

Implications of Bid Rigging Practices in Small Island Developing States: A Case Study

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Abstract

Bid rigging on construction projects has a wider societal implication that has spanned beyond the parties to the contract. This has led to costly litigation actions and additional unaccounted transactional costs derived from taxpayers' funding. This study utilized a qualitative approach, through an emic view of a contemporary case study between the Government of Trinidad and Tobago and several contractors on bid rigging practices. The findings revealed that recommendations indicated within a Commission of Enquiry could have prevented unlawful practices. This research justifies the need for systems to be in place to comply with procurement laws and the heightened need for enforcement of ethical practices in state organizations. This research can assist policy makers in determining areas that require updating in relation to procurement and contract management practices within the construction industry.

Key Words: bid rigging; Tobago; Public sector construction

Introduction

Construction professionals have traditionally focused on time, cost, and quality considerations, in addition to these, no-dispute and safety standards have been introduced, but the oversight process is what distinguishes public building projects. As a result, adherence to audit regulations and transparency standards is essential. Financial and transparency-related restrictions are required for fair performance and can aid in the prevention of corruption as stated by Tabish and Jha (2018). Despite these recommendations, implementation of anti-corruption measures, as recommended by Prof John Uff (2010) within the enquiry into the Trinidad and Tobago, construction industry have been slow paced within the context.

The Government of Trinidad and Tobago has been forced to engage the local construction sector in costly litigations, enquires and investigations into projects. These projects have been burdened with accusations of corruption. Some of these projects that have attracted the attention of the international community are the Piarco Airport scandal that involved local construction firm and international financial agencies. We have been embargoed with the "EMBD Cartel arrangements" or "Billion dollar bobol", which was revealed by a forensic audit conducted into certain projects undertaken by the special purpose company Estate Management and Business Development Company (EMBD).

The research will be guided along the lines of the events that EMBD claimed has occurred that rendered the contracts void and unenforceable and investigated the contractual wrong doings and examine possible remedies that could have been utilized to avoid costly litigations. Foremny (2018) stated that "Collusion and bid rigging are unethical actions

that are prohibited by law”. The researcher further added that “it is detrimental to society and to the free market economy”. Anti-competitive behaviour in the construction industry can result in considerable losses for the national economy due to the high value of its output and the relevance of the time factor. Cartels and bid rigging must be detected, prosecuted, and successfully penalized in order to be eliminated. This report classified and briefly described a variety of existing collusion and bid rigging techniques. Finally, the author proposes that AI (Artificial Intelligence) and BIM (Building Information Modelling) be used as useful tools for detecting collusion and bid rigging in public tenders.

The aim of this paper is to investigate contemporary bid rigging practices within this particular special purpose company (EMBD) and its influence on public interest which involves stakeholders such as local construction firms, public servants and government officials. This project adopts a critical case study approach investigating the events leading up to the lawsuit and seeks to discover the contractual wrongdoings that occurred. A discussion on the legal consequences was undertaken to demonstrate professional and societal pitfalls, together with potential recommendations to mitigate against such occurrences. The scope of this research is limited to information publicly available such as court verdicts, prosecutor’s investigation data and public tender announcements. Bid rigging is described by OECD (2016) as “the process that occurs when bidders agree among themselves to eliminate competition in the procurement process” this “scheme” attributes to raising the prices, encourages lowering quality and/or at times restricting supply. The report stated that this investigation has been ongoing within 1998 it involved the Council that issued its “Recommendation Concerning Effective Action against Hard Core Cartels”. The battle against bid rigging has been prioritized by the Council as a “competition enforcement priority”. The Guidelines presented within the report included a practical guidance and checklists on the design into public procurement procedures that will aid the decrease associated with the dangerous practice of bidder collusion. This report presents a how to detect collusive behaviours throughout the procurement process, and how to maintain the public procurement staff prepared to fight collusion.

Foremny et al. (2018) researched the Polish economy and the significant changes that it experienced during the developing stage that occurred within the past 30 years. The authors noted that during political and economic changes, greater numbers involving price collusions and other illegal practices were observed when compared to the stable development of national economy. Anti-competitive agreements was further identified and it was determined that price fixing performed by producers is simple and abundantly present.

In a separate study, Chan and Owusu (2017) conducted thorough research into corruption in the construction industry. This particular research presented a systematic review of the existing body of knowledge as it relates to the forms of corruption. For a better comprehension of the forms, the authors constructed a conceptual framework. The findings is implemented in this study to gain a better knowledge of the many types of corruption in the construction sector, which will help industry practitioners, policymakers, and anti-corruption organizations, establish appropriate anti-corruption frameworks and policies. Barman and Charoenngam (2017) emphasised that construction solicitors need to be mindful of these observations while drafting contracts in order to prevent future disputes.

The problem of bid rigging has wider societal implications spanning beyond parties to the contract. This leads to costly litigation actions and additional unaccounted transactional cost where monies used continues to be a drain on the tax payers. The research will investigate the contractual wrong doings that led to the lawsuit surrounding the Estate Management and Business Development Company Limited (EMBD) CARTEL CLAIMS (ECC) and to evaluate the impact of these events and contractual wrong doings. Hence, the research aims to determine the events and the contractual wrong doings that led to the lawsuit and to evaluate the impact of these events and contractual wrong doings. This aim is examined through the following objectives:

1. To determine the main implications of the organizational and project practices that led to contractual inefficiencies.
2. To investigate the impacts of the events and contractual wrong doings.
3. To determine measures that can be utilized to mitigate/manage future lawsuits in these circumstances.

This study is focused on understanding the events and contractual wrong doings that have created a litigation matter between the EMBD Contractors vs EMBD vs Government agents and the Engineers. The judgement presented by the Honorable Judge in his ruling into the Consolidated Action Claim No. CV 2017-01415 delivered on 06th August, 2020, that will be referred to within other parts of this research as the EMBD case. This study will not presume guilt or innocence on either party, as it's aimed to focus on evaluating the documents available from feasibility stages into the post construction stages. Attention will be placed to the tender stage, execution stage and close out stage to examine the contractual wrong doings and investigate if the remedies, as identified within the contract or within other studies, could have been utilized to prevent litigation.

This study to this body of knowledge by providing an understanding into the events and contractual wrong doings that have led to another financial burden that will be carried by the tax payers of Trinidad Tobago.

Literature review

Corruption forms in the Construction industry

As the construction industry evolves through continued changes in the thoughts of contracts and construction management, which are motivated through lessons learned within construction projects, and documented as to enhance the understanding of construction professionals. Chan and Owusu (2017) has placed significant efforts to systematically review the existing body of knowledge as it relates to forms of corruption that exists within the construction industry. The author's reviews have directed the research into the selection of thirty-nine (39) peer-reviewed journals that has revealed twenty-eight (28) different forms of corruption. Some of these forms of corruption has found its way into the EMBD's projects that has led to a series of litigation actions that involves some of the larger construction companies within the local sector.

Chan and Owusu (2017) indicated within its findings the most reported corruption forms were bribery, fraud, collusion, embezzlement, nepotism, and extortion. The author developed a conceptual framework, this assisted researchers to attain a more comprehensive understanding into the forms as illustrated within Figure 1. The researcher

revealed a deeper understanding into the forms of corruption within the construction industry that would be useful for industry practitioners, policy makers, and anticorruption institutions. Furthermore, its implementation will attain sustainability within the construction industry and contribute in developing a suitable and effective anticorruption framework and strategies.

Chan and Owusu (2017) further identified the causative factors to the corrupt practices in the construction industry: inadequate sanctions, poor documentation of records, and insufficient transparency in the selection criteria for bidders, poor professional ethical standards, and great project complexity. The EMBD case contains such elements identified. These elements have led to the evolvement of different forms of corrupt practices in the construction sector. Presently our local construction industry has experienced several forms of corruption, these are prevalent within other sectors, including banking and education. Some of these forms of corruption lead to bid rigging which have been associated with the EMBD case.

Wells (2015) stated the implications to developing countries in relation to public infrastructure projects. The author further indicated the major issues that can lead to inappropriate project choice, high prices, poor quality, excessive time and cost overruns, and inadequate maintenance. Wells (2015) indicated that corruption should be identified during the early stages of the project cycle, if these are not rooted out within the early project stages such as projects appraisal, design, and budget it may lead to additional corruption later on, this may be the only way to improve the governance of project preparation.

Chan and Owusu (2017) stated that additional research is needed to rigorously examine the mappings of the detected CFs to the various stages of construction and engineering projects, the various project classes, and the various contract types used for the projects. Other forms of corruption identified include lobbying, ghosting, influence peddling, coercion, intimidations and threats, blackmail, cartels, money laundering, solicitation, and deception although these forms may not be new in other sectors. The EMBD case has pleaded grounds of a cartel arrangement and deception. Chan and Owusu (2017) categorized constructs in the following framework:

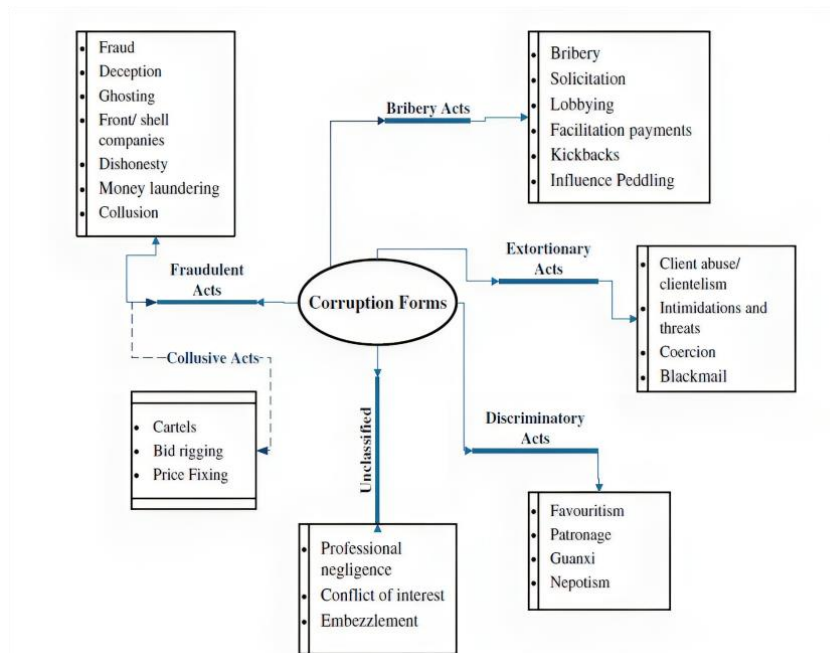


Figure 1: Corruption forms Owusu, Chan, and Shan (2019)

The role of competition in the construction industry

Fox and Healey (2013) presented an article that investigated the actual and potential use of antitrust (competition laws) this was utilized to in proscribing or overriding acts or measures of the state that might significantly and unnecessarily harm market competition. The researcher further looked into the privatization of several state-owned firms, which resulted in a monopoly that allowed the state to command the highest price or benefit cronies. Privileges and benefits were frequently passed down to privatized businesses. Local governments and leaders had financial stakes in major corporations.

Furthermore, competition authorities' campaigning against excessively anticompetitive regulatory actions has become an important component of competition policy. With the help of the Organization for Economic Co-operation and Development (OECD) and the International Competition Network, the advocacy function is growing (ICN). The OECD Competition Committee has developed a toolkit for identifying anticompetitive rules, and the International Competition Network (ICN) has recently initiated a project to establish methods for competition agencies to examine anticompetitive features of regulatory law.

The uncertainty of decision making

The well-known fact that disputes amongst parties bounded within a contract remains an expected endeavor that has become common and well-documented within the construction industry worldwide. Barman and Charoengam (2017) stated that disputes are attributable to the interwoven interactions of disparate parties in construction projects. This study was purposed to investigate forty-eight (48) litigious cases that were filed within the Technology and Construction Court (TCC) within the jurisdiction of the Senior Courts of England and Wales. The purpose of this study was to identify core reasons for escalation to litigation. The EMBD vs the EMBD Contractors has similar gates that may have avoided the escalation of this case into litigation. The authors observed six (6) types of dispute that

were most common within the observed cases: defect, payment, termination, negligence, and performance, where defects were common across seventeen (17) cases.

The Special purpose company Case (EMBD)

The Consolidated action

The special purpose company case has been separated into the consolidated and related action. The consolidated action includes three parties namely the EMBD contractors, the applicants sought to strike out the pleadings of Estate Management, and Business Development Company Limited ('EMBD'). These pleadings were all captured within the case file titled the Consolidated Action CV 2017-01415 republic of trinidad and tobago the high court of justice: 122" (Consolidated Action tn ramnauth and company limited v estate management and business

development company limited v taradauth ramnauth, embd contractors, roodal moonilal, gary parmassar, madho balroop, andrew walker 2020) referred to within the research as CV 2017-01415.

Three contracting companies that are referred to as the EMBD contractors had proceeded to file separate claims against the special purpose company for payments that they were allegedly owed for contracts executed. These payments were for road construction, some of these works were executed around the 2015 General Elections, as stated within the case pleadings. These three actions comprise the Consolidated Action as indicated within the litigation case CV 2017-01415.

The related action

The EMBD reserved its right to claim within the case that the claimants in the Consolidated Action together with all the defendants in the Related Action are seemingly guilty of a number of dishonest acts that are serious in nature of the accusations. EMBD set out to prove at the trial that the involved parties knowingly participated in tortious acts that created the unlawful means, bribery, conspiracy, and assistance of dishonest nature. The EMBD has also placed a claim under relief in contract law, the aim is to have a declaration that the contracts are void as they are bounded in illegality from inception.

Unlawful means conspiracy

The Judge within the Consolidated Action CV 2017-01415 stated "the unlawful means conspiracy is a relatively new tort being developed incrementally within England and the Commonwealth". This tort made some major developments within 2008 into modernity within the House of Lords judgment in "Revenue and Customs Commissioners v Total Network SL [2008] UKHL 19". The judge further stated within the Consolidated Action CV 2017-01415 "the state of the common law has since then been described as uncertain to academicians and practitioners alike".

EMBD's Pleaded case in the related action

The history of EMBD's claims within the Consolidated Action CV 2017-01415 Originated out of the tender, award, and administration of the contracts between EMBD and the EMBD Contractor's between May and September 2015. These are the parts of this case that will be examined to determine the possible wrong doings within the tender rules (instruction to tenderers), the evaluation rules and the contractual rules (from the tender document).

Methodology

The methodology utilized an illustrative case study qualitative method. Hafiz (2008, 544-559) stated that this method can provide the required tools that will enable researchers to study a complex phenomenon that exists within a particular context. Flyvbjerg (2006) presented the benefits associated with the critical case study research that validated the need for single case study researches to have a deeper understanding within the continued development and advancement of aspects associated within the social sciences. This method was adopted to facilitate the investigation into the casual chain of diachronic decision making factors, or need for implements, through process tracing as described by George and McKeown (1985), Jennings (2012) and implemented by Chadee et al. (2021) within their research. This research paper focused on the Consolidated Action CV 2017-01415 EMBD Contractors vs embd republic of trinidad and tobago the high court of justice: 122 consolidated action tn ramnauth and company limited v estate management and business

development company limited v taradauth ramnauth, embd contractors, roodal moonilal, gary parmassar, madho balroop, andrew walker 2020) as illustrated within figure 2 Methodology Chart.

The primary data consisted of: journals; judgement in the striking out notice read by The Honorable Mr. Justice James Christopher Aboud in the consolidated matter CV 2017-04214 that was delivered on 06th August, 2021, within the high court of Justice in Trinidad and Tobago; and the conditions of contract clauses and particular clauses as illustrated within the tender for the Caroni Roads contract.

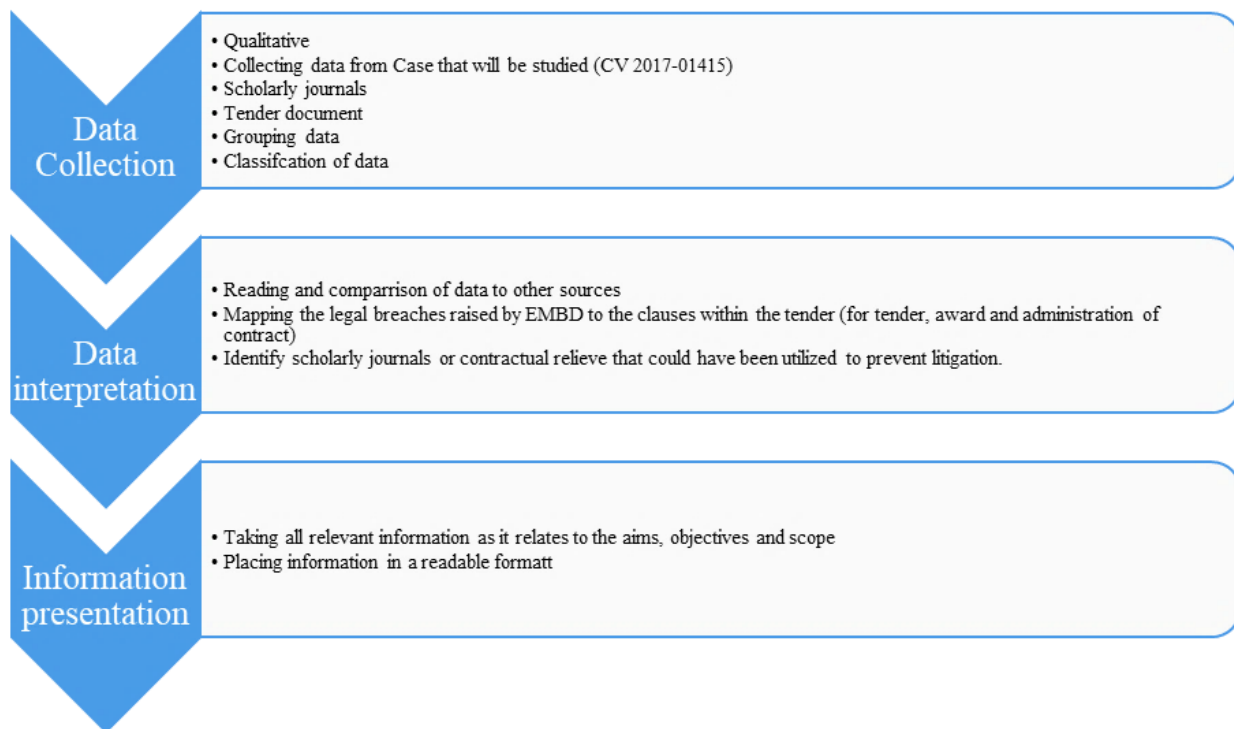


Figure 2 Methodology Chart

This research is grounded within the events that the Estate Management and Business Development Company (EMBD) would have pleaded within the case CV2017-01415 within its defence and claims. The legal factors that have been pleaded by the EMBD that led to the litigation event have been categorized and separated within the stages of the project that the occurrences would have been determined namely the tender, award, and administration of the contract.

Tender

The special purpose company reserved their right in making the following claims within CV 2017 - 01415

1. The contractors involved within the tenders were all exclusively invited to participate in the tendering process.
2. The contractors all had foresight of the Pre-tender estimates (PTE) that were prepared by the Client's Engineer and adjusted upwards by the Client's senior manager.
3. The contractors created a bid rigging cartel arrangement that removed elements such as a free and fair market benefit from the client.

Analysis and Discussion

Analysis

This paper presents a case study research thesis into a phenomenon that has become a plague within the local construction sector that has grasped international attention and veered the industry within the wrong direction. The research focused on the consolidated case CV2017-01415 and scholarly journals that articulate the aims and objectives of this case study research. The research has focused on determining the events and the contractual wrong doings that led to the litigation lawsuit that has been termed the consolidated and the related matters that involves the special purpose company EMBD, five number local contractors, a former government minister and senior agents from the special purpose company. This research has been reviewed within the three stages of the contract namely the tender, award, and administration. This approach has led to a deeper understanding into the organization shortfalls, professional misrepresentation and eventual project failure. The research utilized the information presented within the defence and claims made by the special purpose company (EMBD) as it relates to specific breaches. The impact of these events was presented to facilitate the determination of the contractual wrong doings.

The researcher utilized the consolidated case CV2017 – 01415, the request for proposals (RFP) for the C1 to C10 access roads and scholarly journals to investigate the impacts of the events and contractual wrong doings that would have ultimately led to the litigation suit that is actively being pursued by the special purpose company against the local contractors. These types of litigation actions continue to transfer additional financial burdens to the tax paying citizenry that require the scarce financial resources that could be utilized within the fulfilment of the needs of the citizens of Trinidad and Tobago.

The researcher has also proceeded to analyse the information gathered through the consolidated case CV2017 – 01415, the request for proposals (RFP) for the C1 to C10 access roads and scholarly journals to decipher the impacts of these events and contractual wrong doings that can either contribute positively or negatively to the construction industry in Trinidad and Tobago.

Stage 1: The Tender

The legal breaches as claimed by the EMBD which occurred during the tender stages of the C1 to C10 projects are as follows:

The contractors involved in the executed of the C1 to C10 and two residential projects were all exclusively invited to participate within this tender.

El-Abbasy et al. (2013) and Afolayan, Ojokoh, and Adetunmbi (2020) agreed that the tools and approaches that are utilized within the construction industry that are all aimed to assist the decision makers within the selection process for the best contractors that will be selected for the execution of different construction projects. El-Abbasy et al. (2013) stated that simulation, ANP, AHP, fuzzy logic, and the multi-utility theory are all examples of different approaches that can be utilized to assist in making informed decisions. The simulation models are aimed at analyzing the contractors' pricing behaviour, and dynamic competition process that are under the qualification-based selection (QBS) system as presented by various authors.

On the other hand, Afolayan, Ojokoh, and Adetunmbi (2020) provided a baseline that can inform construction clients and consultants, in relation to the importance of contractor's prequalification decision criteria that should be adopted. The implementation can translate to better quality of decision making, intended to increase project performance. The study took into account past research and proposed the addition of a "Feedback Integrated Fuzzy Analytic Hierarchy Process (FAHP) model for ranking decision criteria for contractual worker determination". This was achieved through the combination of the selection process and consistency control module. It is within the consistency control module that a feedback module can be generated and then create advice to decision makers that can check the irregularity in their decisions' during pairwise comparisons.

The contractors all had sight of the EMBD's Project Engineer's Estimates also referred to as Pre-tender-estimates; The contractors that were awarded contracts under the C1 to C10 and two residential sites colluded together and created a bid rigging cartel arrangement.

OECD (2016) stated that it is imperative for the competition authority to utilize mechanisms to detect bid rigging within public procurement. The report presents the recommendation to detect bid rigging. It gave particular strategies utilized by some members in detecting bid rigging, these include dawn raids and constituting requests for information whilst other competition authorities utilize screens aimed at assessing the markets purposed to identify behavior that may indicate collusion in public procurement.

EMBD presented "text messages" within its claims in CV 2017-01415 that they heavily rely on. These text messages captured in-depth communication between a senior Government Minister, senior state agents from the EMBD and senior members from the contractor's team, which alluded to evidence of prior knowledge of the tenders, in addition to Political directorship regarding decision making.

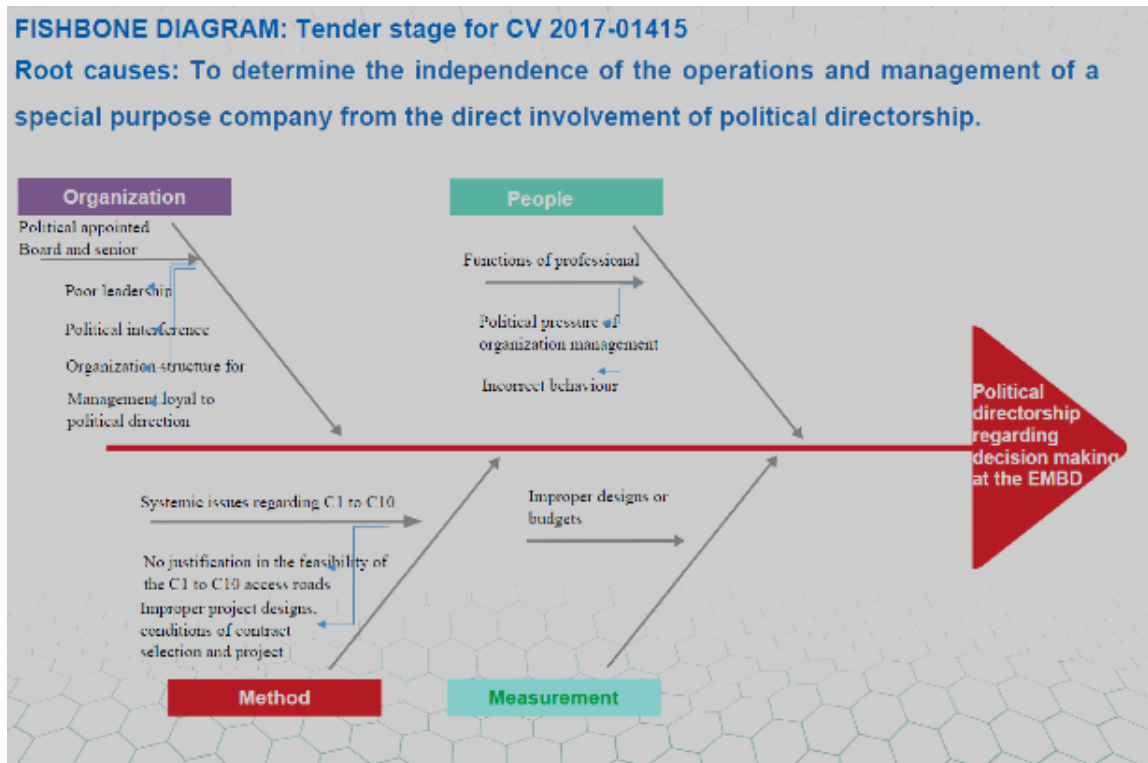


Figure 3 Fish bone chart tender stage

Conclusion leading to determining the independence of the operations and management of a special purpose company from the direct involvement of political directorship

The text messages that were embellished within the claims made by the EMBD within its pleaded case CV 2017-01415, indicated the root cause as illustrated above in figure 3 fish bone chart tender stage. These text messages were the foundation blocks to the claims made within the tender stages as Political directorship regarding decision making. These findings has illustrated Organization systemic failure within the contributors being the path through the tender process and have been identified within the categories of the people (personnel involved in the short list of the contractors, evaluation of the proposals), method (for the selection of the proponents and evaluation of the proposals) and measurement (budgets or estimates utilized as the proverbial yard stick) failure.

Prof John Uff (2010) listed ninety-one (91) recommendations within the report of the construction industry in Trinidad and Tobago, of which Eight (8) of these recommendations, under the section “For the maintenance of integrity and transparency”, have been stated as they have been determined by the researcher as critical, that may have prevented serious breaches of the tender rules as stated by the EMBD within the ongoing litigation CV 2017-01415. These recommendations from the report stated:

- It should be assumed that the construction industry is vulnerable to potential corruption and steps should accordingly be taken to avoid actual corruption

following established guidelines and recommended practices laid down by Transparency International and its affiliates.

- Integrity in public service should be an invariable and unqualified requirement. Rules governing integrity in public life apply to the directors of UDeCOTT and other Government agency companies and should be rigorously enforced.
- Government agencies and other public bodies should recognize that the public may view their activities with skepticism and even distrust. They should therefore take positive steps to achieve and demonstrate openness and transparency, and to avoid actions which may lead to further recrimination and mistrust.
- In particular, Government agencies must seek to dispel suspicion over the operation of their tender procedures and the potentially unfair award of contracts.
- Tender procedures should be designed to eliminate the effect of personal relationships or pre-dispositions to favor one person or company against another.
- There should be no doubt (as there presently is) as to the power of Ministers to give instructions to Government agency companies on any matter within the Minister's remit, including compliance with rules, regulations and procedures. If this cannot be achieved by voluntary means, consideration should be given to creating the agency as a statutory corporation incorporating such powers.
- There should be a review of the decision in *NH International (Caribbean) v UDeCOTT430* and measures, if necessary, legislative, put in place to ensure that bodies making decisions involving public money are open to challenge by Judicial Review.
- To the extent the solutions for the Construction Industry embodied in the White Paper are not to be implemented, other measures and safeguards should be introduced to secure attainment of the principles of value for money, transparency and accountability (enter references).

Recommendation Number 54, within this subsection, has been identified as a major concern that existed and acted counter intuitively as indicated through the evidence of the SMS text messages presented by the EMBD within the current litigation CV 2017-014515. This have been illustrated in figure 3 fish bone chart tender stage as a main trigger within the root cause of creating this litigation suit.

Instruction to tenderers

The information within the Request for proposal (RFP) as summarized in the table 4. These conditions were as follows:

Table 4 Instructions to tenderers EMBD (2014/2015)

Scholarly sources that present approaches that may have prevented costly litigation

Foremny (2018) classified and presented a brief description of the bid rigging and collusion factors existing, in addition to giving the thoughts to the realization of the idea in combining AI (Artificial Intelligence) and BIM (Building Information Modelling), to detect collusion and bid rigging within associative tenders.

Award of Contract

The special purpose company reserved their right in making the following claims within CV 2017 - 01415

1. The contractors colluded in the pre-determining of winners and losers in addition to rate fixing that were beyond the market rates.

Instruction to tenderers

1. Clause 11 (a) EMBD (2014/2015): “The Estate Management and Business Development Company Limited reserves the right to reject any or all Tenders, without limiting the generality of the foregoing, a tender will be summarily rejected if it is conditional, if it is incomplete, obscure or irregular, if it has erasures or corrections not initialled in the Form of Tender and Bill of Quantities; or if it has unit rates that are obviously unbalanced”.
2. Clause 14 EMBD (2014/2015): “(Collusion) - Each tenderer shall submit only one Tender. A tenderer who submits or participates in more than one Tender shall cause all tenders with their participation to be disqualified”.

Scholarly sources that present approaches that may have prevented costly litigation

Owusu, Chan, and Shan (2019) provide a deeper understanding of the causal instigators associated with corruption that has been identified within the construction project management sector (CPM), through expanding the present literature of corruption research in construction management. The findings provided significant information and extended knowledge to industry practitioners and policymakers, as well as anti-corruption authorities. Corruption has been defined as the misappropriation of assigned authority, within the construction industry. The demand side, supply side, and condoners categories are used to categorize corrupt professions.

Administration of contract

The special purpose company reserved their right in making the following claims within CV 2017 - 01415

1. Engineers appointed under the Contracts breached their duties of employment in addition to their duties as Engineer under the contracts.
2. Works under the contract were unverified by the Engineer in the preparation of the various payment certificates.
3. The requirements that constituted the critical elements that supported the issuing of the Practical Completion and/or Completion of Contract and/or Interim Payment Certificates by the Engineer were not satisfied.

Conditions of Contract

The type of contract that was utilized to administrate this particular group of projects was bespoke. Simister and Turner (2017) described the contract as the article that indicates the intentions of client’s and/or suppliers. It’s further described as a means of the written aspects aimed specifically to suit the circumstances of the relationship they are purposed to control. An alternative to the bespoke contracts is the standard forms of contract which is available within the majority industry sections with the usage being preferred over a bespoke form. The main benefit in utilizing standard forms was that clients are given the opportunity in demonstrating that it has a desire to conform within the established industry

standards and not impose many unfair terms that are purposed with shifting the balance of power too much in their favour.

C1 to C10 Caroni access roads: The contractors involved in the execution of the C1 to C10 and two residential projects were all exclusively invited to participate within this tender.

The EMBD pleaded within its counter claim/claims against the EMBD Contractors within CV 2017-01415 that it was determined through an investigation that within early June there existed a draft tender's committee note that was presumably prepared by or on behalf of the Client's senior manager. This note recommended the list of tenderers that should be invited. There was no evidence attached to this draft note that disclosed the rationale to the selection of the six EMBD Contractors. It was stated that the selection of the EMBD contractors that participated within the tenders were not recommended by the tenders committee as prescribed by the EMBD tender rules.

It was also stated within CV 2017-01415 item 58 page 56 "on the 1 June 2016 the client's senior manager was interviewed by Price water house Coopers (PWC) where he said that the EMBD Contractors were selected because of their ability to undertake, mobilize, and execute the Caroni Roads projects due to their financial status. However, no evidence of such an assessment has been discovered.

It was also stated within item 59 page 56 that the "client's senior manager also allegedly told PWC the Tenders Committee had advised which contractors should be invited to tender. The EMBD further pleaded that there existed a clear breach of the Tender Rules as it was stated that the Tenders Committee was not involved in the selection of the six bidders. It was also stated by the EMBD within its pleaded defense within item 60 page 47 on 17 February 2017 that "client's senior manager wrote a letter to EMBD where he indicated that the bidders were chosen by the Divisional Manager of Projects and the Project Managers". This assertion is pleaded as inconsistent with EMBD's internal document.

The EMBD further stated that they inferred through the internal evidence as pleaded within CV 2017-01415 item 61 page 47 that "the bidders were selected by the senior government minister and the client's senior management, outside of the processes mandated by the Tender Rules; alternatively, client's senior management did nothing to ensure an equitable assortment had been carried out when the bidders were presented to him by the government minister".

The summary of the EMBD tender rules is comprised of the following articles (only relevant articles to the tender stage have been listed) :

The inference that was made by EMBD was formed from the differences of the winning bids in comparison to the revised PTE's that EMBD pleaded was "narrow".

The EMBD established its conclusion to this point within its statement of case item 72 page 50 that stated "the PTEs prepared by the client's engineers were unjustifiably inflated and there exists highly inconsistent and highly unusual correlations between the Revised PTEs and the demonstrated amounts reflective within the winning bids". This thought was initiated by the "SMS" message between one of the contractors and the client's senior manager on the 18th May, 2015.

Stage 2: Award

The claim that EMBD presented within its statement of case has presented information that indicated the influence that the tender infractions had on the award of these contracts. Owusu, Chan, and Shan (2019) presented a paper that illustrated a comprehensive review that set out to determine the causes of corruption that utilized a grouping of selected articles that were recognized within construction management journals that sought to address the identified gaps. The author presented causes of corruption that was utilized to identify the main attributing causes and associated variables. The author provided a conceptual framework that the research assesses in terms of relationship with the case being studied CV 2014-01415.

The researcher Owusu, Chan, and Shan (2019) presented the following mechanisms that can be utilized to mitigate the gateways for facilitating corrupt practices, these include ethical codes, technical auditing systems, whistle blower systems, contract monitoring, transparency mechanisms, reforms stringent rules and legislation etc. The EMBD statement of case has claimed specific elements that are characterized within these casual categories. The elements presented by Owusu, Chan, and Shan (2019) are as follows:-

Table 6 Award stage analysis

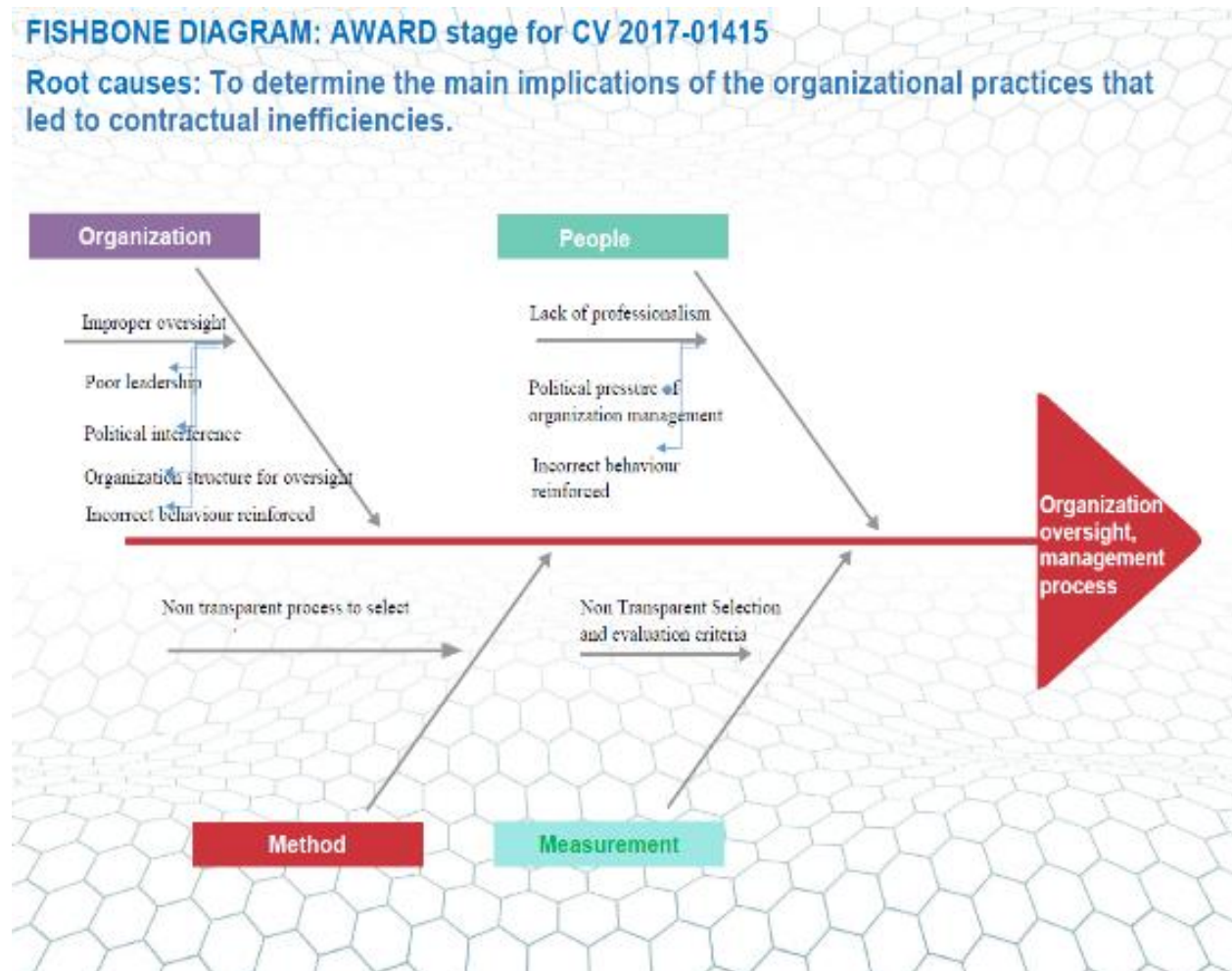


Figure 4 Fish bone chart Award stage

Conclusion in determining the main implications of the organizational practices that led to contractual inefficiencies

As the researcher assessed the claims presented by the EMBD within the litigation suit CV 2017-01415 and the reliance on the SMS messages that revealed some underpinning dysfunctions as indicated within *table 6* and illustrated within *figure 4*, these have remained the symptoms of the underlying problem that exists and existed within the operating and management processes. As categorized within the judgement presented by Justice Christopher Aboud within the case file CV 2017 -01415 the information that EMBD has relied on that the learned Judge has leaned towards with a sense of satisfaction that further discoveries are to be made within the trial rounds.

Information presented by EMBD that indicated a compromised influence and hijacking of the Organization's Management and Contract awarding process

EMBD asserted that on the 30th April 2015 an HDC house was allocated through assistance from a contractor for the CEO of the special purpose company. This assertion was discovered through the discovery of the SMS messages between parties. The EMBD further stated within CV 2017 – 014515 that the existence of very close relationships that were apparent through the SMS and other messages that were exchanged between the client’s senior manager and one of the EMBD contractor’s principal member as illustrated within **table 13 in appendix 2**. EMBD further stated that this key decision-makers may raise an inference that the market is neither free nor fair. This has also yielded questions that this special relationship may have presented undeserved rewards.

Misrepresentation that has been peddled by senior management of the special purpose company

EMBD stated that the CEO during an interview with PWC gave three variations of the reason for the institution of the C1 to C10 Caroni Access road project, EMBD further asserted that the CEO indicated that there was only a real need for the construction of 1 nos access road. As captioned within CV 2017-01415 and illustrated within **table 13 appendix 2 item 61** “on 02nd September, 2015 there existed SMS messages between the contractor and the CEO that gave an instruction from a senior government minister to distribute payment to the EMBD Contractors involved in the C1 to C10 Contracts a few days before the 07th September, 2015 General Elections. EMBD further stated that the EMBD board was specifically told by the client’s senior manager on 3 August 2015 (on behalf of the CEO) that the sums procured through a loan agreement between a local financial institute was purported to reduce the existing historic debt burden that the special purpose company. These sums were reallocated to compensate the EMBD Contractors that participated within the Cartel arrangement”.

Stage 3: Administration

As the research aims to unveil a deeper understanding into the claims made by the special purpose company (EMBD) within the litigation suit that was filed within its defense and counter claim against a group of local contractors that have been issued with the title EMBD Contractors coupled with a serious allegation of the cartel arrangement that allegedly included a senior government minister, senior company officials from the EMBD, staff employed within the EMBD and Professionals within the local construction sector.

Owusu, Chan, and Shan (2019) identified that the category titled Statutory – specific causes that is constituted through six (6) number variables has (2) number of these variables that have direct relation to the defence and counter claim filed by the EMBD within the litigation suit CV 2017 - 01415. The variables under this category can be identified as subjecting workers to job insecurity, especially in government and public enterprise and inappropriate political interference. The author further presented the category titled psychosocial – specific causes that is constituted through seven (7) number variables that seemingly has (6) numbers of these variables that have direct relationship to the litigation case. The variables under this category can be identified as poor professional ethical standard, negative role models, personal greed, and negative encouragement, negative encouragement, and feeble semblance of public interest and over close relationship.

Information presented within CV2016-01522 “Application by the fourth ancillary defendant to stay the ancillary claim”.

As stated within the Judgement presented by the Honorable Mr. Justice R. Rahim within the case CV2016-01522 in the High court of Trinidad and Tobago *Namalco v EMBD v Andrew Walker v APCL v BBFL v Lee Young* 2017) item 30 and 31 page 12-13 that it was the the court’s view, that

“the fact that the clause provides for other methods of dispute resolution prior to arbitration is reflective of an acknowledgment of several matters including but not limited to the fact that arbitration is usually the most expensive of the ADR processes and therefore will be used as a last resort in an effort to settle. It also acknowledges that arbitration may not always be the go to method of dispute resolution in the first instance having regard to the nature of the dispute which may be such that it would be wholly disproportionate to resort to arbitration without attempting a resolution by other methods. This in the court’s view demonstrates the pragmatic and common sense approach of the FIDIC ADR procedure but does not derogate from the fact that the contract does in fact make provision for arbitration prior to the institution of court proceedings. Clause 8 therefore falls to be considered as an enforceable arbitration clause within the ambit of the Arbitration Act notwithstanding its reference to other avenues of dispute resolution. See also *International Research Corp. PLC v Lufthansa Systems Asia Pacific Pte Ltd.* [2013] 1 L1 R 24 and *Emirates Trading Agency LLC v Prime Mineral Exports Private Limited* [2015] 1 WLR 1145, both relied on by LYP”. Within this case filed “on the 6th May, 2016, the contractor sued for sums allegedly due and owing by the special purpose company (EMBD) in relation to six contracts. According to the claimant, the said contracts had provided for it to carry out and complete works to the design specification of the special purpose company (EMBD and/or its engineer). The works would subsequently be evaluated by the engineer, with payment being made from time to time upon the issue of certificates called interim payment certificates (IPCs). The contractor claimed that under the FIDIC Conditions, the special purpose company was obligated to pay the amount certified in each IPC within a specified number of days after receipt of certain stipulated documentation.

Information presented within CV2018-04840 Civil Appeal.

As stated on 13th January, 2020 and further explained by the Honorable Mme. Justice Mira Dean-Armorer, J.A. within the summary judgement in the case of Junior Sammy vs EMBD, the learned judge stated that

- a) In relation to the assignment defense, she held that the assignment between Junior Sammy and ANSA Merchant Bank was not an absolute assignment. In arriving at that finding, she considered the Assignment of Receivables, the Factoring Agreement and the letter of 16th February 2016. The Factoring Agreement preserved the right to the seller to institute proceedings. Though the Assignment was stated to be absolute, it was not. It was conditional on the Factoring Agreement and the right and obligation of the seller to institute proceedings where required.
- b) On the issue of whether the IPCS finally determined Junior Sammy’s entitlement to payment, the learned judge found that EMBD did not make its claim for set off “as soon as reasonably practicable” when it first notified its claims and complaints three years after the Engineer certified the IPCs and after proceedings had been filed by Junior Sammy to recover the sums. Even though EMBD complained that Junior Sammy failed to annex relevant documents to its claim, Junior Sammy did attach the Engineer’s certificate and the relevant notices. The learned Judge found that the only relevant document was the Engineer’s certificate since by Clause 14.7 of the contract, EMBD is bound by the certificate of the Engineer. Further, the letter of EMBD signed by its Chief Executive Officer on 9th October 2015 to First Citizens Bank admitting that it owed Junior Sammy the sums certified in the IPCs was an admission by EMBD of the debt owed to Junior

Sammy. The learned judge further held that the abatement defense was not pleaded and EMBD failed to avail itself of the Dispute Resolution Mechanism in the contract.

- c) In relation to the EMBD's defense of awaiting specific disclosure, the learned judge held that this was in reality not a defense but a plea for time to ascertain whether there was a defense and if so to develop one. EMBD did not establish that any of the documents which it sought in its disclosure application were within the control of Junior Sammy but rather the documents ought to have been in the possession of EMBD.

On the 29th June, 2020 the Honourable Justice Vashiast Kokaram, J.A. granted a stay of execution on specific conditions set out in the judgment and determined that it was warranted. The conditionality of this stay was as follows:-

- 1) There shall be a stay of execution of the judgment on the condition that: a) the sum of \$87,324,469.86 representing 70% of the total debt be paid by the Appellant to the Respondent on or before 17th August 2020 with the undertaking by the Respondent to repay the said sums to the Appellant if the appeal is successful.
- 2) The sum of \$37,424,772.798 representing 30% of the judgment debt be paid into Court by the Appellant on or before 17th August 2020 to be invested into an interest-bearing account pending the determination of these appeals.
- 3) In total 18 number of points stated.

It was noted within the case CV2018-04840 that EMBD made claims of over certification of interim payment certificate and defective work as their counter claim in response to the claims that was brought against them. This counter claim was filed 3 years after the contractor completed the works and the defects liability period had been completed. The special purpose company did not raise any disputes regarding the dissatisfaction of the interim payment certificates and the works during the execution neither within the defect's liability period.

1. Date of contract execution - **February 2015**
2. Taking over certificate issued by the Engineer (VIKAB) and two senior project managers (EMBD) – **17th August, 2015**
3. End of the defects liability period – **16th August, 2016**
4. Engineer sent a letter to the Contractor indicating additional defects – **19th August, 2016**
5. Contractor completed the defects and walked through the site with verification being done by EMBD personnel through a joint inspection – **18th October, 2016**
6. Contractor wrote the special purpose company to get the release of the performance bond – **19th September and 18th October, 2016**
7. **EMBD conducted an audit on the project** (The audit was being done with “on site, in situ testing and measurements by geotechnical experts.”) – **10th November, 2016**
8. Six months later EMBD wrote to Junior Sammy stating that the result from the audit were submitted to the Line Ministry. - 9th May 2017
9. Contractor filed claim against the special purpose company (EMBD) for unpaid interim payment certificates – **20th December, 2018**

The facts presented within this case and captioned within the summary judgement highlights the errors that has been deemed common practice by the EMBD. These practices are inherent within cases where independent Engineer's (Consultants) were selected to Supervise and manage the execution of projects, EMBD has not presented information within this case that they raised any disputes under the conditions of contract against the interim payment certificate's prepared by the

independent Engineer (VIKAB) or did the EMBD raise any disputes against the taking over certificates nor did they raise any concerns with defective work within the defects liability period that has rendered the project unusable.

Statements presented by EMBD within the case CV 2017 -014515 for breaches of duties of a senior manager

Within the statement provided by the special purpose company (EMBD) that was presented within the Judgement in the strike out action brought up by the EMBD contractors. The EMBD stated that the Senior Manager that was responsible for the review and approvals of the Pre Tender Estimates and other duties cited within the duties under the employment of contract and was accused of revising the PTEs for the Caroni Roads contracts, these PTE's were previously prepared by EMBD's engineers. These PTE's were drastically increased with no proper basis for so doing, with no increase in the scope of works to be undertaken.

The senior EMBD manager is also accused of poorly recommending the selection of an improper form of contract that was utilized for the Caroni Roads projects. These forms were favorable to the EMBD Contractors at a cost to EMBD. The senior manager also failed to ensure that a form of contract, more favorable to EMBD was used for the Caroni Roads contracts. The accusations went further to state that the assigning of project management responsibilities to two of EMBD's engineers without assessing the competence and/or ability of these persons to fulfil the role of Engineer on the Caroni Roads project. These breaches have been indicated within **table 7** and illustrated within **figure 5 and 6**.

Claims made by EMBD against the senior manager who intimidated its staff to attain a self-interest result

The senior manager has also been accused of removing engineers who were assigned as an EMBD engineer to the C4 and C5 Caroni roads. It is stated by EMBD that the engineer raised concerns about the certification of works which were applied for by one of the EMBD Contractors for works not completed. The Engineer was subsequently removed and replaced with a Clerk of Works who did not have the requisite competencies to serve as Engineer under the Caroni Roads contracts.

Breach of proper Engineering practice associated with the Caroni Access roads

Another allegation is that the client senior manager authorized payments to the EMBD Contractors within circumstances that verification. The EMBD further stated that the client senior manager approved the issue of Practical Completion Certificates.

The EMBD also asserted its claim against another engineer (EMBD internal Engineer for the Caroni Access road contracts C1, C2, C7 and C8). It is claimed that there was a clear breach in the fulfilling of the substantive duties under the contract of employment and other assigned duties. The case against the Engineer is against the pleaded facts that it accepted invalid pre-construction test results, failed to inspect or test the works to determine whether they were properly executed; prepared Interim Payment Certificates for that certified payments that were not due and based on test results by an unauthorized laboratory.

FIDIC 1999 RED AND YELLOW BOOK

Duties of The Engineer under the contract

The Fidic Red and Yellow book condition of contracts presented the specific duties of the Engineer that the researcher has presented within the following points. These points indicate the key responsibilities and authorities that the standard 1999 red and yellow book conditions of contract (except as stated within the particular conditions) has granted to the Engineer The Employer shall appoint

- 1 The Engineer shall carry out the duties assigned to him in the Contract.
- 2 The Engineer's staff shall include suitably qualified engineers and other professionals who are competent to carry out these duties.
- 3 The Engineer shall have no authority to amend the Contract.
- 4 The Engineer may exercise the authority attributable to the Engineer as specified in or necessarily to be implied from the Contract.
- 5 If the Engineer is required to obtain the approval of the Employer before exercising a specified authority, the requirements shall be as stated in the Particular Conditions.
- 6 The Employer undertakes not to impose further constraints on the Engineer's authority, except as agreed with the Contractor.
- 7 The Engineer is deemed to have been given approval from the Employer when exercising specified authority for which the Employer's approval is required

The EMBD C1 to C10 Contract

Duties of the Engineer under the contract

The EMBD Contract as provided under anonymity stated that the following as the specific authority of the Engineer under the contract:-

- 1 The Engineer shall "administer the Contract on behalf of the Employer's Representative and shall exercise general supervision and direction of the Works".
- 2 He shall be responsible for the inspection and testing of the Works and the materials, the conduct of the Works, the compliance by Contract, the specification and all ordinances, regulations etc. affecting the works.
- 3 The Engineer has authority to stop the work whenever such stoppage may be necessary to ensure the proper execution of the Contract.
- 4 He shall also have authority to reject all work and materials which do not conform to the Contract, to direct the application of forces to any portion of the works, as in his judgment is required and to order the force increased or diminished and to decide questions which arise in the execution of the works.
- 5 The Engineer shall "have the authority to issue change orders, the computation of quantities and certification of payments".
- 6 The Engineer is authorized to revise the Specifications as may become necessary and to revise the design as may be required by changed conditions encountered in the field.
- 7 He shall, however, obtain the concurrence of the Employer's Representative before instituting or approving major changes involving time delays or substantial increases in Contract Cost.

Variance between the duties of the Engineer under the two types of Contracts

The Fidic contracts states clearly as the point identified as number 3 The Engineer shall have no authority to amend the Contract whilst the EMBD C1 to C10 Contract states very ambiguous within the point identified as number 7. The Engineer is authorized to revise the Specifications as

may become necessary and to revise the design as may be required by changed conditions encountered in the field. Based on these contracts having been assigned Engineers from within EMBDs pool of resources these conditions may seem very ambiguous.

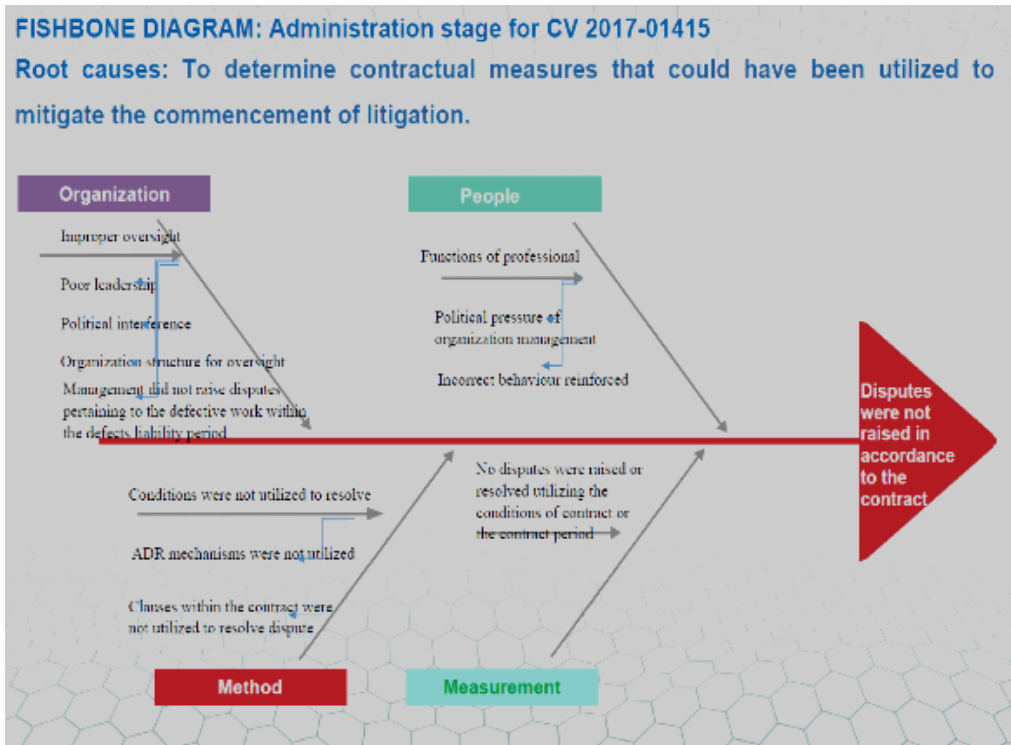


Figure 6:

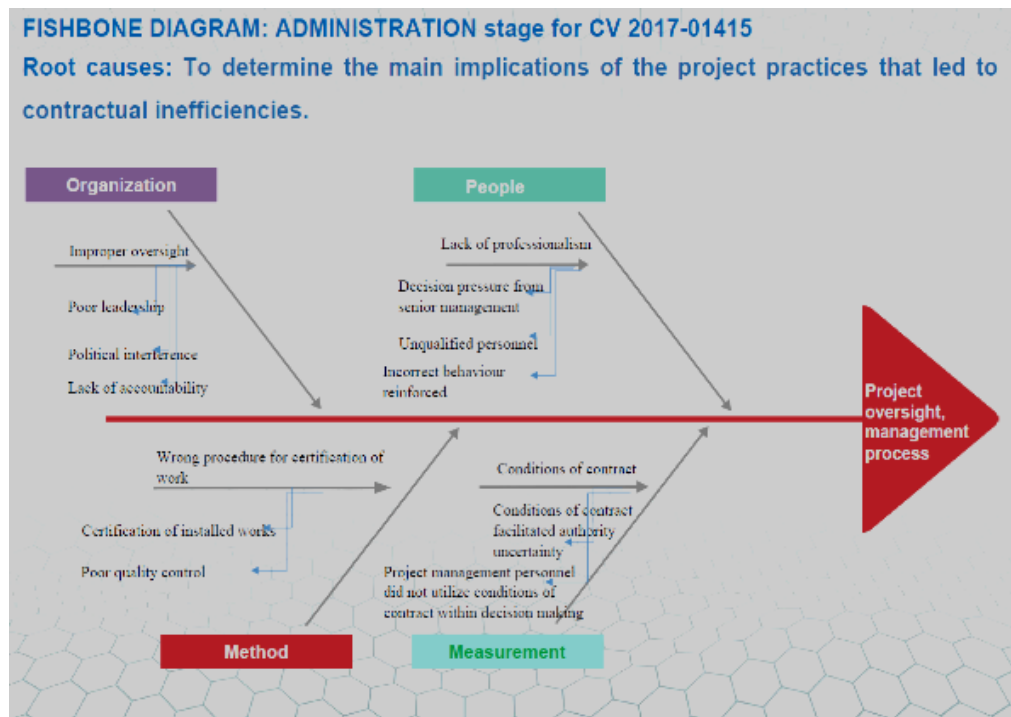


Figure 7

4.2 Discussion

Table 8 illustrates the key findings of this research that has sought to identify the categories of corruption and the variables that connect to the breaches pleaded by the EMBD within the litigation suit CV 2017 -01415. This table presents the various stages of the project and the category of corruption that may have been activated as pleaded by the EMBD. The researcher has presented the remedies to mitigate the occurrence of these breaches that are hinged on scholarly journals and the OECD and UFF report. This case study research paper has presented and sought to determine the events and the contractual wrong doings that led to the lawsuit for which the determination from the information presented within the case. This research evaluated the impacts of these events and presented the contractual wrong doings. This research investigates the impacts of the events and mapped this to the requisite scholarly breaches as illustrated within **table 8**. The research determined that the impacts of these events and contractual wrong doings all contributed negatively to the construction industry in Trinidad and Tobago. The research presented measures that can be utilized to mitigate/manage future lawsuits in these circumstances.

Table 8 Discussion for the tender, award and administration stage

5.0 Conclusion

As the researcher gleaned into the depths of the CV 2017 -01415 litigation suit to ascertain a deeper understanding of the contractual wrongdoings that may have contributed to the unfavorable and unbeneficial burden that the tax payers will have to carry to the end. It was realized that the implication of the 91 recommendations as indicated within the Prof John Uff (2010) may have avoided the breaches and injustice that EMBD pleaded within the litigation suit that negatively affected the special purpose company. It is notably imperative that the special purpose company adopt approaches of procurement practices that is aligned within the recommendations stated within the OECD (2016) report titled “Fighting bid rigging within public procurement...”. This report provides six (6) key strategies with a number of sub categories that is designed to guide the procurement process aimed at reducing the risks of bid rigging. This report also presents seven (7) strategies within a checklist aimed at detecting bid rigging within public procurement. These elements can only be effective with the support of proper governmental legislation and policies within special purpose companies.

The research proceeded to determine the major timeline factors of events that were associative to the Caroni C1 to C10 bypass roads and the Picton and Exchange residential sites. Reference is made to **Figure 8** Timeline of events C1 to C10 Caroni Roads, **Figure 9** Timeline of events for Picton III residential site and **Figure 10** Timeline of events for Exchange III residential site, these charts illustrates the timelines for the three number contracts that have formed the litigation suit and counter claims. The following presents the timelines from the site visit stage, tender, Letter of Award (LOA), contract, commencement of litigation and events leading to the appeal. These key events identifies the procedures that the special purpose company (EMBD) would have utilized in procuring the contracts.

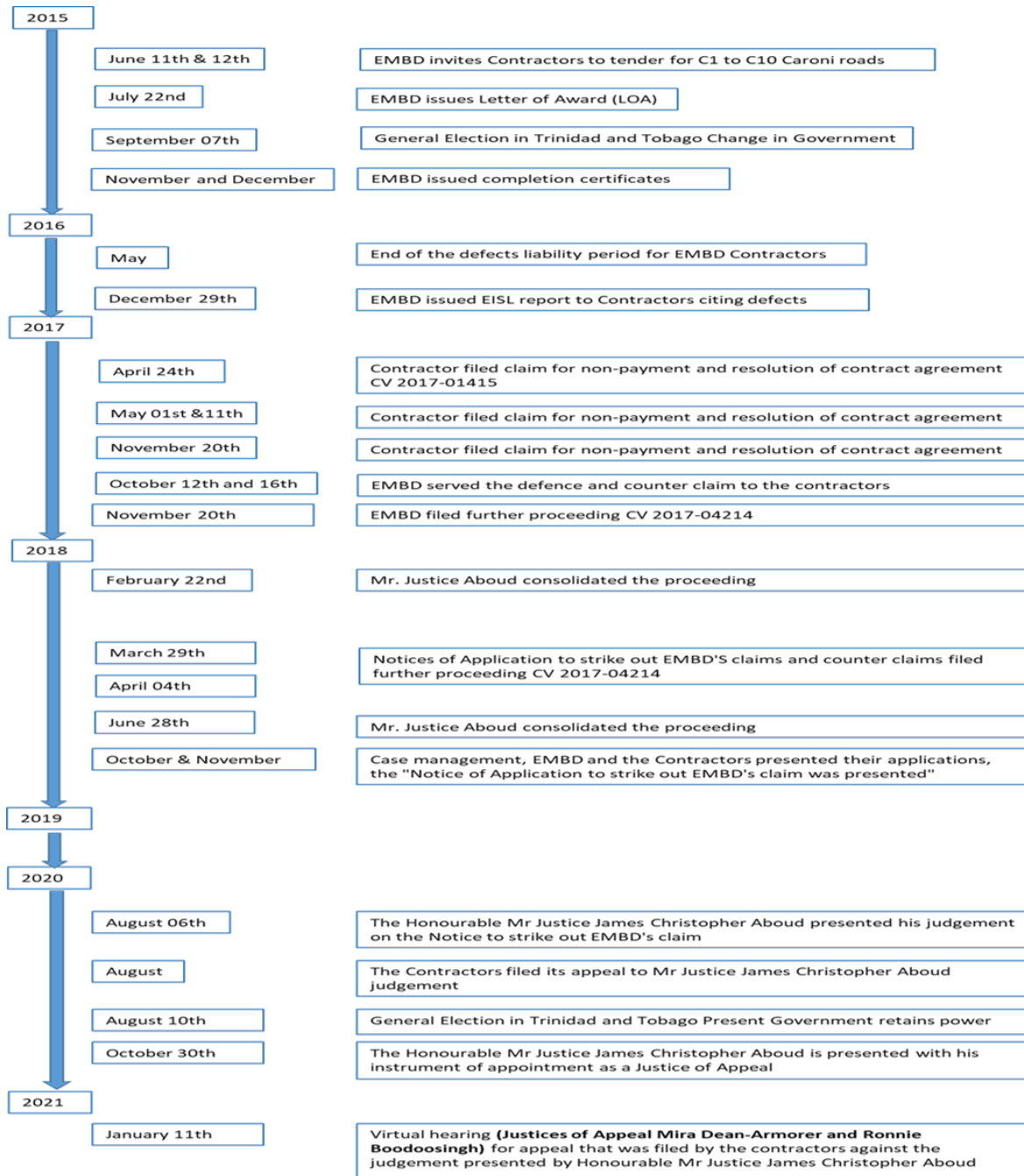


Figure 8 Timeline of events C1 to C10 Caroni Roads

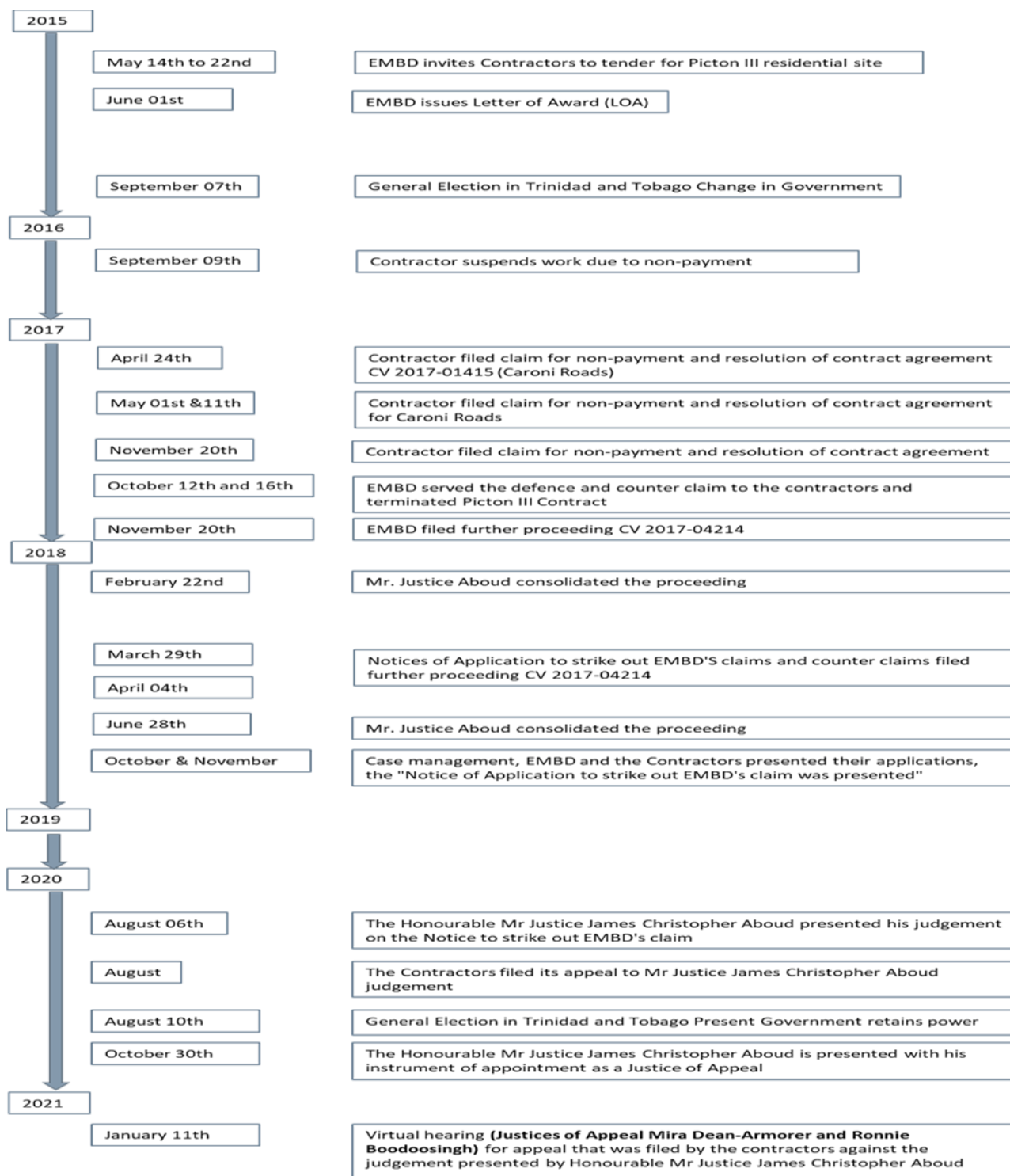


Figure 9 Timeline of events for Picton III residential site

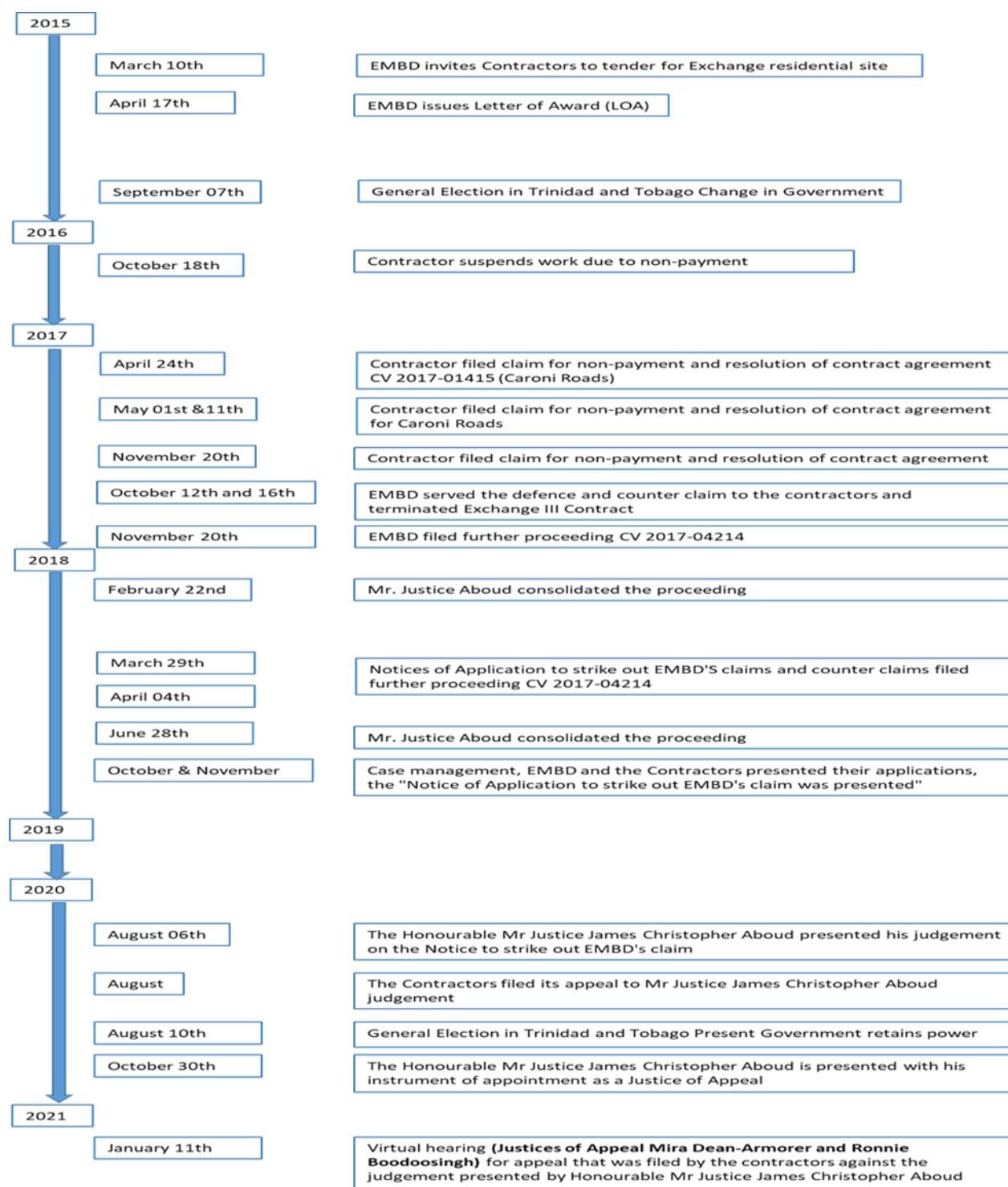


Figure 10 Timeline of events for Exchange III residential site

5.1 Recommendation

The elements listed within section A of the OECD (2016) report titled “Checklist for designing the procurement process to reduce risks of bid rigging” should be instituted within special purpose

companies in the procurement process. This section covers the following steps that should be followed as to reduce the risk of bid rigging: -

1. The procurement department for the special purpose company should be informed before designing the tender process.
2. The tender process should be designed in a manner that maximizes the potential participation of genuinely competing bidders.
3. The project team should ensure that the requirements are clearly defined as to mitigate the occurrence of predictability by the participants.
4. The procurement agents for the special purpose company should design the tender process to effectively reduce communication among bidders.
5. The evaluation committee must carefully choose the criteria for evaluating and awarding the tender.
6. The procurement agents must raise awareness among its staff about the risks of bid rigging in procurement.

That Section B of the OECD (2016) that is titled “ Checklist for detecting bid rigging in public procurement” is also instituted within the procurement process. This section covers the following steps that should be followed as to reduce the risk of bid rigging: -

1. The evaluation team must ensure that a clear line is established to properly identify and red flag the warning signs and patterns when participants are submitting bids.
2. The procurement agents must observe the warning signs in all documents submitted.
3. The procurement agents must observe the warning signs and patterns related to pricing.
4. The procurement agents must observe and red flag signs of suspicious statements at all times.
5. The procurement agents must observe signs of suspicious behavior at all times.
6. The procurement agents must be cautious about indicators of bid rigging.
7. There must be clear written procedures to follow if bid rigging is suspected.

If there is suspicion of the occurrence of bid rigging, there are a number of steps you should take in order to help uncover it and stop it.

- The procurement agents (or member associated to) must be verse in the understanding of the law on bid rigging within the jurisdiction.
- Agents must not discuss its concerns with suspected participants.
- The procurement agents must keep all documents, including bid documents, correspondence, envelopes, etc.

offer.

The implementation of item 54 that was made within the UFF report together with the other implements. There is a deep need to institute an independent agency that will be able to manage procurement of all the special purpose companies, implement intelligent systems that will prequalify contractors and categorize them within their respective categories. Additionally this agency should be tasked with implementing and managing e-procurement systems that will ensure proper value towards the tax paying citizens.

There is a need to investigate the stage of a project that is most susceptible to corruption (design/tender, award and administration). Future research is needed to decipher the most effective intelligent system that is required in selecting and prequalifying contractors for the provision of various services within our local industry that will be able to see value added to the projects and commence the removal of political interference in the selecting of contractors for various projects that will always be a litigious situation that will arise when there is a change within the governing party.

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