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DEPARTMENT OF JUSTICE & ATTORNEY GENERAL

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PAPUA NEW GUINEA

Our reference: AGSS776/2020/3-15.46/3
Action officer: N.Kende

LEGAL-IN-CONFIDENCE

11th January 2021

Joel Simatab
Detective Chief Inspector
Head of Special Investigation Team
P.O Box 85
KONEDOBU
National Capital District

Dear Detective Chief Inspector Simatab,

**SUBJECT: POWER OF THE GOVERNMENT TO COMMISSION A PRIVATE COMPANY
TO AUDIT A GOVERNMENT DEPARTMENT**

1. I refer to your letter dated 09th November 2020 pertaining to the above.

Background

2. As per your letter, you stated that the National Government commissioned a private consulting company called FTI Consulting (Australia) PTY Ltd (FTI) to audit the performance of the National Department of Health (NDoH), regarding the supply and distribution of medical provisions. This occurred as a result of allegations made against senior officers in the NDoH for scorning public funds and compromising the procurement and distribution process of medical supplies.
3. FTI conducted their investigation and produced a report that was presented to your Office, as well as the Prime Minister, the National Executive Council and other relevant bodies, for consideration.
4. Based on the findings of FTI, you now have reasonable grounds to charge and prosecute numerous officers in NDoH and contract companies for a number of criminal offences. You would like to make arrests based on the FTI's report. However, you are concerned about the legality of the Government commissioning a private consulting company to audit the NDoH

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instead of engaging the Auditor-General to inquire into and provide a report on NDoH's conduct.

6. Therefore, you require advice regarding the authority of the National Government to engage a private consulting company to audit NDoH, a public body, as opposed to the Auditor-General. Furthermore you require clarification regarding whether the Royal Papua New Guinea Constabulary (RPNGC) can act on the contents of the FTI report, and any other legal considerations relevant to this matter.
6. I have considered the issues and provided a legal advice for your consideration below:

ISSUES / QUESTIONS

Q1. *Whether the Auditor-General alone has the power to sanction a private company to audit a public body?*

A1. *Yes. Refer to paragraphs 7-15*

Q2. *Whether RPNGC can act on the content of the FTI Report and prosecute persons named within?*

A2. *No. Refer to paragraphs 16-18*

REASONS

Powers of the National Government to Sanction an Audit of a Public Body

7. The Auditor-General is the exclusive auditor of the State, responsible for auditing all public accounts of Papua New Guinea.¹ The Auditor-General is mandated to do so by virtue of s. 214 of the *Constitution* and s. 3 of the *Audit Act 1989 (Audit Act)*, which outline the functions of the Auditor-General.
8. The functions of the Auditor-General, as provided for in the *Constitution* are:
 - (1) *The primary functions of the Auditor-General are to inspect and audit, and to report at least once in every fiscal year (as provided by an Act of the Parliament) to the Parliament on the public accounts of Papua New Guinea, and on the control of and on transactions with or concerning the public moneys and property of Papua New Guinea, and such other functions as are prescribed by or under a Constitutional Law.*

(2) *Unless other provision is made by law in respect of the inspection and audit of them, Subsection (1) extends to the accounts, finances and property of—*

- (a) *all arms, departments, agencies and instrumentalities of the National Government; and*
- (b) *all bodies set up by an Act of the Parliament, or by executive or administrative act of the National Executive, for governmental or official purposes.*

(3) *Notwithstanding that other provision for inspection or audit is made as provided for by Subsection (2), the Auditor-General may, if he thinks it proper to do so, inspect and audit, and report to the Parliament on, any accounts, finances or property of an institution referred to in that subsection, insofar as they relate to, or consist of or are derived from, public moneys or property of Papua New Guinea.*

¹ *Public Consultation on the Review of Laws Governing the Auditor-General, Auditor General's Office*
www.ago.gov.pg

(4) An Act of the Parliament may expand, and may provide in more detail for, the functions of the Auditor-General under Subsections (1), (2) and (3), and may confer on the Auditor-General additional functions and duties not inconsistent with the performance of the functions and duties conferred and imposed by those subsections.

9. These functions are reiterated and further expounded upon in s. 3 of the Audit Act.
10. With respect to s. 214(2) of the *Constitution*, mentioned above, the amended *Public Finance Management Act 1995 (PFMA)* confers powers of inspection onto the Minister for Finance. Section 47M of the PFMA allows the Minister for Finance to investigate the accounts and other records of public bodies, on reasonable belief that that public body has failed to comply with the provisions of the PFMA.² Furthermore, this provision allows the Minister for Finance to have unlimited access at all reasonable times, to the accounts and records of a public body related to:
 - (a) the collection, receipt, expenditure and issue of moneys of the public body; or
 - (b) the receipt, custody, disposal, issue or use of the real or personal property of the public body.³
11. However, the Finance Minister's powers of inspection only apply to matters regarding compliance with the PFMA.
12. The existence of this provision of the PFMA does not preclude the Auditor-General from exercising his functions. The Auditor-General, if he thinks it necessary, may still examine, audit and report to Parliament regarding any accounts, moneys and properties of any institution that falls within his jurisdiction, regardless of the power conferred to the Minister for Finance by the PFMA.
13. The Public Accounts Committee (*Committee*) is also mandated by the *Constitution*⁴ and the PFMA⁵ to examine the public accounts of PNG and report to Parliament on the control and transactions occurring regarding public monies and public properties.
14. The Auditor-General, however, has the ultimate mandate to undertake audits and report to Parliament on the control of and transactions of public moneys and properties. Additionally, the Minister for Finance and the Committee, also have the power to investigate into the public accounts and records. No other legislation or any provision of any other Act allows another person or body to audit the public accounts and properties of PNG, aside from those mentioned above.
15. More importantly, only the Auditor-General has the power to authorise another person to inspect and audit any accounts and records that are under the jurisdiction of the Auditor-General to inspect, and to report to him regarding that inspection⁶. Therefore, only the Auditor-General can engage another person or corporation, such as FTI, to audit NDoH. No other government body, Minister or even the Prime Minister has the power to do this. The

² s 47M (1), *Public Finance (Management) (Amendment) Act 2016*

³ s 47M (2), *Public Finance (Management) (Amendment) Act 2016*

⁴ s. 215, *Constitution of Papua New Guinea*

⁵ S. 86, *Public Finance (Management) (Amendment) Act 2016*

⁶ s 4(1)(a), *Audit Act 1989*

Auditor-General's Office is a constitutional office, not subject to control or direction of any person or authority.⁷

Authority of RPNGC to act on the Report of FTI

16. Section 5 of the Audit Act states that where the Auditor-General is satisfied that a person whom the Constitutional law and Audit Act apply to are guilty of misappropriation, misuse, fraud of public moneys stores or properties, the person shall be referred to the Public Prosecutor for prosecution. However, if the matter is referred to the Public Prosecutor and not proceeded with after 60 days, the Auditor General may prosecute that person. Section 86A of the amended PFMA⁸ also provides that the Committee shall refer any matter to the Public Prosecutor, whether it believes a person or body has not complied with any laws regarding public monies and property.
17. These provisions mentioned above, however, do not prevent the RPNGC from conducting investigations and prosecuting the matter themselves, as established in the case of *State v Paraka*⁹. It was held in this case that there is nothing in s. 214 of the *Constitution* and s. 5 of the Audit Act that prevents RPNGC from investigating offences under the Criminal Code¹⁰, such as those offenses that were allegedly committed by senior officers of the NDoH. *State v Paraka*¹¹ goes further to say in support of the investigative powers of the RPNGC that:

The general duties of a policeman at common law are summarized in Archbold's Criminal Pleadings Evidence and Practice, 2015 Ed. [19-329] as follows (emphasis mine):

"It is part of the obligations and duties of a police constable to take all steps which appear to him necessary for keeping the peace, for preventing crime, or for protecting property from criminal injury. There is no exhaustive definition of the powers and obligations of the police but there are at least these and would further include the duty to detect crime and bring an offender to justice..."

18. Therefore, you have the investigative power to examine the criminal allegations made against NDoH. However, you should only act upon the FTI report if the FTI was authorised by the Auditor General to audit the NDoH. If the Auditor General did not authorise the FTI, then FTI was unlawfully engaged and thus, its report cannot be relied upon for further prosecution. The Auditor-General alone has the power to sanction another person to inspect and audit any accounts or records under his jurisdiction.

Conclusion

19. Given the foregoing, the official auditor for public accounts and properties of PNG is the Auditor-General of PNG¹² with particular powers to audit resting also with the Finance Minister and the Public Accounts Committee. However, the power to appoint another to inspect and audit any public account or record vests with the Auditor-General. No other Government Department, agency or instrumentality can appoint a private company to audit the NDoH except the Auditor-General. Before the RPNGC relies on the report of the FTI, it

⁷ s. 213, *Constitution of Papua New Guinea*

⁸ *Public Finance (Management) (Amendment) Act 2016*

⁹ [2020] PGNC 276; N8608 (23 October 2020)

¹⁰ *State v Paraka* [2020] PGNC 276; N8608 (23 October 2020)

¹¹ [2020] PGNC 276; N8608 (23 October 2020)

¹² s. 214, *Constitution of Papua New Guinea*

must confirm that FTI was engaged by the Auditor General to ensure that the audit of NDoH was lawfully sanctioned.

20. Additionally, the RPNGC is not precluded from invoking its investigative powers to undertake its own inquiries into the allegations made against NDoH. Based on your further inquiries and investigations, you may decide whether or not to proceed to prosecute the matter.

Contact Details

21. Please feel free to contact the action officer mentioned above or my acting deputy Mr Desmond Mwayawa on 301 2890 or myself on 301 2882, if you have any further questions or require further information regarding this advice.
22. In any further correspondences with this office, please include the file reference and the action officer's name as identified above.

Yours sincerely,



for. **DANIEL ROLPAGAREA**
State Solicitor



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