



25 November, 2013

Senator Dr. the Honourable Bhoendradatt Tewarie
Minister Planning & Sustainable Development
Level 14 Eric Williams Financial Building
Independence Square
Port of Spain

Honourable Minister,

We thank you for your letter of 14th November 2013. In response to your invitation we submit for the consideration of the LRC, the following *comments on the Government's Public Procurement Bill* ('the Government Bill').

The Private Sector/Civil Society Group (PSCSG) is of the opinion that *any Bill on procurement reform must be based on five indispensable elements which we consider crucial to a modern, well-managed, fully accountable and flexible procurement regime in a democratic State*. These elements express the principles of good governance—transparency, accountability and value for money—which should inform the function and structure of the legislation. *These are at the heart of the Draft Bill that we are proposing* and have been made publicly available on www.jcc.org.

The five elements are as follows:

1. use of *Public Money* as the cornerstone of any public procurement process;
2. definition of *Procuring Agency* encapsulating any organisations responsible for transactions in the use of public money;
3. effective independence of mechanisms of *regulation and grievance resolution*;
4. *Value for Money* linked to performance/efficient use of public money; and
5. imbedded *participation of Civil Society* in the maintenance of the integrity of the procurement system.

In what follows we explain in greater detail our understanding of these elements, highlight what appear to be some of the loopholes in the Government Bill and note some important provisions in it that do not appear to have been considered by the Joint Select Committee of Parliament (JSC).

Public Money

The main objective of public procurement legislation is to ensure the efficient and transparent use of public money in the procurement cycle. The underlying assumption is that the use of public money necessarily entails some level of public accountability regardless of the source of funds or the status or type of the body/agency responsible for its use. *The use of Public Money is therefore the cornerstone of any public procurement process* and as such must inform every aspect of any legislation pertinent to public procurement. The definition of public money will determine the boundaries of accountability as well as identify the accountable agency and accountable person within the accountable agency

The litmus test to be incorporated in any definition of public money is the liability of the taxpayer. In this regard *the definition of public money and its operation is dealt with thoroughly in the PSCSG Bill* and should form the cornerstone of any Bill under discussion.

The definition of public money utilized in the Government Bill is similar to the one used in the PSCSG Draft Bill. However, in the Government Bill the definition hangs on its own. It is not used in the definition of public procurement or in identifying responsible agencies. Instead, the Government Bill defines “procurement” or “public procurement” as the acquisition of goods, works or services by a public body.

In the PSCSG Draft Bill “public procurement” means procurement involving the use of public money. This definition is designed, *inter alia*, to encompass BOLT (Build, Own, Lease, Transfer), BOOT (Build, Own, Operate, Transfer) and DFC (Design, Finance, Construct) schemes or other funding schemes for the provision of capital works which may be found to be ultimately to the benefit of the public.

Procuring Agency

‘Agency’ refers to the category of organisations where persons are required to provide explanations about their stewardship of public money – in other words the ‘**who**’ of accountability, transparency and value for money—*sine qua non* in any law relating to public procurement.

The system of accountability for public money in Trinidad and Tobago is currently rooted in the *Exchequer and Audit Act* (Act #20 of 1959) a replica of an Act of the same name introduced by William Gladstone and passed in the United Kingdom in 1866. The Act focuses on ministerial responsibility to Parliament for the quality of public expenditure, with the Permanent Secretary as the accounting officer.

It is to be noted that the environment in respect of public expenditure in which the Exchequer and Audit Act was conceived was considerably less complex than what prevails today.

In the PSCSG Draft Bill “agency” means a body incorporated or otherwise that uses public money and includes:

- a) a ministry or department of government;
- b) a statutory body and any corporate body in which that statutory body has a controlling interest or is in a position to directly or indirectly exercise control over affairs of that corporate body;
- c) a state controlled enterprise and its subsidiary;
- d) a person prescribed in the Guidelines for the purposes of this definition
- e) a corporate body that is established for a public purpose;
- f) any other body that is involved in public procurement; and
- g) a person as prescribed for the purposes of this definition

This definition should be incorporated in any Bill to go to Parliament to enable a comprehensive accountability system for public expenditure for the acquisition of property and services. It is the link of these bodies to the use of public money which triggers the requirement for accountability, transparency and value for money.

Item (f) above —“any other body that is involved in public procurement”—is missing from the Government Bill. This omission denies oversight of the use of delivery systems such as Build Operate Lease Transfer (BOLT), of Public Private Partnerships (PPPs) where a private special purpose organisation not controlled or owned by the State is in control of the project. It also denies oversight of Government to Government arrangements.

In the Government Bill the use of the term “procuring entity” is restricted to public bodies, being defined as ‘... a public body that engages in public procurement’. Yet “Procurement” or ‘Public Procurement’ have previously been defined in the same Government Bill as ‘... the acquisition of goods, works or services by a public body’.

The PSCSG Draft Bill states that ‘procurement’ means “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 contracts.” ‘Public procurement’ is defined as “procurement involving the use of public money”.

Mechanisms of Regulation and Grievance Resolution

The functional and financial independence of the Procurement Regulator from the government of the day is a prerequisite for the integrity of any procurement system. In accordance with sound accountability criteria neither a Minister nor a Regulator is to be directly involved in the award of contracts.

The PSCSG Bill derived this third element from the history of public procurement in Trinidad and Tobago—a history in which changes in the institutional framework arose out of corruption issues.

The Central Tenders Board (CTB) was established by the CTB Act of 1961 and came into operation in 1965. This Act took away the power to award tenders from the elected representatives of local government bodies and gave the CTB “sole and exclusive authority ... save as is provided in section 35 ...” (thereby creating loopholes) “... to Act on behalf of the Government and the statutory bodies”. In addition “In the exercise of its powers and in its performance of its duties the board shall conform to any general or special directives given to it by the Minister” meaning the “the Minister to whom responsibility for the Central Tenders Board is assigned”. This was the Minister of Finance. *The CTB Act not only centralised control of public procurement but placed the CTB and thus the award of contracts under the direct control of a Minister.*

According to Section 75 (1) of the Constitution, *Cabinet’s responsibility is for the “general direction and control of the Government of Trinidad and Tobago and shall be collectively responsible therefor to Parliament”.*

The evidence emanating out of the *Commission of Enquiry into the Piarco Airport Project* revealed, not just *general* direction and control but direct interference in the procurement process by Ministers, to the extent that some of those Ministers are before the courts.

During the proceedings of the *Uff Commission of Enquiry*, particularly with respect to the operations of UDeCOTT, the question of ministerial involvement in the procurement process came under intense scrutiny.

It is clear that, *in regard to ministerial involvement in the procurement process, reformed procurement legislation must be true to the letter and spirit of Section 75 (1) of our country’s Constitution.*



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The issue of cabinet accountability to Parliament may require that there be *a permanent Joint Select Committee* responsible for public procurement. This could ensure that matters that fall within the purview of a Regulator are in the public domain as well as under Parliamentary oversight.

The role of Civil Society is critical in this context and should be reflected in any policy and legislation with respect to procurement.

The role of a regulatory authority in the Government Bill is no different from that which exists in the CTB Act of 1966. There is however some merit in what is proposed in it for grievance resolution.

Value for Money

Value for Money is the cornerstone of modern procurement systems. A procurement governance structure utilising the principle of value for money emphasises performance management approaches rather than regulatory procedures managed at clerical levels.

In this context, procurement is perceived as a management function based on:

- (a) methodologies for optimising Value for Money to achieve stated economic and social-outputs on a whole-of-life basis.
- (b) best practice accountability and transparency principles.

Methodologies

As far as methodologies are concerned we note that the PSCSG Draft Bill requires that Guidelines, Agency Handbooks and Agency Instructions apply value for money methodologies that take into account:-

- (a) identification of needs and of economic and social outputs and outcomes (that must be explicitly promoted by the procurement contract) so that specification in these terms will facilitate cost benefit analysis and the proper identification, assessment and comparison of the costs and benefits at each phase of the procurement cycle; and
- (b) planning that includes the selection of an appropriate delivery method and evaluation criteria and takes into account:

- i Government and agency policies;
- ii. market maturity;
- iii the need to implement a competitive process of a scale commensurate with the size and risk profile of the particular procurement;
- iv admission requirements for tenderers;
- v the performance history of each tenderer

Civil Society

A body comprising civil society and others should assist in reinforcing independently the integrity of the system and report accordingly in the public domain. The role of the National Procurement Advisory Council as envisaged in the PSCSG Draft Bill is to consider the effectiveness and efficiency of the procurement system and to make recommendations to Parliament. Good governance can only be permanently established if political participation functions effectively through Civil Society. It is thus incumbent on Parliament to act objectively in forming and nurturing active and responsible civil society participation in the policy formulation process.

Loopholes

We also take this opportunity to draw to your attention to some of the legislative loopholes in the Government Bill that need to be addressed.

Avoiding the CTB

By Act No. 36 of 1979 the Government amended the CTB Act and qualified the CTB's sole and exclusive authority in the procurement process by giving itself *the right to contract directly if "it enters into a contract with a company which is wholly owned by the State"*. This amendment effectively bypassed the philosophy of centralising procurement and led to a proliferation of State Owned Enterprises (SOEs) with independent tendering processes.

SOE's effectively spent public money for property and services outside the purview of the CTB.

We understand there are over seventy such SOEs which are responsible to the Minister of Finance as Corporation Sole. These SOEs are under the purview of Cabinet and the perception of the public is that they serve as vehicles for the distribution of patronage. It is thus imperative that a procurement regulator report directly and only to Parliament and be



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supported by a statutory body the expenses of which should be a charge on the Consolidated Fund. This approach will reinforce Parliamentary sovereignty in accordance with the intent of the Constitution.

Avoiding Judicial Review

Clear legislative expression will also inform future jurisprudence on the operation of the principles of good governance. Currently the jurisprudence of Trinidad and Tobago indicates confusion as to the meaning of public procurement which in turn informs the jurisprudence on the meaning of good governance. *In NH International CvA. No. 95 of 2005 procurement processes were classified as essentially commercial thereby excluding the outcome of those processes from judicial review* notwithstanding the public nature of the agencies involved and the use of public money. The minority judgement of the then Chief Justice Sharma, focusing as it did on the significance of the use of public money, was prescient and to be preferred.

Avoiding the Integrity in Public Life Act (IPLA)

On June 27th, 2013 the Court of Appeal ruled that *Telecommunications Services of Trinidad and Tobago* (TSTT) was not a State Enterprise and as a result, was not subject to the provisions of the IPLA since, the government terminated its *de jure* control of TSTT when it transferred its majority shares in the company to National Enterprises Limited. This Court of Appeal decision overturned a 2007 decision which held that TSTT was a public authority as it was supported by Government funds over which Government was in a position to exercise control. Consequently this may affect SOE's in general and may determine whether or not *they now fall outside the purview of the Integrity Commission*. This decision affects the jurisprudence of the 'who' of accountability.

Significance

These loopholes are significant as they are being tackled in other jurisdictions in the Commonwealth in respect of public sector arrangements where Government agencies attempt

to acquire information on projects when public money is involved. The current definitions in the PSCSG Draft Bill will remove these anomalies by ensuring, very simply, that once there is public money involved the principles/rules pertaining to good governance should apply, regardless of the status of these agencies.

The critical issue is not the constitution of the agency but rather its involvement with public money for a public purpose.

Provisions of the Government Bill not addressed by the JSC Recommendations

It appears that the documents originally laid in Parliament as 'Legislative Proposals' that were then referred to successive JSCs and drawn upon to some extent in the second JSC's report to Parliament, have been largely side-lined in the production of the Government Bill.

At the same time, issues that apparently were not addressed by both JSCs have found their way into the Government Bill. Prominent among these are:

- the *exclusion of Government to Government arrangements*; and
- the *introduction of Framework Agreements* using text that appears to have been copied word for word from the 2011 *UNCITRAL Model Law on Public Procurement* which has been determined by the World Bank as not being efficient in supporting developing countries' policies.

For further discussion of the first of these issues, please see the attached paper entitled '*Local Content, Government to Government and Procurement which demonstrates how g2g arrangements should be brought under our procurement legislation without being in conflict with international agreements.*

Conclusion

In the light of the above, the PSCSG is constrained to conclude that, ***without radical and extensive redrafting that would place the elements that we consider indispensable at its core and would address the loopholes as well as the other concerns that we have identified, the Government Bill could never be considered legislation that was "modern, progressive and transparent"***.

In contrast, the PSCSG Bill qualifies eminently for such a description. Not only does it address adequately the issues that we have identified above, it is also a thoroughly updated version dated 29th October 2010 of the second of the two legislative proposals that were laid

in Parliament and placed before the LRC It is in fact the result of eleven years of public sector/private sector/civil society collaboration.



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It would greatly advance the reform process along sound and efficient lines if, rather than a re-draft of the current Government Bill, the document eventually laid in Parliament and sent to the LRC were substantially the PSCSG Draft.

Please rest assured that the PSCSG remains committed to continue collaborating with Government and all other stakeholders in seeking genuine public procurement reform.

Yours sincerely,

Winston Riley, FAPETT
Chairman

CC: Mr. Moonilal Lalchan, Chairman, Trinidad and Tobago Chamber of Industry and Commerce
Mr. Hugh Howard, President, American Chamber of Commerce of Trinidad and Tobago
Mr. Nicholas Lok Jack, President, Trinidad and Tobago Manufacturers Association
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The Honourable Prakash Ramadhar, Chairman of Legislative Review Committee
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Local Content, Government to Government and Procurement

Winston Riley (FAPETT)

The Joint Consultative Council (JCC) and the Trinidad and Tobago Local Content Chamber (TTLCC) met on July 16th 2013 to discuss issues of Local Content, Government to Government (G2G) arrangements and Public Procurement. The primary concern of Local Content, Government to Government and Procurement Paper was the impact of G2G arrangements on local content, procurement regulations and the development of local institutions and organisations.

G2G arrangements were initially analysed in the context of the existing legislation on procurement– i.e., The Central Tenders Board (CTB) Act 1961 amended in 1979, section 20A which allows Government to act on its own behalf where:-

- i. *‘...as a result of an agreement for technical or other co-operation between it and the Government of a foreign State, the latter designates a company to supply the articles or to undertake the works or any services in connection therewith;*
- ii. *the articles or works or any services in connection therewith are to be supplied or undertaken by a company which is wholly owned or controlled by a foreign State;*
- iii. *it enters into a contract with the National Insurance Property Development Company Limited or a company which is wholly owned by the State, for the supply of articles or for the undertaking of works or services in connection therewith’*

Subsequently, the Private Sector/Civil Society Group (PS/CSG) became aware of a Draft Public Procurement Act to be placed before the Legislative Review Committee (LRC) by the office of the Chief Parliamentary Council (CPC). The document states:-

“This Act does not apply to the procurement of goods and services arising out of –

- (a) *a treaty or other form of agreement to which Trinidad and Tobago is a party with one or more other States;*

- (b) *an agreement entered into by Trinidad and Tobago with an I intergovernmental international financing institution; (IFI)*
- (c) *an agreement with CARICOM; or*
- (d) *an agreement for technical or other cooperation between the Government and the Government of a foreign State,*

Where the treaty or agreement provides for rules or regulations regarding the procurement of goods or services.”

The government bill follows the UNCITRAL 2011 draft model which states

Article 3

International obligations of this State relating to procurement [and intergovernmental agreements within [this State]

To the extent that this Law conflicts with an obligation of this State under or arising out of any:

(a) Treaty or other form of agreement to which it is a party with one or more other States; [or]

(b) Agreement entered into by this State with an intergovernmental international financing institution, [; or]

[(c) Agreement between the federal Government of [name of federal State] and any subdivision or subdivisions of [name of federal State] or between any two or more such subdivisions,]

the requirements of the treaty or agreement shall prevail, but in all other respects the procurement shall be governed by this Law.

We should use our ingenuity to insure that when public money is involved the procurement laws of our country prevail.

A review of G2G arrangements reveals the following:

- i. G2G arrangements in Trinidad and Tobago were initiated in 1979 when ‘money was not a problem’. At present, G2G arrangements are continuing

when the local banks are flush with funds and bonds could be raised at 2.5%. There is no resource deficiency in T&T.

- ii. G2G arrangements are not only instruments for procurement of goods and services from foreign countries but also provide for the outsourcing of the procurement process. As a result, human and institutional systems/structures are placed entirely in the hands of the foreign country thus making any procurement legislation irrelevant.
- iii. All capital projects can be initiated under G2G arrangements
- iv. Public monies utilised for the procurement of goods and services leave generations of T&T citizens responsible for the public debt incurred.

PS/CSG hereby advocates that:

- i. Procurement legislation should state that “*whenever and wherever public money is involved, all procurement of goods and services are subject to the procurement regulations of the country.*”
- ii. Our procurement rules should be in keeping with international best practice.
- iii. The local implementing agencies should establish and express the measurable development objectives of each project before implementation.

Other provisions should include for:-

- a) The optimising of local value added along supply chains.
- b) The enforcing of laws and regulations related to labour, health and safety
- c) The linking and optimising of Value for Money to stated measurable development objectives as the prescribed approach in decision making along the value chain.
- d) The tabling of all G2G arrangements in Parliament upon signing, for public consideration.
- e) The immediate tabling in Parliament of all G2G arrangements already signed. These should include, inter alia:
 - The Declaration of POS with the People’s Republic of China
 - The 2012 Canadian agreements,

- The agreement with the Austrian Government (San Fernando Hospital).

Trinidad and Tobago's history and experience in oil and gas has allowed this country, a former British colony, a strategic advantage over developed countries in becoming a provider of goods and services to other former colonial countries with potential in extractive industries.

Thus G2G arrangements can be used by Trinidad and Tobago to develop:

- i. Business through the supply of goods and services from home companies;
- ii. The banking sector through the provision and or organisation of private or State funded loans to developing countries;
- iii. Learning institutions through the provision of training to foreign students.

Canadian Commercial Corporation (CCC) , SNC Lavalin and the Penal Hospital Project

The Government of Trinidad and Tobago signed a G2G arrangement with the Government of Canada for the development of health-care facilities. The Canadian Government named the Canadian Commercial Corporation (CCC) as the implementing agency under the agreement and the Trinidad and Tobago Government named the Urban Development Corporation as its counterpart. SNC Lavalin through CCC undertook preliminary designs for a Hospital at Penal.

Recently, a ten year ban was imposed by the World Bank and the Canadian International Development Agency on SNC Lavalin Inc. and its affiliates for corruption. A series of newspaper articles both in Trinidad and Tobago and abroad called for clarification of the role of CCC with respect to SNC Lavalin on the Penal Hospital project. CCC has stated that they are at present undertaking a due diligence exercise on the Hospital project.

Trinidad and Tobago's sovereignty is in question here. Due diligence being undertaken by the CCC at this stage with respect to SNC Lavalin Inc. is an insult to the Government of Trinidad and Tobago.

The following should now be undertaken, as public money is involved:

- i. Abandon any existing or future contractual agreement with SNC Lavalin Inc. in Trinidad and Tobago, for the next ten years;
- ii. Implement UDECOTT's procurement rules for the procurement of consultants and contractors;
- iii. Conduct a value engineering exercise at the preliminary design stage to optimise value for money and local content;
- iv. Allow the CCC, after undertaking due diligence, to recommend a firm or firms to UDECOTT for the construction of the Penal Hospital;
- v. UDECOTT should manage its own due diligence procedures on the firms recommended by CCC;
- vi. Encourage Canadian firms to enter into an agreement with local firms for submission of tenders;
- vii. Permit local firms to tender provided that the import component from Canada for goods and services are in keeping with Trinidad and Tobago's national interest;
- viii. Implement UDECOTT's tendering procedure with amendments to facilitate evaluation and verification of local content by setting up technical specifications with requirements and procedures that define, measure and allow for the declaration and verification of the local content of goods, services and works.

Local Content should be expressed as a percentage of the Tender price, and shall be calculated as follows:

$$LC = (1 - x/y) \times 100 \text{ where } (x) = \text{imported component in T\&T Dollars} \\ \text{and } (y) = \text{tender price in Trinidad and Tobago Dollars.}$$

It is to be noted that The Chinese Exim Bank stipulates... ***“The portion of the Chinese content of exported goods should be no less than 50% of the total value”*** of project financing from China. Statements made in the local media about 40% local content are not at all palatable.