HISTORIC ANTI-CORRUPTION INITIATIVE

Accounting For Public Money

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Accounting For Public Money

This special is dedicated to the important issue of Public Procurement. It is written by a private sector group headed by the Joint Consultative Council for the Construction Industry (JCC). The JCC consist of:

1. Association of Professional Engineers of Trinidad and Tobago (APETT),
2. Trinidad and Tobago Institute of Architects (TTIA),
3. Board of Architecture of Trinidad and Tobago (BOATT) (Observer Status),
4. Trinidad and Tobago Society of Planners (TTSP),
5. Trinidad and Tobago Contractors Association (TTCA)
6. Institute of Surveyors of Trinidad and Tobago (ISTT) (Land Surveyors, Quantity Surveyors, Valuation Surveyors)

The private sector group consisted of –

- Joint Consultative Council for the Construction Industry (JCC)
- Trinidad & Tobago Chamber of Industry & Commerce (TTCIC)
- Trinidad & Tobago Manufacturers' Association (TTMA)
- Trinidad & Tobago Transparency Institute (TTTI)

The members of that Private Sector group were part of the Working Party on the Public Procurement White Paper, which was published in August 2005 and laid in Parliament the following month.

SPENDING THE PEOPLE'S MONEY

By AFRA RAYMOND
President of the Joint Consultative Council for the Construction Industry

AN OVERVIEW

CIVIL SOCIETY'S SUBMISSION TO THE JOINT SELECT COMMITTEE ON PUBLIC PROCUREMENT

The Peoples' Partnership's manifesto, at page 18, commits to –

"***Procurement***
• *Prioritise the passing of procurement legislation and appropriate rules and regulations*
• *Establish equitable arrangements for an efficient procurement system ensuring transparency and accountability by all government departments and state enterprises.*"

In keeping with those campaign promises, the Minister of Finance tabled two legislative proposals in Parliament on 25th June 2010. Those were a Bill to amend the Central Tenders' Board Act (originally prepared in 1997, when Ramesh Lawrence Maharaj was Attorney General) and the Public Procurement Bill (originally prepared in 2006, after publication of the White paper). A Joint Select Committee (JSC) was established on 1st October 2010 to examine those proposals, invite submissions and make recommendations.

The stated target of the PP government is to have the new Public Procurement legislation in place by the first anniversary of their electoral victory – i.e. by 24th May 2011.

Our Private Sector/Civil Society group reconvened last year and made a joint submission to the JSC in December

THE CONTRIBUTORS

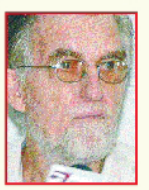
• Afra Raymond President of the Joint Consultative Council for the Construction Industry (http://www.jcc.org.tt/index.htm.) who outlines the case for procurement legislation.

• Winston Riley immediate Past President of the JCC and Chairman of the JCC's Public Procurement Committee, writes on the history of the campaign to create this new framework.

• Carla Herbert Legal Advisor to the JCC's Public Procurement Committee, writes on the proposed apparatus and the provisions of the draft legislation.

• Lawrence Placide, Director of the International Trade Negotiations Unit of the Trinidad & Tobago Chamber of Industry & Commerce - http://chamber.org.tt/ - explains the ways in which these proposed changes will conform to the emerging 'new normal' of transparent commercial arrangements in the international arena.

• Dr Trevor Townsend and Mark Sandy, of the Trinidad & Tobago Manufacturers' Association -http://www.ttma.com/ - make the case for an increased and clearer emphasis on local content as a key driver of national development.



• Boyd Reid of the Trinidad & Tobago Transparency Institute - http://www.transparency.org.tt/ - locates these proposals as critical instruments in reducing the rampant levels of corruption in public procurement and the use of the Integrity Pact provisions.

2010 – it is available here from the JCC's website. Our Private Sector group has had several meetings with the JSC - which was chaired by Education Minister, Dr. Tim Gopeesingh - but the results of those are not featured in this publication.

This special publication is intended to inform readers of the necessity for new Public Procurement legislation in our country and to set out the objectives of our proposals.

The guiding Principles

These are –

- Transparency
- Accountability
- Value for Money

The Broad Picture

One of the most serious findings of both the Bernard Enquiry (Piarco Airport Project) and the Uff Report (UDeCOTT and HDC) was the extent to which the largest State projects were being executed outside of any normal system of accountability. The very purpose of setting up these companies and procurement methods was to bypass the Central Tenders Board. The natural consequence of that way of proceeding being that if the CTB could be sidelined as a deliberate act of public policy, then other important elements of the regulatory framework are violated as a matter of course. In the case of both UDeCOTT and NHA/HDC, accounts were not filed for years – since 2006 for the former and 2002 for the latter – in flagrant violation of the rules and laws.

These were the largest State projects - often described as being the flagship or centre-piece of this or that government's policy – yet they were breaking the main rules and getting away with it. The 'getting away with it' is the cloudy part of the picture, because we never hear of any penalty being sought against those State Enterprise Directors who broke the governance rules.

But that is the very centre of the puzzle and we need to understand it before we can try to unlock it. So, we are told, time and again, that the only way to really get important and urgent projects done in the correct fashion and in a timely nammer is to go outside the rules. The stated reasons are that the old rules are too cumbersome, slow etc… and yet, we end up, time and again, in the same mess.

Some of the features of these fiascos are –

- Huge cost over-runs on virtually every project.
- Unfinished projects which virtually no one can make sense of – to date there is no proper rationale for the huge and loss-leading International Waterfront Project, apart from Calder Hart's illogical explanation to the Uff Enquiry.
- A gross burden on our Treasury going forward – The continuing delay in completing the accounts for these State Enterprises shows how difficult it is to work out exactly what the State owes and to whom.

What all that tells us is that the existing rule-book seems to be blocking progress and the attempts to bypass it have done little better, if not far worse.

The dismal picture on public procurement is not limited to construction projects and can be found in all the other areas.

A new approach is needed and that is what is at the foundation of these legislative proposals.

What Is Public Money?

Central to the new proposals is that any new Public Procurement system must be in full effect whenever Public Money is spent.

'Public Money' is defined at page 5 of our proposals as money which is either due to, or ultimately payable by, the State.

Our proposals are intended to form part of a financial management reform package to include for a National Audit Office and a Financial Management and Accountability Bill.

The intended move is towards a greater transparency and duty of care in terms of how taxpayers' money is spent. Our citizens, particularly the unborn ones who will have to pay for some of the wasteful schemes which are littering the landscape, deserve no less.

The new equation confronting us is –

Expenditure of Public Money	
minus	Accountability
minus	Transparency
equals	CORRUPTION

We must fix that.

So, What Is At Stake Here?

Our society is beset by large-scale corruption, which sustains wrong-headed decision-making. The wider social consequences of that toxic culture are now hatching, with a vengeance, in the naked violence and wily crimes which pre-occupy our head-space.

The killing-fields of East PoS, the decimation of African urban youths, the URP and CEPEP-realted gang warfare and the battle for turf are all part of this picture.

As long as our society continues to applaud and reward dishonest, corrupt behaviour, we will continue sliding downhill.

The structure of our economy is that most of the country's foreign exchange is earned by the State in the form of oil & gas earnings. The rest of the society relies on the State and its organs to recycle those earnings for the benefit of those of us not directly engaged in the energy sector.

For that reason, the State casts a very long shadow in our country, far more so than in other places. Virtually every substantial business relies on the State and its organs for a significant part of its earnings. A healthy connection with the State is essential for good profits.

But that is where the particular problem is, since the conduct of the State and its organs is often found to be lacking in the basic ingredients of fairplay, accountability and transparency.

If the State is the biggest source of funds in the place and the State is not playing straight at all, a serious question arises: How can we hope to uplift our society?

The State has an over-riding duty to behave in an exemplary fashion in its policy and operations.

Due to its tremendous footprint, the State has to behave in that exemplary fashion if we are to move out of this mess. A positive shift in State conduct will have a salutary effect on the commercial culture and wider society, one that is long overdue.

So, Who Spends Public Money?

We have a vast, expensive and confusing array of organs, all of which are authorized to spend our money. For a country of about 1.4M people, we have 26 Ministries. Just consider that the UK, with a population of about 65 million, has 19 Ministries and the USA, with a population of about 300 million, has 16 Ministries.

For a Caribbean example, Jamaica has twice our population and 16 Ministries.

Quite apart from the number of Ministries, there are two further layers of agencies which also have the power to spend - our country has 73 Government Bodies and 58 State Enterprises.

Given the vast range of operations undertaken by these agencies, any new system would have to be flexible in order to cover all those types of transactions.

The Main Features Of The New System

Three new independent organs will be created –

1. **The Procurement Regulator (PR)**, with the duty to create overall Guidelines and a common handbook to guide the public procurement process. The Regulator is appointed by the President in his own discretion and reports only to the Parliament. Agencies can create their own procurement handbooks, once these conform to the overall Guidelines, as approved by the Procurement Regulator.
2. **The Public Procurement Commission (PPC)** will be the investigative arm of the new apparatus to which complaints will be directed.
3. **The National Procurement Advisory Council (NPAC)** will be purely advisory and comprises 14 members from a broad range of named private sector/civil society organisations – the JCC, Manufacturers' Association, Chamber of Commerce, Transparency Institute – as well as the Ministry of Finance and the Tobago House of Assembly.

All expenses are to be drawn on the Consolidated Fund, with the Procurement Regulator and Advisory Council required to report annually to Parliament.

A vital part of our proposals is that Cabinet, Government Ministers or politicians are prohibited from instructing or directing these new agencies in any way.

They are intended to be entirely independent of political influence, which conforms to the proposals in the White Paper.

That freedom from political influence was also specified in both the 1997 and 2006 draft legislation.

A Complaints Procedure

The proposed system will create clear rights to make complaints or report wrongdoing. Those rights are an important aspect of any modern procurement system and we propose three types of complaints/investigations –

1. Potential tenderers/suppliers can complain, in the first instance directly to the Agency with which the tendering opportunity resides, then, if that is not dealt with satisfactorily, they can complain to the Public Procurement Commission. Ultimately, the right to seek the protection of the High Court is preserved, once the established complaints procedure has been followed.
2. The Whistleblower – We are proposing that whistleblowers be given legislative protection and practical means to bring their complaints direct to the Public Procurement Commission.
3. The Public Procurement Commission can also, on its own initiative, start an investigation into an area of concern.

There are strict time-limits for acknowledgement and resolution of complaints.

Our proposal is for the Public Procurement Commission to have powers to punish both frivolous complainants as well as parties found to be in breach of the new system. Those can range from fines to embargoes, during which offending parties can be banned from tendering opportunities. Offending public officers can be subject to both fines and/or imprisonment.

Concern About The Cost Of The New Apparatus

One of the most frequently expressed criticisms is that as critics of the rationale and operations of significant State Enterprises, we seem to be proposing a new series of State-funded agencies. Some people have pointed out that these offices are unlikely to be cheap, particularly the PPC, which is to be constituted as a standing Commission of Enquiry under those existing legal provisions.

Yes, there will be new agencies and yes, they will cost money.

Given the recent revelations as to the cost of the Uff Enquiry – already estimated to exceed $50M - there are genuine concerns that we could soon have three new state-funded agencies which could absorb, maybe, $100M a year.

The challenge here is to move beyond the obvious and factual observations so that we can consider the decisive factors. Our proposals have the promotion of Value for Money as one of its founding principles and that is good for the public. So, how can we measure the value for money of these proposals, at this stage?

The Scale of Public Procurement Spending

In the case of expenditures direct out of the Ministries, the 2011 Budget has an anticipated capital expenditure for the Ministries of $7.050Bn, as per para 8 at page 4 of the Public Sector Investment Program (PSIP).

Also in that Budget is an anticipated capital expenditure for the State Enterprises of $6.725Bn, as per the Foreword at page 4 of the Supplementary Public Sector Investment Programme (Supplementary PSIP). The combined figure of $13.775Bn is only for projects, so it excludes the salaries, rents and normal running expenses. Please note that other elements in public expenditure, beyond just capital projects, will be covered by these proposals. The guiding principle being that those activities involve the expenditure of Public Money.

There are very limited exemptions from the proposed provisions and those can be viewed at t JCC website.

There are other ways in which Public Money is being expended which are not shown in the national Budget, so the amounts are surely larger than that estimate.

The Potential For Savings

The scale of the public transactions, involving Public Money, which will come under the control of this new system is huge, at least $14Bn in size. Even if the new system saves only 5% of that sum every year, one could easily justify an annual running expense in the $100M range, as mentioned earlier. Five percent of $14Bn is $700M.

In the next three weeks, we expect our Legislators to make the crucial decisions on this series of proposals and

we all need to be vigilant to preserve the key points.

Those key points would include –

- Heads of Independent organs to be appointed by the President
- Separation of the Regulator from the Investigator
- Regulations laid in Parliament for negative resolution, with no Ministerial or Cabinet approval required.
- Independent Organs funded from the Consolidated Fund, with no requirement to seek a Ministerial approval or Budget vote.
- Accountability is ensured by the requirement to report annually to Parliament.
- Private Sector/Civil Society oversight via the National Procurement Advisory Council.
- Proper provisions for complaints and Whistle-Blowers.

The ultimate question, given what we know now, is – **Can we afford not to take this step?**

At this unique and challenging moment in what has been a long, twisted journey, the prospects of more corruption and waste are grim.

For these proposals to succeed, the legislators will have to vote in favour of a new law which reduces their power and discretion. To some, that might be an impossible contradiction and an unreasonable thing to expect, but there will be considerable political credit to the account of those who make this change happen. Our citizens deserve no less.

ON THE CUSP OF A BREAKTHROUGH

The Long History Of Public Procurement in T&T

By **WINSTON RILEY**
Past President of the JCC and Chairman of the JCC's Public Procurement Committee

The term 'procurement' is derived from the Latin prōcūrāre incorporating two Latin words, 'pro" meaning 'on behalf of or in favour of,' and 'Cura' meaning "care, concern, or thoughtfulness". In the modern sense, procurement has the sense of acquiring through best management practices.

Procurement involves more than just purchasing and can be seen as a business management process akin to supply chain management. Supply chain management deals with the management of resources brought into an organisation to support its activities. The resources under the purview of the proposed legislation are property (which includes intellectual property, goods and works) and services. The procurement process includes pre-contract activities such as needs identification, planning, analysis, sourcing and post-contract activities such as contract management, supply chain management, risk management and disposal.

Public procurement brings into play acquisition on behalf of the public, through the use of public money. "Public money" as used in the draft Public Procurement and Disposal of Public Property Act 2006 means money that is –

a. received or receivable by an agency; raised by an instrument that is issued by an agency from which it can be reasonably inferred that the State accepts liability in the case of default;
b. spent by an agency; or distributed by an agency to a person for a specified public purpose

"Agency" means ministry or department of government and includes statutory bodies, and corporate bodies and its subsidiaries in which the state exercises control. Public Procurement thus means procurement involving the use of public money for and on behalf of the public.

The history of public procurement in Trinidad and Tobago is a history:

i. in favour of the liberalisation and privatisation of public procurement through the development of different delivery and financing systems such as design bid build, design build, public private partnership.
ii. of the role played by international lending agencies (IFIs) in the privatisation of the procurement process and the destruction of the public service.
iii. In favour of authority over the procurement process by politicians as elected representatives of the central government.
iv. Which demonstrates the patent lack of accountability for public money through devices such as Government to Government arrangements and the establishment of over 72 publicly-owned private sectors firms such as UDECOTT
v. In favour of the use of the foreign private sector to accelerate the development of infrastructure. As one former minister put it, "the world is our oyster".

The history of public procurement in Trinidad and Tobago reveals also the presence of an entrenched culture acted out by elected representatives and public servants in tandem. It is a culture which perpetuates the mistaken view that control by the central government amounts to regulatory oversight and effective delivery, and which has become the major challenge to implementing an efficient procurement process in Trinidad and Tobago.

Under Crown Colony government, public procurement in Trinidad and Tobago consisted mainly of the use of a Force Account system where materials were acquired through:

1. crown agents in the United Kingdom and
2. bonded suppliers in the colony

Labour was sourced through:

a. department employees in the colony and
b. casual labour in the colony.

Management of the process was the prerogative of the colony's departments and councils.

During the period 1956 to 1960, there was a significant increase in demand for infrastructure facilities which led to the sourcing of finance from international lending agencies and an increase in public sector activity. Capital and recurrent expenditure rose from $87.4 million in 1955 to $155.3 million in 1960.

The increased demand for infrastructure facilities, coupled with the international lending agencies' preference for delivery through the international private sector, and concerns over decision-making in contract awards at the local government levelgave rise to financial management problems, prompting changes in the institutional infrastructure. These changes resulted in the establishment of two new organisations:

1. The Central Tenders Board (CTB); and
2. A Cost Accounting Division in the Ministry of Finance to control and monitor government development expenditure.

The CTB was established by the CTB Act of 1961 which came into operation in 1965.

Sub-Section 3 (4) states that the CTB has the sole and exclusive authority "save as is provided in section 35… to act on behalf of the Government and the statutory bodies." Section 35 enabled the Governor in Council- now the President of the Republic- to "make such regulations as may appear to him to be necessary or expedient for the proper carrying out of the intent and provisions of this Ordinance."

Section 33 says of the CTB that: "In the exercise of its powers and in its performance of its duties the board shall conform to any general or special directives given to it by the Minister". Minister is defined by the Act as "the Minister to whom responsibility for the Central Tenders Board is assigned."

Sections 33 and 35 demonstrate the control the Minister and the Governor in Council (now the President) maintained over the CTB. Sub sections 3 (1) and 3 (2) of the Ordinance left the door wide open for the erosion of the "sole and exclusive authority" of the CTB through deleting or in the case of statutory bodies, non-inclusion in the First Schedule. Sub section 3(1) states: "This act applies to such of the statutory bodies as set out in the first schedule to this act." Sub section 3 (2) states: "The President may by order published in the Gazette amend the first schedule to this act by adding thereto or deleting there from a statutory body."

The CTB Act not only centralised control of public procurement but placed the CTB and thus the procurement process under the control of a Minister. Since 1961 Cabinet thus has had the authority to determine the efficiency, accountability, transparency, value for money, local content and the social return on investment in the public procurement process.

In his autobiography, *Inward Hunger*, Dr Eric Williams, the Prime Minister and Minister of Finance in 1961 states." As Minister of Finance I was very much concerned with the decision to introduce a Central Tenders Board and take away the powers to award tenders from the elected representatives of local government bodies who enjoyed the privilege under existing legislation. This unsound arrangement, bad in principle, was further vitiated by the tendency of local government councillors not to award tenders to the lowest bidder. The opposition saw in this an attempt to emasculate local government bodiesd, deprive them of their rights in law and introduce the principle of centralisation."

Here we have the Minister of Finance in 1961 using a euphemism for corruption to justify the initiating of a process which supposedly would enhance the regulatory framework in public procurement. Regulatory means total control by the CTB which in turn is controlled by an elected representative of the central government at the time through the authority to give general or special directives.

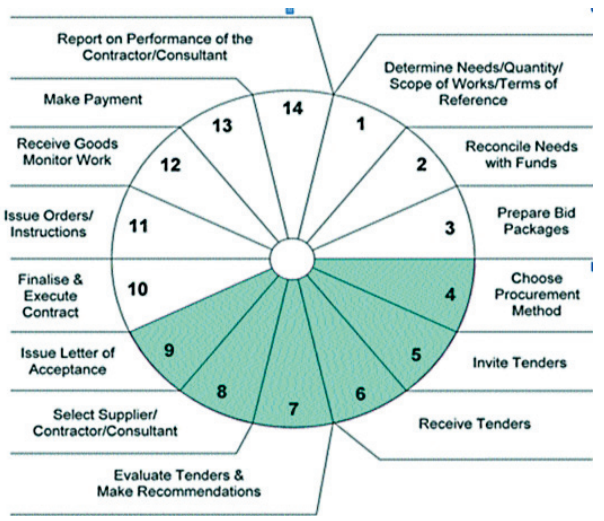
What is also important here is not only how the procurement process entrenches a culture but the emasculating impact of changes in the process on the State's organisations of governance.

The role of ministers in the procurement process is further entrenched by Sub-section 11 (1) which states, "there shall be established for every Ministry or Department of the Government not under Ministerial control a Ministerial or Departmental Committee comprised—

a. in the case of a Ministerial Committee, of a Chairman who shall be the Director or Deputy Director of Contracts and two officers nominated by the Minister responsible for the Ministry concerned and appointed by the Minister responsible for the subject of Finance;
b. in the case of a Departmental Committee, of a Chairman who shall be the Director or Deputy Director of Contracts and two officers nominated by the Head of the Department and appointed by the Minister responsible for the subject of Finance."

The Procurement cycle has at least 14 stages as indicated in Figure 1. The cycle begins when an agency conducts a needs assessment, reconciles its needs with available funds and prepares a bid package. The CTB's involvement is limited to stages 4 to 9. In an efficient and effective procurement process, the factors of accountability, transparency, value for money, local content, sustainability, the social return on investment and environmental effects should influence every stage of the procurement cycle.

Figure 1



This Cost Accounting Division in the Ministry of Finance was given the responsibility in collaboration with other Ministries to:

i. rationalise all aspects of production and services with the view to setting up definite areas of authority and responsibility with concomitant standards of output and related expenditure;
ii. Design a cost accounting machinery with a corresponding reporting

system, whereby management will be enabled to exercise a dynamic control over the cost and efficiency of operations;

iii. Maintain constant supervision to see that control systems, as instituted, are maintained with efficiency;

iv. undertake a constant review of existing systems with a view to their improvement in the light of changes in technology, in size factors, or changing requirements of management;

v. make continuous inspection of development programme projects until such time as ministries can satisfactorily undertake this function themselves, when the Cost Accounting Divisions of this Ministry will restrict its activities to ensuring that requisite control devices as approved by the Ministry of Finance, are being maintained efficiently;

vi. undertake special investigations work on its own initiative or by request;

vii. Collect and disseminate cost data on a local and regional basis;

viii. train cost personnel for Government departments.

The cost accounting unit was established in 1961. The objectives as stated above could not be faulted and contained elements of the role of the Regulator as outlined in the draft Public Procurement and Disposal of Public Property Act 2006. The facts are:

a. the unit has failed.
b. the unit no longer exists; and
c. there is a complete loss of institutional memory.

The placing of the unit in a Ministry investing it with apparently only audit and reporting functions with no authority in law, little autonomy, limited transparency and accountability, determined to a great degree the failure of the unit.

THE IMPACT OF FOREIGN LOANS AND AID FINANCING ON PROCUREMENT POLICY

Subsequent to 1961 the role of multilateral lending agencies in development increased. Their policy of financing only projects with high import content and bilateral aid, which was tied to goods and services of the donor countries, effectively limited local procurement options and accelerated outsourcing to foreign firms.

Nevertheless, in 1969, the Third Five Year Development Plan recognised the need for greater emphasis on pre-planning as one method of reducing delays in implementation. Procurement was thus regarded in the Plan as starting from "the preliminary feasibility stage and ending at the stage when the project comes into operation." This approach underscored the distinction between procurement as a complex of policy choices and procurement as a complex of laws and regulation.

IMPACT OF FOREIGN LOANS AND AID FINANCING ON ORGANISATIONS IN THE PUBLIC SECTOR

Chapter X1 section 9, of the Third Five Year Development Plan states: "*The use of consultants, who will-as far as possible within the limits set by the requirements of foreign aid and loan programs-be nationals…But the use of consultants and outside experts should be complementary to, and not a substitute for, the obtaining of trained staff permanently attached to the Ministry or agency concerned.*"

The demand to shift to the private sector was based, initially, more on the need to satisfy the interest of the donating countries of the IFIs, than on any attempt to secure efficient delivery. The issue of development of local capacity was not a priority of the IFIs. The initial shift to the private sector led to an exponential reduction in the efficiency of the public sector in-house delivery caused by the haemorrhaging of trained human capital to the private sector. Declining performance in the public sector then became the self-fulfilling justification for out-sourcing to the private sector. The decay in the public sector organisations was exacerbated through the following processes:-

i. starving of the public sector organisations of meaningful work which led to trained personnel migrating to the private sector, thus

ii. emptying of the public sector of trained personnel both at professional and sub-professional levels.

iii. Establishment of Project Execution Units within public sector organisations to manage projects funded by the IFIs. This led to the remaining experienced staff from the public sector becoming managers of these units thus further reducing the technical staff available for day to day operations and maintenance.

The net result was decay in the technical capacity of the public organisations.

LABOUR INTENSIVE SCHEMES

In 1971, the Government embarked on an expansion of the labour intensive 'Special Works' approach, using Force Account, mini contractors and bonded contractors. These approaches to delivery of works using public money had as precursors the 1959 Depressed Area Programme and the 1962 Better Village Programme. The utilisation of labour intensive schemes to deliver works represented an example of the use of procurement policy as a tool of social and economic development. This aspect of procurement policy, however, has not to-date been brought into a regulatory framework where efficiency in the use of public funds can be measured. The basic objective of these labour intensive schemes is laudable but the incentives in the procurement system have led more to piracy than efficiency, more towards criminal activity and gang violence than towards the development of trade and entrepreneurial skills.

INCREASED OIL REVENUES AND IMPLEMENTATION PROBLEMS

The Minister of Finance in the 1976 Budget Speech stated: "*Increasing concern has been expressed in many quarters about the slow and cumbersome tender procedures which, it has been argued, are geared to an earlier age of Government expenditures and revenues. Some have used this as an alibi for the increasing tendency to evade, distort, or frustrate the tender procedures… It would seem to be appropriate, however, to have a comprehensive reappraisal at this time of the existing procedures.*"

In the 1977 Budget Speech, the Minister of Finance stated: "*The Central Tenders Board and its Ordinance under which it operates are now being re-appraised. Special attention is being given to the following:*

1. the transfer to the Tenders Board of responsibility for appointment of consultants for architectural and

engineering services (the National Advisory Council considers that consultants should be graded);
2. *the question of recruitment and appointment of experienced technical competence to the staff of the Central Tenders Board;*
3. *the question of providing the Central Tenders Board with funds so that it may, whenever necessary, secure appropriate technical assistance from sources outside of the Government;*
4. *the grading and registration of contractors;*
5. *appropriate incentives to local contractors in their competition with external firms;*
6. *the scope of selective tendering;*
7. *existing provisions related to statutory boards, local government authority and ministerial committees.*"

The sudden demands placed on the local construction sector occasioned by increased revenues from oil in the seventies fuelled the concerns expressed in the 1976 and 1977 Budget Speeches. The period 1974 to 1979 thus saw several studies and reports on the CTB and the construction sector.

In search of greater output from the construction sector, the Minister of Finance in his 1978 Budget Speech announced the introduction of the Design Build delivery method and the use of pre-fabricated systems as ways to increase output. The ground was now fertile for the introduction of the most dramatic changes in the policy and regulatory framework of public procurement in Trinidad and Tobago. Two drastic policy shifts were made:

i. The Government decided to overcome the bottlenecks to the implementation of its development programme by relying on foreign expertise and organisations.
ii. The Government removed the Central Tender Board's sole and exclusive authority in the procurement process giving itself the right to contract directly.

The objectives of the shift in policy were achieved by virtue of the following amendments to the Ordinance:

Act No. 36 of 1979

The term "company" was defined to include "a firm, a partnership or a statutory corporation." Through the addition of section 20A the government relegated onto itself the authority to procure on its own behalf where –

a. "as a result of agreement for technical or other co-operation between it and the Government of a foreign state, the latter designates a company …which is wholly owned or controlled by the foreign state... to supply the articles or to undertake the works or any services…"
b. "it enters into a contract with a company which is wholly owned by the state, for the supply of articles or for the undertaking of works or services therewith…"
c. "it enters into a contract with a company for the purchase of books for official purposes".

Under the government-to-government arrangements, six ministries, four statutory bodies and three wholly state-owned development companies were used as executing agencies. The National Insurance Property Development Company (NIPDEC) was not wholly state-owned but was used nonetheless as an executing agency. This was later regularised by Act No 3 of 1993. This Act also increased the powers of the CTB to give it the authority and responsibility for appointing consultants in connection with any project. Section 27D of the Ordinance sets out the procedure for appointing consultants while section 27E gives the Board authority to negotiate fees.

Act No. 22 of 1987

This amending Act made provision for the handling of matters in the event of an emergency (flooding, hurricane, landslide, earthquake, or other natural disasters) without reference to the CTB. Once a Minister makes a decision to act in accordance with this amendment, the Minister shall report the matter to Parliament at the first sitting thereafter, and within thirty days of the completion of the works caused by the emergency situation, he or she is to submit to Parliament a report of the expenditure incurred. The amendment also provided for the public opening of Tender Boxes.

Act No. 39 of 1991

This amendment provided for a Special Ministerial Tenders Committee to be established at the Ministry of National Security to procure certain items for the Trinidad and Tobago Defence Force and the Protective Services. These items include "arms and ammunition; repair and maintenance of aircraft and Coast Guard vessels; security equipment including scanners, detectors and safe fax machines; uniforms and protective gear; aircraft, marine craft and parts thereof; and wireless equipment and spares including radar systems."

Act No. 3 of 1993

This amending Act empowered the National Insurance Property Development Company Ltd (NIPDEC) as an entity with which the Government could enter into a contract for the supply of articles or for the undertaking of works or services without the intervention of the CTB. This Act validated contracts the Government had entered into with NIPDEC as lawfully made since 1979. The Regulations made by NIPDEC with respect to inviting, considering or rejecting of offers in this regard required that it be laid in Parliament and be subject to negative resolution of Parliament.

DECENTRALISATION TRENDS

Apart from Legislative amendments, the Government continued the trend towards decentralisation of the tendering process through two mechanisms:

i. by providing newly established statutory corporations with their own contracting capability outside the purview of the CTB; and
ii. by removing statutory bodies from the First Schedule of the Ordinance, (e.g. the CTB handled award of contracts for the Port Authority of Trinidad and Tobago which was established by Act No. 39 of 1961. The Port Authority was removed from the First Schedule of the Ordinance, by Legal Notice No. 70 of June 1981. The Authority was no longer subject to the Ordinance, with regard to award of contracts).

A NOTE ON TOBAGO

The Tobago County Council was listed in the First Schedule of the Ordinance and therefore subjected to the provisions of the Central Tenders Board Ordinance. Currently, the Tobago House of Assembly, by virtue of section 78 of the THA Act, 1996, continues to follow the provisions of the Central Tenders Board

THE PRESENT INITIATIVES 2003 To 2011

In 2003 a cabinet committee was established for the reform of the Public Procurement Regime. The cabinet-appointed committee was chaired by the Ministry of Finance and all documentation was produced under the auspices of the Ministry of Finance.

The Terms of Reference of the 2003 cabinet-appointed committee were:

i. to review Government's procurement policy and processes;
ii. to make recommendations for improving Government's procurement regime, including an appropriate procurement model;
iii. to prepare a draft Policy on Government Procurement (a Green Paper including draft legislation and regulations.

A green paper was produced and laid in Parliament in June 2004. The Green Paper was titled "Reform of Governments Procurement Regime".

The Green paper was subject to public discourse through public consultations, public meetings and workshops. In addition, meetings were held with representatives of State-Owned Enterprises and government ministries. A White Paper titled "Reform of Governments Procurement Regime" was produced by the committee and laid in Parliament in August 2005.

Subsequent to the laying of the White Paper, the cabinet-appointed committee prepared a draft bill dated 2006 This draft bill plus a 1997 draft Bill entitled "A Bill to amend the Central Tenders' Board Act" was laid in Parliament in June 2010. A Joint Select Committee (JSC) was established on 1st October 2010 to examine those proposals, invite submissions and make recommendations.

In 2010 the private sector component of the original Cabinet-Appointed Committee of 2003 under the chairmanship of the past president for the Construction Industry (JCC) Winston Riley convened a series of consultations which resulted in a submission a revised version of the 2006 draft bill to the Joint Select Committee entitled "Private Sector Submission to the Joint Select Committee (JSC) on Legislative Proposal on Procurement Reform".

The private sector submission took as a basic assumption that the only policy position which was placed in the public domain for comment and subject to negative resolution by Parliament is outlined in the 2005 White Paper. The private sector group was on March 2nd 2011 invited to meet with the JSC.

CONCLUSIONS

At present Trinidad and Tobago (T&T) has 26 Ministries, 73 Government Bodies and 58 State Enterprises.
In addition the capital and recurrent expenditure in 1960 was $155.3 million. In 2011 our total expenditure is pegged at $49 billion. T&T has been subjected to the Piarco and Uff commissions of enquiry on corruption. Procurement is a major risk area for corruption in the public sector The management of the risk of widespread corruption requires the political will to change the culture which substitutes central government control for good governance.

The issues of regulatory oversight, complaint and investigatory procedures are now centre stage. These issues are addressed in the Private Sector Submission to the Joint Select Committee. It is important to note that although the term decentralisation is used in this submission, only procurement functions were decentralised or outsourced.

The CTB started with decentralisation of functions. Under government-to-government arrangements procurement itself was outsourced to foreign governments. What is important to note is that authority at every step remained centralised and under the control of ministers. Herein lies the vexing problem of the SOEs in the procurement process where:

i. Corporation Sole is the shareholder under the Corporation Sole Act and is the Minister responsible for finance.
ii. the board of directors and the CEOs are political appointees
iii. the SOEs are subject to the regulatory processes under the Companies Act
iv. the minister responsible for a specific SOE can give general and specific directives; thus the CEO reports to the Permanent Secretary of that specific ministry.

It is now clear that although ministers and, by extension cabinet, has since 1962 had complete authority over the public procurement process the vexing problem of proper and productive use of public money remains. The lack of accountability for public money has made a mockery of the relationship between Parliament and the Executive and infested the social fabric with a piratical approach to private progress.

References:

1. *2005 White Paper: Reform of Government on Public Procurement,*
2. *Politics of Procurement 1 and 2 (2002 and 2008) WRiley,*
3. *Private sector Submission to the Joint Select Committee on Legislative Proposals on Procurement Reform.*

A MODERN LAW FOR A NEW CULTURE

By **CARLA HERBERT**
Attorney-at-Law

Government contracts form a significant part of the economy. The contract involving public money, that is, money received or receivable by government or a government agency such as State owned enterprises, is a tool of public administration. A Government contract is the purchase of property and services using public money. A government contract is not quite the same as a contract between parties in the private sector. It is subject to a higher standard.

A government body cannot be fettered if there is a contest between the contract and government's public responsibilities. It is sometimes assumed that because a contract is used no special rules apply and that Government is the same as anyone else. But this assumption becomes questionable if the subject of the contract is being used for Governmental purposes. For example if the contract is to provide human services to third parties, how can a breach that adversely affects the third party be said to cause any loss to the contracting party?

Government also by its very nature is a moral exemplar. "If the government becomes a law breaker, it breathes contempt for the law, it invites every man to become a law unto himself, it invites anarchy." Olmstead vs United States 277US438, (1928). Government's role as a teacher is relevant to its commercial activity and informs the related law. It is incumbent upon Government to ensure its agencies perform impeccably when entering into contracts as well as policy documents, guidelines, codes of conduct or legislation.

Because of the involvement of government in a contract the presence of public law values sometimes lie uneasily with strict commercial rules of private law that inform the contract. The list of public law values includes openness, fairness, participation, impartiality, accountability, honesty and rationality.

The justification for special standards in procurement contracts is that government never spends its own money. It is spending taxpayers' money, public money, yours and mine. In real terms this means we, the taxpayers, are liable for Government's bad spending and conversely we benefit from government spending when transparency, accountability and value for money are apparent. Government therefore must act in a fair and ethical manner.

In Hughes Aircraft Systems International vs Air Services Australia (1997) ALR 1) Finn J, found that a public tender is governed by a "process contract". The terms of this type of contract includes "not only the expressed rules of tender but also implied terms that the government party would conduct its tender evaluation fairly and deal even-handedly with the tenderers in the performance of the process." This statement was influenced by the public nature of the contracting party which was a semi-governmental agency.

In a private contract the company officials are in the business of making profits. If they perform badly the shareholders advise them accordingly. In a public contract i.e. involving public money the accountability to the taxpayers is by a very different route. Taxpayers have a limited avenue of redress for bad management of their money or for poor delivery of services therefore public enterprise is very different from private enterprise – and this difference is to be reflected in the applicable law.

At present, the T&T government has tabled in Parliament two Bills entitled the National Tenders Board Bill, 1997 and the Draft Public Procurement and Disposal of Public Property Bill, 2006. These were referred to a Joint Select Committee who invited comments from the public. The private sector submitted a Draft Bill entitled "Public Procurement and Disposal of Public Property Bill 2011"

This Bill accords with the only Policy statement put out by any government. This Policy, (being the White Paper on Public Procurement Reform) was laid in Parliament in September 2005 by the Manning administration. It was the culmination of Private/Public sector participation and hours of public consultation. The issues canvassed and resolved are grounded in the universal acceptance that good governance in transactions involving public money must manifest the operating Principles of Transparency, Accountability and Value for Money and meet the objectives of economy, efficiency, competition and fair dealing.

In public procurement where the main tool is a contract, the governing law is a fusion of public law and contract law (private). In public law it is standard form for the reference and application of principles such as natural justice and those of transparency and accountability. In contract or commercial law traditionally the law is only concerned with interpreting the strict agreement between the parties and consequential damages.

THE PRIVATE SECTOR SUBMISSION A SYNOPSIS OF DRAFT BILL 2011

Introduction

The design and the content of the Bill with its emphasis on the Guidelines of the Bill provides for continuous review of practices so that there is conformity with best current practice. The norm in Trinidad and Tobago is for administrative processes to be prescribed in regulations made by a Minister which are generally not maintained for relevance and which, by their nature, attract a literal style of interpretation by the courts. While the Private Sector Submission draft law reflects, in principle, the Central Tenders Board Ordinance in that it recognises the need of an independent third party involved in the system, to ensure impartiality, fairness and competition in the award of contract, it avoids the pitfalls of the current system as manifest by the CTB Ordinance and its regulations as

discussed in the White Paper.

The CTB Ordinance and its regulations do not apply to the full range of public bodies spending public money for property and services. It does not apply to the full procurement process. Procurement involves a lot more than going to public tender – procurement involves the process commencing with the identification of the need for the property or services to be supplied to the assessment of the effectiveness of the performance of the parties to the contract. It does not treat with complaints nor does it treat with publication of awards.

While the current law falls short, lessons can be learned.

The prime responsibility for the integrity of public expenditure must be that of the parties to the contract. The parties to the contract operate within an overarching framework which dictates to them how they are to conduct the business of purchase and supply of property and services involving public money.

The expressed intent of the Bill is to maximize economy and efficiency in public expenditure being defined in the Bill to mean "the process of acquiring money or services commencing with the identification of the need of the property or services and with the assessment of the performance of the related contracts.

The Bill reflects the assumption that expenditure involving public money triggers a prime responsibility of the purchaser who uses public funds for a transaction to ensure that the people get value. The Bill does not inhibit the common law doctrines in relation to contract nor does it specify a rigid process. Rather, it establishes the overarching legal framework founded on principles of public law in which contractual rights will operate. It enables customizing and responsibility of the procurement process to reside with agencies while identifying key points in the procurement system to which all agencies must adhere. The relevant design and monitoring of the procurement system within the specified parameters of the principles of accountability, transparency and value for money is the function of an independent Procurement Regulator appointed by the President.

This Bill therefore heralds the Government's stated intention to strengthen the quality of governance by promoting these principles of good governance by systemic re-engineering of the public procurement system, currently residing in the Central Tender Board Ordinance (CTB).

Critical to the proposed new procurement regime is a clear understanding of the concept of 'public money'. This encompasses –

- all money received or receivable by an agency regardless of source
- all money received by a non-public body from an agency

This means the law is to apply to procurement funded by loans or promises for which the taxpayer is liable in case of default. The legal framework will embrace expenditure by an agency which is essentially an organisation using public money for a public purpose:

- a public organization even if for a private purpose
- a private organization for a public purpose regardless of the source or type of funding if it can be identified that the State is ultimately liable

This was in fact a core issue in NH International (Caribbean) v Udecott & Hafeez Karamath HCA No. 3181 of 2004 where the Court of Appeal found Udecott's tender processes to be outside the realm of public law notwithstanding it did find Udecott was a public body, as the tender process was found to be a commercial process, and thus not subject to public law

However Sharma CJ, the dissenting judge allowed the appeal: "*…in a small country which possesses enormous wealth and in which allegations of corruption are rife, the government has proclaimed its commitment to accountability, transparency and integrity in public affairs. The Courts have a special role to play in protecting this ethos particularly in state companies incorporated as private companies with unlimited taxpayers funds at their disposal and the freedom to bypass the Central Tender Board (CTB).*"

He was influenced by the correlating of the use of public money and the protection of the public interest. This Bill, reflecting Judge Sharma's concerns, should assist the Court.

BRIEF DESCRIPTION OF THE BILL

The crux of the Bill is the mandatory compliance with the Operating Principles, Objectives and Guidelines by all parties to transactions related to the procurement of property, services involving public money and the disposal of public property. The details of the procurement process will in general terms be dealt with in the Guidelines whilst the customized details in respect of an agency will be found in Agency Handbooks. All documents are to be publicly available.

The responsibility for the effective operation of the overarching system will reside in an independent Procurement Regulator who directly accounts to Parliament while the accountability for the actual acquisition of property and services and the disposal of property acquired with public money will reside with the agencies.

The Bill requires that all parties to a transaction involving public money for the acquisition of property and services or the disposal of public property will need to ensure that their conduct, processes and documentation conform to stated objectives of–

- Economy, efficiency and competition
- Ethics and fair dealing according to the highest standards of probity and professionalism
- Promotion of national industry in a manner that conforms to the international obligations of Trinidad and Tobago
- Sustainable development taking into account the Social return on investment.

The Operating Principles and the Objectives will inform the National Procurement Guidelines which, in turn, will inform the content of Handbooks for various categories of transaction which are to be prepared by the agency.

The Guidelines will be developed by the Procurement Regulator in consultation with the National Procurement Advisory Council. The Council will comprise a total of 14 persons including representatives of private sector organizations, appointed by the President to represent civil society, and representatives from the public sector including the Ministry of Finance and the Tobago House of Assembly.

The Bill also provides for a Public Procurement Commission, essentially a specialist administrative tribunal, to treat with irregularities and complaints of non-

compliance with the Operating Principles, Objectives and Guidelines. The members of the Commission are to be appointed by the President and are answerable to Parliament.

Apart from the accountability framework, the Bill also prescribes penalties for non-compliance with the Operating Principles, Objectives and Guidelines: a fine of $500,000 and imprisonment for seven years where no other sanction is prescribed. As these penalties indicate an indictable offence, the Bill ensures the applicability of the Proceeds of Crimes Act, 2000. This may be used by the State for the tracing of assets to reclaim public money in the event that there is a breach of the Act.

Where a transaction is found either by a court or by the Public Procurement Commission to be in breach of the Act it is prescribed to be void – the common law result of a contract in breach of public policy.

For the purpose of operational flexibility for local conditions and to take into account the culture of an agency, the Bill enables the Chief Executives of agencies (which include ministries and departments, statutory bodies and their subsidiaries, state-controlled enterprises and their subsidiaries) to issue instructions to treat with the procuring procedures of their respective agencies. These Agency Instructions are to be complied with by all parties to a transaction so long as they do not breach the Operating Principles, Objectives and Guidelines and will include details of the authorized purchasing officers and purchasing responsibilities, including the quanta of their purchasing limits. They are required to be in the public domain.

Apart from the Guidelines and the Agency Instructions of the Chief Executive, the relevant procedures in respect of the transaction to aid purchasers using public money will be provided in support documents as Handbooks. These may be developed by the Procurement Regulator as model Handbooks which can be customized by the agency. The Bill thus enables the internal procuring rules of a state-owned enterprise to be incorporated into the Handbook for the respective agency.

The Bill thus enables the incorporation of existing procedures into the proposed legal and regulatory framework. The Bill enables model Handbooks to be designed for different types of categories of transactions such as those pertaining to construction, consultancy services and Information Technology.

The Procurement Regulator will also have the function of –

- enabling agencies to explore alternative service delivery options thereby saving the taxpayer
- promoting flexible and accountable systems for procurement
- encouraging a streamlined Government procurement framework which will enable compliance with Framework Agreements on a holistic basis
- implementing a procurement system to foster small to medium enterprises which encourages local industry and employment
- providing best practice advice on the conduct of procurement, including promoting electronic transactions which, in the circumstances of operation expects significant savings
- auditing and reviewing the procurement system to ensure compliance with the Operating Principles and Objectives which will require generally the monitoring of award and implementation of transactions all to be in the public domain.

The Procurement Regulator will also be required to prepare an Annual Report to be submitted directly to Parliament identifying inter alia:

- the strengths and weaknesses of the procurement system and steps taken to rectify any weaknesses
- the total value of contracts awarded by agencies so that Parliament can get an idea of the amount of public money involved in procurement
- outcomes of investigations, and lessons learnt which are to be or have been fed back into the procurement system through amendment of the Guidelines.

The Procurement Regulator will be supported by a statutory body to be known as the Office of the Procurement Regulator. The expenses of both offices are to be a charge on the Consolidated Fund.

The Public Procurement Commission has, with a direct reporting accountability to Parliament, the function of investigating breaches of the procurement system by parties to a transaction involving the expenditure of public money.

As an essentially administrative tribunal, it will have the powers of a Commission of Enquiry as if it were a Commission properly constituted under the Commissions of Enquiry Act, Chapter 19:01. The sanctions it may employ are, inter alia, to order a suspension of the contract pending the hearing in a court of law or to find the transaction to be in breach of the Operating Principles and Guidelines resulting in it being voided. It is noted that any decision it makes is subject to the Judicial Review Act, 2000.

However, persons bringing frivolous complaints to this body will be penalized and parties would need to have used mechanisms for redressing complaints at agency level through the processes specified in the contract and tender documents and or as specified in the guidelines.

Where parties comply with the Operating Principles, Objectives and Guidelines it is highly unlikely there will be much recourse to the Public Procurement Commission.

SOME OBJECTIONS ADDRESSED

The law prescribes the application of “Operating Principles of Accountability, Transparency and Value for Money and Objectives” for efficiency, economy, competition and fair dealing. It is argued that these will present a difficulty for the courts to interpret.

However, citation of principles in laws is a modern development in public law legislation such as public service management or that pertaining to financial expenditure management. For example the Public Service Act of Queensland 2005 specifies the Principles of the Public Service to include selflessness, honesty and integrity while the Financial Management and Accountability Act of Guyana recites principles of prudent fiscal management. The prescribed principles and objectives as amplified in the proposed Guidelines avoid the inflexibility of regulations while providing the courts and the users with a comprehensive statement of the outcomes and objectives that apply to all transactions irrespective of size and quantum.

The Guidelines will have force of law and are designed to ensure the application of best current practices in procurement including those relating to Transparency and Publication, Methods of Procurement, Criteria for use of Selective or Limited Tendering Methods, Specifications, Qualifications of Suppliers, Competitive negotiation methods, opening of tenders, information on contract awards, supplier list, framework agreements, bid challenge procedure, time requirements and e-auctions, amongst other matters. As such it is the function of the Procurement Regulator with advice from private and public sector users to keep the Guidelines relevant and effective in accordance with the Principles and Objectives.

All Agencies- meaning Government departments, statutory bodies and state-owned enterprises must publish handbooks and agency instructions so that the public knows who is an authorised purchaser for the agency and the limits of their purchasing power. The law as envisaged should provide sufficient data to aid the courts and other tribunals in the protection of the public interest.

IMPACT OF PROPOSED BILL

This in turn should develop greater public confidence in the quality of Government. The Bill once implemented will address sloppy management practices of public procuring agencies through constant monitoring and auditing by a cross-disciplinary staffed Office of the Procurement Regulator. Specialised procurement units would need to be established in agencies, thus creating a cadre of professionals in public procurement throughout the system.

Given the nature of governance in Trinidad and Tobago as articulated by Sharma CJ, the Bill, by its design, protects a Minister from direct involvement in procurement thereby mitigating allegations of corruption by the Executive. It also reinforces the constitutional duty of Parliament for the quality of public spending. Given the multi-billion dollar nature of the activity, the proposed reforms in the Bill, which provides for the incorporation of inputs at an operational level from both the private and public sectors, reflects concrete and practical support for good governance, savings and an enhanced reputation in international financial circles, all of which augur well for a prosperous Trinidad and Tobago.

A LAW TO TACKLE CORRUPTION

By **BOYD REID**
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Good procurement legislation will not, on its own, protect a society from the ravages of corruption. But it certainly can help.

Parliament can enact laws that set up effective checks and balances on those who have access to the public purse, holding them accountable and providing for the punishment of those who fail to obey these laws.

The current legal framework for public procurement, based on the Central Tenders Board (CTB) Act dating back to before Independence, has become inadequate as a check against corruption.

A Legislative Proposal to provide for Public Procurement and the Disposal of Public Property was laid in Parliament in October, 2010 for the consideration a Joint Select Committee (JSC). An amended version of this document was submitted to the JSC by a committee of representatives of private sector/ civil society organisations convened by the Joint Consultative Council for the Construction Industry (JCC) as a proposed Draft Public Procurement and Disposal of Public Property Bill, 2011. (It is available at: http://www.jcc.org.tt/policy.htm.)

This Draft Bill is designed to be, among other things, an adequate bulwark against corruption in public procurement.

COVERING THE WHOLE PROCESS

A major weakness of the current law is that it does not cover some important parts of the procurement process. As the Government's official policy statement, the 2005 White Paper on Reform of the Public Sector Procurement Regime, says:

> *According to the law, the CTB is the procuring agency of the State but its activities are limited mainly to the tendering stage of the procurement cycle. It is not responsible for the design stage at which the critical decisions involving the spending of public money are taken. It is neither responsible nor equipped for the monitoring of project implementation.* ***(Executive Summary: C.i)***

So the way is made easier, for example, for a decision to run a new highway through property owned by a financier of a party in power so that the financier may benefit from a lucrative sale to the State.

This weakness is common to many procurement regimes around the world and so Transparency International (TI) has made its Minimum Standards for Public Contracting (downloadable from: http://www.transparency.org/global_priorities/public_contracting/tools_public_contracting/minimum_standards) apply to:

… the entire project cycle, including needs assessment, design, preparation and budgeting activities prior to the contracting process; the contracting process itself; and contract implementation.

The Draft Bill has the same scope. It defines 'procurement' as 'the process of acquiring property and services commencing with the identification of the need for the acquisition and ending with the performance of the related contract' (Clause 2).

So it will, for example, make it more difficult for contractors to defraud the State during the course of project implementation.

COVERING ALL WHO SPEND PUBLIC MONEY

A second major weakness of the current law is that it covers mainly Government departments.The other agencies, such as the State-owned enterprises (SoEs), that have actually been doing the bulk of public procurement do not, in effect, fall within its purview.

As the White Paper notes:

> *The exclusion of several significant procuring agencies from the purview of the CTB results in parallel procurement systems about which there are concerns relating to guidance and control, lack of transparency and accountability, and unfair practice.* ***(Executive Summary: Section C.ii)***

You need go no further than the report of the Uff Commission of Enquiry to find examples of these concerns. Clearly, under the present system, the doors at SoEs are wide open to large-scale corruption.

The Draft Bill remedies this by providing a legal and regulatory framework not for specific agencies but for specific transactions. These are procurement transactions that involve public money, defined (in Clause 2) as… money that is-

a. received or receivable by the State, a statutory body or a state controlled enterprise;
b. raised by an instrument from which it can be reasonably inferred that the State accepts ultimate liability in the case of default;
c. spent or committed for future expenditure, by the State, a statutory body or a state controlled enterprise;
d. distributed by the State, a statutory body or a state controlled enterprise to a person; or
e. raised by a private body in accordance with a statutory instrument, for a public purpose;

The same overarching legal and regulatory framework will govern all agencies procuring with public money—including SoEs. (See Clause 4: Application of the Act.)

OVERSIGHT AND CONTROL

A further weakness noted by the White Paper is the lack of general oversight and control:

> *While the Auditor General is responsible for auditing and reporting on public expenditure matters annually, there is no agency charged with the responsibility for systemic monitoring and dispute resolution in relation to public procurement within an accepted policy framework.* ***(Executive Summary: Section C.iii)***

Anyone who followed the public hearings of the Piarco Airport Project and the Construction Sector enquiries could have hardly failed to realise that public procurement in Trinidad and Tobago is sadly lacking in appropriate, effective regulation.

For example, it emerged at the Airport enquiry that it was possible for the CTB to be ignored by the Airports Authority even when the regulations required a representative of the former to sit on the latter's Tenders Committee.

It has become clear that such monitoring mechanisms as exist under the current procurement regime are largely ineffective. The cat is, in effect, often away and, as a result, the mice can have a ball.

As for dispute resolution, this almost always involves lengthy court proceedings—for those who can afford them.

To reduce corruption in public procurement, therefore, appropriate oversight and control are essential. The Draft Bill makes ample provision for this by the establishment of the Office of Procurement Regulator and a Public Procurement Commission.

AN INDEPENDENT REGULATOR

The prime function of the Procurement Regulator (Part IV, Clauses 23 to 28) is to ensure an effective, efficient and relevant procurement system that conforms to the prescribed principles, objectives and guidelines. The Regulator is required to develop, implement and review the guidelines and monitor their implementation by the procuring agencies.

It is very important to note that, in the exercise of his functions, the Procurement Regulator, like the Auditor-General, is not subject to the direction or control of any person. The Regulator is appointed by the President in the exercise of his own discretion [Clause 23(1)] and is directly accountable to Parliament for the performance of his functions and powers [23(2)].

This independence is essential if the new procurement regime is to be effective in the tackling of corruption. In no way could it work if, for example, the Regulator were made accountable to, say, the Minister of Finance.

This accords well with the TI Minimum Standards' requirement that public procurement authorities should:

> *10. Ensure that internal and external control and auditing bodies are independent and functioning effectively, and that their reports are accessible to the public. Any unreasonable delays in project execution should trigger additional control activities.*

A standing commission of enquiry The Public Procurement Commission (Part III, Clauses 11 to 22), appointed by the President and directly accountable to Parliament, is constituted as a standing commission of enquiry. It may investigate any procurement transaction so as to ensure conformity to the prescribed principles, objectives and guidelines. The Commission may, pending the outcome of the investigation, suspend the procurement process and employ mediation techniques. At the end of the investigation the Commission must advise all parties to the transaction of the outcome and report accordingly to Parliament. The Commission may refer matters to an appropriate authority, such as the DPP, for further action.

These provisions of the Draft Bill for oversight and control implement the policy set out in the 2005 White Paper. If they had become law in 2006 or 2007, would we have needed the Uff Commission?

PUBLIC INFORMATION

The fourth weakness of the current procurement system listed by the White Paper is that it lacks transparency.

- *There is no system in place to provide suppliers of property and services as well as the wider public with full, up-to-date and electronically accessible information on tender opportunities, on the status of bids and awards, and the progress of major projects.*
- *There is no single national registry of contractors, consultants and suppliers.*

(Executive Summary: Section C.iv)

Corruption can only thrive in the dark. For obvious reasons, those involved in stealing from the public purse don't want their activities exposed to the light of public scrutiny.

That is why the Draft Bill, in Clause 4, requires all parties to public procurement transactions to comply with the principle of Transparency.

How the procurement process is to be made compliant is set out in general terms in the National Procurement Guidelines [Clause 5(1)(a)]. These are to provide, for example, for the publication of transaction details [5(1)(b)], public consultation on major contracts [5(2)(c)], a process of independent reviews at critical points [5(1)(f)], establishment of a public database [25(4)(c)], agencies' procurement records being made publicly available [35] and the publication by agencies of the award of contracts [36].

Detailed prescriptions on implementing transparency are to be provided in the Handbooks (Clause 6) and Instructions (7), developed by the procuring agencies and approved by the Regulator. All documents are to be publicly available.

The Draft Bill, as far as providing public information is concerned, conforms in large part to TI's Minimum Standards document which states that public procurement authorities should:

6. Provide all bidders, and preferably also the general public, with easy access to information about:

- *activities carried out prior to initiating the contracting process*
- *tender opportunities*
- *selection criteria*
- *the evaluation process*
- *the award decision and its justification*
- *the terms and conditions of the contract and any amendments*
- *the implementation of the contract*
- *the role of intermediaries and agents*
- *dispute-settlement mechanisms and procedures.*

Confidentiality should be limited to legally protected information. Equivalent information on direct contracting or limited bidding processes should also be made available to the public.

INTEGRITY

In TI's Minimum Standards document we read that the public procurement authorities should:

1. Implement a code of conduct that commits the contracting authority and its employees to a strict anti-corruption policy. The policy should take into account possible conflicts of interest, provide mechanisms for reporting corruption and protecting whistleblowers.
2. Ensure that all contracts between the authority and its contractors, suppliers and service providers require the parties to comply with strict anti-corruption policies.

This may best be achieved by requiring the use of a project integrity pact during both tender and project execution, committing the authority and bidding companies to refrain from bribery.

ETHICS AND FAIR DEALING

The Draft Bill in Clause 4(2)(b)(ii) states that "*a person who is a party or seeks to be a party to a (procurement) transaction shall ensure that the transaction … addresses … ethics and fair dealing according to the highest standards of probity and professionalism; …*"

The Mandatory Guidelines spell out some of the implications of this in relation to the elimination of conflicts of interest, the non-disclosure of confidential information, the ensuring of fairness in the pre-qualification and tendering procedures.

Also, Clause 9 of the Draft Bill identifies the persons in procuring agencies who are authorised to execute procurement transactions. The names of such persons are to be published. [9(3)]

Among other things, these persons are "personally liable for the damages incurred by the agency as a consequence of entering a transaction in breach of the Operating Principles, Objectives and Guidelines" [9(5)]. An authorised person is "deemed to be 'a person in public life' for the purposes of the Integrity in Public Life Act, 2000" [9(6)]. "A person who wrongly represents himself as a person authorized to enter a transaction commits an offence." [9(7)]

Neither Cabinet, a Minister of Government nor a person directly instructed by either, is authorised to enter a transaction.

Clause 10 prohibits suppliers from entering into transactions with unauthorised persons under pain of debarment.

Clause 21 enables the Procurement Commission "to make a special report to Parliament in the event that it finds that an officer of an agency is in breach of his duty, commits misconduct or a criminal offence, which report it further refers to the appropriate agency for further action."

OFFENCES

The Draft Bill, Clause 39, determines offences under the Act. These include the exercising of "undue influence which results in a transaction being in breach of the Operating Principles, Objectives or Guidelines" [39(1)] as well as the case of an officer of an agency who "maintains a standard of living above that which is commensurate with his present or past official emoluments; or is in control of financial resources or property disproportionate to his present or past official emoluments" [39(2)].

Where no other sanction is prescribed, the Bill prescribes a fine of $500,000 and imprisonment for 7 years for offences under the Act. [Clause 40(1)]. As these penalties indicate an indictable offence, the Bill ensures the applicability of the Proceeds of Crimes Act, 2000. [40(2)] This may be used by the State for the tracing of assets to reclaim public money in the event that there is a breach of the Act.

WHISTLEBLOWER PROTECTION

Clause 38 requires a person who "has a reasonable belief that collusion between all or any of the interested parties to a transaction, or reasonably believes that an irregularity or a breach of this Act has occurred… to report accordingly to the Procurement Regulator, or the Public Procurement Commission."

Clause 41(1).states that "a person shall not be discharged, demoted, suspended, threatened, harassed, or financially prejudiced or otherwise discriminated against for making" such a report. Clause 41(2) provides for the reinstatement of a person who has been victimised in this way.

The victimiser is liable on conviction to a fine of $150,000 and imprisonment for 6 months. [41(3)]

INTEGRITY PACTS

Clause 5(2)(d) of the Draft Bill states that the National Procurement Guidelines may address "the use of a joint undertaking by all parties (involved in the procurement process) to comply with an agreed code with sanctions."

TI's Integrity Pact (see Minimum Standard 4 above) is precisely this kind of undertaking in that there is a written agreement between the procuring agency and all bidders to refrain from bribery and collusion.

Bidders are required to disclose all commissions and similar expenses paid by them to anyone in connection with the contract.

Sanctions for violation of the agreement may include:

- Loss or denial of contract;
- Forfeiture of the bid or performance bond and liability for damages;
- Exclusion from bidding on future contracts (debarment); and
- Criminal or disciplinary action against employees of the agency.

A monitoring system provides for independent oversight and increased accountability of the process. It aims to ensure that the pact is implemented and the obligations of the parties are fulfilled. The monitor performs functions such as:

- Overseeing corruption risks in the contracting process and the execution of work;
- Offering guidance on possible preventive measures;
- Responding to the concerns and/or complaints of bidders or interested external stakeholders;
- Informing the public about the contracting process's transparency and integrity (or lack thereof).

TI has seen the pact tried and tested in hundreds of contracts in over 15 countries.(For more information see: http://www.transparency.org/global_priorities/public_contracting/integrity_pacts)

INTERNATIONAL CONVENTIONS

Trinidad and Tobago is signatory to the Inter-American Convention Against Corruption (IACAC) and to the United Nations Convention Against Corruption (UNCAC).

(The IACAC is available at: http://www.oas.org/juridico/english/treaties/b-58.html while the UNCAC can be found at http://www.unodc.org/documents/treaties/UNCAC/Publications/Convention/08-50026_E.pdf).

Here are some of the ways in which the Draft Bill contributes to the fulfillment of T&T's obligations under these treaties.

PROCUREMENT REFORM

If the Draft Bill became law we would become compliant with IACAC Art. III(5) which urges State Parties to develop systems of public procurement of goods and services that assure their openness, equity and efficiency.

T&T would also comply with UNCAC Art 9 which requires that States Parties establish appropriate systems of procurement, based on transparency, competition and objective criteria in decision-making that are effective, inter alia, in preventing corruption.

WHISTLEBLOWER PROTECTION

The provisions of the Draft Bill for whistleblower protection (Clauses 38 & 41, outlined above) are in full accord with IACAC Art. III(8) urging the development of systems for protecting public servants and private citizens who report acts of corruption.

They also comply with UNCAC Art 8(4) that urges the establishment of measures and systems to facilitate the reporting by public officials of acts of corruption and with UNCAC Art 33 that calls for protection against any unjustified treatment for any person who so reports.

CIVIL SOCIETY PARTICIPATION

Both IACAC Art III(11) and UNCAC Art 13 urge the promotion of the active participation of individuals and groups outside the public sector, such as civil society … in the prevention of, and fight against corruption.

The Draft Bill in Part V (Clauses 29 to 32) establishes a National Procurement Advisory Council which is a purely consultative body that provides inputs into the design of the system. Among its membership are nominees of three civil society organizations which are publicly acknowledged as having a concern for good governance.

A true anti-corruption Bill

The Draft Bill:

- brings all agencies spending public money under an overarching legal and regulatory framework that effectively covers all stages of the procurement process;
- provides effective mechanisms for oversight and control;
- requires appropriate transparency; and
- ensures as far as possible integrity in the system.

It meets international anti-corruption standards and makes Trinidad and Tobago more compliant with international anti-corruption conventions.

Made into law it would be a powerful weapon in our country's fight against corruption.

A LOCAL CONTENT POLICY FRAMEWORK

By **Dr TREVOR TOWNSEND and MARK SANDY**
Trinidad and Tobago Manufacturers Association

The construction sector is recognised as an essential component in the role of national development. The Government has an obligation to ensure that domestic procurement practices are in compliance with international best practices. Such a policy will guarantee a significant market share to local contractors, providing opportunities for development of the construction sector of Trinidad and Tobago.

This policy framework will act as a guide for a Partnership approach between the local business sector and Government (both Central and Local), specifically, individuals and enterprises engaged in the construction sector, operating within and outside of the country.

Historically, much of Trinidad and Tobago's construction tendering was based on lowest price. However, the construction sector requires a variety of professional skills, expertise, technology, labour, material and capital. In order to ensure continued development of local skills and expertise it is essential to ensure that local participation within the sector is maximised.

It is with maximum local participation that there will be development of local skills and expertise which would result in a more efficient and competitive construction sector in the world marketplace. It is also understood that from time to time it would be necessary to engage foreign expertise with the necessary skills to ensure a satisfactory level of development in the national interest.

The immeasurable value such initiatives can bring to the local construction sector provides compelling reasons for the development and enactment of a local content and participation policy in Trinidad and Tobago.

PURPOSE

This policy framework seeks to identify the guiding principles for partnership between Government and the construction sector that will determine:

- The major mechanisms for local content, participation and capability development
- Where, how and by whom these will be delivered
- The performance measurement, assurance and reporting processes to be used
- Key areas for priority focus

This partnership aims to deliver construction projects to time and to budget, with less defects and accidents on site. The Government of Trinidad and Tobago will benefit from maximising the impact of its construction expenditure, modernising the relevant authority's procurement process and delivering best value from improved knowledge.

VISION & POLICY FRAMEWORK

To achieve the goal of maximizing value for the country, the Government and people of Trinidad and Tobago should participate in the construction sector and engage external participants in a manner that captures and adds value on two fronts:

1. Fiscal Measures – through the use of
   i. Taxation and
   ii. Government expenditure

to capture value from the sector and to extend it by building local capabilities that supports growth of the sector.

2. Non Fiscal Measures – through
   i. Local Participation – maximising the depth and breath of local ownership, control and financing, in order to increase local value-capture from all parts of the value chain, including those activities in which T&T people, business and capital are not currently engaged, both within and outside of T&T.
   ii. Local Content – maximising the usage of local goods and services, peoples, businesses and financing.
   iii. Local Capability Development – maximising the impact of activities within the construction sector, through the transfer of technology and expertise to
      a. Enhance, deepen and broaden the capability and international competitiveness of T&T's people and business within the sector
      b. Provide on-going training programmes to ensure sustainability of the expertise developed with T&T
      c. Provide intelligence and support for T&T's people and businesses within the sector to expand competition within and outside of T&T.

"Local Content and Participation" – collectively referred to as "local value-added" – will be defined in terms of ownership, control and financing by citizens of Trinidad and Tobago.

While, typically, the themes of "local content and participation" have focused primarily on the aspects of in-country activity, Trinidad and Tobago recognises that the construction sector has tremendous potential to develop local capabilities and expertise outside of the country and which, potentially, are not likely to be achieved without specific strategies for doing so.

This policy framework addresses local content and local participation in a manner that:

- Will maximise utilisation and development of T&T nationals, professional firms and businesses owned by nationals in all areas of the construction sector
- Recognises the impact of other mechanisms for maximising local value-added in the short term, while building capability for increased value capture now and in the future
- Seeks to ensure that T&T does not overlook opportunities provided

by activities in and support of the construction sector, so that
- Supporting construction sector policies and strategies on human and enterprise development will be consistent with this policy framework
- All Government, state and quasi-state agencies, regulator bodies, strategies and contracts or agreements are aligned with these policies
- All policies will be vigorously applied to ongoing, proposed and future individual projects, operations and suppliers of goods and services in the construction sector.

LOCAL CONTENT AND PARTICIPATION POLICY STATEMENT

The Government of T&T should take every opportunity to partner with the construction sector on pipeline projects that will maximise the local value-added and value-retention from the activities within the construction sector, whether those activities occur within T&T or not.

The Government should consistently define Local Content and Participation in terms of the level of ownership, control and financing by citizens of Trinidad and Tobago, in conformity with internationally accepted norms, best practices and the key tenets of international conventions, such as GATT and GATS.

LOCAL CONTENT POLICY IMPLEMENTATION

In order to achieve the goal of maximum local content and participation, the Government should ensure that all participants in the construction sector are selected, engaged and managed in a manner that:

1. Identifies WHERE to enable local value-added opportunity capture from the construction sector by
   - Selecting, from time to time, specific goods or services and projects for focusing the local content, participation and supply capability development efforts
2. Determines HOW to enable delivery of maximum local value-added by
   - Managing the programme of activities within the construction sector as a portfolio, so that project pace and scheduling enable maximum opportunity for development of local capabilities and their sustainable utilisation
   - Targeting local capability development by increasing the amount, depth and breath of in-country activities, so as to enable fuller participation of nationals and enterprises in the value chain
   - Giving preference, firstly, to locally owned, controlled and financed enterprise, then to those that demonstrate a clear culture, commitment and capacity for maximising local value-added, participation and capability development, consistent with the country's aspirations and vision
   - Focusing on improving local skills, expertise, technology and financing wealth capture and distribution
   - 3. Ensures DELIVERY of maximum local value-added by
   - Aggressively promoting and rigorously applying this policy wherever State and Local Government projects or resources are involved
   - Facilitating the development of local capability and expertise to enable local value-added
   - Remove barriers for local participation
   - Setting targets of local content and participation that will be aligned to individual projects, operations and/or operators and supporting these targets with appropriate terms of agreement
   - Measuring and reporting on the performance of operations within the construction sector
   - Periodically comparing local content and participation performance amongst operators, between projects and operations and with other countries, to establish benchmarks, targets and opportunities for improvement and for the transfer of best practices

To achieve these ends the Government of T&T should establish a Construction Local Content Committee comprising a balance of interests from State and private enterprise. The Construction Local Content Committee will be responsible for:

- Updating these local content and participation policies, as required
- Developing specific subsidiary policies and strategies, to ensure the transfer of technology and expertise to improve local skills, businesses and capital markets
- Ensure compliance with these policies
- Report to the Minister of Works and Transport and the Cabinet, as appropriate

The traditional approach of "giving preference to local suppliers if the cost, quality and timeliness of delivery of their goods and/or services are of equal quality to the international competitor" has not helped to build local capability, as only those who are already globally competitive will succeed. There is no opportunity to become competitive if the local is not given a chance to do, learn and improve. For this reason "local capability development" will be an important part of the implementation strategy.

Recognising that not all projects, activities, goods or services can be addressed immediately nor can they all be delivered or sustained locally, the Construction Local Content Committee should initially direct efforts to maximise local content and participation in the following way and in the following key areas:

1. Defining Local Content and Participation in terms of the level of
   - Local ownership, control and decision-making
   - Local financing [preferential access to local finance – not just equal access].
2. Requiring preferential treatment of local suppliers of goods and/or services by
   - Ensuring that these are given preference and assurances from the principal operator, which is not deferred to primary or other contractors or prime consultants; these assurances to include access, treatment and re-imbursement for goods and services actually provided
3. People development in key areas that allow locals to take more value-added, analytical and decision-making roles and to ensure the existing regulations and processes, such as work permits, are aligned to ensure compliance with the policies and strategies for developing
   - High value-added skills
   - Technical
   - Project management

- Architecture
- Structural engineering
- Electrical engineering
- Mechanical engineering
- Geo-technical engineering
- Quantity surveying
- Business strategic skills
- Leadership
- Business development
- Project development
- Negotiating
- Commercial
- Service

4. Technology and business know-how that have high value, consistent and sustained demand and which might be transferable to other sectors of the economy. Areas for immediate focus should include:
   - Fabrication
   - IT support
   - Business support services, including accounting, HR and customer services and management
   - Financing
5. Creating and maintaining databases of:
   - Projects and operations work programmes, including their needs for the provision of goods and services and their scheduling
   - Local suppliers of goods and services
   - People development programmes and initiatives of the operators and their international counterparts
   - Including work permits/skill certificates awarded and the related commitments
   - Business development programmes and initiatives
   - The status of activities of in-country operators, State-owned companies and agencies and their contractors, including their
   - Local content and participation policies, strategies and initiatives;
   - Targets, benchmarks and performance metrics;
   - Appropriate legislation, regulations and contracts

Recognising the importance of local value-added to national development and in order to ensure that the Construction Local Content Committee [CLCM] is able to properly deliver on its mandate, the necessary resources [human, financial and technology] should be made available to the CLCM.

A WELCOME REFORM

By **LARRY PLACIDE**
Trinidad and Tobago Chamber of Industry and Commerce

The Trinidad and Tobago Chamber of Industry and Commerce supports the current process to update and reform the system under which the Government of Trinidad and Tobago purchases goods and services on behalf of the people of Trinidad and Tobago. It believes that change to the current system is necessary to improve efficiency, ensure equality of access, improve transparency and oversight, keep abreast with the evolution of procurement activities in Trinidad and Tobago over a number of years and restrict opportunities for corruption of the processes, all to the benefit of the people of Trinidad and Tobago.

The Chamber has been long involved in this reform process. It was a member of the Cabinet-appointed Procurement Reform Committee established several years ago that produced a Green Paper, a White Paper and draft Procurement Legislation under the chairmanship of former Permanent Secretary in the Ministry of Finance, Mr. Kamal Mankee. The Chamber is heartened that some serious attention is now being paid to those recommendations, albeit in a revised form, principally by the Government and specifically by the Joint Select Committee of Parliament.

Procurement reform is critical for the Trinidad and Tobago economy. Modernisation of the existing system will bring significant benefit to our people through more efficient use of the people's money. Greater accountability throughout the process will ensure an adherence to good procurement practice. Increased transparency will allow greater public oversight of procurement activity and ensure broader access to procurement activities. New institutional development is required to support the proposed new rules and regulations. In making these changes, the Chamber fully expects that our country will reduce the opportunity for corruption and place our system at the forefront of global best practice in procurement.

While reform should be undertaken for national benefit, it is useful to consider international and regional developments in procurement policy that support the case for reform at home. This article reviews briefly some of the developments in Latin America and the Caribbean that have either influenced our own proposed reform or support the case for reform.

Jamaica is the country most advanced in the CARICOM in the evolution of the procurement system from the post-colonial model. In 2002, a few years before the Trinidad and Tobago reform process began, the Government of Jamaica issued a statement outlining its policy on public procurement. Several aspects of that policy were also found to be relevant to this country as well. The objectives outlined by the Government of Jamaica were:

- Maximising economy and efficiency in the procurement process
- Engendering fairness, integrity and public confidence
- Sustainable development
- Fostering national growth and development

To achieve these objectives there should be:

- Application of the rules to all public entities, including public enterprises and any entity in which the Government of Jamaica owns "a majority share or otherwise exercises control over the operations of the entity, including any entity acting on behalf of the Government".
- Primary adherence to the principle of Value for Money
- Uniform, transparent and co-ordinated systems
- Commitment to minimize the environmental impact, disaster preparedness and emergency

management
- Opportunity for the involvement of capable domestic companies in the procurement process to promote national development
- Fair implementation of the policy to ensure equal treatment of all contractors
- Flexibility with the primary use of competitive bidding but sole source and selective tendering being appropriate in certain circumstances.

Several of these elements have found their way into our proposed system. One that is certainly worthy of emulation is the comprehensive scope of the system. In recent years we have seen the proliferation of entities that, although funded by Government, are outside the scope of Government procurement rules. The new system should and would ensure that all these entities develop and implement systems that are fully in keeping with national procurement guidelines.

Further, the Chamber is fully supportive of the idea that room can and must be made in the revised procurement system for the participation of national enterprises. There is no conflict between fair application of the system and provision for a minimal percentage of contracts to local firms which are fully qualified and capable of meeting the required standards of performance and quality. Jamaica, for example, sets aside 15% of its contracts for micro, small and medium-sized enterprises.

As our private sector-supported policy proposes, Jamaica sets out a comprehensive Policy Handbook to ensure the uniform application of the system. This Handbook of more than 200 pages in length "provides the procedures and methods to Procuring Entity public officials engaged in planning and managing procurement of goods, works and services on behalf of the Government of Jamaica (GOJ), in accordance with its policy on Public Sector Procurement." Certainly, the work necessary in compiling the Handbook is compensated for by the clarity that it provides for users of the system, from both the supply and demand side.

Support for the further modernisation of the Jamaican procurement system has recently come from the Inter-American Development Bank, IDB, has provided a grant to the Government of Jamaica to implement an e-procurement system. The fact that this is a grant is important, given the public sector financing challenges being faced by Jamaica, as is the confidence that has been expressed in the procurement system in Jamaica as it presently operates.

Similarly, Barbados has made important strides in improving its procurement processes as well. Last year, the Minister of Economic Affairs of Barbados commented on the importance of efficient procurement systems noting that procurement is "an area of activity that is a target for exploitation. It is an area where governments often incur significant overspending as a result of cost overruns, overpricing of bids, non delivery of services and general inefficiencies in the procurement process." The Government of Barbados has concluded that there is room for improving transparency of public bids as well as for reducing the centralisation of the system.

What we have seen in Trinidad and Tobago over a number of years is the de-facto decentralisation of the procurement system, through legal revisions, state practice and the evolution of the economy. The new system proposed by the private sector seeks to recognise this decentralisation, not to re-impose centralisation. At the centre of the system would be the Procurement Regulator. This office would be responsible for ensuring that all the various entities in the system work according to identical guidelines while allowing for adjustment in the particular case based on the key principles of Value for Money, Accountability and Transparency.

Further afield, another of our Caribbean neighbours has been making significant strides in procurement reform. In the case of the Dominican Republic, its reform has been heavily influenced by the country's policy of and commitment to trade liberalization and of the benefits it perceives from furthering the integration of the Dominican Republic into the global economy. It has signed and implemented the Central America and the United States Free Trade Agreement and this has, in turn, required it to make changes to upgrade its procurement systems. Under the CAFTA-DR Agreement, the Dominican Republic is required to provide suppliers of goods and services from Central America and the United States with non-discriminatory access to procurement of goods and services by the Government. It has also undertaken a broad commitment to be transparent with respect to laws and procurement notices and time limits for the publication of such notices. It has agreed not to use the technical specifications of the tender to obstruct trade and sets out procedures in the event suppliers are required to prequalify for tenders. Under the CAFTA-DR, the preferred tendering procedure is an open process and instances are set out where departure from this procedure is possible. Among the transparency provisions is a requirement for prompt publication of information relating to the award of a contract including:

a. the name of the entity
b. a description of the goods or services included in the contract
c. the name of the supplier awarded the contract
d. the value of the contract award; and
e. where the entity did not use an open tendering procedure, an indication of the circumstances justifying the procedure used.

Importantly, the CAFTA-DR Agreement requires all its signatories to establish an independent authority to "receive and review challenges that suppliers submit relating to the obligations of the Party and its entities under this Chapter and to make appropriate findings and recommendations". These review procedures should be "timely, transparent, effective, and consistent with the principle of due process" and must include provision for

a. a sufficient period to prepare and submit written challenges, which in no case shall be less than 10 days from the time when the basis of the complaint became known or reasonably should have become known to the supplier;
b. an opportunity to review relevant documents and to be heard by the authority in a timely manner;
c. an opportunity to reply to the procuring entity's response to the supplier's complaint; and
d. prompt delivery in writing of its findings and recommendations relating to the challenge, with an explanation of the grounds for each decision.

In order to implement these requirements, the Dominican Republic recognized that it would require technical cooperation to modernize its procurement procedures. In particular, it recognized the need for staff training and technological updating in the procurement and purchasing departments of its state institutions and that common guidelines would have to be established for all institutions involved in procurement covered by its obligation

In the case of Trinidad and Tobago, significant training would be required as a result of the proposed revision of the Trinidad and Tobago legislation. Some view this as a cost to be avoided. The Chamber, on the contrary, sees this as an investment in building our human resources to support good governance within the system.

Significant benefit can be demonstrated will accrue to all as a result of the increased transparency and the availability of the appeal procedure for challenging the outcome of a tendering process where non-adherence to the guidelines can be demonstrated. Efficiently implementing this procedure will engender confidence in the new system although the Chamber cautions that clear rules should be in place to avoid frivolous or malicious complaints that could have the effect of delaying the procurement of required goods or services or unfairly disqualifying companies from participation in the process during an investigation.

Opportunities for corruption are present in any human system. However, the Chamber firmly believes that the proposed reform of the system in Trinidad and Tobago currently under way will substantially reduce the opportunities for corruption by increasing accountability throughout the system and strengthening system oversight. In this regard, it is worth remembering that in 1998, Trinidad and Tobago has been a signatory to, and ratified, the Inter-American Convention against Corruption.

Signatories to this Convention recognize that “corruption undermines the legitimacy of public institutions and strikes at society, moral order and justice, as well as at the comprehensive development of people.” States commit themselves to promote and strengthen mechanisms to prevent, detect, punish and eradicate corruption and to co-operate in ensuring the effectiveness of internal measures to punish corrupt activities. The Convention seeks to discipline the offering of bribes, acceptance or solicitation of bribes; the fraudulent use or concealment of property derived from corrupt activity; involvement in the commission of corrupt activity before or after the fact; and any other activity that is accepted as being corrupt between two Member States of the Convention. The Convention also deals with instances of transnational bribery, illicit enrichment and extradition of offenders.

In this article, the T&T Chamber of Industry and Commerce has sought to bring to public attention some of the regional developments in procurement policy and law. Certainly other instances could have been cited as well. However, the Chamber wishes to stress that reform is necessary not because of external developments but because of the requirements of the situation as it obtains in Trinidad and Tobago- our own internal needs.

Some may consider that the changes proposed are too far-reaching and outside of our scale of competence. The Chamber rejects that idea. On the contrary, we feel that the public and private sectors in Trinidad and Tobago are ably equipped to deal with the new system. Certainly, some training would be required as would institutional reform and there will be the expected period of adjustment to the new processes. However, the potential benefits to the country, some of which have been mentioned in this article, and others detailed throughout this issue by the other collaborators, clearly tip the balance in favour of a joint commitment to reform.

RESCUING THE STATE ENTERPRISE SECTOR

By **AFRA RAYMOND**

State Enterprises were created to enhance the pace and quality of Public Procurement, yet they are now the scene of the most bedeviling paradoxes in the entire system of public administration.

Some of the key procurement issues which arise in this arena flow directly from the split character of the governance model.

The basic rationale for the existence of State Enterprises is that they can be more effective because they are not bound by the strict rules which control the conventional Civil Service. The absence of those rules is supposed to allow more latitude in terms of hiring, borrowing and contracting. State Enterprises can hire professional staff at market rates, enter complex commercial arrangements and borrow on commercial terms, all of which should, in principle, amount to significant improvements in public services.

The typical State Enterprise is owned by the State, with the shareholding held by the Corporation Sole, an exceptional legal creature which exists within the Ministry of Finance. Apart from its owner, the State Enterprise will sometimes have a ‘line Ministry’, which would be its sole or main client. For example, the Ministry of Housing & the Environment is the sole client of the Housing Development Corporation (HDC) and the Ministry of Education is the sole client of the Education Facilities Company Limited (EFCL).

State Enterprises can operate within the existing Companies Act or be established by a separate Act of Parliament, as is the case with the HDC. That legal framework ought to ensure that a satisfactory standard of corporate

governance and accountability is maintained.

The fact is that many of the Directors and Officers of State Enterprises are political appointees, which puts the entire rationale onto a doubtful footing. Because the salaries and perks are so attractive, not to mention the commercial opportunities, the State Enterprises are prize targets for political appointments and favours.

Some of the main issues which arise when one is considering this sector are -

- The number of State Enterprises – there needs to be a reduction in the number of State Enterprises.
- If the politicians can instruct the State Enterprise, via the Permanent Secretary, on specifics, what is the purpose of the Board?
- Given the preceding point, do Board members of State Enterprises have the same duties under the Companies Act as other registered companies?
- In terms of our proposed Public Procurement legislation, what is the boundary between the fiduciary responsibility of the Directors and the contracting powers of an 'authorised officer' – i.e. someone identified as having the power to enter certain contracts?

We can proceed along the Procurement Cycle by using the International Waterfront Centre (IWC) as an example –

1. Needs Identification – This is the first stage of the Procurement Cycle and it ought to be an objective assessment of needs. In this case, the IWC was part of a huge, disastrous boom in building new offices in POS – this is all detailed at 'Capital Concerns - New Office Buildings' –(See http://www.raymondandpierre.com/articles/article39/htm).

Before the boom started in 2005, there was 6.5M sq. ft. of office space in Greater POS. At the start of the boom some 3.2M sq. ft., or an additional 50% of the capital's office supply was approved for construction. It should be noted that Nicholas Tower, which took 5 years to fill, is only 100,000 sq. ft. Just under 2.8M sq. ft of new offices was actually built in POS in the last 5 years, with 2.3M sq. ft. of that space (82% of it) actually built by the State. Every State project identified at the outset was executed, but in stark contrast, virtually half the private sector projects stopped before construction began. The obvious consequence of that over-building by the State has been a collapse in office rental levels in the capital, which is detailed in the next point.

2. Reconcile Needs with Funds – This is the stage at which a developer ought to consider critical questions such as the cost of funds, the cost of the project and the returns from it. That is sometimes called a feasibility test and this is where the IWC dissolves into utter confusion. When then PM Manning addressed the Senate on 13th May 2008, he emphasized that every UDeCOTT project was approved by Cabinet and had been vetted by a Finance Committee on Financial Implications. That is the most important address if we are to see the depth of the problem with these State Enterprises – see here (http://www.ttparliament.org).

The break-even point on such projects is the rent at which the project can repay its costs of construction – at minimum, those costs would have to include the cost of land, design, construction and finance. On that 'bare-bones' basis, which makes no allowance for maintenance or periods when spaces are vacant, the break-even rent for the IWC is in the $30 per sq. ft. range. This is the largest single office building ever built in our capital and the best rents ever achieved for space of comparable quality is about half the break-even figure. There is no way that the IWC project could ever have satisfied any proper feasibility test.

Every new office project started in the capital only increased the supply of offices, which reduced the market rent, which, in turn, increased the gap with the break-even rent. Under oath at the Uff Enquiry, Calder Hart tried to rationalize the confusion when he confirmed that only one of UDeCOTT's projects had been subject to a feasibility test and that one was the IWC. He was even so bold-faced as to estimate a break-even rent in the $20 range, but, when pressed, had to admit that he had left the cost of the land out of the calculations! That is the extent of the deformed thinking which typified the best schemes of the leading State Enterprise.

Only one of the State's many office development projects tested for feasibility and in that case, the cost of the land is omitted, yet that same land is included as a part of UDeCOTT's Assets at $224M in that very financial year! Political imperatives were allowed to pervert a process which exists to protect the public interest from this kind of empire-building. But it is in this next part that the full confusion comes to bear.

3. The rest of the procurement cycle – This is the stage at which tenders were invited for design-build and the winning bidder selected, the project built and the complex opened. According to UDeCOTT's statements, the IWC project is its flagship and an outstanding success, having been built on time and within budget. Even if one accepts those assertions, the IWC project is an example of the tragic consequences of a limited application of proper procurement processes.

As a result we have a completed project which is said to have been built on time and under budget, yet makes no economic sense and has a break-even point at some uncertain point in the future, if ever.

Some collateral damage needs to be noted, to quote one of the former PM's notable phrases. Contrary to his statement to the Senate, UDeCOTT has not published its accounts since 2006, which is a breach of both the Companies Act and the Ministry of Finance guidelines. This is a total breach of the elementary norms of good corporate governance, which is the protection that the private sector structure was supposed to give us taxpayers as a safeguard. Because of the political element in the operation, we can see that UDeCOTT was carrying-out the instructions of the Cabinet and those Directors have not been censured in any way, apart from their public dismissal. Given the condoning of breaches at the largest State Enterprises, how does one get the smaller and less visible State Enterprises to conform to good governance?

If the priest could play, who is we?

This is why Trinidad and Tobago needs a complete review of procurement controls.

Joint Consultative Council for the Construction Industry (JCC)

Trinidad & Tobago Chamber of Industry & Commerce (TTCIC)

Trinidad & Tobago Manufacturers Association (TTMA)

Trinidad & Tobago Transparency Institute (TTTI)