

INTERNAL MEMO

From: Emma Mendy
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To: Solicitor General and Legal Secretary
Cc: Attorney General and Minister of Justice
Date: 1st June 2017
Subject: RE: COMPREHENSIVE REPORT ON THE STATUS OF PRISTINE, SEMLEX & AFRICARD/ZETEX CONTRACTS WITH THE MINISTRY OF INTERIOR

The above subject matter refers.

Please find below a comprehensive report on the status of the Pristine, Semlex and Africard contracts (together, the "Contracts") from their inception to date in chronological order. We understand that the Ministry of the Interior ("Interior") is seeking to amend and/or terminate these contracts. Our advice in relation to those contracts is contained below. TBC

History of the Contracts

THE GOVERNMENT OF THE GAMBIA AND PRISTINE

The Government of The Gambia and Pristine Consulting entered into an agreement for the implementation and production of a state of the art Biometric National Identity System, Consumables and Associated Services for a five-year period effective from the 20th April, 2009 to 20th April, 2014. INCLUDE HERE WHAT THE GOVERNING LAW IS FOR THE CONTRACT AND WHETHER THERE IS AN ARBITRATION CLAUSE. IT WOULD BE GOOD TO UNDERSTAND WHAT THE LITIGATION POSTURE MIGHT BE AND WILL HELP US ADVISE ON WHETHER THERE IS FLEXIBILITY UNDER LOCAL LAW UNDER THE CONTRACT

As part of the conditions of the agreement, Pristine was to transfer knowledge and infrastructure to the Government of The Gambia at the end of the contract. There was also a minimum guarantee clause (the "Minimum Guarantee") contained in article 2.4 which provided that –

"the Customer shall pay Pristine Four Hundred and Thirty-Seven Thousand Seven Hundred and Ninety-Eight USD (\$437,798) for the delivery of phase one of the BNIS Infrastructure in three equal installments of One Hundred and Forty-five Thousand and Nine Hundred and Thirty-two USD and Six Cents (\$145, 932.66). The first installment is payable two (2) months from issuance of the first official documents. The second installment is payable four (4) months from the date of issuance of the first official document. And the third and final

installment is payable (6) months from the date of issuance of first official documents...."

CAN YOU INCLUDE THE LANGUAGE THAT INDICATES THAT A MINIMUM AMOUNT OF DOCUMENTS NEED TO BE PRODUCED? Shortly after signing the contract, problems arose, which led to the parties holding several meetings and exchanging various correspondences in an effort to resolve those problems.

The problems include but are not limited to:

- a. Minimum Guarantee;
- b. Transfer of knowledge;
- c. Delays in printing and issuance of documents;
- d. Insufficient training of staff attached to the GAMBIS project;
- e. Lack of promotion of staff attached to the GAMBIS project;
- f. Nonpayment of bonuses to government staff attached to the GAMBIS project, etc.

However, from the minutes of an internal Government meeting held on the 10th October 2011 between officials from the Ministry of Finance, the Ministry of Interior and the Ministry of Justice, it appears that the Minimum Guarantee was way above the realistic public demand and consequently, Pristine did not print these amounts as well. Notwithstanding, Pristine sought to enforce the Minimum Guarantee.

After the internal meeting, the Government in a meeting held the same day engaged Pristine to explore the possibility of the removal of the Minimum Guarantee clause from the Master Agreement. From the minutes of this meeting, the chairman Mr. Mod A.K. Secka (Ministry of Finance) stated that -

"it is also in the contract that Government will pay based on what has been printed and it is quite unreasonable to pay for what has never been printed...it is without doubt that Pristine owes the Government 35 million dalasi, Government is willing to deduct the cost of infrastructure which is about 12 million dalasi from the said amount, and the balance which will be about 24 million dalasi will be shared equally amongst both parties, i.e. Government is willing to forfeit half of the balance of 24 million dalasi for the sake of an amicable settlement. In addition to this, Government will claim ownership of the Infrastructure, Pristine should develop and submit to Government an action plan for skills transfer to government for the GAMBIS project and moving forward, the contract will be revisited and negotiated."

Despite the Government's proposal above, Mr. Hassan Touray from Pristine stated that Pristine had no problem removing the minimum guarantee clause in future but they cannot forgo it for the period 2009 and 2010 as they had taken out huge loans with banks and investors which they have to pay back. He further stated that the cost of ordering and purchasing of consumables is very expensive and as such they cannot forgo the money already owed. **TO BE CONFIRMED. DOES THE CONTRACT STATE THAT THE GOVERNMENT WILL PAY BASED ON WHAT HAS BEEN PRINTED? THAT WOULD BE A USEFUL ARGUMENT THAT THE CONTRACT IS ITSELF CONTRADICTIONARY. IN ADDITION, IS THERE ANYTHING IN THE CONTRACT THAT STATES THE PRISTINE WILL PAY THE GOVERNMENT?**

After this meeting, several other meetings were held between the Government officials and Pristine to explore the possibility of renegotiating the removal of the Minimum Guarantee clause. From the minutes of a meeting held on 10th October, 2011, it was claimed that Pristine owed the Government D35 million dalasis (which was supposedly not disputed by the parties) but if the issue of the Minimum Guarantee was taken into consideration, then the Government will end up owing Pristine. We would like to draw your attention to the fact that there is no evidence of how Pristine came to owe the Government D35 million in our files. Therefore, Interior needs to clarify how Pristine came to owe the Government D35 million.

From the minutes of another meeting held on the 3rd of November 2011 between officials of the Government of The Gambia and Pristine, a consensus (pending formal executive approval) was reached on the following:

1. That the parties will remove the Minimum Guarantee clause in the contract in the future.
2. That Pristine will not be paid for the monies presumed owed as a result of the Minimum Guarantee clause.
3. That Government will forgo the D35, 000,000 owed to them by Pristine.
4. That Pristine will continue to procure the consumables for the GAMBIS project.
5. That Pristine's shares in the Residential Permit B will be increased to D450 from D130. **WHAT IS THIS? IT WOULD BE USEFUL TO UNDERSTAND THE CONTEXT AND WHAT THE IMPLICATIONS ARE. DOES THE GOVERNMENT OWE MONEY AS A RESULT OF THIS AGREEMENT?**
6. That the contract will be vetted by all stakeholders and renegotiated again.
7. That Pristine will submit to the Government an action plan for skills transfer for the GAMBIS project (since the cost of infrastructure has been paid) and this will be incorporated in the contract.

We would like to emphasise that the consensus on the above issues was reached subject to formal executive approval. However, there is no evidence in our files to show that executive approval has been granted concerning this matter. IN ADDITION, THERE WAS NO FORMAL AMENDMENT TO THE CONTRACT EXECUTED BY THE PARTIES—ASSUME THAT THIS IS TRUE—TO BE CONFIRMED.

A legal opinion dated 20th May, 2015 and referenced AG/310/01/Part 5 (15) from this Office made a comprehensive analysis of the contract between the Government of The Gambia and Pristine Consulting and concluded that, based on the documents available, the Master Agreement between Pristine Consulting and Government had expired in April 2014. The opinion recommended for amicable settlement in view of the fact that both parties were claiming some monies from the other.

It would appear that despite the problems encountered in the 2013 Master Agreement between the Government of The Gambia (through the Ministry of Interior) and Pristine, the Government (through the Ministry of Health) proceeded to sign a new five-year contract with Pristine for the production of electronic birth registration system and certificates as an extension of the GAMBIS project. This new contract was witnessed by the then Minister of Interior. CONFIRM WHETHER YOU HAVE REVIEWED THIS CONTRACT AND THE STATUS OF IT. HOW IS IT WORKING?

We would like to point out that there is no evidence in our files pertaining to the implementation and status of this new contract which was signed on 4th May 2015 and is due to expire 4th May, 2020. Therefore, the Ministry of Health needs to clarify the status of, and report on the implementation of this contract. AGREED

Furthermore, by a letter dated 14th March 2017 and referenced 1070/P/48/YHC, Pristine Consulting has (through Ida D. Drammeh and Associates) written to the Ministry of Interior stating that the contract provided for the expansion of its terms IS THIS TRUE? WHAT DOES THE CONTRACT SAY ABOUT AMENDMENTS, TERMINATION, AND RENEWAL? and the renewal of the Master Agreement of 2009 after its expiry in 2014. Pristine further stated that they are entitled to the benefits specified in the contract terms having performed their contractual obligations and as such the Government now owes Pristine D340, 883,088. MY UNDERSTANDING FROM IS THAT THEY DID NOT. CAN WE PUT SOMETHING HERE ABOUT THE FACT THAT, IN FACT, THEY DID NOT?

In their letter, Pristine also expressed their commitment to reactivate the GAMBIS project with the Government of The Gambia and to see through its existing contract to cover the full scope of the project. They further stated that if this is not the case, then Pristine's claim is that *the Government has continued using its intellectual property with other vendors and that they are willing to negotiate termination of the two agreements on terms which have to be mutually satisfactory to both parties* including the payment of sums outstanding and all license and other fees that will be incurred and be payable. WHAT DOES THE CONTRACT SAY ABOUT INTELLECTUAL PROPERTY IN RELATION TO THE GOVERNMENT. TYPICALLY INTELLECTUAL PROPERTY WOULD BE TRANSFERRED TO THE GOVERNMENT AT THE END OF THE CONTRACT. THAT NEEDS TO BE CONFIRMED.

The position of Pristine concerning the contracts at the moment is that, pending the mutually agreed termination, the Government of The Gambia has existing contractual obligations to Pristine and that neither the Government nor any new entity can without being liable to a claim for "*inducing breach of contract*" engage in discussions with other vendors for services already contracted for their clients.

We observe, from a careful perusal of it, that the Master Agreement for Biometric National Identity System, Consumables and associated services signed on 20th April 2009 has expired on 20th of April 2014. However, it would appear that the Government has since the expiry of the Master Agreement with Pristine, continued to operate within the spirit of that expired contract. HOW SO? IF USING TECHNOLOGY OR LICENSING THAT WAS TRANSFERRED AT THE END OF THE CONTRACT, THEN MAYBE NOT.

We observe also, that the Government of the Gambia has a subsisting contract with Pristine Consulting for the production of electronic birth registration system and certificates signed on 4th May 2015 which is due to expire on 4th May, 2020. WE NEED TO HAVE A LOOK AT THAT CONTRACT TO SEE IF IT EXTENDS THE ORIGINAL MASTER AGREEMENT.

THE GOVERNMENT OF THE GAMBIA AND SEMLEX

Semlex Europe offered to implement a biometric system for diverse documents and database and to produce those documents in the Republic of The Gambia. A contract was drafted and a review process of the draft contract commenced on the 11th November, 2015 at the Ministry of Interior Conference Room by a team composed of officials from the Ministry of Interior, the Ministry of Information, Communication and Infrastructure, the Ministry of Finance and Economic Affairs, the Solicitor General and Legal Secretary, the Inspector General of Police and the Director General of Immigration.

On the 9th day of March, 2016, this Office received a letter referenced **LD79/125/01 PART II (62-GBG)** and dated 7th March, 2016 with a copy of the proposed draft contract requesting for legal advice on the draft contract. We have not seen a copy of the legal advice (that was presumably given by this Office) in any file.

A Sub-Committee sanctioned by the Ministerial Taskforce on the Semlex Project held several meetings to scrutinise the draft contract between Government and Semlex based on its technical, legal and financial implications. In a meeting attended by the Deputy Secretary General Office of the President, the Minister of Trade, the Minister of Interior, the Minister of Information, the Chief Executive Officer of GIEPA, the Permanent Secretary of MOICI, two Semlex representatives and six other senior Government officials held on 19th February 2016, the past dealings of Semlex based on reports from Interpol, ICAO and a UN partner were scrutinised. The meeting requested for more detailed information on the overall investment figures, forecast of employment and training needs (transfer of knowledge), list of materials and ownership, contract duration and revenue sharing percentages etc..

In a meeting held on 11th March, 2017 and chaired by the Deputy Secretary General Office of the President, the Sub-Committee discussed the request for more information by the Ministerial Taskforce on the Semlex Project on the overall investment figures, forecast of employment and training needs (transfer of knowledge), list of materials and ownership, contract duration and revenue sharing percentages. The Sub-Committee proffered suggestions on the technical, legal and financial implications of the contract, whilst recommending that the Solicitor General officially be given a copy of the contract for final scrutiny so that the State could be protected should a breach of contract occur.

The Sub-Committee convened further meetings on the 4th April, 2016 and 8th June 2016 at the Office of the President. At the conclusion of its task, the Sub-Committee made the following comments and observations:

- a. Change of database from Microsoft SQL to Oracle.
- b. Scaling down of some equipment that reduced the amount from 31 million euros to 10 million euros.
- c. Change to more effective and up-to-date Firewalls and software license agreements.
- d. Entrusting of the project to Semlex.
- e. Samples for the cards provided to be of high quality.
- f. The border control system and centralised CCTV system are a big plus.
- g. The Ministerial Taskforce should consider signing the proposed contract with Semlex not exceeding 10 million euros.
- h. The Technical Sub-Committee should continue to supervise the execution of the project according to the contractual agreement.

The Government of The Gambia and Semlex Group on the 16th June 2016 entered into a five-year contract for the implementation of Biometric Identification and Border Control Management Systems. Furthermore, by a letter dated 20th June 2016 and referenced

OP 262/291/01/TEMP: XIV (SOB – 8), the Secretary General Office of the President conveyed executive approval for Semlex to provide biometric identity documentation for The Gambia.

On the 24th August 2016, the Secretary General Office of the President conveyed a fresh executive directive that the contract with Semlex be terminated and that steps to be taken to conclude another contract for the same services with Zetex.

By a letter referenced **LD 188/125/02 PART 11 (47 – MNC)** and dated 24/08/2016, the Permanent Secretary Ministry of Interior requested for legal advice from the Solicitor General and Legal Secretary on how to proceed with the termination.

By a letter dated 24th August 2016 and referenced **AG/310/01/PART 6 (13)**, the Solicitor General and Legal Secretary wrote to the Permanent Secretary Ministry of Interior advising that Ministry on how to proceed with the termination and the legal implication of termination. The Solicitor General and Legal Secretary advised the Ministry of Interior that if the Semlex contract was terminated without cause, the Government would be liable to pay Semlex compensation and that termination can only be valid if done in accordance with the provisions of the contract. The Solicitor General and Legal Secretary also requested for information on the status of implementation of the contract to enable the Ministry of Justice to provide updated advice. We observe that the Ministry of Interior did not adhere to the advice given by the Solicitor General and Legal Secretary.

Following the Executive Directive, the Ministry of Interior by a letter dated 29th August wrote a letter to Semlex Group terminating the contract the Government of The Gambia had with them without giving any reasons, thereby exposing the Government to potential costly litigation.

After the sudden termination, Semlex wrote several correspondences to the Ministry of Interior seeking a solution to resolve the issue of breach of contract. In the absence of a solution, Semlex invoked article 14 of the contract which provides -

14.1 Should the Government or Semlex terminate the contract without cause, the terminating part shall be required, without delay to pay the other Party, a compensation amounting to the sum total (1) of the cost of creating and implementing the INFRASTRUCTURE; (2) the profit due on sale of OFFICIAL DOCUMENTS for the duration of this Contract

14.2 A party who terminates the Contract in accordance with Article 14.1 shall not be entitled to any compensation.

The most recent of the Semlex correspondence is a letter dated 14th February 2017 addressed to the Minister of Interior seeking a solution to resolve the matter amicably otherwise Semlex will have no choice but to recoup their investment via the courts as described in article 14.1 of the agreement.

By a letter referenced **SLX_GAM_MINJUS_001** and dated 17th October 2016, one Mr. Razouk Ralph Hajjar of Semlex Europe informed the Attorney General and Minister of Justice that since Semlex had already invested resources into the project before the termination, the Government will be liable to pay compensation to Semlex of a sum up to one hundred thousand United States dollars (\$100,000.00).

By letter referenced **AG/310/01/PART 6 (22)** and dated 20th October 2016 addressed to the Office of the President, the Attorney General and Minister of Justice stated that the letter of termination of the Semlex contract had been written by the Ministry of Interior in a manner at variance with the legal opinion of the Solicitor General and Legal Secretary and that no reasons had been given for the termination.

By a letter referenced **OP 244/323/01 (60)** and dated 27th October 2016, the Secretary General Office of the President responded to the Attorney General's letter and claimed that Zetex, and not Semlex, was the company that the Office of the President had approved for negotiation and that the Semlex contract was awarded by the former Minister of Interior without any Cabinet approval. The Secretary General Office of the President further claimed that Semlex does not have a contract with the Government of The Gambia, as this was neither approved by the Office of the President nor by the Cabinet and that the Semlex contract was awarded and signed illegally by the Minister of Interior.

We would like to reiterate that despite the advice given by the Solicitor General and Legal Secretary on how to proceed with the termination and the legal implications of termination, the Ministry of Interior terminated the contract between the Government of the Gambia and Semlex without giving any reasons for the termination. WE NEED TO CONFIRM HERE WHAT INTERIOR WANTS TO DO. DO THEY WANT TO CONTINUE WITH THE TERMINATION OR DO THEY WANT TO SEE IF THEY CAN SAVE THE RELATIONSHIP. THE CONTRACT FOR SEMLEX LOOKS REASONABLE, AND THE COST SHARING ARRANGEMENTS AND TRANSFER OF IP LOOKS BENEFICIAL. THIS IS A COMMERCIAL QUESTION. WHAT DO THEY WANT TO DO?

ON THE LEGAL SIDE, THE TERMINATION WITHOUT CAUSE PUTS THE GOVERNMENT IN A WEAK POSITION. ALTHOUGH THIS IS UNDER GAMBIAN LAW, AND COULD POTENTIALLY BE FOUGHT ABOUT IN GAMBIAN COURTS THAT THE CONTRACT WAS VOID/UNENFORCEABLE DUE TO NO PROPER EXECUTION, MY SUGGESTION WOULD BE TO SETTLE IT FOR THE MONEY THEY ARE ASKING FOR (100,000) AND SIGN A SETTLEMENT AGREEMENT WITH THEM. HOWEVER, I WOULD ENCOURAGE INTERIOR TO CONFIRM WHAT THEY WANT FROM THIS RELATIONSHIP GOING FORWARD.

THE GOVERNMENT OF THE GAMBIA AND AFRICARD

The Government of The Gambia entered into a **ten-year** Concession Agreement with Africard Gambia for ECOWAS Passport ICAO, starting from **March 11th, 2013** and ending in **2023**.

As mentioned previously, on 24th August 2016, the Secretary General Office of the President conveyed an executive directive that the contract with Semlex be terminated and that steps be taken to conclude another contract for the same services with Zetex (i.e. for the implementation of Biometric Identification and Border Control Management Systems).

The Technical Task Force (or Technical Task Team) held several meetings in which an Addendum to the 2013 contract was scrutinised. This was an effort to amend the 2013 contract the Government had with Africard to include: secured document solution with an ECOWAS electronic passport ICAO Compliant, with e-gate and Afis, along with centralised database, ECOWAS ID, driving licenses, birth certificates, death certificates, car registration cards, residence permits, e-visa clearance and stickers, non-Gambian ID cards, border control solution and any other item that will be mutually agreed upon later by both parties.

This Addendum was signed by a representative of Africard and forwarded to the Ministry of Interior for signing by the Government of The Gambia. However, due to the political impasse, the Government did not sign the Addendum as the executive directive ordering for the signing of an Addendum with Zetex was overtaken by events.

By a letter referenced **LD 118/125/01 PART VI (97 – GBG)** and dated 27th April 2017, the Permanent Secretary Ministry of Interior requested for legal advice from the Solicitor General and Legal Secretary relating to the Concession Agreement between The Gambia Government and AFRICARD for the production of biometric passports and options for terminating or renegotiating the contract.

We observe that there exists a contract between the Government of The Gambia and Africard for the production of ECOWAS Passport ICAO passports only which is due to expire on **March 11th, 2023**.

Please note that the minutes of all (the) meetings referenced in this report are not signed by any official.

IN RELATION TO AFRICARD, I WAS TOLD THAT INTERIOR WAS UNHAPPY WITH THIS CONTRACT BECAUSE THE POWER TO AUTHORIZE WHO RECEIVED IDENTITY DOCUMENTS HAD BEEN OUTSOURCED TO AFRICARD. WE NEED TO UNDERSTAND FROM INTERIOR IF THEY WISH TO TRY TO RENEGOTIATE THIS AGREEMENT AND TAKE THAT OVERSIGHT POWER BACK. HAVE WE SEEN THE AFRICARD AGREEMENT?

Respectfully submitted.