The Republic of Trinidad and Tobago

Submissions on the Public Procurement Reform Legislative Package 2010

21st February 2011

On 25th June 2010 the Public Procurement and Disposal of Property Bill 2010 and the National Tenders Board Bill 1997 were laid in the Parliament of Trinidad and Tobago. The bills were forwarded to the newly established Joint Select Committee for Public Procurement Reform and on December 6th 2010, the said Committee issued a Call for Submissions from Stakeholders. This paper is submitted in response to this Call and our representative will be available for oral presentation if such is deemed useful.

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Abbreviations & Acronyms

CE	Covered Entity
CPPU	Centralized Public Procuring Unit
CTB	Central Tenders Board
CTBO	Central Tenders Board Ordinance
MLO	Multi-Lateral Lending Organization
NCE	Non Covered Entities
NPAC	National Procurement Advisory Council
OECD	Organization for Economic Cooperation and Development
PAEC	Public Accounts (Enterprises) Committee
PPP	Public Private Partnerships
PFI	Private Finance Initiatives
PU	Procurement Unit
SA	Social Accountability
SME	Small and Medium sized Enterprises

1.0 Introduction

1.1 The need for comprehensive public procurement reform in Trinidad and Tobago has been recognized as critical and identified for action by successive administrations since the late eighties.

1.2 It is uncontroverted that the current duality of the public procurement system with some public sector entities covered by existing legislation[1] and others operating under their own tender rules and with ambiguous corporate governance guidance requires addressing. In addition, the lack of an independently resourced regulatory body with responsibility for monitoring the public procurement function, or a formal complaints and/or dispute resolution body for procurement disputes or a functioning centralized public procurement information system represent significant gaps. The failure to build critical institutional capacity at both the leadership and professional levels is also a systemic weakness which needs addressing.

1.3 This paper is not intended to rehash the various weaknesses, gaps and inefficiencies of the present public procurement system in Trinidad and Tobago, which in our view, have already been quite adequately highlighted in the **White Paper on Reform of the Public Sector Procurement Regime 2005**[2] and the **Report of the Commission of Enquiry into UDeCOTT and the Public Procurement Practices in the Construction Sector 2010**[3]**.** Instead the paper seeks to highlight the tenets of an effective public procurement system based on accepted best practice and assess the proposed reforms through such a lens. We will also analyse the current external influences at both the international and regional levels and their potential impact on any meaningful domestic reform initiative.

1.4 It should be noted that the proposed reforms being considered under the **Public Procurement and Disposal of Property Bill 2010** are stated to be a part of *"a package of relevant Bills to enable a holistic and rational approach to the re-engineering of the public financial management system"* which will also include the National Audit Office of Trinidad and Tobago Bill, 2006 and the Financial Management and Accountability Bill. Not having sight of these, we are not in a position to comment on the alignment of the instant proposals and those contained in the other Bills but recommend that these Bills not be considered in isolation by the Committee, if they are to work in tandem.

[1] Central Tenders Board Ordinance No. 22 of 1961
[2] Hereinafter referred to as **"the White Paper"**
[3] Though a synopsis of the current systems of public procurement will be included in order to provide appropriate context for the recommendations.

2.1.0 Features of the Current Public Procurement System

2.1.1 The public procurement system in Trinidad and Tobago consists of a combination of centralized and decentralized processes resulting in the coexistence of at least two distinct but parallel systems.

2.1.2 During the early independence years[4] an aggressive development agenda engendered an escalation in public sector construction activity which strained the existing public sector financial management systems. A lack of uniformity in policy, standards and practices, and instances of insufficient security and poor management were identified[5]. By 1961, it was clear that reform of the system was necessary and a Cost Accounting Division in the MoF was established and the CTBO was passed[6].

2.1.3 As GoRTT's development agenda continued to expand, the need to participate more directly in the public procurement process was recognized and a policy decision was taken to amend the CTBO in 1979[7] to allow GoRTT to contract on its own behalf, outside of the CTB. Following up on this amendment, GoRTT established new statutory corporations with their own contracting capability outside the purview of the CTB and also began removing statutory bodies which were originally included in the First Schedule of the CTBO from the purview of the CTB.

2.1.4 Further statutory erosion of the remit of the CTB continued by virtue of amendments to the CTBO in 1987[8], 1991[9] and 1993[10], resulting in the vast majority of public procurement in sub-central procuring entities being administered outside of the statutory framework[11].

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[4] Prior to independence during 1956-1960 an extensive Development Programme was embarked upon by the GoRTT as part of the First Five Year Development Plan.

[5] These were identified in the Budget Speech delivered in Parliament by the then Hon. Prime Minister, Dr. Eric Williams, on April 12th 1961.

[6] The Central Tenders Board Ordinance 22 of 1961 was passed in 1961 but commenced on 1st January 1965.

[7] Act No. 36 of 1979 included the following amendments (i) the term "company" was defined to include "a firm, a partnership or a statutory corporation." (ii) the reduction of powers of the CTB through the addition of section 20A. This amendment allowed the GoRTT to act on its own behalf where - (a) "as a result of agreement for technical or other cooperation 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 service therewith ..." (c) "it enters into a contract with a company for the purchase of books for official purposes".

[8] By virtue of Act No. 22 of 1987, the CTBO was amended further to provide for the handling of matters in the event of an emergency without reference to the CTB.

[9] By virtue of Act No. 39 of 1991, an amendment provided for a Special Ministerial Tenders Committee to be established at the Ministry of National Security to procure arms, ammunition, and equipment for the Defence Force and the Protective Services.

2.1.5 Over the last thirty (30) years the practice of creating new public sector bodies termed "Special Purpose Companies" (SPCs) or Special Purpose State Enterprises (SPSEs) has developed. SPCs are wholly owned state companies incorporated as private limited liability companies under the Companies Act 1995 as amended in 1997. The SPCs are supposed to provide expert personnel to speed up project implementation. Some SPCs[12] acting on the instructions of Line Ministries, carry out construction projects and undertake not only the arrangement and placement of contracts for the work, but also an overseeing function during the course of the project which is generally labeled "project management".

2.1.6 While on the one hand SPCs are owned by the State, utilizing public funds and operating on behalf of GoRTT, they are not, however, subject to the same regulatory framework as other public bodies. Significant issues of governance have arisen in connection with, what we will term, these "hybrid entities" and the operation of these new public sector contracting models. This is so, in large part because, in decentralizing the public contracting function, there was no concomitant overarching regulatory interface established, governing the relationship between the State and these bodies, and in particular, their engagement with public contracting activities.

2.1.7 The justification proffered for the exclusion of these bodies from the CTBO regime had primarily been that the bureaucratic CTBO procedures hampered commercial efficiency and the pace of GoRTT's infrastructural development agenda.

2.1.8 It has been suggested[13] that a further contributor to GoRTT's shift towards developing contracting models outside of the CTBO has been the conditions attached to MLO financing of GoRTT projects. Thus a perhaps unintended consequence of MLO policy, only to finance projects with a high import content from donor countries, has been to further diminish the ambit of the CTB, as the CTBO would not sanction procurement conditioned on such terms, thus leading GoRTT to adopt alternative procurement routes.

The Centralized System - Covered Entities

2.1.9 The Centralized System refers to the procurement processes and practices which are governed by the CTBO and followed by CEs ('Covered Entities'). CEs presently include Central and Municipal

[10] By virtue of Act No. 3 of 1993, an amendment validated the National Insurance Property Development Company Ltd (NIPDEC) as a procurement agency for Government outside the ambit of the CTB.
[11] For a more detailed exposition of the CTB amendments and the impact of GoRTT policy on the public procurement function between 1956 and 2005 see the White Paper on Reform of The Public Sector Procurement Regime 2005.
[12] for example NIPDEC and UDeCOTT
[13] White Paper on Reform of Public Sector Procurement Regime 2005 para 2.2.3

Government entities including Ministries, regional corporations and some statutory commissions listed in the First Schedule to the CTBO.[14]

2.2.0 The CTBO establishes the CTB which forms an integral part of the public financial management system as it is the GoRTT agency responsible for awarding contracts as requested by GoRTT Ministries, Departments and certain Statutory Bodies[15].

2.2.1 The weaknesses of the Centralized System have been documented comprehensively in the White Paper on Reform of the Public Sector Procurement Regime 2005 and there is little need to repeat them in detail herein as they are non-controversial and widely recognised.

2.2.2 The weaknesses include (a) the lack of a formal complaints and/or dispute resolution mechanism for disgruntled bidders; (b) the lack of a regulatory body with power to investigate and monitor independent of the CTB, (c) the narrow legislative focus only on the tendering phase of the procurement cycle with little guidance on budgeting, feasibility and contract management; (d) the lack of technical infrastructure and development of an electronic centralized public information system, (e) lengthy and costly bureaucratic procedures which are unable to keep pace with the expanding needs of GoRTT's development agenda (f) the absence of provision for newer procurement methodologies including eAuctions and innovative project financing models such as Public Private Partnerships (g) poor data collection and reporting and (h) human resource limitations - there is a dearth of trained staff at the CTB.

2.2.3 All of the above notwithstanding, it is notable that no significant allegation of corruption has been leveled in relation to CTB awarded contracts from the date of its establishment to present. However, the inference to be drawn from this is unclear and may be reflective of the nature and scale of public contracts which continue to be let under the auspices of the CTB, as compared with major implementing agencies such as UDeCOTT and NIPDEC.

The Decentralized System : Non Covered Entities (NCEs)

2.2.4 Entities outside of the CTBO fall within the Decentralized System and procure utilizing their own tender rules and procedures. Broadly speaking, one can ascertain a systematic policy on the part of the GoRTT to deregulate entities which are engaged directly in carrying out major infrastructure and development projects. The ***Table 1***. below depicts the present structure of procurement deregulation.

[14] It should be noted that the remaining statutory bodies presently included in the First Schedule of the CTBO are now defunct eg., the Railway Board, the Marketing Board, the Cocoa and Coffee Industry Board, the Sugar Industry Board, the Sugar Industry and Labour Welfare Committee and the National Housing Authority.

[15] The composition and structure of the CTB and a description of its procurement process and thresholds is set out in the CTB Information Booklet available on the MoF Website www.finance.gov.tt

Row 1 comprises Covered Entities, whereas Rows 2 and 3 comprise the different types of Non Covered Entities existing outside of the CTBO.

Table 1.

Entity	Procurement Framework
Ministries, Regional and Municipal Corporations, THA	Covered by the CTBO
Statutory Commissions, Authorities & Corporations	Some Entities have power to establish Tenders Rules w/o reference to Parliament, others must send Tender Rules to Parliament for negative resolution *(eg. Housing Development Corporation (HDC))*
Companies Incorporated under the Companies Act 1995 as amended 1997	Entities generally have power to create their own Tender Rules eg., *Urban Development Company of Trinidad and Tobago, (UDeCOTT), Education Facilities Company (EFCL). However Note NIPDEC which requires the negative resolution of Parliament.*

2.2.5 It should be noted that there is no uniform or standard process or procedure which characterizes the Decentralized System and accordingly such cannot be represented here. From ***Table 1*** it can be observed that the procurement procedures of some NCE's are subject to greater oversight than others by virtue of a statutory requirement for their tenders rules to be placed before Parliament for negative resolution.

2.2.6 In June 2005 GoRTT, through the MoF, issued **Standard Procurement Procedures for the Acquisition of Goods, Services to be provided and Works to the undertaken and for the Disposal of Unserviceable Items in State Enterprises/Statutory Bodies (State Agencies)** (hereinafter referred to as the "MoF SPP"). There seems to be some ambiguity with respect to the status of these procedures. Whilst on the one hand, GoRTT Ministers and senior public officials have made numerous statements in public fora[16] to the effect that the procedures must be followed by NCEs, NCEs seem to be of the view

[16] Former Minister in the Ministry of Finance is on record at least twice as stating this (on 20th March 2008 at the Caribbean Public Procurement (Law & Practice) Conference (CPPC) held at the Hyatt Regency, Trinidad and on 9th May 2008 at the eAuction Workshop hosted by the Investments Division, Ministry of Finance and the statement of Bernard Sylvester, Ag Permanent Secretary in the Ministry of Finance dated 9th January 2009 submitted to the Commission of Enquiry into the Public Procurement Practices in the Construction Sector 2010.

that these procedures are merely guidelines. In some cases, NCEs argue that since their tenders rules had previously been approved by the MoF there was no need for them to adopt or harmonize their existing rules with the MoF SPP.[17]

Oversight of NCEs

2.2.7 The Minister of Finance as "Corporation Sole"[18] is charged with the responsibility for GoRTT's entire portfolio of investments of which the SOE sector is a major element.

2.2.8 The Investment Division of the MoF, as shareholder's representative, along with Line Ministries for the NCEs, share responsibility for management and operational oversight. The role of the Investment Division is to ensure management efficiency for these firms to meet domestic and international industry operational standards; and to ensure the continuing capitalization to accommodate sustainable healthy growth as a way to contribute to national economic development in a way that supports government policy. Line Ministries are responsible for technical supervision and ensuring that NCEs adhere to GoRTT sectoral policy guidelines.

2.2.9 The Investment Division of the MoF issued the **State Owned Enterprises Performance Monitoring Manual (SOEPMM) 2008** which provides directives to NCEs relating to governance, reporting lines and mechanisms, auditing and performance indicators.

2.3.0 These NCEs are required to submit audited financial statements to the Investment Division of the Ministry of Finance annually. NCEs employ private audit firms to prepare annual financial audits and the Public Accounts Enterprises Committee (PAEC), a subcommittee of parliament, reviews all of the submitted financial statements and can question company officials on issues raised in Management Letters. The Investment Division serves as adviser to the PAEC.

2.3.1 It should be noted that these oversight mechanisms are at best *ex post facto* mechanisms for accountability in public contracting activities, relying only on review and audit mechanisms to achieve accountability. The inherent weakness of such approaches in ***preventing*** excesses and abuses during the course of a procurement process is readily apparent.

[17] See a table submitted by UDeCOTT during its Closing Submissions to the Commission of Enquiry into Public Sector Procurement Practices in the Construction Sector 2010 comparing the extent to which their own tender rules and that of four other NCEs conformed to the MoF SPP. The table presents a sample of NCE compliance with the MoF SPP which is instructive for present purposes and hereto attached and marked **ANNEX 1.**

[18] By virtue of the Minister of Finance Incorporation Act Chap. 69:03 - the Corporation Sole is a body politic having perpetual succession constituted in a single person, who in right of some office or function has capacity to take, purchase, hold and demise lands, tenements and hereditaments, and in some particular instances also to take and hold property.

2.3.2 To varying degrees NCEs practice limited competitive procedures and routinely resort to sole selective tendering, a practice which has under previous administrations enjoyed express approval of GoRTT.[19]

2.3.3 In addition, transparency is lacking since it is not the practice that the tenders rules and procedures or tender notices or awards of NCEs are routinely published online on company websites.

2.3.4 The risks in the present Decentralized System are significant and are facilitated by (a) the lack of an overarching regulatory framework for NCEs; (b) the lack of a formal complaints and/or dispute resolution system; (c) the lack of uniformity of rules, procedures and documentation; (d) poor management; and (e) a lack of transparency. Although the flexibility of the systems allows for GoRTT to escalate its infrastructural development programmes, the present perceived vulnerability to corruption and associated risks and the consequential strain on value for money objectives remain significant.

2.3.5 Notably, the Report of the **Commission of Enquiry into the Procurement Practices in the Construction Sector in Trinidad and Tobago 2010** outlined the present risks in the public procurement system being utilized by NCEs and the Report stated as follows:

"it is clear that the existing level of oversight is seriously ineffective and has not secured the degree of transparency which the people of Trinidad & Tobago are entitled to expect in the expenditure of public funds."[20]

A Note on Bidders Rights

[19] See statements of Minister in the Ministry of Finance at the Caribbean Public Procurement Conference October 2008 endorsing and explaining the use of sole selective tendering by SOEs where, inter ailia, "a contractor is already onsite or expertise is limited due to the specialized nature of the profit companies." There was also evidence from GT officials at the Uff Enquiry which indicated GT's endorsement of this practice.

[20] Paragraph 28.21 – UFF Report delivered on March 29th 2010 published and laid in Parliament on April 7th 2010

2.3.6 Given that there is no formal complaints and/or dispute resolution process in either the centralized or decentralized systems, disgruntled bidders have only had recourse in the Supreme Court of Trinidad and Tobago. Traditionally, there being no contractual remedy[21], bidders seeking to assert their rights in respect of a public procurement would initiate judicial review proceedings in order to get the Court to overturn, set aside or declare null and void a procurement decision. This approach has not met with much success in our courts, [22]in large part because the courts have viewed the procurement function as a commercial function with a limited public interest element [23].

2.3.7 The above notwithstanding, post 1983, the common law in other jurisdictions such as Canada[24], UK[25]and Australia[26] now recognizes what is called the "Contract A" or "Blackpool Contract". In 2004 the Privy Council[27], in an authority binding on the courts of Trinidad and Tobago, recognized the "Process Contract" based on the implied tender contract doctrine[28]. By virtue of this doctrine contracting entities in both the public and private sector will be held to the terms of their tender call and to certain implied duties of fairness in the procurement process.

2.3.8 Though there has as yet been no local case initiated by a disgruntled bidder based on this emerging implied contract paradigm, as more lawyers and contractors become aware of their rights under the common law, reformers must be cognisant of the increasing risk of legal action on these grounds. Continued regulatory gaps suggest that the courts will eventually intervene to determine bidders rights, as has been done in other jurisdictions, thereby excluding the executive's opportunity in this reform effort to set its own parameters for its obligations to bidders.

2.3.9 The current context for public procurement as outlined above in this section must be appreciated by reformers in designing the new system, mindful of the cultural realities and jurisprudential context.

[21] Pre-1983, contract law did not provide a remedy for persons aggrieved because of a procurement decision. Procurement decisions were deemed pre-contractual and the courts held that there was no intention of the parties to create binding legal relations.
[22] except in the case of fraud and bad faith
[23] See NH v UDeCOTT Civ. App. 95 of 2005, judgment delivered March 2006
[24] R. v. Ron Engineering [1981] 1 S.C.R. 111
[25] Blackpool and Fylde Aero Club v Blackpool BC [1990] 1 WLR 1195; 3 All ER 25
[26] Hughes Aircraft Systems International v Airservices Australia (1997) 146. ALR 1
[27] Pratt Contractors Ltd v Transit New Zealand (2004) BLR 143 PC
[28] or "two contract theory"

3.1.0 Tenets of Effective Public Procurement System

3.1.1 It is important to note at the outset that the procurement function and in particular the public procurement function is inextricably tied to a country's economic, social, industrial and environmental objectives. Accordingly, the effectiveness of a public procurement system is judged by its ability to meet these objectives. The tenets of an effective public procurement system therefore depend firstly on the objectives of the system. There is no one standard set of objectives of a public procurement system. Such objectives are a matter of public policy. So for example, if the objective of the system is to foster SME sustainable development, the tenets of the system and scope of regulation will necessarily be different from one where the objective is to facilitate greater competition in or access to regional markets or one which makes environmental objectives primary. According to Trepte[29]

"..there is no one ideal form of procurement regulation. Even where procurement regulation is expressed by means of similar concepts and principles, the underlying objectives of the regulation will be reflected in and condition the precise form and scope of that regulation. Such regulation will be appropriate only within the context in which it was developed."

3.1.2 Without making a determination of the merits or demerits of a particular policy objective, it is clear that regulators must have their policy objectives clearly determined before designing a workable system which will serve them. Further, it would be wrong to assume that rules, guidelines and best practices "so-called" from international and supra-national bodies necessarily reflect a system which would produce the results required by domestic policy objectives. It is our respectful view that the whole-scale adoption of international rules, guidelines and "best practices" without (a) a rigorous examination of the objectives of the international and supra-national regulators and (b) a clear conception of the domestic objectives of the public procurement system, will not serve domestic interests.

3.1.3 Some of the more common objectives of public procurement systems include

(a) maximizing economy and efficiency in procurement;
(b) promoting environmental and sustainability issues
(c) promoting competition among suppliers and contractors for the supply of the goods or construction to be procured;
(d) providing for the fair and equitable treatment of all suppliers and contractors;

[29] Peter Trepte, *Regulating Procurement, Understanding the Ends and Means of Public Procurement Regulation,* Oxford University Press pg.41

(e) promoting the integrity of, and fairness and public confidence in, the procurement process;

(f) achieving transparency in the procedures relating to procurement; and

(g) SME development

3.1.4 It is not our intention nor do we consider it our place to proselytise as to what the objectives of the new public procurement system in Trinidad and Tobago should be. This is squarely within the purview of the legislature. What can be said, however, is that it is difficult to ignore the reality that at an international level the ability of a government to apply discriminatory or protectionist procurement policies may raise trade barriers and undermine the international economic order which represent not an insignificant part of the underlying motivations of some international rules and "best practices". The ongoing tension between domestic objectives and regional and international objectives must be carefully balanced in a country's reform efforts and the fact that the objectives of domestic systems are necessarily broader than the limited aims of international regulatory systems must be appreciated.

3.1.5 This notwithstanding, it is possible to distill from the international rules and guidelines a basic framework which would apply in *any* effective public procurement system regardless of its objectives. At the international level, two of the most accepted benchmarking tools for public procurement systems include the World Bank Country Procurement Assessment Reviews (CPAR) and the OECD DAC Procurement Assessment Tool. The UN Model Law on Procurement also provides a suggested template for effective public procurement regulation. From a consideration of these tools and other materials the following six (6) main components can be ascertained as being the basic building blocks of an effective system[30] :

(a) A comprehensive framework of rules, regulations and policy guidelines governing all public procurement processes

(b) An independently resourced, institutional structure empowered to guide, monitor, oversee and enforce the framework,

(c) A sophisticated cadre of personnel responsible for implementing the framework who are sufficiently resourced and demonstrate appropriate levels of professionalism, skill and standards of ethics.

(d) A formal complaints and/or dispute resolution mechanism capable of providing rapid and effective response/remedies to supplier/bidder's complaints.

(e) A system of internal management control and audit with sufficient capacity for effective identification and countering of risk.

[30] See OECD Procurement Toolbox and Building Blocks for Integrity in Procurement, WB Guidelines, UNCITRAL Model Law on Public Procurement

(f) An independent external audit with sufficient capacity to detect irregularities involving the waste and misuse of public funds and to identify related weaknesses in management controls.

3.1.6 It is important that in the context of the proposed reforms that these six (6) components represent the skeleton framework of the new system. These components are considered in more detail below.

(a) ***A Comprehensive Framework of rules, regulations and policy guidelines governing all public procurement processes***

3.1.7 This framework can be in the form of (i) an overarching legislative and regulatory framework or (ii) policy guidelines issued by the executive or (iii) a combination of law, regulations and policy. There must be clarity in the laws, regulations and guidelines hierarchically organized with precedence clearly established. The cultural realities and jurisprudential context of a country will dictate what type of system will be most effective to meet the policy objectives of the government. If for example, strengthening anti-corruption and accountability efforts is the objective of the system, then a legal and regulatory framework may be more applicable. On the other hand, if the culture and standard of ethics and professionalism is high then a flexible system more reliant on policy guidelines may be workable.

3.1.8 A distinction needs to be made between a framework which governs "public contracting" and one which governs "public procurement". In the former the procurement contract may be the instrument of regulation and in the latter the entire procurement process is the instrument of legislation. In regulating the procurement process which spans from the identification of the need right up to the disposal of a good, maintenance of a work and review of a service, such a system goes beyond the "tip of the iceberg"[31] and recognizes the contracting phase (or the bidding phase right up to award of the contract) as just one portion of a ten stage process[32]. Accepted "best practice" now recognizes that an efficient public procurement regulatory system is no longer based on the transactional approach but addresses the entire procurement cycle.

[31] OECD Principles for Integrity in Public Procurement 2009 defines the beyond the "tip of the iceberg" approach to procurement regulation as which addresses the entire procurement cycle. Discussions at the 2004 OECD Global Forum on Governance highlighted the need for governments to take additional measures to prevent risks of corruption in the entire procurement cycle.

[32] See *Government Procurement* 2nd Edition published by Lexis Nexis 2008 page 20 where author Paul Emanuelli outlines the 10 stage process.

3.1.9 Although, a one size fits all approach is not recommended, there are certain standard provisions which ought to be included in comprehensive procurement frameworks. These include: definition of public sector organisations that are covered under the legislation; the types of tender methods/or procedures available and thresholds; selection and award criteria to be used in the tender process; exemptions from standard procurement procedures and clear applicable criteria for such exemptions; the review and remedies system; and enforcement mechanisms to ensure the appropriate functioning of the public procurement system.

3.2.0 The entire framework inclusive of the laws, regulations, guidelines and decrees ought to be published and easily accessible to the public at no cost.

A Note on the Proposed Reforms

1. **Both the White Paper on Reform of the Public Procurement Regime 2005 & Public Procurement and Disposal of Property Bill 2010 provide for the establishment of a comprehensive legal and regulatory framework for public procurement with policy guidelines issued by the newly established Regulator requiring the negative resolution of Parliament.**

2. **Both also purport to recognise the entire procurement cycle in the definition of procurement. In the Public Procurement & Disposal of Property Bill, notwithstanding references to the pre-tender stage by empowering the Regulator to develop guidelines toward the determination of value for money and public consultation on major contracts, there is persistent focus on the "transaction" or "negotiation" throughout the bill.**

(b) An independently resourced, institutional structure empowered to guide, monitor, oversee and enforce the framework,

3.2.1 The institutional structure may be centralized or decentralized or a mixture of these systems. There are different schools of thought on the extent to which the procurement function should be centralized or decentralized and no standard model can be recommended. Developments in the last decade—e-government, the emergence of procurement as a strategic profession, modern financial management practices from the Government's side, as well as e-commerce and new production technologies from the private sector's side—dilute the strength of some of the traditional arguments in the centralisation vs. decentralisation debate.[33]

3.2.2 The structure must have the roles of public officials clearly defined. In particular, staff roles and responsibilities with regards to specifying requirements, giving financial authority and making purchasing commitments must be clearly delineated.

3.2.3 There ought to be established a regulatory body or bodies in which functional responsibilities for oversight and enforcement of the procurement framework are assigned. The functional responsibilities include the provision of advice to contracting entities, provision of policy and drafting support to the Executive for amendments to the legislative and regulatory framework, monitoring of the public procurement function, the collation and publication of procurement information, management of statistical databases, developing and supporting implementation of initiatives for improvements of the public procurement system and providing implementation tools and documents to support training and capacity development of implementing staff.

3.2.4 Some countries have established a central public procurement organisation with responsibility for developing the procurement rules and regulations, creating a government-wide information and publication system, ensuring government procuring authorities employ trained personnel, developing a training system and maintaining general supervision of the public procurement system.

A Note on the Proposed Reforms

The Public Procurement and Disposal of Property Bill 2010 proposes a decentralized system but with the requirement of uniformity and compliance with the Operating Principles and Objectives. The bill also proposes the establishment of a Procurement Regulator in whom functional responsibility for oversight and enforcement of the new system is assigned.

[33] See the arguments for centralization vs decentralization in the OECD (2000), 'Centralised and Decentralised Public Procurement,' CCNM/SIGMA/PUMA (2000)108, 25 October 2000, OECD Publishing, Paris hereto attached and marked **ANNEX 2.**

(c) A sophisticated cadre of personnel responsible for implementing the framework who are sufficiently resourced and demonstrate appropriate levels of professionalism, skill and standards of ethics.

3.2.5 As the appreciation for the strategic and critical role of procurement increases so to does the need to have personnel implementing the function who have the necessary skill and professionalism and who are recognized for their contribution. Procurement practitioners are now being called upon to go beyond mere compliance to a more sophisticated and goal-oriented approach to the buying function. It is well accepted that a key component of an effective procurement system is the equipping of professionals with adequate training and capacity building support in the form of well defined curricula, specialised knowledge, professional certifications and integrity guidelines to ensure that they have the necessary knowledge, skills and integrity to carry out their functions along with the requisite recognition, profile and scope for upward mobility. Any capacity building system must be sustainable and not sporadic or intermittent.

3.2.6 It should be noted that an emerging school of academic thought is that given the cross-disciplinary nature of the procurement function, it is necessary to enhance the skills of all professionals interacting with the function of procurement and not only the procurement practitioners themselves. An effective public procurement policy must contemplate the strategic alignment of the legal, financial, risk and audit functions to the procurement function and it is important that in the training and capacity building efforts sustainable programmes are designed and implemented for professionals working in all of these fields. [34]

A Note on the Proposed Reforms

The Public Procurement and Disposal of Property Bill 2010 proposes that the Procurement Regulator has the responsibility for this component of the system.

[34] Caribbean Procurement Institute - *Professionalizing Procurement :Toward an Integrated Model for Procurement Education*

(d) A formal complaints and/or dispute resolution mechanism capable of providing rapid and effective response/remedies to supplier/bidder's complaints.

3.2.7 This is an essential component of an effective public procurement system. This serves to allow disgruntled bidders an avenue to challenge decisions taken by public bodies in awarding contracts. This supports the appropriate functioning of a procurement system and builds trust with both the private sector and the general public. The main objective of the complaints/review system is to enforce the practical application of the legislative framework and thereby serve as a deterrent to breaking the law. The system ought to be able to ascertain and distinguish quickly between anomalies, irregularities, mistakes and deliberate acts of fraud or collusion and provide effective remedies in each situation. In so doing this ultimately contributes to the achievement of the objectives of the substantive procurement rules.

3.2.8 It should be reiterated that failure to establish such a system will encourage intervention by the courts into the public procurement function, thereby causing excessive costs arising from litigation and project delays. An effective response and remedies system will allow the government to set in advance, criteria for raising issues and procedures and timelines for resolution.

A Note on the Proposed Reforms

The Public Procurement and Disposal of Property Bill 2010 assigns the responsibility for this function to the Office of the Procurement Regulator and also proposes an independent review process involving civil society at critical points of the public procurement process.

(e) A system of internal management control and audit with sufficient capacity for effective identification and countering of risk.

3.2.9 Internal control systems work to faciliate the achievement of management's objectives and contribute to continuous improvements in programme management, service delivery and accountability. Internal audit spans administrative and accounting reporting on the procedures governing decision making processes, in addition to the preparation of reliable financial records. They provide management with an assessment of the adequacy and functioning of an organisation's risk management, control and governance processes.

3.3.0 An effective public procurement system must align its procurement and financial management systems (including the internal audit) functions and can no longer operate in silos. To be effective, internal controls must be appropriate, function consistently throughout the procurement cycle, and be cost-effective. This is a critical part of the risk mapping function which must be introduced in an effective system of public procurement.

A Note on the Proposed Reforms

The Public Procurement and Disposal of Property Bill 2010 at present does not expressly address the internal audit function within public bodies. It is important to reiterate that the proposed bill is part of a tri-partite legislative agenda (including the National Audit Office of Trinidad and Tobago Bill, 2006 and Financial Management and Accountability Bill) to re-engineer the public financial management system in a holistic and rational manner.

(f) An independent external audit with sufficient capacity to detect irregularities involving the waste and misuse of public funds and identify related weaknesses in management controls.

3.3.1 The external audit system can be designed to conduct specific audits on the functioning of the public procurement system. Audit opinions can then be given as to the degree to which the systems are in compliance with statutory requirements and regulations.

A Note on the Proposed Reforms

The Public Procurement and Disposal of Property Bill 2010 establishes the post of Procurement Regulator which functions include the conduct of periodic inspections of the records and proceedings of the procuring and disposing practices of public bodies and also to institute audits into specific transactions and awards. It is important to reiterate that the proposed bill is part of a tri-partite legislative agenda (including the National Audit Office of Trinidad and Tobago Bill, 2006 and Financial Management and Accountability Bill) to re-engineer the public financial management system in a holistic and rational manner.

Concluding Remarks

3.3.2 On its face, the new proposed regime meets all the markers for the design of an effective framework. This notwithstanding, a framework without the appropriate substantive and supporting provisions can defeat its purpose entirely and cause more damage than it is worth. Accordingly, we have sought to examine and assess the specific provisions of the proposed regime herein below.

4.1.0 Assessment of Proposed Legislative Provisions

(a) Public Procurement & Disposal of Property Bill 2010[35]

4.1.1 This Bill purports to implement the Government policy on procurement contained in the White Paper and proposes the repeal of the CTBO by establishing a legal and regulatory system which places all bodies procuring "property and services" with public money within one overarching framework. The Bill is said to be designed to promote the operation of the Operating Principles of *Value for Money, Accountability* and *Transparency* and the following Objectives:

(i) open and effective competition;
(ii) ethics and fair dealing according to the highest standard of professionalism;
(iii) promotion of national industry in a manner that conforms with the international obligations of Trinidad and Tobago;
(iv) promotion of Government policy to effect sustainable development

4.1.2 The Bill is divided into five (5) parts and our comments in respect of each part are highlighted below.

Part I - Preliminary

4.1.3 This Part deals with operational matters pertaining to the Bill.

Section 1(2) - commencement provision ought to be revisited since the date has already passed.

Section (2) - definition provision -

"agency" - it should be considered why the concept of a *"state controlled"* enterprise has been introduced here and not the more familiar terminology of *"state owned"* and/or *"majority owned"*. It should be noted that a *"state controlled enterprise"* is also defined later in the same section introducing in our respectful view some confusion since the word *"controlled"* is repeated within the definition itself and not itself defined anywhere else in the Bill. It is unclear

[35] hereinafter referred to as "**the Bill"**

whether the intent of the Bill is to include enterprises other than those wholly or majority owned by the State, but from the definition of a *"state controlled enterprise"* it is uncertain whether any other type of entity would fall therein.

"authorized purchaser" - "means a person referred to in section 10(1) and 10(2). This introduces a new layer of complexity into an already established corporate governance framework. The application of this definition and the interpretation of sections *10(1) and 10(2)* are considered in more detail below.

"procurement" - is defined as *"the process of acquiring property or services commencing with the identification of the need of the property or services and ending with the performance of the related contract".*

(a) It should be noted that this definition does not accord with accepted definitions of procurement which normally refer to procurement as "the process of acquiring goods, *works* and services...".[36] Works refers to construction projects and programmes. Whilst it may be contended that *"works"* or *"construction projects"* are a combination of *"property or services"*, one wonders at the attempt to reinvent the wheel here. This is an argument at best, whilst a simple inclusion of express reference to construction activity or works would suffice. The definition of "services" later on, makes reference to *"consultancies, professional services and activities".* One again wonders, at the inclusion of a term of ambiguous meaning such as "*activities".* It should be remembered that there is a plethora of cross-commonwealth case law augmenting statutory frameworks which specifically addresses construction contracts and/or "works" and distinguishes same in application from the rules applied to other types of *"services"* contracts. By removing the word *"works"* or *"construction"* from the definition the possibility of judicial ambiguity in any subsequent litigation arises.

[36] According to the UN Model Law on Procurement, construction activity is expressly specified Article 2 *"procurement" means the acquisition by any means, including by purchase, rental, lease or hire-purchase, of goods or of* ***construction****, including services incidental to the supply of the goods or to the construction if the value of those incidental services does not exceed that of the goods or construction themselves; "Public Procurement ...is understood to mean the act of a public body purchasing or acquiring goods,* ***works*** *and services from the market place"* Peter Trepte, Regulating Procurement, Oxford University Press 2004; in the CARIFORUM EC EPA Government Procurement is defined as "*any type of procurement of goods, services or a combination thereof,* ***including works****, by procuring entities listed in Annex VI for governmental purposes" ,* Article 3 (2) OECD Public Procurement Law ***"public procurement*** *shall mean the provision of goods and services or* ***awarding work assignments*** *by a state body, organization, institution or some other legal person regarded as a procuring entity pursuant to this Law, in the manner and under the conditions prescribed by this Law;"*

(b) Further, the definition purports to encapsulate the entire procurement process but does not use the best practice definition of the cycle which ends not at the *"performance of the contract"* but after *"assessment of performance"*[37].

(c) Of note, the definition of procurement itself seems to include every type of transaction or process by which material or services are acquired utilizing public money. If this is the intention of the legislature then it ought to be noted that arrangements and transactions which are usually excluded from standard procurement regulation will be covered by this new framework. This would include transactions such as :

(i) the acquisition or rental of land, existing buildings, or other immovable property or the rights thereon;

(ii) non-contractual agreements or any form of assistance provided by foreign states or MLOs including cooperative agreements, grants, loans, equity infusions, guarantees, and fiscal incentives;

(iii) the procurement or acquisition of fiscal agency or depositary services, liquidation and management services for regulated financial institutions, or services related to the sale, redemption and distribution of public debt, including loans and government bonds, notes and other securities;

(iv) public employment contracts;

(v) research and development services;

(vi) intra-governmental procurement;

(vii) procurement relating to national defence or security interests

The issue here is not whether these types of transactions should be subject to regulation but whether if regulation is required it should be subject to standard procurement regulation. It may be, and has been indicated that these type of transactions require specialised regulation. Consideration ought to be given to any potential overlap and/or ambiguity created in the law by virtue of existing rules in real property law, financial regulations, employment and industrial relations law etc.

Part II - Procurement Framework

4.1.4 This Part establishes the regulatory framework which will bind the State. It provides for the mandatory application of Operating Principles and Objectives as outlined at para 4.1.1 above.

[37] Paul Emanuelli, *Government Procurement* 2nd Edition, Lexis Nexis 2008 at page 20, *The Ten Stages of the Procurement Cycle*

Section 4 and 5 purport to make unlawful non-compliance with the Operating Principles and Objectives. However, these principles and objectives are vague in their nature and capable of a plethora of interpretations. With the exception of section 5 (c) which states that *"a person who is party or seeks to be a party to a transaction or related negotiation, shall - (c) conform to the Act, Regulations and Guidelines"* the attempt to make mandatory compliance with the general principles of value for money, accountability and transparency and with the general objectives of efficiency, economy and effectiveness, ethics and fair dealing according to the highest standards of probity and professionalism and promotion of national industry in a manner that conforms with the international obligations etc, is in our view unenforceable. In our respectful view section 5 (c) meets the objective of the section.

Section 6 (1) and *(2)* grants the power to the Procurement Regulator to develop the mandatory and discretionary guidelines. While there is no objection in principle to delegating the responsibility for developing the substance of the framework to the office of the Procurement Regulator, regulators ought to be cautioned that this is the crux of the system here and will require substantial inputs and consideration. If the guidelines are not carefully and appropriately drafted then the entire system is rendered ineffective. Passage of this legislation without an understanding of potential substance of the system is dangerous. It is recommended that to prevent the establishment of an "elephant" which does very little for years while developing regulations, Members of the Committee consider the substance of the rules in the course of the present exercise, prepare draft guidelines to be submitted to the Procurement Regulator and a time-frame be established after passage of the Bill for the consideration and re-formulation, if any, by the Regulator, and submission to the Parliament for negative resolution. Alternatively, the Committee should take the opportunity to regulate some material aspects of the substance of the framework from the outset by setting the rules and guidelines and empowering the Regulator to amend, if necessary, with the ratification of Parliament.

Section 6(3) provides for mandatory consultation by the Procurement Regulator with the National Procurement Advisory Council established in accordance with section 22. Whilst civil society involvement in the public procurement process is a welcome and progressive step. Care must be taken in the creation of bodies with whom mandatory consultation must take place and/or who have the power to intervene or thwart a public procurement exercise, initiative or development on the basis of private agendas. The increased potential for conflicts of interests in a small society as well must be carefully considered. Establishing the most appropriate model for civil society involvement is no simple task and as with everything else depends on the cultural realities in a particular country. Much research and data has begun to be collated to decipher best practice models for civil society involvement and the Committee would do well to avail itself of some of

these works[38]. Thought must be given to the intended role of the civil society involvement. Is it to act as an internal watchdog of sorts or to provide technical expertise and support in the development of rules, policies and guidelines? This will be considered further below.

Section 8 (1) provides for the issuance by the Chief Executive of an Agency of "*an internal administrative direction for the purpose of expediting a transaction"* called *"an Agency Instruction"*. The purpose of this section is not readily discernible, especially in light of the fact that the substantive guidelines have not yet been developed. The reference *"for the purpose of expediting a transaction"* seems to be contemplating an exemption from the standard procedures, yet section 8 (3) makes it clear that *"an Agency Instruction that fails to conform with the Act, Regulations and Guidelines is void"*. Further "*for the purposes of expediting a transaction"* without more can pertain to any transaction under the sun regardless of whether exigent circumstances apply. This section gives a very wide authority which is open to abuse since unless the guidelines are tightly drafted, whether or not such an instruction conforms to the Operating Principles and Objectives of the Act would be open to competing interpretations.

Section 9(1) seems unnecessarily repetitive and redundant in light of the section 5 (previously discussed). If section 5 is to be retained, a simple amendment by including the words in italics : "A person who is a party or seeks to be a party to a transaction or related negotiation *or is performing duties in relation to a transaction for or on behalf of an Agency* shall....". Notwithstanding, the same comment arises as to how much further this provision goes than merely stating that compliance with the Act, Regulations and Guidelines is mandatory.

Section 9(2) creates concern and bears repetition here. It states *"(2) A person referred to in subsection (1) who takes an action that is inconsistent with the agency instruction shall make a written record for the Procurement Regulator of the reasons of the decision for so acting"*. The drafters here seem to be seeking to empower an officer or agent of the body performing duties in relation to a transaction to act inconsistently with an agency instruction upon provision of reasons to the Procurement Regulator. This in our respectful view, creates a governance conundrum whereby a subordinate to a Chief Executive can refuse to act in accordance with an agency instruction so long as reasons are provided to the Procurement Regulator. This cannot be a tenable situation and one can readily see how such a situation without appropriate checks and balances can be abused. There are no checks and balances on this power of a subordinate to act inconsistently with an agency instruction, no timeframe within which reasons are to be provided to the Regulator, no timeframe in which a decision on any inconsistency is to be made by the Regulator and yet, the subordinate can refuse to comply with the instruction. It is noted that compliance with the Act, Regulations and Guidelines is mandatory and that it is expressly provided in section 8 (3) that an Agency instruction which fails to so conform is void. The

[38] referred to more comprehensively below

drafters may have been seeking to address a situation where a subordinate had formed the view that an Agency Instruction (AI) is void for non-compliance with the Act, Regulations and/or guidelines. It is our respectful submission that this certainly is not the way to deal with such a situation. This approach empowers the subordinate to make the first determination and lawfully act in accordance with his own determination on the lawfulness of an Agency Instruction. It is submitted that a better approach would be to specify a procedure by which if a subordinate forms the view that an AI is void, he first submits reasons for his decision to the issuer of the AI, copied to the Procurement Regulator. Timeframes ought to be given for action by the issuer, failing which the Procurement Regulator will rule and guide the subordinate. Even so, we are of the view that the enabling statute is not the level at which this kind of detailed rule should be included and such should be left to form part of the comprehensive guidelines to be prepared by the Regulator. Alternatively, if retained, it must be a part of a more comprehensive set of rules established in the enabling legislative framework.

Section 10 - Authorized Purchaser - It is respectfully submitted that the imposition of this concept of an authorized purchaser is ill conceived and ought to be revisited. Section 10 (1) provides that a Chief Executive is authorised to enter into a transaction and/or negotiate on behalf of his agency. This provision seems unnecessary and superfluous since rules of corporate governance and the laws of Trinidad and Tobago already so provide. This is standard corporate commercial practice for companies incorporated under the Companies Act 1995 as amended in 1997. For statutory bodies and authorities such rules are typically specified in their enabling statute, with clear statutory delineations of actions requiring Ministerial guidance, instruction and approval. For departments of Government which are not separate legal entities, the Civil Service Rules and Regulations, established signing authorities etc would apply. In respect of sections 10 (2) that a person who enters a transaction or related negotiation without authority so to do or (3) who wrongly represents himself as having such authority commits an offence; this is covered by the common law offence of fraud under the criminal law and the Integrity in Public Life Act 2000. Although section 10 (2) seems to create a strict liability offence[39] which is more embracing than fraud, one wonders what is the public policy behind such a provision. One is hardly likely innocently to fall into the error that one has the authority to transact on behalf of one's entity since the rules governing this must be known to one. Section 10 (4) also further complicates since, in addition to the statutory rules, there are already established common law rules with respect to the capacity of persons having "ostensible authority" to contract on behalf of his/her entity, binding third parties even if the person in fact was acting without lawful authority[40]. As the law stands there are certain categories of persons which the law will hold as having the ostensible authority to contract regardless of the internal rules including directors

[39] i.e. does not require proof of knowledge of the lack of authority

[40] *Royal British Bank v Turquand* (1856) 6 E&B 327, and the eponymous "Rule in *Turquand's Case*" refer to the rule of English law that a third party dealing with a company is entitled to presume that a person held out by the company has the necessary authority to act on behalf of the company.

and CEO's. These proposed provisions will create a new level of complexity in governance and in our respectful view are unnecessary.

Section 11 For the same reasons outlined in respect of section 10 above, this provision will serve to cause confusion with respect to the established rules on ostensible authority and unfairly create too onerous a burden on suppliers and contractors to ascertain whether a person holding themselves out to have authority to contract and appearing to have ostensible authority so to do, actually does. If the purport of the section is to capture and punish collusive acts by suppliers and contractors there are criminal laws already in existence which cover this and accordingly it seems inappropriate surely to reverse established jurisprudence on rules of ostensible authority for this reason.

Sections 12 -16 dealing with the establishment of a Complaints/Review system will be dealt with under the following part when considering the post of the Office of the Procurement Regulator.

Part III - The Procurement Regulator

4.1.5 The establishment of the position of Procurement Regulator and the Office of the Procurement Regulator is a welcome one and critical to an effective public procurement system. However, great care must be taken in establishing the post with appropriate checks and balances in place. It is submitted that a comparison ought to be made between the role, functions, powers, obligations and tenure of similar positions in other jurisdictions[41]. The following are some comments on the post as presently proposed in the Bill.

Appointment & Tenure

4.1.6 Section 17 (1) provides that the Procurement Regulator shall be an officer of Parliament, appointed by the President in the exercise of his own discretion after consultation with the Prime Minister and Leader of the Opposition on terms and conditions to be approved by the President. It is respectfully submitted that in the creation of a statutory post of this nature with the expansive powers suggested in the Bill, it would be bordering on irresponsibility and the infringement of the very rules of transparency the Bill is supposed to uphold, to not have the qualifications required and the tenure of appointee statutorily determined. In respect of the qualifications, given the highly specialized and technical nature of the position, some level of professional experience ought to be specified. In respect of the tenure, the circumstances and procedures by which the Regulator can be removed or other circumstances for

[41] A comparison of the positions of Procurement Ombudsman, Canada; the Contractor General in Jamaica and the proposed Office of the Procurement Regulator, can be prepared and forwarded to the Committee in an subsequent Annex, if deemed useful.

termination ought to be specified. Whilst, salaries and emoluments and other ancillary matters can be determined by a Committee or the secretariat of the President, at the very least these two critical areas (qualifications and tenure) ought to be dealt with at this stage.

4.1.7 Section 17 (2) provides that the Regulator shall be appointed on a five (5) year contract and is eligible for "*re-appointment"* for two consecutive terms. This would mean that the Regulator can in potentiality serve approximately fifteen (15) consecutive years. It may be that this is an unintentional consequence of the wording of the section rather the deliberate intention of the drafter. The inherent risks of entrenched bureaucratic relationships and/or other vested interests and lack of innovation which such a situation could spawn are apparent. It is recommended that the appointee be eligible for only one consecutive term.

Functions

4.1.8 Section 18 outlines very expansive functions of the Regulator. The functions include in summary, the development of all the procurement rules policies, guidelines[42], handbooks, standardized bidding documents, procedural forms etc, the harmonization of policies, systems and practices of all agencies utilizing public funds, annual review of procurement opportunities with a view to streamlining and centralizing processes, the establishment of comprehensive databases with information on procurement processes, contract awards and prices and any other information of public interest, the development and maintenance of related system wide databases and fostering improvements in the use of technology, the maintenance of a register of suppliers, adopt, adapt and update common specification standards, promote public understanding of procurement and related processes, set training standards, competence levels and certification requirements and professional development paths for procurement practitioners, conduct procurement audits and inspections, investigate complaints, develop policies and maintain an operational plan on capacity building, establish and maintain institutional linkages with other entities and professional bodies, undertake research and surveys, report to Parliament and undertake any activity which may be necessary for the execution of the functions of Procurement Regulator.

4.1.9 It would seem that the drafters of these functions intended to create a sort of "procurement God" who would hold every overarching responsibility within the public procurement function, except undertake the procurement itself. Whilst this may be a laudable intention, this will be a herculean task and may introduce potential conflicts of interest which must not be underestimated. It must be remembered that this Bill proposes the repeal of the CTBO. There is no transitional period contemplated or reform of the CTBO while developing capacity in other areas. It is expected that the Bill will be passed, the CTBO repealed and this Procurement Regulator established performing these functions. It is

[42] Section 6 outlines comprehensively the kinds of matters which could be contained in the guidelines determination of Value for Money, general rules relating to procurement, public consultation on major contracts etc.

submitted that this is unrealistic and several of these functions will require the commitment of significant human, financial and physical resources to implement effectively. Whilst this is being addressed, the current challenges in the procurement system could be worsened instead of being made better.

4.2.0 Issues of potential conflict of interest ought as well to be considered. As the Procurement Regulator has both the responsibility for developing the rules and policies and guidelines with some degree of specificity (eg. inclusive of handbooks, standardized documents and forms) in addition to the purview to deal with complaints relating to transactions, one can anticipate a situation where the Regulator is called upon to investigate issues relating to the fairness or lack thereof of procedures developed by his Office. Also in the maintenance of the Register of Suppliers which will necessarily include the role of pre-qualifying suppliers to be included in the register, one can again anticipate a situation where a disgruntled supplier may make a complaint about the system of or procedure for registration; but this complaint will be handled by the Office of the Procurement Regulator itself.

4.2.1 The scope of this post far exceeds that of the Procurement Ombudsman in Canada[43] for example whose functions are (a) to review the procurement practices of departments, to assess their fairness, openness and transparency and make any appropriate recommendations to the relevant department for the improvement of those practices; (b) to review complaints relating to contract awards and decisions during the contract administration phases and to ensure an effective alternative dispute resolution process is provided to parties who agree to be subject to same[44]. Noteworthy, is that this position still falls under the purview of the executive under the portfolio of the Ministry of Works which submits its annual reports to the Minister who is then statutorily enjoined to lay said report before parliament within fifteen (15) days of receipt. Further the Procurement Ombudsman is statutorily prevented from recommending that a contract award be cancelled.

4.2.2 The Contractor General's Office in Jamaica also has a much more limited function than our proposed Procurement Regulator but is far more empowered than the Procurement Ombudsman of Canada[45]. The Contractor General's Office is established as a Commission of Parliament and reports thereto. Its functions include a two fold role (a) to monitor the award and the implementation of government contracts with a view to ensuring that**,** (i) such contracts are awarded impartially and on merit; (ii) the circumstances in which each contract is awarded or, as the case may be, terminated, do not involve impropriety or irregularity; and (iii) without prejudice to the functions of any public body in relation to any contract, the implementation of each such contract conforms to the terms thereof; and (b)

[43] This post was recently established in 2007 under the new public sector finance and procurement reforms. For insight directly from the first Procurement Ombudsman appointed under the new system, Mr. Shahid Minto see Paper presented at the 2nd Caribbean Public Procurement Conference (CPPC) 2010 11-12 October, at Hyatt Regency Trinidad entitled *The Role of the Procurement Ombudsman: Another Cop on the Beat or a new Frontier in Procurement Oversight?* hereto attached and marked **ANNEX 3.**

[44] Department of Public Works and Government Services Act (1996, c. 16)

[45] See Contractor General Act (Acts 15 of 1983 | 17 of 1985 | 1 of 1999)

to monitor the grant, issue, suspension or revocation of any prescribed licence, with a view to ensuring that the circumstances of such grant, issue, suspension or revocation do not involve impropriety or irregularity and, where appropriate, to examine whether such licence is used in accordance with the terms and conditions thereof. Noteworthy, is that the tenure of the Contractor General is carefully provided for in the enabling statute including circumstances for removal and termination.

4.2.3 Some duplication exists in the description of the functions as well and therefore some streamlining and/or coalescing is required.[46] Also there seems to be a grammatical irregularity in section 18 (k).

Part IV - National Procurement Advisory Council

4.2.4 The establishment of a National Procurement Advisory Council (NPAC) seems to be aimed at mandatory civil society involvement in the public procurement process. This is not a simple issue and requires a careful balancing of the executive's power to make policy decisions in the public interest and the concern of citizens to be involved in that decision making process. It therefore strikes at the heart of the issue of democratization of the public procurement function and any administration contemplating such reform must be mindful of the ramifications, opportunities and pitfalls. Whilst it is laudable and appropriate to seek to have greater stakeholder involvement in the public procurement process, it is important that the executive is allowed to pursue its development agenda for the country.

4.2.5 The NPAC as presently conceived in the Bill has been given substantial interface and power to influence the public procurement process. This must be considered alongside the expansive powers already referred to above and specifically the powers of the Regulator defined in section 6 to provide Guidelines for the determination of Value for Money,[47] public consultation on major contracts,[48]the consideration of government policies on public procurement,[49] and an independent review process involving civil society at critical points of the public procurement process.[50] There can be observed a heavy bent toward greater civil society involvement in the public procurement process of which the present administration must be mindful.

4.2.6 It is recommended that proper research is undertaken on the many emerging models for civil society involvement in the public procurement process and our present proposed system benchmarked against them. In 2007 the OECD and the World Bank undertook a joint stocktaking exercise of social accountability (SA) initiatives in OECD member countries. The stocktaking exercise produced forty (40) templates detailing social accountability initiatives in twenty-seven (27) OECD countries and the

[46] eg 18 (d), (e) and (l) can be collated;
[47] section 6(2) (a),
[48] section 6(2) (b),
[49] section 6(2) (e)
[50] section 6(2)(f) - there appears to be grammatical irregularity in this sub-section

European Commission. Cases were selected on the basis of their focus and level, and potential transferability of their policy lessons and contribution to the global exchange of policy relevant knowledge.[51]

4.2.7 Below we have outlined some of our observations on the proposed model for CSO involvement.

Appointment of Nominating Organizations vs Appointment of Individuals

4.2.8 Section 22 outlines a process whereby the President in his own discretion will appoint seven (7) nominating organizations[52] with an ex officio member from the Ministry of Finance for a period of three (3) years. These nominating organizations can then appoint whomsoever of their membership they choose to serve on the NPAC. The nominating organization can also replace its nominee merely by giving notice to the President and the Procurement Regulator[53].

4.2.9 Firstly, it is suggested that in a society as small as Trinidad and Tobago there are few competing organizations for these seven (7) positions and one can readily envisage a future where the same organizations are represented every three (3) years, with the same vested interests. Secondly, if a citizen with appropriate experience, skill and expertise were not aligned to one of these organizations or, even if so aligned, marginalized from the leadership for whatever reason, he/she will not have an opportunity to contribute to the development of the public procurement process. Thirdly, if for some reason the nominating organization is not happy with the conduct of the representative on the Council he can be unilaterally removed by mere notice to the President and the Procurement Regulator. This means that these representatives are at the behest of their organizations and not their professional codes of conduct or ethical standards. This seems inimical to the objective of greater civil society involvement and the democratization of public procurement function. It is recommended that in order to balance the membership of this Council, that consideration be given to the President appointing individuals directly after being satisfied of their experience, skill, expertise and standard of ethics, in addition to the proposed system of having members appointed by approved nominating organizations. Further that (a) the criteria by which the President exercises his discretion with respect to appointing individuals and nominating organizations be specified in the legislation and (b) the President retain the right to veto the nominee of a nominating organization on grounds specified in the legislation which should include its record of professional and ethical conduct.

Functions

[51] The results of the study and report are hereto attached as **ANNEX 4.**
[52] three NGOs having an interest in good governance, three organizations representing the construction, manufacturing and retail sectors and one representing the financial institutions
[53] Schedule - Operation of the National Procurement Advisory Council, Tenure of Office section 1(2)

4.3.0 Section 23 outlines the functions of the NPAC which include advising the Procurement Regulator on the implementation of the Operating Principles and Objectives and making recommendations in the development of the Guidelines so as to ensure that the Guidelines conform to the Operating Principles and Objectives. Noteworthy, is that these Guidelines represent the substance of the new framework. Caution is again advised against the passage of this Bill without the establishment or development of these Guidelines. To do otherwise would mean that the Executive would be setting a skeleton system in place over which their control will be limited in terms of the substance of the framework to which they and their public officials and agents will be bound. The Bill contemplates the substance of the framework being designed by the Procurement Regulator with the assistance of the NPAC.

Part V - Miscellaneous

4.3.1 Section 26 provides that all records or documents in relation to a transaction are to be available to a member of the public on request. There is no consideration here given to how this will operate in relation to the exemptions provided for under the Freedom of Information Act 1999 as amended. It is suggested that the section read "Subject to the provisions of the Freedom of Information Act all records or documents...".

4.3.2 Section 28 provides for relief under the Judicial Review Act, 2000 to apply. This provision is redundant and adds nothing to the state of the law. Once the Bill is passed and the post of Procurement Regulator is established, the courts by virtue of the Judicial Review Act would have purview over decisions made since they are made under a statutory power. For this not to be the case, the Bill would have to expressly so provide. It is recommended that this section be removed.

4.3.3 Section 30 provides for the protection of whistleblowers and this is a critical component of any effective public procurement system and consistent with our international treaty obligations. Retention of this section is recommended.

4.3.4 Section 31 provides for the entrenchment of the provisions of the Bill requiring no less than a two/thirds majority for amendment. This provision ought only to be retained if the role, functions and powers of the Regulator and NPAC and the substance of the framework to form part of the Guidelines is carefully considered and refined.

(b) National Tenders Board Bill 1997

4.3.5 A quick perusal of the National Tenders Board Bill 1997 reveals that the provisions are inconsistent with the provisions of the Public Procurement and Disposal of Property Bill 2010. There is also considerable overlap and it is assumed that this Bill is at present not being formally considered. If

this assumption is incorrect we are prepared to provide comprehensive submissions on the effectiveness of the provisions in a subsequent paper.

5.1.0 Impact of External Influences

5.1.1 Over the last quarter century a global revolution has taken place in the perception of the function of procurement within the context of public and private sector business. Across the board, more and more, the highly strategic impact of procurement decision-making on the sustainable development and growth of organisations, countries and regional trading blocks is being appreciated. The impetus for the advancement of public procurement reform initiatives in developing states is escalating as trade liberalisation is exhorted as a universal good. Public Procurement reformative efforts within CARICOM member states are presently plagued by tensions between the varied and often competing objectives of the political desire to retain "policy space" in order to pursue socio-economic development objectives and the demands of trade liberalization and accountable governance.

CARIFORUM - EC - Economic Partnership Agreement (EPA)

5.1.2 Although public procurement has traditionally been viewed as a "behind the border" issue, this approach is fast becoming a thing of the past. Increasingly, international treaties and conventions and Bi-lateral Investment Treaties (BITs) are imposing conditions relating to public procurement with which the member state must contend. Trinidad and Tobago has not signed onto the most widespread international agreement on public procurement, the World Trade Organization (WTO) Government Procurement Agreement (GPA) [54] but has nonetheless signed onto the CARIFORUM - EC EPA[55] which is said to have

[54] as is consistent with the approach taken by most developing countries. Currently forty (40) WTO Members are covered by the WTO Agreement on Government Procurement. These comprise Canada, the European Community (27 member states), Hong Kong, China, Iceland, Israel, Japan, Korea Liechtenstein, the Netherlands including Aruba, Norway, Singapore, Switzerland and the United States. Twenty (20) other WTO Members have observer status under the Agreement: Albania, Argentina, Australia, Cameroon, Chile, China, Columbia, Croatia, Georgia, Jordon, the Kyrgyz Republic, Moldova, Mongolia, Oman, Panama, Saudi Arabia, Sri Lanka, Chinese Taipei and Turkey. Four intergovernmental organisations also have GPA observer status: the International Monetary Fund (IMF), the Organization for Economic Co-operation and Development (OECD), the United Nations Conference on Trade and

WTO-plus conditions and is historic, in that it is the first multi-lateral agreement between the developed and the developing world "so-called" which contains public procurement conditions. This was signed by CARICOM member states notwithstanding the fact that there is yet to be established a regional framework for public procurement. Accordingly, at a regional level, the opportunity to drive the CARIFORUM EC EPA negotiations upon a foundation of an established regional framework, was lost.

5.1.3 As it now stands, undertaking a domestic public procurement reform initiative without reference to our treaty obligations under the CARIFORUM EC EPA would be shortsighted. The CARIFORUM-EC EPA public procurement conditions are covered under Chapter 3 of Title IV which deals with Trade Related Issues[56].

5.1.4 It is suggested by CARICOM negotiators that the EPA does not provide for non-discrimination and national treatment for foreign based companies, however a careful perusal of the provisions reflect that it does provide for non –discrimination and national treatment for foreign companies operating through a locally incorporated subsidiary[57]. Notably, covered entities are limited to Central Governmental Authorities and the thresholds agreed are stated by the CRNM negotiators to be very high in order to reserve "policy space" for development objectives.

5.1.5 It is important that the Committee consider the Chapter 3 conditions carefully, not only with a view to ensuring alignment of domestic provisions to treaty obligations but also with a view to proposing amendments to the EPA in the future. Of significance, under Article 181 there is a mandatory review process of the said Chapter 3 to be undertaken every three (3) years. The EPA was signed by Trinidad and Tobago on 15th October 2008 and so this period will expire in October 2011. The present administration should be proactive and establish firm and researched policy positions on all issues relating to this Chapter so as to propose any amendments as it sees fit.

Draft Framework for Regional Integration of Public Procurement Policy (FRIP)

Development (UNCTAD) and the International Trade Centre (ITC). At present, there are eight (8) WTO Members which are in the process of acceding to the GPA: Albania, Georgia, Jordon, the Kyrgyz Republic, Moldova, Oman, Panama and Chinese Taipei. Notably, no CARICOM or CARIFORUM territory has acceded to the WTO-GPA.

[55] The negotiation and initialling of the CARIFORUM-EC EPA on December 16th 2007 is the single most significant regional development in public procurement policy and is the next page in the complicated relationship between the European Community and its former colonies. The EPA was finally executed by the CARIFORUM countries on 15th October 2008.

[56] The full text of the Public Procurement Chapter is attached below in **ANNEX 5.**

[57] see Article 167 which expressly states there shall be no discrimination against locally established foreign companies and also Article 172 which limits the use of qualifying criteria relating to work experience in the jurisdiction

5.1.6 National reform efforts must be considered in the context of regional reform initiatives which are currently underway to harmonize regional public procurement policy. The Revised Treaty of Chaguaramas provides the justification for the establishment and implementation of a regional Public Procurement Regime. Article 239 of the Revised Treaty obliges Member States to *"elaborate a Protocol relating …to… Government Procurement"*.

5.1.7 To date, the Community has undertaken and concluded a significant volume of work regarding the establishment of a Community Regime for Public Procurement[58]. The CARICOM Secretariat has been actively engaged in follow up communications with Member States in pursuit of concluding the national consultations that are required as a key input into the finalisation of the Policy framework and movement towards the Protocol.

5.1.8 Notably, the proposed Community Policy, now entitled the *Framework for Regional Integration of Public Procurement Policy (FRIP)* which is presently at third draft stage, is expressed to be based in large part on the UNCITRAL Model Law on Procurement of Goods, Construction and Services. This is important since the White Paper 2005 criticises this model as being highly prescriptive and proposes a more flexible "principles based" approach to procurement reform which forms the substance of the present Bill. Given that the Bill proposes a skeletal framework based on compliance with Principles and Objectives, there is no substantive inconsistency between this enabling statutory reform and that being undertaken at the regional level. However, in the establishment of Guidelines under the proposed legislation, care will need to be taken to ensure alignment with emerging regional standards.

CANADA - CARICOM Free Trade Agreement (FTA)

5.1.9 Note should also be taken of the ongoing Canada-Caribbean Community (CARICOM) Free Trade Negotiations. During late 2009 into 2010 two rounds of negotiations were held and negotiators are said to be working assiduously to conclude an FTA shortly. It is indicated that once again public procurement conditions are on the table to be included in the FTA. This domestic reform initiative must be mindful of this ongoing development, in an attempt not only to influence the final obligations of the FTA but also to ensure no unnecessary friction between the two.

[58] See **ANNEX 6** for findings of the of the IDB/CIDA funded project on the status of national public procurement systems within CARICOM

6.1.0 Recommendations & Conclusions

6.1.1 It is clear that there are areas in need of further consideration in the present domestic reform effort. These issues ought not to be brushed aside in the name of expediency and/or the dire need for public procurement reform. The effective regulation and management of the public procurement function is arguably the most critical in public sector governance. Moreover, in light of the increasing external pressures to adopt "international standards" and "best practice" so called, the GoRTT must be careful not to cede its sovereign power over this function by implementing a system of boiler plate provisions which serve the interests of the international community far more than the domestic good.

6.1.2 The following are a series of recommendations based on observations of possible weaknesses and gaps in the proposed new public procurement regime.

(1) **Recommendations relating to perceived *Regulatory Gaps***

6.1.3 The Bill in its present form proposes the establishment of a skeletal framework upon the passage of the legislation. The task of developing the substantive framework is delegated to the newly established offices of Procurement Regulator and the National Procurement Advisory Council. We reiterate, for all the reasons advanced above, that there are inherent dangers in this approach and it is difficult to assess whether or not the new proposed regime will produce the efficient, transparent, accountable system required in the absence of the substantive provisions to be included in the proposed Guidelines being part of the package.

6.1.4 Further, in light of the pressures of the global harmonization initiatives, the present administration should take great care in delegating important policy framing opportunities. The following areas in particular are highlighted for inclusion in the enabling statute and/or at the very least serious consideration by the present administration in order to develop public policy positions :

(a) **Establishment of thresholds** - It is noted that the Bill is silent on the issue of financial and market access thresholds. It is well accepted that organizations and countries can set thresholds below which statutory provisions would not apply for efficiency and/or market access reasons. This in effect would mean that the provisions of the Bill would apply to all procurement, whether it is the acquisition of two pens or a concession for development of railway. It may have been considered, although this is not expressly addressed in the Bill, that such a threshold would be set by the Procurement Regulator, after consultation with the NPAC and issued in the Guidelines. However, in the present global environment, existing domestic thresholds are playing an increasingly important role in the negotiation of market access thresholds for multi-lateral and bi-lateral agreements and can be a powerful instrument in these exercises. The actual threshold established is becoming almost as political a decision as it is an economic one. Care must be taken by the present administration in the establishment of thresholds, which re-emphasizes the point that the policy dialogue on these issues must be developed now and serve as a driver in the establishment of the Guidelines and not the other way around.

(b) **Establishment of Preference Margins -** It is noted that the power to establish guidelines on preference margins has been delegated to the Procurement Regulator. As above, the establishment of preference margins, even when transparently determined and implemented, has become an alarmingly controversial and political issue. These margins establish the extent to which SMEs or local industry or any other sector or category of individuals can gain preference within the public procurement system. The establishment of these margins which can be done by sector, organisation or across the board is one in which the executive should determine whether or not it ought to have some measure of control or influence. Even if the power to set the preference margin is delegated to the Procurement Regulator and or the respective procurement entities, a policy statement as to the lawfulness of any such margin set or the parameters within which they may be set, may be required at the level of the enabling statute if the Executive wishes to have influence on this important issue. This is another reason why the Guidelines should be fleshed out at this stage to prevent the passage of legislation which cannot be implemented as a result of disagreement/standoff between that which is proposed by the Regulator on the one hand and Parliament on the other, when presented for ratification. It is reiterated that care must be taken by the present administration in the establishment of preference margins, which re-emphasizes the point that the policy dialogue on these

issues must be developed now and serve as a driver in the establishment of the Guidelines and not the other way around.

(c) **Establishment of a Central Electronic Public Information System** - It is noted that the Bill is silent on the establishment of a Central Electronic Public Information System. Despite empowering the Procurement Regulator to develop Guidelines relating to the publication of details in respect of a transaction[59]; to establish a comprehensive database with information on procurement processes, contract awards and prices and any other information of public interest as the Procurement Regulator determines[60]; and to determine, develop, introduce, maintain and update related system-wide databases and technology[61], there is no express provision requiring the establishment of a Central Electronic Public Information System. Whilst it is not here argued that it is not within the proposed statutory purview of the Procurement Regulator to so establish, it is not expressly statutorily mandated. The Procurement Regulator can act consistently with the mandatory provisions highlighted here and quite lawfully not establish an on-line system which provides all the material information to the public. Given that this is a critical component of an effective public procurement system, it is suggested that this is expressly mandated in the enabling statute, in addition to providing for the nature of the information required to be disseminated and timeframes for publication. It should also be noted that the creation of an on-line facility for access to public procurement information and opportunities is an express condition of the CARIFORUM-EC EPA[62] .

(d) **Regulating Public Private Partnerships (PPPs) and Private Finance Initiatives (PFIs)**[63] - Public Private Partnerships are not a new model. Collaboration between the public and private sectors in the delivery of large infrastructure development projects and services has been with us in a variety of forms for well over 200 years. More recently, however, in both "developed" and developing countries there has been a marked increase in the use of these types of models. Although seen by some as a means of delivering greater efficiency, they are regarded by many primarily as a means of limiting public sector borrowing. Recent reports suggest that the true life time costs of PPP structured projects may be excessive.[64] Their proponents argue that PPPs offer solutions to government borrowing and expenditure constraints, and value for money benefits by the transferring of risks and costs to the private sector. However the ability to achieve such

[59] section 6 (1) (b)
[60] section 18 (2) (d)
[61] section 18 (2) (e)
[62] see Article 168
[63] For PPP and PFI definitions and classifications see ADB, Public Private Partnership (PPP) Handbood 2008 http://www.adb.org/Documents/Handbooks/Public-private-Partnership/default.asp
[64] See eg www.**telegraph**.co.uk/Private-Finance-Initiative-hospitals-will-bring-taxpayers-60-years-of-pain.html

advantages depends heavily on whether the right PPP contractor has been procured and whether suitable and reasonable terms can be agreed which provide a fair balance of incentives for the private sector in exchange for the delivery of service improvements and efficiency gains. It should be noted that a PPP framework comprising policy, legal, regulatory and institutional aspects is a key building block for countries engaging in these models. In addition, an effective contract management and monitoring framework and tools need to be developed in order to ensure that a credible performance evaluation process exists, public policy objectives are being met and the PPP project does indeed provide value for money for the Government. There should also be transparent mechanisms in place for the allocation, valuation and management of contingent liabilities that may arise from PPP arrangements. The fact that most PPP contracts run for around twenty-five (25) or thirty (30) years distinguishes them from most other forms of public procurement. It is thus inappropriate to include such a specialised regulatory framework within the context of the present proposed legislation as may now be caught within the expansive definition of procurement in the Bill. It is recommended that an independent institutional framework including a specialised PPP Unit be established with its specific regulatory mandate for this type of procurement model. Work must also be done to build critical capacity in the area of PPP management. It should be noted that UNCITRAL distinguishes this area from the Model Law on procurement by having established the UNCITRAL Legislative Guide on Privately Financed Infrastructure Projects 2001[65].

(2) Recommendations relating to perceived weaknesses and ambiguities in proposed framework

(a) **Definitions -** Reference is here made to the observations at paragraphs 4.1.3 - 4.1.4 with particular reference to "agency", "authorized purchaser", "procurement", and "state controlled enterprise". Some of these definitions ought to be revisited in order to avoid ambiguity.

(b) Checks and Balances on the Post of Procurement Regulator - Reference is here made to the observations at paragraphs 4.1.5 - 4.2.3. Consideration ought to be given to the nature of the qualifications required, the process of appointment, process for termination and tenure of the post. Removal of the *"re"* in the word *"re-appointment"* in section 17(2) of the Bill is recommended to prevent the consequence

[65] UNCITRAL Legislative Guide on Privately Financed Infrastructure Projects version 2001 was considered to be prepared in 1996 in the light of a note by the Secretariat on Build- Operate- Transfer (BOT) project in order to assist in the establishment of a legislative framework favorable to privately financed infrastructure projects. This Legislative Guide was adopted by the resolution of UNCITRAL on 7 July 2000 subject to editorial modification of the Secretariat of BOT Project.

an individual holding the post of Procurement Regulator for as long as fifteen (15) years.

(c) **Civil Society Involvement : *NPAC* -** Reference is here made to the observations at paragraphs 4.2.4 - 4.3.0. More consideration ought to be given to the purpose of such a model for civil society involvement and whether in its present form it strikes the appropriate balance between goals of efficiency (the need for the executive to achieve its development agenda) and accountability (the need for transparency and stakeholder involvement in the function). It is suggested that one can achieve the goal of greater efficiency and having the benefit of stakeholder involvement without the establishment of an autonomous civil society council over which the Executive has limited control. We are unaware of any model of the type proposed in other jurisdictions. Models observed in New Zealand, US and Canada all involve consultative bodies set up with civil society representation, but with a reporting line to a Ministry of Government.

(d) **Establishment of Procurement Units (PUs) -** It is noted that the Bill proposed a decentralized public procurement system where the individual public entities have responsibility for their procurement function. Two recommendations are made here. Firstly, consideration should be given to the creation of a hybrid system comprising both centralized and decentralized elements. The former to be utilized for standard goods and services being procured across the entire public sector, eg, stationary, etc from which the state could benefit greatly from discounts arising from supplier economies of scale and savings from use of eCommerce and eAuction technologies. There should be established a centralized public procurement unit which would have responsibility for ascertaining the needs of public entities and receiving requests and conducting the procurement on behalf of the public entities. Consideration should be given as to whether or not the CTB could be retained to fulfill such a role in the new system. Secondly, consideration should be given to the establishment of Procurement Units (PUs) within each public procuring entity. Within the PU formal positions should be established whereby the functions of procurement, legal, risk, finance and project management are aligned and interact with their counterpart in the wider organisation. This approach is consistent with the cross-disciplinary approach to the procurement function advocated by our Institute and accepted as best practice. This will serve to encourage greater specialization and profile for procurement professionals. The head of the PU should be appropriately qualified and report directly to the CEO. The PU should be responsible for the collation of procurement information and statistics, dissemination of opportunities to the public, compliance with domestic and regional procurement regulatory requirements and annual

procurement planning and reporting. It is noted that although the system proposed in the Bill is a decentralized one, these responsibilities remain with the Procurement Regulator. In our respectful view this will neither create the most efficient system nor one which will serve the ends of quickly identifying non-compliant institutions, that is to say, accountability.

(e) **Establishment of CPPU and Retention of CTB** - It is suggested that consideration be given to the retention of the present CTB albeit under a different mandate. The human resource and infrastructure of the CTB can be utilized far more efficiently to continue undertaking the procurement of standard goods and services which are common throughout the public sector and also be responsible for running eAuctions for the entire public sector. At present there exists an eAuction Task Force which operates under the auspices of the Ministry of Finance already performing such auctions for several public sector entities simultaneously with reports of savings of over 25% or more on the goods and services acquired. Such a unit can be absorbed into a **Centralized Public Procuring Unit (CPPU)** utilizing the resources of the old CTB and can contribute to much greater efficiency than in a completely decentralized system. This new CPPU can also be made responsible for the collation of procurement information and statistics; dissemination of opportunities to the public, compliance with domestic and regional procurement regulatory systems and annual procurement planning and reporting. The CPPU and the PUs, as proposed in (d) can then be responsible for reporting to a Procurement Regulator on a quarterly, biannual or annual basis.

(f) **Procurement Planning** - An efficient public procurement framework must have a robust approach to procurement planning. Gone are the days when the perennial excuse of "its an emergency" will hold, when the evidence suggests that proper planning would have averted the situation. Best practice requires the preparation and publication of annual procurement plans and then an annual report on whether or not the plans were in fact successfully carried out with subsequent updates and progress. Such a mandatory requirement forces procuring units to invest in more efficient organizational approaches for the carrying out of the procurement function.

(g) **Potential FOIA overlap -** Reference is made to paragraph 4.3.1.

(h) **Whistleblower Protection** - Reference is made to paragraph 4.3.3. This protection should remain. However, care should be taken in the drafting to protect against "bad

whistleblowing"[66] i.e. the unwitting empowerment of a disgruntled or unsuccessful corrupt actor against a blameless public officer or bidder.

(3) Recommendations relating to proposed substantive Guidelines

(a) **UN Model Law -** In 1994, the United Nations Commission on International Trade Law (UNCITRAL) adopted the UNCITRAL Model Law on Procurement of Goods, Construction and Services at its twenty-seventh session. The Model law offers a potential regulatory framework for all procurement and its provisions deal with scope (Articles 1-3), qualifications (Articles 6-8), specifications (Article 16), procurement methods and their operation (Articles 18-51) and review (Article 52-57)[67]. It should be noted that the FRIP is said to be based in large part on the Model Law, while the White Paper 2005 criticizes the Model Law for being too prescriptive and merely "a more sophisticated version of the CTBO". Of further note, the Model Law covers only the process of acquiring a supplier or service provider and does not deal with the pre-acquisition stage including planning, feasibility and budgeting or the post-award phase including contract administration and implementation. Both of these phases are significant since compromises or weaknesses therein contribute to severely undermining the objectives of transparency, accountability and value for money in the procurement process. Further limitations of the UNCITRAL Model Law are that it does not yet expressly provide for some of the more recent methodologies being employed in the function of procurement e.g. electronic reverse auctions, supplier lists, and framework agreements[68]. Despite these express limitations of the Model Law there is much to recommend it as a guiding template for public procurement reform. Its inherent flexibility through the broad range of procurement formats from which to choose gives the reformer sufficient space to adapt the Model Law to suit the specific needs of a territory. Typical substantive provisions include those relating to transparency and publication, methods of procurement, criteria for use of selective or limited tendering methods, specifications, qualification of suppliers, competitive negotiated methods, opening of tenders, information on contract awards, bid challenge procedures, Time requirements, eAuctions, Framework Agreements,

[66] *Economics of Corruption* 2009 Professor Johann Lambsdorff

[67] The full text of the UNCITRAL Model Law on Procurement of Goods, Construction and Services can be downloaded at www.uncitral.org and hereto attached and marked **ANNEX 7**

[68] Work is said to be presently underway to produce a revised UNCITRAL on Procurement which covers these newer areas later this year. The area of regulating PPPs is covered under a separate existing UN Model Law.

Supplier Lists, PPPs and all should be considered within the context of this reformative effort.

(b) **Code of Ethics** - Recognizing the sensitive role that procurement practices can play in the public's trust in public sector decision-making, it is recommended that a comprehensive Code of Ethics be established in the framework for those involved in the function of procurement and in particular, purchasing, supplies, logistics and materials management. It is recommended as well that other professionals who are functioning in established PUs (eg. lawyers, finance, risk, project management and construction professionals) be also required to adhere to the Code. Standard provisions should include conflicts of interest, responsibilities to employers, relationship with suppliers, gift and confidentiality policies.

6.1.5 In conclusion, this public procurement reform effort must be commended and it is urged that the opportunity to re-define the arrangements in this most critical area of public sector governance is not lost. Our summarized recommendations in general terms are :

(a) Consideration ought to be given to a hybrid public sector procurement system which benefits from the economic advantages and efficiencies to be derived from a combination of centralized and decentralized processes.

(b) The establishment of an independent regulatory body in the form of the Procurement Regulator with responsibility for monitoring and enforcing the public procurement policy and regulation is a critical component of an efficient procurement system, but checks and balances ought to be put in place to ensure that this position does not become vulnerable to conflicts relating to bureaucratic, commercial or other vested interests.

(c) Civil society involvement in the procurement process is a welcome inclusion and certainly consistent with emerging best practice. However, great care must be taken in the model for civil society or stakeholder involvement established. The practical implications of the model in respect of its capacity to stymie the Executive's development agenda must be considered.

(d) Opportunities to develop robust economic policy positions on areas (eg thresholds and preference margins) which have been seen to have an increasingly powerful impact on the negotiation of our external arrangements should not be lost and/or delegated by the Executive.

(e) The substance of the framework ought to be developed now and some areas ought to be included in the enabling statute and others in the Guidelines. Even in the case of the latter, these should be discussed and developed now and not after the passage of the proposed legislation.

(f) Attention must be paid to our existing and potential international and multi-lateral obligations in the defining of our domestic reform effort, mindful of the ongoing regional public procurement reform effort (FRIP conditions) the CARIFORUM - EC EPA conditions and the current negotiation of the CANADA-CARICOM conditions.

(g) Greater care must be taken in the drafting of definitions to ensure consistency with best practice.

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ANNEXURES

Annex 1 NCE Compliance Comparative Table

Annex 2 Centralised and Decentralised Public Procurement (2000)

Annex 3 Shahid Minto, Procurement Ombudsman Canada CPPC 2010

Annex 4 Stocktaking of Social Accountability in OECD countries 2007

Annex 5 CARIFORUM EC EPA Chapter 3 Title IV

Annex 6 IDB/CIDA Funded CARICOM Project Findings 2003

Annex 7 UNCITRAL Model Law on Procurement