax)
- v. Substantially excluded possibility for local involvement in the development;

22. Of the three proposals a decision was taken by the Ministry to accept the Tortola Port Partners submission which detailed a \$57,000,000 investment for the pier expansion and upland development on a 49 year marine and land lease arrangement.

Planning and Scope

23. Despite the magnitude of the newly proposed development, examinations of the records do not indicate any comprehensive planning or revised needs analysis to redefine the scope of the project and development of the upland. The provisions of the Public Finance Management Regulations (PFMR) with respect to public procurement were largely ignored. The Protocols for Effective Financial Management (PEFM) that were executed on 23 April 2012 between the Government of the Virgin Islands and the UK Minister for Overseas Territories were not in place during the early part of the project. The provisions of this document however, echo general good practice with respect to major project planning and financing that should have been considered and observed, in the development of the project. Both are therefore referred to herein.

24. The revised project was not suitably appraised prior to the procurement stage as required by PEFM 11.a. No analyses or other documentation was found supporting the desirability of an immediate and large scale development of the upland. No assessment was performed on the state of the market and how the development would likely impact other property owners, prospective developments and existing businesses on Wickhams Cay and in Road Town.

25. In the absence of a project plan, the format and scope of the development appears to have been driven by the developers' vision and interests as opposed to what was needed and beneficial for the territory.

26. Significantly, the Town and Country Planning Department which is the Government's primary advisor on development ideas, concepts and planning issues was notably absent from the cross agency consultations solicited for this major development scheduled to take place in central Road Town. The Department did however receive development plans for approval in March 2012 (submitted on behalf of the then Managing Director of the Authority Mr Vincent O'neal) that were limited to the pier expansion and welcome center.

27. The process of securing stakeholder consultations, to better define the project and gain support for the development, commenced after Heads of Understandings were executed with a developer, Tortola Port Partners. This should have taken place before tendering or otherwise securing a contractor. This process resulted in some significant amendments to the proposal:

- i. The proposed investment increased from \$57,000,000 to \$70,400,000 with an additional \$18,400,000 being allotted to community investments.
- ii. Four buyout options were incorporated into the proposal at years 15, 20, 30 and 39.
- iii. Rebate of passenger taxes would be granted to the two participating cruise lines for up to 15 years.

28. Subsequent to the selection of a developer a business appraisal was performed by PKF (BVI) Limited (dated 20 July 2012) and independent legal advice to review the existing agreement and pending legal documents was sought and received in July 2012.

Procurement Process

29. There was no transparency in the process by which the three submissions were received. Contrary to the provisions of PFMR173 and PEFM 11 b. the public tendering process was not engaged. This failure likely deprived the Government and the Authority from obtaining broader interest and possibly more favourable results.

30. It is also unclear what the companies were invited to submit a proposal on as the files contain no invitation for proposal and no project specifications.

Agency and Executive Approval

31. The BVI Port Authority is a body corporate charged with providing, operating and maintaining port and harbour services and facilities of the BVI.

32. The entity is specifically authorized to develop and manage all lands that have been leased or vested in the Authority (British Virgin Islands Port Authority Act 1990 section 4 (e)). It is in addition, empowered by section 5(d) of the Act to coordinate and execute any Government project in any specified port.

33. Throughout the period in which the prospects for the development were being pursued and assessed (November 2011 – July 2012) the project was directed and controlled by the

Ministry of Communications and Works, to the exclusion of the Port Authority and its Board. The project scope and costs were expanded representing a major shift in the development which received no prior approval from the Port Authority.

34. Heads of Understanding were executed on 27 March 2012 between the Government and the selected developer, Tortola Port Partners. These provided a basis for the Government and the Developer to continue negotiations to iron out relevant details and finalize the documents required to advance the project. The Heads of Understanding agreement stipulated a term of 90 days after which either party could terminate the agreement by giving 14 days written notice. The BVI Port Authority was not a party to the agreement.

35. The Board Members were however informed that the development was being pursued at a meeting on 26 January 2012, briefed at a meeting on 8 March 2012 that the Disney agreement had been cancelled and after execution of the Heads of Understanding the Minister of Communications and Works, and the Consultant attended a Board meeting on 3 May 2012 to provide information to the members about the selected proposal.

36. Subsequent to this, the Board received instructions from the Ministry on required actions and ratifications to ensure that the process was not hindered. These included:

- i. Requirement to execute an agreement with the Developer for a credit of \$3,043,880 to allow for ready mobilization of the pier work pending execution of the development contract. The proposed agreement stipulated that the sum would be reimbursed to the Authority once the contract was signed. The rationale was that the pier expansion was mandatory and the piles would be required for these works whether or not the contract was awarded to the Developer.
- ii. Requirement to issue a resolution for the Authority to enter into an agreement with Tortola Port Partners for the development of the pier.
- iii. Requirement to cover the costs of the presentation made by the Developer in conjunction with the Ministry in July 2012 at a cost of \$11,215.00.

37. The three million dollars for purchasing piles was approved by the Board but the transaction was not pursued for reasons not disclosed in the records. Despite the push to purchase piles for use by Tortola Port Partners, the Department of Trade advised that no application for a trade license had been received from the developer to do business in the BVI.

38. The resolution authorizing the execution of an agreement with Tortola Port Partners for development of the pier was passed by the Board on 5 July 2012 and signed by the Acting Chairman.

39. At the time of the audit the costs for the presentation in excess of eleven thousand dollars had not been paid by the Authority.

40. In effect, the role of the Port Authority was reduced to endorsing decisions already made by the Ministry. In excluding the Authority from the decision making process the Ministry failed to avail itself of the experience and knowledge residing in the management and Board of the Authority.

Independent Legal Review

41. *A review of the legal document by experts in the field of Public Private Partnerships indicated that the documents (executed and proposed) for the partnership heavily favoured the developers.*

42. Throughout the process the Attorney General's Chambers was consulted for clarification and legal advice with respect to the Government's interests. All of the legal documents, however, originated from the Developer's lawyers. In June 2012 the Financial Secretary sought independent legal advice from specialists in the field of Public Private Partnerships (PPP). A team of lawyers from the firm of Baker & McKenzie LLP in the UK reviewed the proposed Project Development Agreement (PDA), the Heads of Understanding (HOU) agreement and the Ground Lease that had been drafted for execution by the Authority and the Developer.

43. The review raised a number of concerns with respect to the Government's position in the partnership. Among these were:

- i. Absence of guarantees or a performance bond which would require the controlling entities for the developer to provide substantive support or security for its obligations should it be unable to perform as contracted;
- ii. Allocation of risk drafted in a manner to heavily favour the Developers;
- iii. Failure of the development documents to state how the project will be financed. Debt financing would require review of the documents by lenders and thereby cause time delays;
- iv. Absence of performance standards. These are especially desirable to regulate the operation of the Pier Park ensuring that it is operated and maintained to acceptable standards;
- v. Absence of a positive obligation on the Developer to carry out the Environmental Assessment, abide by its conclusions and carry out its works in accordance with strict environmental requirements and standards;
- vi. Failure of the agreements to give the Authority approval rights for the initial design and any changes;

- vii. Absence of a stipulation which would require the Developer to assume the risk for the performance of its subcontractors;
 - viii. Absence of a provision stipulating ownership of the pier;
 - ix. Absence of safeguards preventing the Developer from transferring shares at least until after the works are complete;
 - x. Absence of a provision which allows the Authority or the Government to step in to remedy situations or in case of a default;
 - xi. Existing ambiguity as to the nature and purpose of the HOU. The document is being referred to in the PDA in a manner which suggests that it is a full form agreement when usually an HOU is used simply to document key terms which would be embodied in detail in a more substantive agreement.
 - xii. Failure of the PPP Agreement to set out obligations of the cruise lines in detail. In particular, nature of their use of the pier (guaranteed passenger numbers and ships per year), whether the agreement is binding or contingent on other provisions, whether cruise lines are contributing to the cost of the project and consequences of the cruise lines failing to use the pier as agreed.
 - xiii. Failure to make provision for the Authority to be a party to the berthing agreement. This is desirable as the Authority will be continuing to operate the pier and the agreements are a major source of revenue for the project.
 - xiv. Failure of the HOU to stipulate whether the decisions of the Cruise Industry Planning Board are binding or simply advisory. Though this is likely to be the latter.
44. Other points raised were the need for the insurance provisions to be revised by an insurance adviser to ensure adequate coverage and appropriate assignment during the development and operation periods. The need to strengthen the warranties as the requirements and standards stipulated in the document provide only vague and poorly defined assurances.
45. The initial process which was being expedited contained several shortcomings which could function to the detriment of the Government and the Port Authority. Efforts to secure independent expert knowledge on the format, structure and provisions of PPP agreements was sought only after steps were in the advanced stages for drafting the terms of the parties legal relationship.

Implementation of the Procurement Process

46. The process was discontinued and the project put to public tender in an expedited process which may have limited the number of possible responses.

47. After execution of the Heads of Understanding and commencement of preliminary activity on the development, the project was halted.

48. Ministry of Finance then published on its website a request for “Expression of Interest” dated 31 July 2012.

49. The project outlined in the document included:

- i. Cruise pier which must at minimum accommodate vessels with minimum length of 1,300 feet, minimum deck width of 45 feet and rated for two 170,000 tons ships.
- ii. Development of approximately four acres of vacant reclaimed land in the immediate vicinity of the cruise pier for the use of cruise passengers. Must include a visitor center, shopping mall/village, recreation areas/green space; restroom facilities; staging area for transfer of passengers to taxis or tour operators on land or sea.
- iii. Construction schedule that would allow for readiness for use of pier and landside improvements by January 2014.

50. Additional requirements were:

- i. Submitted concept must be self-financing;
- ii. Involvement and partnership of a cruise line partner(s) which subscribe to a philosophy that is aligned with the Virgin Islands Brand and target market and having a medium to long term relationship with Virgin Islands as a destination or home port of choice in their itineraries;
- iii. The use of a local partner(s) (strongly encouraged);
- iv. Expectation that the project would be used to train, transfer technology to the local population to maximize the use of local resources.

51. The initial closing date for the Expression of Interest was 16 August 2012 which was extended twice. First to 28 August 2012 and later to 12 September 2012. Aside from the publication on the Ministry of Finance’s website, the request for Expression of Interest was published as indicated below:

Publication	Dates Advertised	Stated Closing Date
Daily Commercial News (Canadian based)	22, 23 and 24 August 2012	28 August 2012
BVI Beacon (Local)	16 August 2012	28 August 2012
Island Sun (Local)	18 August 2012	28 August 2012
Island Sun (Local)	25 August 2012	16 ^(sic) August 2012
Stand Point (Local)	16 and 23 August 2012	28 August 2012

52. The publications above provided a submission period of less than two weeks for a project envisioned to cost between \$50,000,000 - \$75,000,000. The extended submission date of 12 September 2012 was not found in any of the publications examined. In addition, no evidence was found to support assertions that the tender was also advertised in the Wall Street Journal.

53. The process resulted in the submission of three proposals. These came from GLF Construction Corporation; Tortola Port Partners; and Royal Caribbean Cruises Ltd/Decco.

54. The submissions were reviewed for responsiveness by a committee chaired by the Deputy Financial Secretary and comprising of representatives from the Ministry of Natural Resources and Labour, Ministry of Communications and Works and the Public Works Department. After which all three developers were invited to submit tenders by 11 October 2012. Two were subsequently received. GLF Construction Corporation did not submit a tender.

55. The two tenderers were invited to make presentations to a committee formed for the purpose of negotiating the terms of a PPP agreement. The committee's membership included the Financial Secretary, the law firm of Baker and McKenzie of the United Kingdom (specialists in PPP arrangements), the accounting, audit and business strategy firm PricewaterhouseCoopers of Trinidad and Tobago, together with the Chairman of the BVI Port Authority and representatives of the Attorney General Chambers and the Ministry of Communication and Works.

56. At the time of the Audit Examination the assessment and negotiation process was being undertaken and not subject to audit review or comment.

57. The intention was to have the process expedited to accommodate an early construction schedule. However, the provisions in the invitation for expression of interest mirrored the previously accepted proposal from Tortola Port Partners to a considerable extent which may have created an unfair advantage. This opens the door whereby the impartiality of the process could be challenged. In particular the requirements that the developer be partnered with a cruise line; commitment from said cruise line to have the BVI as a medium to long term destination; requirement that the successful tenderer to provide training etc.

58. The tying together of the dock expansion to the development of the upland without making allowance for the possibility of separate submissions and assessment limited the government's ability to achieve value for money and precluded other parties that might have been qualified to perform one or the other engagement. In particular local developers and investors.

59. The additional requirement of the submissions that there be an opportunity for at least 20% of local ownership in the venture. This may have been in response to local criticism regarding the absence of locals' involvement in the previously endorsed Tortola Port Partner proposal. No details were incorporated as to the format in which this should take place (at the time of the submission, during the construction period or during the operating phase). In satisfying this requirement the Royal Caribbean Cruise Lines proposal partnered with the

local firm Romasco which has maintained an interest in the development before it became active. The subsequent submission by Tortola Port Partners named the BVI Investment Club as its local partner.

60. The involvement of BVI Investment club raises potential issues of conflict of interest in the following respects:

- i. The principal of PFK (BVI) Ltd., the firm engaged to prepare a business case for the initial Tortola Port Partner/ BVIG PPP is also a President of, and public figure for, the BVI Investment Club.
- ii. The declarations of interest for election candidates published and Gazetted on 10 October 2011 show more than one elected member with shareholding interests in subsidiary companies owned by the BVI Investment Club.

61. In terms of compliance it could be said that the minimum was applied to the procurement requirements stipulated in the PFMR. The process was not one that allowed for broad range involvement and may have limited the Government options.

Conclusion

62. The process of addressing the pier expansion needs commenced in 2007 with a professional project assessment and competitive tendering for a project which should have cost just over \$12,000,000. This ended in inaction due to insufficient information being provided to the Cabinet. The project was subsequently allowed to evolve into an undefined, large scale development which bypassed much of the planning and preliminary approval processes required for prudent and transparent management of public projects. Subsequent tendering of the works was performed to satisfy PFMR provisions on procurement but in a fashion which did not allow for broad scale participation of other qualifying developers. The highly specific nature of the project requirements created an advantage in favour of the previously selected developer (TPP).

Recommendation

1. All public agencies should apply the highest standards when seeking to engage contractors on public projects. This is particularly so on multi-million dollar projects which bind the Government for the long term. This must include competitive procurement procedures, full transparency and equitable terms. The procurement regulations of the Public Finance Management Act should be adhered to along with the standards for good practice present in most industries.
2. Expansion of the pier facility to accommodate large cruise ships and essential infrastructural and aesthetic works should be given priority to ensure that the territory's cruise industry is not further negatively impacted.
3. Major development of the upland should not be approved without the proper assessments as to need and appropriateness with input from required expert services and public agencies such as Port Authority, Town and Country Planning, and other stakeholders.

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