



REPUBLIC OF TRINIDAD AND TOBAGO

**REFORM OF
THE PUBLIC SECTOR
PROCUREMENT REGIME**

A White Paper

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EXECUTIVE SUMMARY

A. The Need for a New Procurement Policy

Public procurement is the process of acquiring property and services using public money to accomplish specified public purposes. The current legal and regulatory framework embodied in the Central Tenders Board Ordinance, 1961, (The Ordinance) applies mainly to Government ministries and departments and some statutory authorities. There are other agencies using public funds, including State-owned enterprises, statutory authorities and civil society whose procurement practices fall outside the ambit of the Ordinance. The new framework must apply to all.

The scope of public procurement envisaged by the current legal and regulatory framework is largely limited to the tendering stage, in which offers of supply are invited and contracts awarded. The White Paper proposes that public procurement should include both the prior design stage in which needs are identified, scope of works determined, costs estimated and bid packages prepared as well as the subsequent implementation stage in which the performance of the contract is managed.

There is need for a framework that applies objective standards evenly across all stages of the process and to all the actors in the process.

Reform is also needed to:

- achieve the quality of governance envisioned by Vision 2020;
- strengthen and promote confidence in public institutions;
- guarantee substantial market share to local business, in order to develop and promote domestic industry;
- take advantage of developments in information and communications technology;
- ensure that domestic procurement practices are in conformity with international best practice; and
- meet the requirements of the Caribbean Single Market and Economy.

B. The Current Procurement System

The Evolution of the Legislative and Regulatory Framework

During the period 1956 to 1960, there was a significant increase in Public Sector in-house construction activity which gave rise to a number of financial management problems. This led in 1961 to the establishment of:

- A Cost Accounting Division in the Ministry of Finance to deal with the control of Development Programme expenditure; and

- The Central Tenders Board (CTB) to be “...*the sole and exclusive authority in inviting, considering and accepting or rejecting offers for the supply of articles or for the undertaking of works or any services necessary for carrying out the functions of Government or any statutory bodies, and to dispose of surplus or unserviceable articles belonging to the Government or any statutory bodies.*”

These measures applied the principles of efficiency, transparency and accountability, as understood at that time, to the management of public procurement.

Over the years, Government has played an increasingly influential role in the public procurement system.

In 1979, the Ordinance was amended to allow the Government to act on its own behalf. This reflected a major shift in policy on the role of the CTB as Government’s sole procuring agency. The amendment also increased the powers of the CTB to contract consultants.

In 1987, the Ordinance was amended further to provide for the handling of matters in the event of an emergency without reference to the CTB.

In 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.

In 1993, an amendment validated the National Insurance Property Development Company Ltd (NIPDEC) as a procurement agency for Government outside the ambit of the CTB.

Further decentralisation of the procurement regime was also effected from 1979 onwards by the establishment of new statutory corporations and the removal of some earlier established statutory bodies from the purview of the CTB. The CTB now has an exceedingly diminished role as compared to 1961.

Current Practice

The client ministry or department, after conducting a needs assessment, reconciling its needs with available funds and preparing a bid package, submits its documents to the CTB who then invites tenders. Tenders are generally advertised publicly, but may be invited selectively. Tenders received are opened publicly and forwarded to an evaluation team approved by the Board. Evaluation reports are reviewed and considered by the Board. The team may be required to provide explanations of aspects of their report. The Board then decides on the award of the contract.

In the case of consultancies, the two-envelope system is used.

The CTB Division issues letters of acceptance to successful bidders. In major projects, the form of contract is prepared by the Chief State Solicitor's office who formally executes the contract. On a monthly basis, the CTB publishes all contracts awarded in the Trinidad and Tobago Gazette and submits copies of these contracts to the Auditor General.

The client ministry or department is responsible for administering the contract. The CTB is involved in this stage of the process only if called upon to resolve a dispute or approve a variation to the contract outside the client's jurisdiction. Upon completion of the contract, a report is submitted to the CTB which in turn authorizes the release of performance bonds and refund of deposits. The Auditor General is responsible only for financial audits.

The Ordinance provides for tenders committees in the client ministries or departments to act for the Board within limits. These committees are chaired by representatives of the CTB and follow the CTB procedures. Committee secretaries are trained by the CTB Division. Where the value of the acquisition is below a certain limit, the committee can award the contract. There are also limits below which Permanent Secretaries and Department Heads can procure property and services. All limits are prescribed in the CTB Regulations.

Most statutory bodies, all State-owned enterprises and NIPDEC are fully responsible for their own procurement activities. Some of those outside the regime of the CTB, may, with Cabinet approval, be hired by Government ministries as Design/Finance/Build contractors for major capital works.

To achieve some measure of uniformity in the procurement process, policy directives of Cabinet in 1979 and 1980 required State enterprises to invite a representative of the CTB to sit on panels considering tenders above a certain level. Not all comply with this directive. In 1985, Cabinet agreed that the tender rules of the National Hospital Management Company be used as a model for the tenders' rules of all State companies, which were to be submitted for vetting to the CTB. Not all companies have complied. However, the award of contracts by these agencies is subject to monitoring by a Central Audit Committee, established within the Ministry of Finance.

It is to be noted that the tendering process in the Ordinance also applies to the disposal of property including the real property of the State. With respect to unserviceable and surplus articles, the legislation authorizes the Board to sell and dispose of articles by public auction or adopt such other method as it considers proper and desirable.

C. Critical Review of the System

The weaknesses of the current procurement system have long been recognised. From as early as 1987 there have been several attempts at reform. Some of these weaknesses include the following:

i. Deficiencies in the Legal & Regulatory Framework

According to the law, the CTB is the procuring agency of the State but its activities are limited mainly to the tendering stage of the procurement cycle. It is not responsible for the design stage at which the critical decisions involving the spending of public money are taken. It is neither responsible nor equipped for the monitoring of project implementation. The CTB does remedy defects in design by referring inadequate documentation back to the client agency, but this often causes undesirable delays that can be costly. This regulatory vacuum can result in escalating costs and poor quality of products.

The exclusion of several significant procuring agencies from the purview of the CTB results in parallel procurement systems about which there are concerns relating to guidance and control, lack of transparency and accountability, and unfair practice. There is also a lack of uniformity of procedure across these agencies leading to an absence of necessary standardisation in procurement documentation and practices.

Under the present partially decentralised regime it is possible for agencies that are within the purview of the CTB to by-pass the CTB, with Cabinet approval, and enter into contracts with State-owned companies who in turn sub-contract using their own procurement rules and procedures.

The Ordinance does not apply to tendering on financial matters and as a result does not accommodate delivery systems such as Design/Finance/Build, BOLT and BOOT projects. These limitations effectively put some state procurement activity outside the ambit of the CTB.

ii. Human Resource Limitations

There is a dearth of trained staff at the CTB, the Chief State Solicitor's office and several of the purchasing agencies which negatively impacts on the efficiency of the system.

iii. Lack of General Oversight

While the Auditor General is responsible for auditing and reporting on public expenditure matters annually, there is no agency charged with the responsibility for systemic monitoring and dispute resolution in relation to public procurement within an accepted policy framework.

iv. Inadequate Public Information

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

There is no single national registry of contractors, consultants and suppliers.

D. Current Best Practice

Operating Principles

Current best practice in public procurement adopts the operating principles of Value for Money, Transparency and Accountability, in an environment using an integrated financial management information system that incorporates the principles of output management.

i. Value for Money

Value for Money is the achievement of the best combination of price and quality to meet the particular needs in the shortest possible time.

Measures employed to effect value for money include:

- public consultation on the rationale and elements of major projects at the design stage before the bidding documents are finalised;
- a transparent system of registration and pre-qualification of suppliers of property or services;
- incorporation of a code of conduct and a draft contract in the tender documents;
- monitoring by an independent body of project implementation with heavy penalties for parties in transgression;
- prompt payment of suppliers by Government agencies and penalty interest in the event of late payment;
- co-ordinated purchasing by Government departments to take advantage of volume discounts; and
- the use of measurable criteria to determine the best combination of price and quality.

ii. Transparency

The Transparency principle requires that information regarding the procurement process be in the public domain. Potential suppliers of property and services should have full access to information on procurement requirements, rules and decision-making criteria. Bids are opened publicly and award decisions are published.

Measures that can be employed to increase transparency in the procurement process include:

- public reporting, usually on the Internet, of business opportunities, details of successful awards (including reasons and evaluation criteria), details of different tendering procedures and strategic purchasing plans;
- oral debriefing of unsuccessful bidders;
- greater use of electronic procurement; and
- public monitoring of the implementation of contracts.

iii. Accountability

In current best practice, officials of procuring agencies as well as their responsibilities are clearly identifiable. They are held directly accountable within the framework of ministerial responsibility to Government, Parliament and the public. They are obliged by law to reflect in their procurement practices specified policies and principles and are subject to heavy penalties for infringement.

A useful administrative measure that incorporates the principle of Accountability in procurement requires all tenderers for a contract and all relevant buying agency officials to sign a joint undertaking guaranteeing the integrity of the whole process and accepting sanctions in the event there is a lapse, arbitration in the event of disputes, and monitoring by an independent third party.

Promotion of National Development

Buying agencies in best practice environments are alert to the wider implications of their procurement activities on Government's national policy objectives. Reform initiatives clearly specify that procurement systems should promote local industry while being sensitive to international commitments.

Trends in Current Best Practice

The general trend is towards decentralised purchasing carried out within a single legal and regulatory framework that specifies the underlying fundamental operating principles of the system. This provides policy guidelines that have the force of law and establishes a central regulatory agency to ensure the conceptual, strategic and operational integrity of all procurement activities.

Each purchasing agency is responsible and accountable for carrying out all stages of the procurement cycle. These activities are subject to a degree of monitoring by the central regulatory agency commensurate with the complexity of the project and the amount of public money involved.

In addition to its monitoring and auditing role, the regulatory agency develops the policies and guidelines that all participants are obliged to follow as a matter of law,

advises the buying agencies on process improvement, trains them in procurement, assists them in developing procedures and investigates complaints.

This framework accommodates the use of electronic procurement and payment methods which is seen as a means of further streamlining the process and providing access to a larger marketplace.

The emphasis in best procurement practice is on promoting objectivity and flexibility, minimizing the opportunity for manipulation, and increasing public trust in the integrity of the process.

E. Legislative Models Effecting Current Best Practice

The Prescriptive Model

The UNCITRAL model law typifies this model. It prescribes in detail for the purchaser as decision maker a range of procedures for different types of transactions that reflect the principles of value for money and good governance. Some consider this model to be a more relevant and sophisticated version of the current model of the CTB Ordinance. Like the Ordinance, it does not address the contract implementation phase. Modification of any of its provisions requires Parliamentary approval. This results in some operational rigidity making it less suitable for a rapidly changing environment.

The Institutional Model

This model, reflected in the Contractor General Act of Jamaica, concentrates on establishing the institutions involved in managing Government contracts together with their reporting relationships. The Jamaican law establishes the office of Contractor General as a Commission of Parliament to ensure that the award and implementation of Government contracts do not involve impropriety or irregularity. It constitutes the National Contracts Commission to promote efficiency in the award and implementation of contracts. Specification of procedures and monitoring are the responsibility of these institutions. The law does not explicitly adopt the core principles of value for money, transparency and accountability nor does it explicitly draw the link between procurement and policy objectives. The emphasis is on investigation and sanctions.

The Principle Model

In this model, the law prescribes the operating principles underlying procurement that promote best procurement practice. There is a central regulatory agency that formulates operating policies and guidelines that amplify these principles, showing in general terms how the principles are to be applied in all transactions involving public funds. The central agency develops for the purchasing agencies procedure manuals for specific types of transactions. As the environment changes, guidelines and procedures can be modified without too much difficulty.

However, the prime responsibility for procurement in all its stages rests with the decision-makers in the purchasing agencies. They are required by the law, to comply with the principles, policies, and guidelines. Their compliance can be monitored through a system of reviews by an external agency at critical stages of the process.

The hallmark of this approach is flexibility combined with accountability.

F. The Preferred Procurement Model

The preferred option for Trinidad and Tobago is the Principle Model, appropriately adapted to our economic, social and political environment to reflect the current trend of best practice in procurement. This model supports a procurement regime that facilitates the achievement of value for money with transparency and accountability. It can support Government's national development policy objectives in an environment in which increasing use is being made of State owned and private bodies to carry out public procurement.

Public Money

The underlying philosophy of the Principle Model is that once a body is spending public money there follows an obligation on that body to account for Value for Money - which by definition encompasses efficient and effective delivery of the property or services for which public money is spent.

Public money in this context, includes money received by a public body regardless of source, or money received by a non-public body from a public body.

The legal framework will embrace expenditure by –

- (a) a public organisation for a public or private purpose; or
- (b) a private organisation for a public purpose regardless of the source or type of funding where it can be reasonably inferred that the State is ultimately liable.

A New Legal and Regulatory Framework

To implement the preferred option, the CTB Ordinance and its subsidiary legislation will be repealed and replaced by a new Act that will govern the procurement activities of all who use public money. The Act will establish a legal framework and prescribe operating principles. The details of process and procedure will be provided for in subordinate instruments. This framework approach enables flexibility of policy formulation to accommodate market and technological change and separates policy issues from operational issues.

Prescribed Operating Principles

The new Act will prescribe the following operating principles to apply uniformly to the entire public procurement process and be implemented by all procuring agencies using public money:

- Value for Money;
- Transparency of the procurement process;
- Accountability of participants in the procurement process.

Procuring agencies will be required to conform to these principles to attain the following objectives:

- Open and effective competition;
- Ethics and fair dealing according to the highest standards of probity and professionalism;
- Promotion of national industry, taking into account the international obligations of Trinidad and Tobago;
- Promotion of other Government policies.

Achieving Value for Money

Procuring agencies will have to seek the best possible outcome taking into account all relevant costs and benefits over the whole of the procurement cycle. They will have to make use of any Common Use Arrangements that are available. They must give all potential suppliers the same opportunity to compete.

Accountable Participants

Permanent Secretaries, Heads of Government departments and corporate Chief Executive Officers will be accountable to Parliament for any plans, actions, decisions and outcomes that involve spending public money. Managers of procuring agencies will be accountable to them and operational staff will be accountable to the managers for advice given, for management of programmes and for quality of service.

Permanent Secretaries, Heads of Government departments and corporate Chief Executive Officers will be:

- accountable for their agency's procurement performance;
- authorised to issue Chief Executive's Instructions (CEIs), which may include directions to officials involved in procuring property and services; and
- responsible for ensuring adequate systems for recording decisions and reasons for making them are maintained.

A Transparent Process

Transparency provides the assurance to the public that the procurement processes are appropriate and therefore should be an inherent characteristic of all processes and procedures, plans, actions or decisions relating to procurement.

Disclosure is the mechanism by which agencies make their procurement activities visible and transparent. Agencies will be required therefore to make easily available to the public, amongst other things, information on procurement opportunities and evaluation criteria used in particular procurements. All qualified suppliers must be provided with the required information to tender.

Disposal of Public Assets

The same principles and objectives apply to disposal of public assets including lands, buildings, intellectual property rights, and other assets, real and financial, fixed and moveable, owned or managed by the State or State agencies whether by sale, lease, concession or licence.

Sanctions

The firmness of the principles is attained by a mandatory legal requirement of compliance in every transaction involving expenditure of public money, supported by prescribed penalties in the event of non-compliance.

National Development

To develop competitive local industries including small and medium enterprises (SMEs), domestic industry will be given a 10% price differential over foreign suppliers of goods and services.

Procuring agencies will ensure that, as a first option, all of their requirements for property and services are produced, generated or provided by domestic firms, once they satisfy the criteria of competitive quality, price, standards, and delivery schedules.

When setting selection criteria, procuring agencies should ensure that they encourage participation by SMEs as direct suppliers or as subcontractors.

The Government will ensure that a proportion of public agencies contracts are reserved for small and medium sized enterprises.

Complaint Mechanisms

The model will provide mechanisms for dealing with complaints from or about procuring officers or potential suppliers in relation to practices or executive directives that result in activities contrary to the provisions of the Act or to procedures established under it.

Review

To ensure that Value for Money and Transparency issues are adequately addressed the model provides for reviews at scheduled milestones in the procurement cycle of projects that are above a specified threshold value.

This effectively replaces pre-contract audits, and can be conducted so as not to impair the efficiency of the procurement cycle. It reinforces the integrity of the process and facilitates greater efficiencies.

Legal & Institutional Framework

(i) The Law

The new law will:

- repeal the CTB Ordinance;
- prescribe the principles, address the objectives and provide for the development of the Guidelines;
- define the responsibilities of the purchasing agencies and prescribe penalties;
- establish a Independent Regulator mandated to ensure a relevant, efficient and compliant system;
- establish a National Procurement Advisory Council, drawn from civil society and the private sector, to support the operations of the Regulator;
- provide a complaints mechanism; and
- provide for the allocation of adequate human and material resources to the regulatory agency.

(ii) The Regulator

The Regulator will be mandated to, inter alia:

- monitor procurement and divestment activities;
- develop mandatory guidelines for procuring agencies;
- establish minimum standards of skills and competencies for procuring officers;
- promote public awareness of the processes;
- report to Parliament;
- foster improvements in the use and application of purchasing systems and electronic trading; and
- establish and maintain a database of procurement activities.

The Regulator is to be appointed by the President in the exercise of his own discretion after consultation with both the Prime Minister and the Leader of the Opposition. He or she will have investigatory powers equivalent to that of a Commission of Enquiry.

(iii) The Guidelines

The Regulator in consultation with the National Procurement Advisory Council will design Guidelines for the procuring agencies that will spell out the implications for their procedures and practice of the prescribed principles and objectives.

The actual details of the procedures to be followed in public procurement will be found in *handbooks* developed by the Regulator in collaboration with the procuring agencies or

developed by the agencies in conformity with the Guidelines. These handbooks may be supplemented by *Chief Executive Instructions (CEIs)*.

Benefits of the Preferred Option

The modified Principle Model will address several of the weaknesses of the current system by:

- placing those agencies currently outside the ambit of the Ordinance, firmly within an overarching policy and legal and regulatory framework reflecting the operating principles while accommodating their current policies and procedures;
- increasing openness and accountability;
- enabling stakeholder participation in the development of policies and guidelines;
- accommodating technological change;
- removing ambiguities in reporting relationships and strengthening Parliamentary oversight;
- enabling better monitoring of contract execution;
- providing a specific dispute resolution mechanism and clear criminal sanctions in the event of breach of the principles and guidelines;
- ensuring competition and national development;
- guaranteeing publication of details of all bids and awards so as to ensure equal opportunity for bidders and greater confidence in decision making; and
- accommodating procurement not only by direct expenditure but also by other financial arrangements for which the public is ultimately liable including those using delivery systems such as Build Own Operate Transfer (BOOT), Build Own Lease Transfer (BOLT), Design Finance Construct, and Design Build.

G. SAMPLE PROCUREMENT GUIDELINES

Sample procurement guidelines are provided in Annex 1. These guidelines are to assist Government agencies in achieving Value for Money, Transparency and Accountability in their procurement activities.

CHAPTER 1 THE NEED FOR A NEW PROCUREMENT POLICY

PUBLIC PROCUREMENT

The term *public procurement*, for the purposes of this White Paper, includes all stages of the process of acquiring property, works and services, involving the use of public money to accomplish specified public purposes, beginning with the identification of a need and ending with completion of the contract.

1.1 INTRODUCTION

Public procurement has a tremendous impact on the economic, social, political and legal environment. In Trinidad and Tobago, public agencies are major purchasers of property and services and therefore exert significant influence on the size, structure, and performance of domestic industries. It therefore becomes necessary from time to time for the Government to review the effectiveness and efficiency of its procurement regime.

This White Paper presents a review of the current system of procurement, and the introduction of a new procurement regime for public agencies. It is a statement of policy that sets out the State's objectives with respect to public procurement and how these objectives are to be achieved.

This first chapter, after clarifying the concept of public procurement, establishes the need for a new policy. Subsequent chapters examine the evolution and weaknesses of the current system, the main features of current best practice, the legislative models that effect best practice, and the preferred option for Trinidad and Tobago. Annex 1 provides sample procurement guidelines that will underlie the new procurement regime.

1.2 WHAT IS PUBLIC PROCUREMENT?

Public procurement¹ involves the utilisation of public money in a complex of processes and choices in which needs are evaluated, scope of works, products or services identified, form of delivery and methodology for making contractual choices determined, contractual arrangements entered into and works or services performed.

Public procurement distinguishes itself from private procurement through the utilisation of public money and as a result is subject to a greater degree of transparency and accountability than obtains in the private sector. The utilisation of public money imposes on all agents a duty of care in the public interest and a duty to safeguard and ensure the attainment of value for money. The utilisation of public money also demands that such utilisation will be undertaken only for the purposes intended and authorised.

Public procurement occurs wherever public money is spent on the acquisition, maintenance and disposal of property, or the procurement of works and services. This means that the legal framework will apply not only to Government ministries and departments but also to statutory authorities, State-owned enterprises (SOEs) and civil society bodies. Wherever and whenever public money is being spent, the public interest must be paramount.

In undertaking public procurement reform, a number of important issues arise:

- The definition of public money as all monies spent on the acquisition, management and disposal of property and services and including all money received by a public body regardless of the source, or money received by a non-public body from a public body.
- The obligation of all Bodies spending public money to be held accountable for the achievement of Value for Money.
- The extent of the function of public procurement in the formulation and implementation of public financial management policy and, by extension, public policy; and
- The appropriate trade-off for procurement officials between, control, rules, regulations and accountability on the one hand, and efficiency, flexibility, judgement and innovation, on the other.

1.3 PUBLIC PROCUREMENT IN TRINIDAD AND TOBAGO

The legal and regulatory framework for public procurement in Trinidad and Tobago is based primarily on the Central Tenders Board Ordinance, 1961 (The Ordinance)ⁱⁱ. Subsequent amendments made and administrative measures taken have sought with some success to meet the challenges of a rapidly evolving national, international and technological environment.

The initial environment that called into being the CTB's Ordinance was one, primarily of in-house delivery accelerated by increased public sector spending, monitored by a cost accounting arm of the Ministry of Finance with final accountability to the Auditor General under the Exchequer and Auditor Act (20 of 1959). The stated objective of the

government at that time was to have the CTB as the sole agency responsible for government procurement.

The policy objectives of the government in the sixties were informed by the principles of transparency, accountability and efficiency as then understood. Since then, the demands for increased public sector spending, the availability of funds, the source of funding and the limitations of the procurement regime combined to force dramatic changes in policy and the legislative framework. A review of the legislative history of public procurement in Trinidad and Tobago makes clear the role of the State in determining the survival of local suppliers. The State shifted from in-house delivery, to an emphasis on the local private sector and to a championing of foreign firms in a stated search for efficiency in the delivery of works, property and services to the public.

The legislative history of public procurement, since the country's Independence, reflects the piecemeal attempt at reform that has led to the proliferation of parallel procuring agencies in the stated attempt to improve efficiency in delivery. This has weakened the original mandate of the Central Tenders Board (CTB) established by the Ordinance as the sole agency responsible for Government procurement. These parallel procurement agencies (Statutory Bodies, State-owned enterprises and NIPDEC) also allowed the government to be involved in off-budget financing of public sector projects

It has thus become increasingly evident that if public procurement is to be carried out in such a manner as to be efficient, strengthen the local economy, build public confidence in the institutions involved in the procurement process, improve the quality of governance and promote the public interest, then a new framework supporting best procurement practice is required.

1.4 IMPERATIVES FOR REFORM

Good Governance

The Government of Trinidad and Tobago, in its national policy statement-Vision 2020, has set as a goal, a quality of governance reflecting the highest standards of ethics, transparency and accountability. Implicit in this goal is the need for good governance and securing the public interest. The quality of prevailing governance is often reflected in the practices and procedures of public procurement.

The operation of its procurement practices and procedures directly affects the esteem in which Trinidad and Tobago will be held at home and abroad. Efficient procurement practices incorporating the principle of good governance will signal to the world at large the Government's preferred way of doing business.

Social and Economic Development

Procurement is a major driver of the development or weakening of public sector institutions. If there is a lack of clear and objective criteria and of direct accountability of decision-makers at every phase of the procurement process, windows of opportunity are

created for poor spending practices. Conversely, where procurement decisions are clearly seen to reflect the principle of good governance, there is a strengthening of public institutions.

Procurement practices also operate as a direct driver of the national economy. The volume of purchases by public agencies must profoundly impact upon the sustainability of small and medium sized enterprises. In fostering social and economic development, Government's procurement policy must therefore address the guaranteeing of substantial market share to local businesses and the development of local skills.

Public Confidence

Integral to successful business - public or private - is the confidence of the parties in the integrity of the procurement process. The current practices of sole tendering by SOE's are cause of concern with respect to the lack of transparency of the contracting process and criteria for evaluation and decision-making. In public procurement, the public must have confidence in the integrity of the process. There is need therefore for processes that have public endorsement and which will restore and deepen public confidence.

Impact of Technology

The use of information and communications technology is profoundly affecting the way people and institutions do business. Changes in technology affect what people procure and how they procure. The advancement of cross-border trading and e-commerce places additional demands for the establishment of a procurement system that can meet international demands. The current procurement system would function more efficiently if placed on an electronic platform. The imperative, therefore, is for a procurement system that meets these challenges without compromising the public interest.

Conformity to Best Practice

The removal of trade barriers and the evolution of procurement practices internationally have triggered the need to review current practices in Trinidad and Tobago and ensure that domestic practices are in conformity with international best practice.

Regional and International Developments

In the Caribbean Region, the formation of the Caribbean Single Market and Economy (CSME), which is expected to deepen regional economic, social and political relationships, will create new challenges for private and public sector management. It is expected to expand opportunities for the free movement of capital, property and services throughout the Region. Part of this integration process involves the establishment of a regional regime for Government procurement, reflecting current best practice. It will entail therefore, uniformity in procurement processes and conformity to agreed principles.

Judicial Notice

A national policy on procurement, sanctioned by Parliament, signals Government's regulatory philosophy to the public at large. It will also assist the Courts in resolving

legal disputes arising out of decisions of procurement involving public money, particularly in the context of judicial review.

Weaknesses in the Current System

Prevailing deficiencies in the legislative framework have weakened the current system. These weaknesses are further flawed by a shortage of skilled procurement staff in the various public agencies. The lack of a Regulator, with the responsibility of oversight of the whole system to ensure efficiency and effectiveness, has promoted windows of opportunity for dubious practices.

1.5 WHAT WILL A NEW POLICY DO?

A policy on procurement clearly based on the principles of good governance, the involvement of civil society, and an attendant legal and regulatory framework promoting proper oversight will provide a mechanism for ongoing public evaluation of the efficiency and effectiveness of the procurement process. Such a policy will in turn promote value for money, transparency and accountability and will ensure equal opportunity in the acquisition, disposal and maintenance of property, works and services involving public money.

In addition, it will:

- Operate as a lever for public policy implementation;
- Uplift the general quality of governance; and
- Increase public confidence in the quality of governance, by the involvement of civil society.

CHAPTER 2 THE CURRENT PROCUREMENT SYSTEM

2.1 INTRODUCTION

Understanding the operation of the local procurement system entails consideration of the influences that brought the system into being and the forces that have led to a transformation of the system. This chapter shows how changes in policy have affected the legal and regulatory framework and have resulted in a regulatory system that is in part centralised and in part decentralised. It also describes how the current system operates.

2.2 THE LEGISLATIVE BACKGROUND

2.2.1 THE INITIATING CONDITIONS

During the period 1956 to 1960, the Government of Trinidad and Tobago embarked on an extensive Development Programme, which was in full stride by 1960. This Development Programme, which was part of the First Five Year Development Plan, engendered a significant increase in Public Sector in-house construction activity using in-house resources and to a lesser degree private sector contracting. This increase in activity created financial management problems, which led to the following proposals in the 1961 Budget Speechⁱⁱⁱ :

1. The establishment of a separate Cost Accounting Division in the Ministry of Finance designed to deal only with the control of expenditure under the Development Programme. This Cost Accounting Division will:
 - *“In collaboration with other Ministries rationalise all aspects of production and services with the view to setting up definite areas of authority and responsibility with concomitant standards of output and related expenditure;*
 - *Design a cost accounting machinery with a corresponding reporting system, whereby management will be enabled to exercise a dynamic control over the cost and the efficiency of operations;*
 - *Maintain constant supervision to see that control systems, as instituted, are maintained with efficiency, and undertake a constant review of existing systems with a view to their improvement in the light of changes in technology, in size factors, or due to changing requirements of management.*
 - *Make continuous inspection of development programme projects until such time as Ministries can satisfactorily undertake this function*

themselves, when the Cost Accounting Divisions of this Ministry will restrict its activities to ensuring that requisite control devices as approved by the Ministry of Finance, are being maintained efficiently;

- *Undertake special investigations work on its own initiative or by request;*
- *Collect and disseminate cost data on a local and regional basis;*
- *Train cost personnel for Government departments.”*

2. The establishment of a Central Tenders Board under the Ministry of Finance to deal with

“.....the system of awarding contracts for works and services required by Government departments and statutory bodies...which was in urgent need of rationalization as there was a lack of uniformity in policy, standards and practices, and instances of insufficient security and downright bad management”

The main policy objective of the Ordinance was to have the CTB as

“.....the sole and exclusive authority in inviting, considering and accepting or rejecting offers for the supply of articles or for the undertaking of works or any services necessary for carrying out the functions of Government or any statutory bodies, and to dispose of surplus or unserviceable articles belonging to the Government or any statutory bodies.”

As early as 1961, the principles of transparency, accountability and efficiency were employed to establish the regulatory framework through which articles, works and services were delivered to the public using public funds. In addition, in 1961, the Government’s procurement policy framework supported the development of local capacity, in both the public and private sectors with an emphasis on in-house production. The objectives of the principles were to be achieved through two complementary pillars of a financial management system:

- i. The utilisation of management approaches including an investigatory function implemented by the Cost Accounting Division; and
- ii. The utilisation of open competitive tendering for transactions with the private sector.

2.2.2 THE CENTRAL TENDERS BOARD ORDINANCE, 1961

The Central Tenders Board Ordinance, 1961, currently governs public procurement in Trinidad and Tobago. The Ordinance was developed as a system of controls and

procedures to ensure propriety and efficiency in Government purchases from the local, regional and international private sectors through the establishment of a sole purchasing authority, the Central Tenders Board.

However, the following aspects of the Ordinance are of significance:

- (a) Sub sections 3(1) and 3(2) of the Ordinance enabled the erosion of the “*sole and exclusive authority*” of the CTB through the act of deleting or in the case of statutory bodies, through non-inclusion in the First Schedule.
- (a) Sub-Section 3(4) gave the Central Tenders Board, sole and exclusive authority in all circumstances “*save as is provided in section 35... to act on behalf of the Government and the statutory bodies.*”

Section 33 gave the Minister “*the authority to give general or special directions.*”

Section 35 enabled the Governor in Council to “*make such regulations as may appear to him to be necessary or expedient for the proper carrying out of the intent and provisions of this Ordinance.*”

Sections 33 and 35 demonstrate the control the Minister and the Governor in Council maintained over the ability of the CTB to adapt to a changing environment.

- (c) Sub-sections 16 (1) and 19 (1&2) allowed for the establishment of “*for each statutory body to which the Ordinance applies a Committee of the Board*” with powers to act for the Board when the decision of the Committee is unanimous and within the prescribed limit.
- (d) Sub-section 26 (3) (a) and (b) allowed the Board to “*invite members of the public in general to make offers...or subject to the approval of the Minister, invite such bodies or persons as may be selected by the Board to make offers...whenever the Board considers it expedient or desirable so to do.*”

The Ordinance restricted the Board to the use of open competitive tendering and allowed selective tendering only on approval by the Minister.

2.2.3 THE IMPACT OF FOREIGN LOANS AND AID FINANCING ON PROCUREMENT POLICY

During the period 1962 to 1973, there were no major legal or regulatory changes affecting public procurement. In this period, the role of the Multilateral Development Banks (MDBs) in development increased. The MDBs’ policy of financing only projects with high import content from donor countries through bilateral aid effectively limited local procurement options and accelerated outsourcing to foreign firms.

Nevertheless, in 1969, the Third Five Year Development Plan recognised the need for greater emphasis on pre-planning as one method to reduce delays in implementation. Procurement was thus regarded in the Plan as starting from “*the preliminary feasibility stage and ending at the stage when the project comes into operation.*”

This approach underscored the distinction between procurement as a complex of policy choices and procurement as a complex of laws and regulation. However, the regulatory framework affected mainly the product or production cycle for implementation at each stage of the procurement process. The new policy emphasis in which the procurement process was seen as starting from the pre-feasibility study stage clarifying objectives coupled with the financing of these studies through soft loans or aid from foreign sources and the thrust to increase local capacity led to the development of the local consulting sector^{iv}.

2.2.4 LABOUR INTENSIVE SCHEMES

In 1971, the Government embarked on an expansion of the labour intensive ‘Special Works’ approach, using in-house resources, mini contractors and bonded contractors. These approaches to delivery of works using public funds had as precursors the 1959 *Depressed Area Programme* and the 1962 *Better Village Programme*. The utilisation of labour intensive schemes to deliver works represented an example of the use of procurement policy as a tool of social and economic development. This aspect of procurement policy, together with the collapse of the cost accounting unit in the Ministry of Finance, left the labour intensive schemes outside the regulatory framework where efficiency in the use of public funds can be measured.

2.2.5 INCREASED OIL REVENUES AND IMPLEMENTATION PROBLEMS

In 1976, against the backdrop of increased oil revenues, the Minister of Finance, in the Budget Speech stated that:

“Increasing concern has been expressed in many quarters about the slow and cumbersome tender procedures which, it has been argued, are geared to an earlier age of Government expenditures and revenues. Some have used this as an alibi for the increasing tendency to evade, distort, or frustrate the tender procedures”... “All breaches that have come to our attention have been referred to the Auditor General. It would seem to be appropriate, however, to have a comprehensive reappraisal at this time of the existing procedures.”

In the 1977 Budget Speech, the Minister of Finance stated,

“The Central Tenders Board and its Ordinance under which it operates are now being re-appraised. Special attention is being given to the following:

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

The sudden demands placed on the local construction sector occasioned by increased revenues from the oil sector in the seventies fuelled the concerns expressed in the 1977 Budget Speech. The period 1974 to 1979 thus saw several studies and reports on the CTB and the construction sector. In search of greater output from the construction sector, the Minister of Finance in his 1978 Budget Speech announced the introduction of the Design Build Delivery^v method and the use of prefabricated systems as ways to increase output.

The ground was now fertile for the introduction of the most dramatic changes in the policy and regulatory framework of public procurement in Trinidad and Tobago. Two drastic policy shifts were made:

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

The objectives of the shift in policy were achieved by virtue of the following amendments to the legal framework, which accelerated the decentralisation of procurement.

Act No. 36 of 1979

This Act redesigned the legal framework to allow for the policy shifts, through the following amendments to the Ordinance:

- The term “*company*” was defined to include “*a firm, a partnership or a statutory corporation.*”
- The reduction of the powers of the CTB through the addition of section 20A. This amendment allowed the Government to act on its own behalf where -
 - a) “*as a result of agreement for technical or other co-operation between it and the Government of a foreign state, the latter designates a company ...which is wholly owned or controlled by the foreign state... to supply the articles or to undertake the works or any services...*”
 - b) “*it enters into a contract with a company which is wholly owned by the state, for the supply of articles or for the undertaking of works or service therewith...*”
 - c) “*it enters into a contract with a company for the purchase of books for official purposes*”.

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

Act No. 22 of 1987

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

Act No. 39 of 1991

This amendment provided for a Special Ministerial Tenders Committee to be established at the Ministry of National Security to procure certain items for the Trinidad and Tobago Defense Force and the Protective Services. These items include “*arms and ammunition;*

repair and maintenance of aircraft and Coast Guard vessels; security equipment including scanners, detectors and safe fax machines; uniforms and protective gear; aircraft, marine craft and parts thereof; and wireless equipment and spares including radar systems.”

Act No. 3 of 1993

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

2.2.6 DECENTRALISATION TRENDS

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

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

2.2.7 A NOTE ON TOBAGO

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

2.3 CURRENT PRACTICE

2.3.1 THE PROCUREMENT PROCESS

The Central Tenders Board Ordinance, 1961, gives the CTB the authority to:

- a) Act for, in the name and on behalf of the Government and Statutory Bodies, to which the Ordinance applies, in inviting, considering and accepting or rejecting offers for the supply of articles or for the undertaking of works or any services in connection therewith, necessary for carrying out the functions of the Government or any of the Statutory Bodies;
- b) Dispose of surplus or any unserviceable articles belonging to the Government or any of the Statutory Bodies;
- c) Perform other functions and duties as the President may by order prescribe from time to time.

As indicated in Figure 1, the procurement process is initiated when a client ministry/department conducts a needs assessment, reconciles its needs with available funds and prepares a bid package.

The CTB's involvement in the procurement process is from stages 4 to 9. The tender, based on the bid documents received from the client, is generally advertised publicly. Bids received from tenderers are opened publicly and forwarded to an evaluation team approved by the CTB.

On completion of the evaluation exercise, the evaluation team's report on the award of contract is reviewed and considered by the CTB. In cases where the CTB is not satisfied or requires clarification on any of the reports, the client is requested to attend the particular meeting of the CTB to provide the necessary explanations.

The consideration of the award of a contract is placed before the CTB in Note form by the CTB Division. Section 24 of the Ordinance, stipulates that the CTB or Tender Committee must, except for good reason, accept the lowest offer.

Awarding consulting contracts is slightly different, in that the two-envelope system is applied. Consultants are requested to submit both technical and financial proposals. The technical proposal is evaluated first, ranking is established and a preferred consultant recommended. The Board is required to approve this report before the financial proposal of the highest ranked consultant can be opened and negotiations commenced.

Selective tendering may also be used. The CTB must approve all requests for selective tendering and will do so only on presentation of proper justification by the client. The selected tenderers must also be registered with the CTB.

Subsequent to the CTB's approval of the award of a tender, the CTB Division is responsible for issuing letters of acceptance to successful bidders. After the letter of acceptance is issued, a formal contract prepared by the Chief State Solicitor has to be entered into.

Issuing instructions to the contractor and the actual administration of the contract is the direct responsibility of the client. The CTB is not involved in any aspect of this phase of the process except if called upon to resolve a matter or approve a variation outside the client's jurisdiction. Upon completion of the contract a completion report is submitted to the CTB. The staff of the CTB, in turn, authorizes release of performance bonds or refund deposits as the case may be.

At the end of each month, the CTB publishes in the Trinidad and Tobago Gazette all contracts awarded. Copies of all contracts awarded by the CTB are submitted to the Auditor General.

The client is responsible for the remaining stages of the procurement cycle during which the contract is administered. The only independent auditing of the process that is done is financial, and this is the responsibility of the Auditor General.

2.3.2 DISPOSAL OF PUBLIC ASSETS

With respect to the disposal of unserviceable and surplus articles as authorized in Section 4(1)(b), the processes are recorded in Sections 28 and 29 of the Ordinance and Section 15 of the Regulations as follows:

The Ordinance 22/61

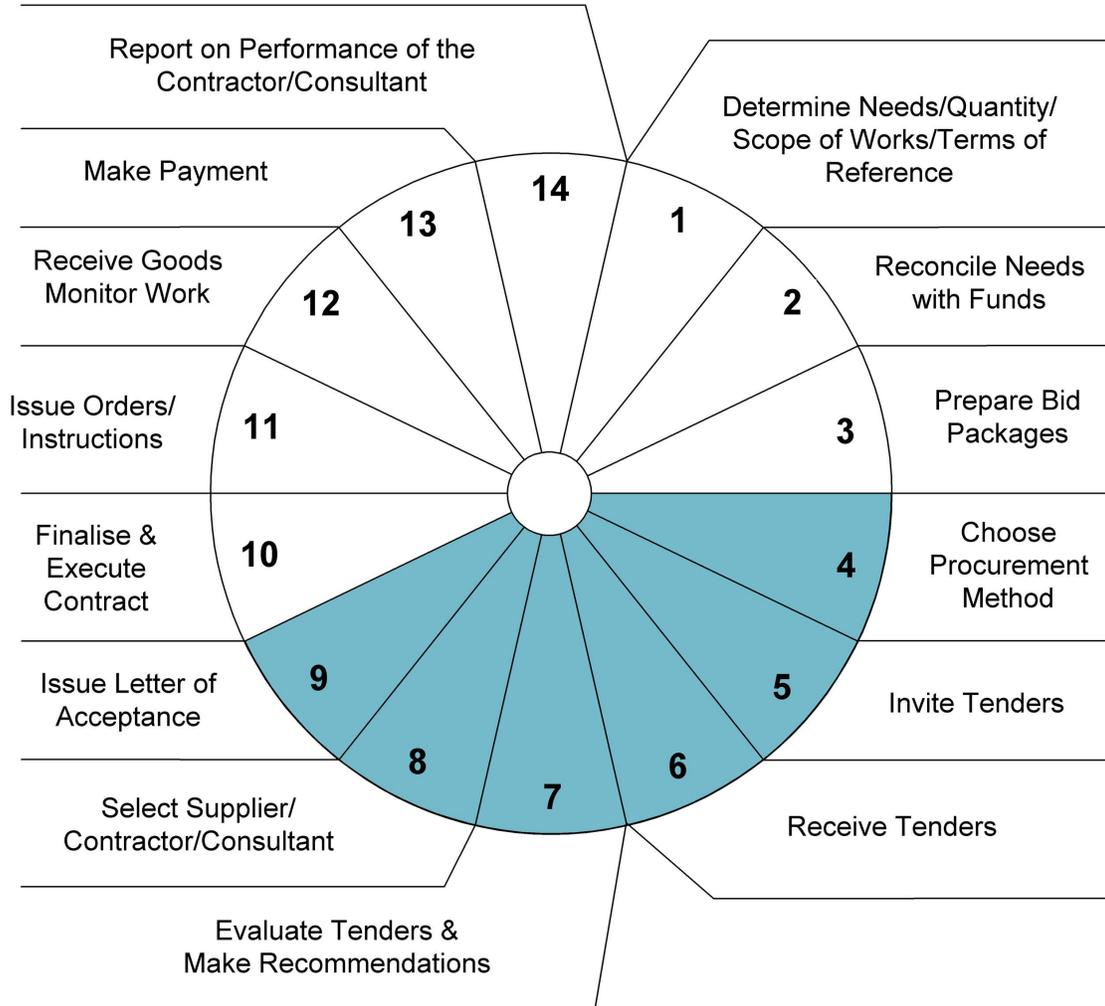
28. (1) *“Whenever the Government or a statutory body to which this Ordinance applies determines that any article which is the property of the Government or such statutory body and which was originally valued more than one thousand dollars is unserviceable or in surplus to the requirements of the Government or such statutory body, the Government or the statutory body connected shall report to the Board to this effect.*

(2) *The report shall contain a full description of the articles, the quantity thereof and the places where the articles are stored.*

(3) *The Government or the statutory body shall continue to be responsible for the surplus or unserviceable articles until it surrenders the custody or control thereof to the Board.”*

Figure 1

The Procurement Cycle When The CTB is Involved



29. (1) “On the receipt by the Board of a report under Section 28(1), the Board may in its discretion assume the custody and control of the surplus and unserviceable article.

(2) The Board shall sell and dispose of the articles by public auction or may adopt such other method of disposal as the Board may consider proper and desirable.

(3) A member of the Board or such officer of the Board as may be nominated by the Chairman shall attend every such sale and report to the Board the result thereof.

(4) *The Board shall make arrangements for the deposit of the proceeds of such sale less all expenses incurred as a result thereof with Accountant General for the account of the Government or the statutory body.*”

CTB Regulations 137/65

“An article which is declared by the Government or a statutory body to be unserviceable or surplus, and which was originally valued at two hundred and fifty dollars or less, may be sold by auction by an auctioneer appointed by the Board or destroyed or otherwise disposed of by such public officers or by such officers of statutory bodies as are nominated for the purpose by the Ministry or the statutory body concerned, as the case may require, and an article which was originally valued at more than two hundred and fifty dollars but not more than one thousand dollars may be sold by auction or destroyed or otherwise disposed of by a Committee of the Board established for a statutory body under section 16 of the Ordinance or by a Ministerial or Departmental Committee.”

The disposal of real property subsidiary legislation made under Section 4(2) of the Ordinance, gives the Board authority to act for, in the name of and on behalf of the Government. Section 2 of the Central Tenders Board, (Functions and Duties), Order, 1997, states:

“The functions and duties of the Central Tenders Board are hereby extended to include the authority to act for, in the name and on behalf of the Government to dispose of real property owned by the Government in such manner as the Government may consider appropriate and desirable.”

2.3.3 DEVOLUTION OF CENTRAL TENDERS BOARD FINANCIAL LIMITS

Sub-section 16 (1) of the Ordinance, states:

“There shall be established for every statutory body to which the Ordinance applies a Committee of the Board...” Sub-section 16 (2) states *“Any committee so established shall consider offers for the supply of articles or the undertaking of works or services of all kinds that are made to the statutory body...and shall make recommendations to the Board for its acceptance or rejection of any such offers.”* Sub-section 19 (1) states *“A committee may act for the board where the value of the Articles to be supplied or the works and services to be undertaken does not exceed ten thousand dollars.”*

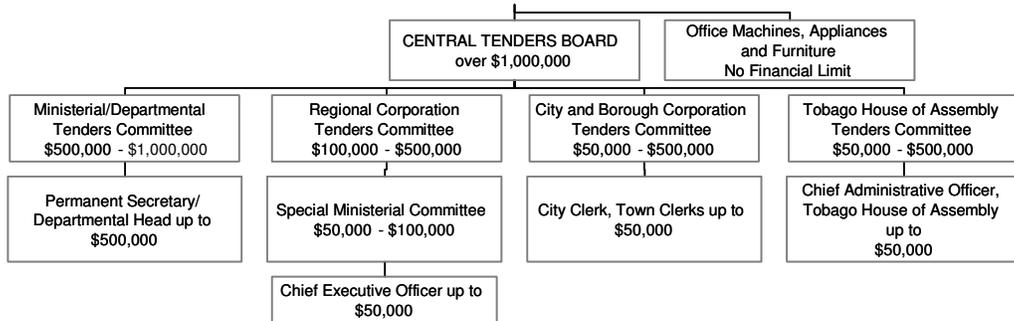
Act No 22 of 1983 increased the financial limit to one hundred thousand dollars. Sub-section 35(e) of the 1961 Ordinance allows the Governor in Council to make such regulations

“prescribing the financial limits within which contracts may be awarded by officers of statutory bodies...” and in sub-section 35(g) “for establishing Ministerial, departmental or special committees to deal with departmental contracts. the value of which does not exceed an amount, if any, fixed by the regulations;”

At present, the financial limits for committees acting on behalf of the Board is one million dollars (\$1,000,000) and Permanent Secretaries and Department Heads (public officers) five hundred thousand dollars (\$500,000). The spending limits of the Committees, CEO’s, Permanent Secretaries and Departments Heads are shown in Figure 2.

The tender committees, owing to the fact that they are chaired by representatives of the CTB, follow the same procedures as the Board does in the case of projects over \$500,000. Secretaries of these committees are appointed by the client and are trained in procurement by the CTB. These Committees have generally operated efficiently.

Figure 2
Central Tenders Board and Sub-Committees
Financial Limits



CONSULTANCY SERVICES

- P.S. - \$200,000
- M.T.C. - \$200,000 - \$1,000,000
- C.T.B. - OVER \$1,000,000

UNSERVICEABLE/SURPLUS ARTICLES - DISPOSALS

- P.S. - \$250
- M.T.C. - \$250 - \$1,000
- C.T.B. - OVER \$1,000

Source: Legal Notice 223 of 2003

2.3.4 ATTEMPTS TO ESTABLISH UNIFORMITY IN THE TENDERING PROCESS

In 1978, the Minister of Finance saw an expanded role for State-owned enterprises in the development process through their existing supply of extensive human resources, established management systems and in some cases, their relevant experience in project management.

In 1979, Cabinet by Minute No 3248 required a representative of the CTB to be invited to sit on the panel which considers tenders above a certain level in State-owned enterprises. On March 21, 1980, this decision was amended to have the representative of the CTB represent the Government, rather than the CTB, on the tender committees of State enterprises. This amendment took into account the fact that all State enterprises did not come under the purview of the CTB. Not all companies comply with this directive. In June 1985, Cabinet further agreed that the Tender Rules of the National Hospital Management Company should be used as a model for the tenders rules of all State companies, and these rules be submitted by each State enterprise, to the CTB for vetting. Not all companies comply.

Most Statutory bodies, State-owned enterprises and NIPDEC are therefore fully responsible for their own procurement activities. They are in charge of establishing their own policies and procedures managed through their own tender committees. Some of these enterprises, outside the regime of the CTB, but with Cabinet approval, may be hired by Government ministries as Design/Build contractors for major capital works or for the supply of other property and services.

In 2001, Cabinet by Minute No 1266 agreed on the establishment of a Central Audit Committee within the Ministry of Finance, charged with the major responsibility of approving the issuance of contracts of \$5 million and higher by all State agencies. Other duties of the Committee include the evaluation and analysis of the procedures and practices of State agencies as they relate to the procurement of property and services. Furthermore, the Committee is expected to ascertain whether State agencies are conforming to agreed guidelines when spending public funds. In July 2005, the requirement for State agencies, outside the purview of the CTB Ordinance, to obtain the prior approval of the Minister of Finance to award contracts of \$5 million and higher was discontinued.

CHAPTER 3 REVIEW OF THE CURRENT PROCUREMENT SYSTEM

3.1 INTRODUCTION

This section considers the strengths and limitations of the present system. It highlights the fact that the current system deals only with activities in the product or production cycle of procurement. The weaknesses associated with the present procurement system and the impact of agencies operating outside of the purview of the CTB are also considered.

3.2 STRENGTHS

The CTB, as governed by the Ordinance, operates in a largely transparent manner in the tendering process. Apart from the occasions of selective tendering, the CTB invites all tenderers to submit bids. Opening of these bids is done publicly before being evaluated by an evaluation team appointed by the CTB. While the CTB is not involved in all steps of the procurement process, it has a good reputation for ensuring that the procurement processes and procedures within its ambit are properly followed.

3.3 WEAKNESSES

3.3.1 DEFICIENCIES IN THE LEGAL & REGULATORY FRAMEWORK

The existing procurement legislation is considered archaic by all stakeholders and in need of major reform if it is to meet current needs and to conform to current best practice. The underlying principle of accountability in the CTB Ordinance was compromised by prescribing the CTB as the procuring agency of the State, while at the same time limiting its activities mainly to the tendering stage. The processes, as prescribed particularly in relation to the award of contracts, do not reflect involvement in the full procurement cycle. (Figure 1)

The critical decisions involved in spending public money for property and services are made at step 1 of the procurement cycle. These decisions permeate the process and affect the award of the contract. In law, the CTB has no direct involvement in the design of the Terms of Reference (TOR), nor the preparation of Requests For Proposal (RFPs), nor the monitoring or the execution of the contract. Further, after the award of a contract, all matters that are dealt with fall within the domain of contract law to which the CTB cannot be a party.

Even within its realm of responsibility, the CTB in many cases refers the documents back to the client Ministry/Department as a consequence of obvious faults, which appear to predispose a particular outcome in contradiction to the principle of fair competition, and compromises the integrity of the procurement process. As a consequence, the process is often delayed.

Some contractors, suppliers and consultants share the view that there are too many stages in the procurement process, especially where it is necessary to go back and forth from CTB to client. They argue that the resultant delays affect tender prices and more often than not justify price increases since the validity period of three months expires before a contract is awarded.

Because of concerns that the procurement procedures are outdated, different forms of project delivery systems such as Design Finance Construct (DFC), Build Own Lease Transfer (BOLT) and Build Own Operate Transfer (BOOT) are used to shorten the procurement cycle. The Ordinance does not apply to tendering on financial matters and as a result does not accommodate these systems. These limitations effectively put the procurement activity of these projects outside the ambit of the CTB.

In addition, amendments to the CTB Ordinance have led to the use of off-budget arrangements and the proliferation of procurement activities not covered by the legal and regulatory framework.

3.3.2 ABSENCE OF UNIFORMITY IN THE TENDERING PROCESS

State-owned enterprises and NIPDEC are fully responsible for their own procurement activities. These procuring entities tend to use their own standard bidding documents (SBD's) and procedures, thereby creating unnecessary parallel systems. While the CTB has striven for uniformity in the tendering process, in practice this uniformity has not been achieved. The net result is a complete lack of standardisation at all levels of the procurement cycle, and particularly so in the standardisation of bidding documents. Standardisation is an essential prerequisite for the utilisation of digital technology and the modernisation of organisational processes.

3.3.3 HUMAN RESOURCE LIMITATIONS

The current staffing and training of the CTB's personnel constrains the organisation's ability to adequately service ministries and departments. The organisation is restricted also in its ability to be current with present practices in a rapidly changing technological environment.

Currently, the office of the Chief State Solicitor prepares all major contracts in the goods, works and services areas. However, it is neither staffed nor structured to deal efficiently with the volume and complexity of the work involved or with rapid changes in

technology contracts. This contributes to delays in the preparation and execution of contracts and is a major deficiency in the system.

Many State-owned enterprises, NIPDEC and Statutory Bodies, also lack staff properly trained in procurement. In fact, procurement is not looked upon as a professional discipline in its own right.

3.3.4 LACK OF REGULATORY OVERSIGHT

The partially decentralised nature of the current system extends the contracting authority among the various players without providing adequate monitoring. Cabinet has authority to direct Ministries/Departments to use selected State-owned enterprises under Section 20A (1) (c) of the Ordinance thereby bypassing the regulatory oversight of the CTB. In most cases, these companies lack the technical capability to conduct the activities under contract and award sub-contracts using their own procurement rules and procedures.

The CTB does not have the authority to regulate. The regulatory procurement framework lacks the authority to audit the procurement system and ensure compliance with the rules and procedures for the award and implementation of contracts. However, under the Constitution, the Auditor General is responsible for auditing and reporting annually on public expenditure matters.

3.3.5 ABSENCE OF A COMPLAINTS MECHANISM & DISPUTE RESOLUTION

Although the CTB receives and acts upon supplier complaints with respect to the procurement process, there is no formal independent complaint and dispute resolution mechanism in place.

3.3.6 LACK OF A NATIONAL REGISTRY

Each procurement agency keeps its own register for inviting bids, and uses its own procedures for prequalification registration. There is no national registry of contractors, consultants and suppliers. The absence of such a registry creates additional work for consultants and contractors by having to register with the various agencies.

3.3.7 LACK OF AN ELECTRONIC PUBLIC INFORMATION SYSTEM

There is no system in place to provide suppliers or the public at large with full, up-to-date and electronically accessible information on tender opportunities, the publication and status of bids and awards, or the progress of major projects.

3.3.8 CONCERNS OF LOCAL SUPPLIERS

Notwithstanding the Government's stated objective of supporting the development of local industry, local contractors, consultants and other suppliers do not believe that they are being fairly considered in the tendering process. There are concerns that some SOEs negate fair competition by the use of the selective tendering process without due regard to the prequalification or registration criteria. The Ordinance does not stipulate any guidelines or restrictions limiting the use of this method of procurement.

3.3.9 POOR DATA COLLECTION & REPORTING

Procurement records are maintained by both CTB and State-owned Companies. There is no minimum requirement, however, on the contents of such records and the maintenance period that is applicable to all procuring entities. Furthermore, there is no adequate centralised reporting of the awards of government contracts.

3.4 SOME ATTEMPTS AT REFORM

Several attempts have been made to reform the procurement system over the past twenty years, with few of the recommendations made by the various reports being implemented. It has been suggested that the main reason for this was the absence of a working group with the relevant authority and resources to drive the reform process to implementation.

The Gobeil Report

In 1992, Dr. G. Gobeil, a Canadian consultant, recommended that the CTB remain a centralized unit and outlined some eighteen ways in which its operations could be improved. Of these, only three have been implemented over the years:

- the use of a merit point system and improvement of the two-envelope system;
- insistence on clear specifications; and
- reorganization of the structure of the CTB Division.

Report of an Inter-Ministerial Team of the Finance and General Purposes Committee

In 1993, an Inter-Ministerial Team of the Finance and General Purposes Committee of the Cabinet submitted a report recommending, amongst other things that:

- all ministries and departments be removed from the purview of the CTB and made responsible for their own procurement; and
- the Ordinance be repealed and an agency be established to oversee the procurement practices of the ministries and department.

The report's recommendations were never implemented chiefly because the political directorate changed, there was no working group committed to the implementation process, and the CTB Division's technical staff were never part of the process.

Central Tenders Board Report

In 1998, the CTB presented a Report on the legislation governing public procurement, suggesting changes to the Ordinance and Regulations as well as putting in place administrative measures to ensure greater efficiency.

Improvements resulting from this included representation of the CTB on all evaluation teams and the training of senior technical officers. There has been minimal change to the legislation.

World Bank Country Assessment Report

In 1999, a World Bank Country Assessment Report recommended among other things, new and comprehensive legislation to provide for a transparent and efficient system and decentralization of the procurement function with restructuring of the CTB into a regulatory agency. Very little from this report was implemented.

National Tenders Board Bill

In 1999, a draft National Tenders Board Bill was prepared by the Office of the Attorney General. The Bill was designed using the UNCITRAL Model law and the Contractor General Act of Jamaica. Again, with the change of the political regime and little consultation with the CTB and the Public, the process came to an end.

CHAPTER 4 CURRENT BEST PRACTICE

4.1 INTRODUCTION

In response to the evolving complexities of the global marketplace, many countries are reforming their governmental procurement systems. These efforts are leading to general agreement on what constitutes good public procurement practice. An analysis of these reform efforts suggests that any system of public procurement should:

- be efficient and reflect best business practice;
- be publicly acknowledged as fair, open and above reproach;
- involve civil society as a check and balance to ensure transparent practices;
- be ethical: the conduct of all parties must be that of mutual trust, respect and integrity;
- promote competition and not discriminate;
- promote the competitiveness of local business;
- clearly identify relevant decision-makers; and
- be alert to the impact of technology in the marketplace and avoid bureaucratic red tape;

4.2 OPERATING PRINCIPLES FOR BEST PROCUREMENT PRACTICE

Based on a survey of a number of reformed procurement systems in the Commonwealth, including Jamaica and Australia, and those in operation by multilateral financial institutions, some core operating principles which characterise these systems have been identified. These principles are primarily Value for Money, Transparency and Accountability. They redefine the economic concerns, identify with the public interest, and impact the procurement process. How these principles are implemented in best practice is outlined below.

4.2.1 VALUE FOR MONEY

Value for Money in the context of current best practice in procurement means the attainment of the best combination of price and quality to meet the particular need in the shortest possible time.

It is essential that procurement attains the best quality of property and services for the price that is paid, or the lowest price for the acceptable quality of property and services. It does not necessarily result in the lowest priced goods available or the absolute highest quality available. It is the best combination of price and quality to meet the particular need.

An assessment of Value for Money must take into account not only the immediate cost of property and services procured, but also:

- the performance of the suppliers in meeting their contractual obligations, quantitatively and qualitatively;
- financial considerations including the source and cost of funds;
- the cost of maintenance support; and
- the anticipated price on disposal.

In other words, life cycle costing must be done as part of the evaluation process leading to the recommendation for award.

Measures which might be employed to effect Value for Money include:

- Undertaking of value analyses for contracts over a specified limit;
- Public consultation on the rationale and elements of major projects during the design phase before the bidding documents are finalised;
- Greater use of standard clauses in Conditions of Contract;
- A registration system of endorsed suppliers, contractors and consultants who get preferential consideration for contracts by virtue of that registration after a thorough prequalification or evaluation exercise;
- Prompt payment of suppliers, contractors and consultants by Government agencies and the introduction of penalty interest in the event of late payment;
- Monitoring of the execution of large contracts by civil society;
- Coordinated purchasing by Government departments to take advantage of volume discounts (bulk purchasing);
- The use of measurable criteria to determine the best combination of price and quality.

4.2.2 TRANSPARENCY

Transparency through internal and external scrutiny is an essential element of accountability and should be an inherent characteristic of all processes and procedures, plans, actions or decisions relating to procurement. Given that procurement systems are a key indicator of the prevailing culture of governance, it is a generally stated imperative of reform that procurement systems be transparent, particularly with respect to details of bids and awards.

Best procurement practice requires that all information regarding the process be in the public domain. The potential suppliers of property and services must have full access to information on procurement requirements, rules and decision-making criteria. Bids are opened publicly and all decisions are fully recorded and published. The public is therefore able to debate the rationale of projects, particularly the large ticket items or those of strategic importance, and to monitor the implementation of contracts awarded.

Some measures employed in other jurisdictions to incorporate the principle of Transparency into the procurement process are:

- public reporting, of all business opportunities in an adequate and timely fashion and in a separate gazette, for example a Procurement and Disposal Gazette, and the Internet;
- greater use of e-procurement;
- reporting of details of awards, agreements, and reasons for selection of the supplier, contractor or consultant;
- oral debriefing of all unsuccessful bidders by the awarding agency;
- public access to details of different tendering procedures;
- incorporation of the draft Agreement and/or Contract in the tender documents;
- publication of bids and awards with price;
- incorporation of specified ethical standards and codes of conduct into the Terms of Reference, Requests for Proposal, tender notices and letters of invitation; and

4.2.3 ACCOUNTABILITY

In the context of current best practice in public procurement, officials of buying agencies are not only clearly identified but are held directly accountable within the framework of ministerial responsibility to Government, Parliament and the public. In conducting their duties, they are protected from the undue influence of the Executive.

They are obliged by law to ensure that their procurement practices reflect the policies and principles that are specified. In addition, they are subject to heavy penalties and personal liability if the policies and principles laid down are not manifested in transactions involving public money.

Some measures in current best practice to incorporate the principle of Accountability in procurement are:

- all interested parties are required to sign a joint undertaking guaranteeing the integrity of the process and accepting sanctions in the event there is a lapse, arbitration in the event of disputes, and monitoring by a third party such as a civil society body;
- identification of contact persons and relevant decision-makers together with details of the extent of their authority and contact information;
- keeping of proper auditable records, which can be scrutinised at any point of the process; and
- instituting and enforcing heavy penalties for parties in transgression as well as adverse publicity and debarment from future consideration both in their corporate and individual personas.

4.3 PROMOTION OF NATIONAL DEVELOPMENT

Buying agencies in best practice environments are required to be alert to the wider implications of their procurement activities on Government's national policy objectives, particularly in the context of Value for Money, and are expected to collaborate where their activities have an effect on the operations of other agencies.

Reform initiatives in some Commonwealth jurisdictions clearly specify that procurement systems should promote local industry while being sensitive to international commitments. For example, tender documents are required to specify industry criteria, associated evaluation methodology and opportunities for participation by small and medium sized business enterprises (SMEs).

4.4 SOME DISCERNIBLE TRENDS IN CURRENT BEST PRACTICE IN PUBLIC PROCUREMENT

Given that no single procurement model suits all situations, the general trend is towards one with a legal and regulatory framework that specifies the underlying fundamental operating principles of the system. This trend steers away from prescribing specific methods and arbitrary thresholds. This Framework approach supports the buying agencies by providing them with the authority to consider their requirements and the existing market and select a procurement method on its merits. However, the method selected should reflect the prescribed operating principles, which have the force of law. These operating principles are supported by policy guidelines that have the force of law and will be relevant in any judicial proceedings.

The key element in the Framework approach is that the purchaser is held responsible and accountable. The trend is towards full decentralization of authority with differing but effective checks and balances that are determined by the complexity of the transaction and the amount of public money involved. Thus, larger multi-million dollar contracts are subject to a greater degree of monitoring than smaller contracts.

The monitoring of the process to ensure effectiveness and efficiency is usually performed by a Regulator who plays no role in the actual operation of the procurement process of the purchaser.

The major function of the Regulator is to ensure the integrity of the process conceptually, strategically and operationally. This body is established either by statute with its functions and duties specified as a matter of law or by the creation of an administrative unit, usually within the Ministry of Finance.

The Regulator is removed from the operation of the procurement process and is mandated to:

- ensure the relevance and effectiveness of procurement by developing policies and guidelines that all participants, whether Government, quasi-Government or suppliers/purchasers, are obliged to follow as a matter of law;
- advise the buying agencies on process improvement;
- monitor and audit the procurement process; and
- investigate complaints;

In reforms where the core mechanism is adherence to prescribed principles and guidelines, compliance with which is a matter of law, the details of the procurement process are found in comprehensive handbooks that are prepared as guidance material by either the Regulator or the procuring agencies themselves. These handbooks are publicly available and provide step-by-step instructions on the procedures to be used for different categories of purchase.

Because of changing technologies, there is a trend towards e-commerce and the consequent reassessment of the legal foundation of commercial practices to accommodate this. Promotion of the use of e-commerce is seen as a means of further streamlining the process and providing access to a larger marketplace.

The emphasis in best procurement practice is on promoting objectivity and flexibility, minimizing the opportunity for manipulation, and increasing public trust in the integrity of the process. This is done not only by negotiation between the parties themselves but also by input from the society at large through full publication of the details of bids and of other elements of the process to enable stakeholders to comment thereon. Given advances in technology, this is easily and cheaply achieved within short time frames, depending on the nature and complexity of projects. Best Practice therefore requires the procuring agency to:

- describe clearly and fairly what is to be procured;
- publicise the bid widely to enable greater opportunity for offers of supply;
- publicise the criteria for the selection of award of a tender;
- publicise the details of all bids;
- award the contract in accordance with predetermined rules for selection;
- award the contract to the selected bidder without requiring price reductions or other changes to the winning offer;
- give equal treatment to all bidders, potential and actual, in terms of deadlines, confidentiality and pre-selection information;
- recognise that Value for Money does not equate with awarding the contract to the lowest bidder; and
- pay for property and services rendered on-time, with penalty for late payments in accordance with the terms and conditions of the contract.

4.5 ENABLING ENVIRONMENT

Current best practice requires the procurement function to be placed within the framework of a well functioning integrated public financial management system, particularly with respect to the timely provision of funding to support the procurement activity. A lack of integration between the budgeting process and the procurement process can result in increased cost and inefficiencies in the use of public monies.

CHAPTER 5 LEGISLATIVE MODELS EFFECTING CURRENT BEST PRACTICE

5.1 INTRODUCTION

Current best practice, to be effective, must be supported by an appropriate legal and regulatory framework. The following legislative models:

- The *Prescriptive Model* - the *UNCITRAL Model Law* on Procurement of Goods, Construction and Services;
- The *Institutional Model* – the Contractor-General Act, Jamaica;
- The *Principle Model* – the Financial Management and Accountability Act 1997, Commonwealth of Australia^{vi}, and accompanying Regulations 7 to 12

indicate a range of legislative options used in promoting current best practice.

5.2 THE PRESCRIPTIVE MODEL – THE UNCITRAL MODEL LAW ON PROCUREMENT OF GOODS, CONSTRUCTION AND SERVICES

The UNCITRAL Model Law comprises 57 complex provisions of which approximately 48 treat with the process of procurement as a matter of law.

The Model Law applies to “procuring entities” defined as “*any governmental department, agency, organ or other unit of the State that engages in procurement except...*” or

“any department, agency, organ or other unit of the Government that engages in procurement and (other entities or enterprises or categories to be included in the definition of “procuring entity”. This enables application beyond government to State-owned enterprises and other entities involved in public procurement should a country’s policy so dictate.

Generally the provisions in the UNCITRAL Model Law treat in detail with the process of solicitation, pre-qualification proceedings, submission of tenders, evaluation of tenders, principal methods of procurement, and alternative methods of procurement such as two-stage tendering, competitive negotiations and single service procurement.

The legal remedies of a supplier aggrieved by a breach by the procuring entity are either dealt with by review by the procuring entity, or where a contract is in force, by a review tribunal. However, the UNCITRAL Model Law precludes review of the selection method of procurement, the choice of selection process and the decision to reject all tenders, proposals, offers or quotes.

The UNCITRAL Model Law also provides for the paramountcy of international agreements even though not ratified, and agreements entered into with international financing institutions.

The model is highly prescriptive as it specifies different procurement processes depending on the kind of transaction. It reflects the assumption that the decision maker is the purchaser and purports to effect transparency by prescribing the procurement process in great detail as a matter of law. It is arguably a more relevant and sophisticated version of the current model of the Central Tenders Board Ordinance. The result is a level playing field with differing processes determined by the amount of the value and type of contracts, all specified in law. The amount involved is either prescribed by regulation or fixed administratively.

High value contracts face a more rigorous process – in some instances, Parliamentary approval, if not that of Cabinet, is required in respect of an award.

This model allows greater flexibility for the different types of transactions, in contrast to the current system in Trinidad and Tobago that is manifest in the Central Tenders Board Ordinance, in that there is a greater range of processes designed to reflect the principles of Value for Money and Good Governance.

The model favours the international objectives of procurement over domestic political, social and economic objectives.

However, as stated in “The Guide to the UNCITRAL Model Law” at page 53

“The Model Law sets forth procedures to be used by a procuring entity in selecting the supplier or contractor with whom to enter into a given procurement contract. The Model Law does not purport to address the contract performance or implementation phase.”

The approach manifest in the UNCITRAL Model Law may attract some of the criticisms made of the current regime operating in Trinidad and Tobago. It is highly prescriptive of detail of process. Any failure to follow these detailed processes attracts legal sanctions.

By virtue of the need for Parliamentary approval to modify its provisions to suit the market and the time that it takes to get Parliamentary approval, an operational rigidity is built into the legal framework. This raises serious concerns as to whether or not this model is sufficiently flexible to accommodate the challenges of a multicultural, social, and economic environment, and the increasing impact of technology on business processes.

Notwithstanding the shortcomings of the UNCITRAL Model Law, it has been adopted in a number of countries including, Kenya, Mauritius, Poland and Uganda, and the emerging states of Eastern Europe and Central Asia.

5.3 THE INSTITUTIONAL MODEL

This legislative model is reflected in the Contractor General Act of Jamaica. The model is classified as institutional because it concentrates on establishing the institutions involved together with their reporting relationships in managing public procurement. This approach is in stark contrast to the detailed prescription of the processes of procurement in the UNCITRAL Model Law.

In Jamaica's Contractor-General Act, the various institutions are involved in different aspects of the management of *Government contracts* which are defined to include:

"... any licence, permit or other concession or authority issued by a public body or agreement entered into by a public body for the carrying out of building or other works or the supply of any goods or services".

The application of the regime is encapsulated in the definition of "*public body*" as follows:

- (a) *Ministry, department or agency of government;*
- (b) *A statutory body or authority;*
- (c) *any company registered under the Companies Act, being a company in which the Government or an agency of Government, whether by the holding of shares or by other financial input, is in a position to influence the policy of the company."*

Thus the Act applies not only to direct governmental procurement but can also apply to that conducted by State-owned enterprises as well as those enterprises where Government may not be a majority shareholder.

The function of the Contractor General, prescribed as a Commission of Parliament, is to act on behalf of Parliament to ensure that the award and implementation of Government contracts do not involve impropriety or irregularity. The Act details the powers of the Contractor General, including that of investigation, and guarantees the independence of the Contractor General and other terms and conditions of employment. Penalties of \$15,000 and/or 12 months' imprisonment are prescribed for obstructing or resisting the Contractor General in the conduct of that officer's functions.

The responsibility for the promotion of efficiency in the process of award and implementation of Government contracts is the responsibility of another statutory body: the National Contracts Commission. The National Contracts Commission may specify the procurement process by way of subordinate instruments and is responsible for the system of registration of suppliers under the Act. Thus the details of the process as well as the monitoring are the responsibility of these institutions. The Act also addresses resolution of complaints. However, penalties on officials for non-compliance with the process are dealt with in other legislative instruments and the criminal law.

This legislative model does not explicitly adopt the core principles of Value for Money, Transparency and Accountability^{vii}, nor does it explicitly draw the link between procurement and policy objectives. The legislation, however, is supplemented by the adoption of policy, which refers to the operation of those principles. The emphasis is on investigation and sanctions, despite the 1999 amendments inserting the National Contracts Commission as the designated regulator of the procurement process

There is increasing demand for the National Contracts Commission to exercise punitive measures, including suspension of contract in its own right in the case of non-compliance.

This model is nonetheless laudable for the scope of activities that fall within its ambit. It also reflects current best practice with respect to accountability to the Executive by prescribing in the Act, the direct accountability of the Contractor General to Parliament, even if the National Contracts Commission is answerable to the Cabinet.

It is important to note that the Contractor General Act can apply to all government contracts, irrespective of the source of funding, and favours domestic political, social and economic objectives in contrast to the UNCITRAL Model Law which gives a greater weighting to the international objective.

5.4 The Principle Model

The conceptual basis of the legal framework of this model is the ethical use of public money and public property by an agency within the prescribed principles of Value for Money, Accountability and Transparency. The legislation, in addition to prescribing the principles, also establishes the broad parameters that promote best procurement practices. This is achieved by the development and implementation of mandatory guidelines which are amplifications of the operating principles, and address issues such as:

- the requirement that procurement specifications are rendered in functional and performance terms;
- means of improving the cycles of competitive tendering and contracting;
- determination of Value for Money;
- achievement of good governance;
- bonded suppliers in the case where the prime responsibility for procurement resides with individual buying agencies;
- preferential treatment afforded to local suppliers;
- open and effective competition which would include public notification of opportunities and of evaluation criteria to be used in the bid process;
- public consultation on major contracts;
- review of the procurement process at critical points of the procurement cycle;
- a joint undertaking by all parties to comply with an agreed code of ethics;
- publication of details of contracts;
- an endorsed supplier system; and

- the impact of other policies, such as those pertaining to national competitiveness and industry development, on the procurement process.

While compliance with the principles, policies and guidelines is mandatory with heavy penalties for non-compliance by any decision maker in the process, the details of the tender process pertinent to specific types of transactions are found in handbooks.

The role of the Regulator, usually administratively established, is to oversee the system. This person is not involved in the actual procurement process.

The responsibility for procurement rests squarely with decision-makers in the procuring agencies. The Heads of various agencies have the power to provide further specific instructions as to process, so long as these instructions conform to the operating principles, policies and guidelines thereby enabling customization of the procurement process to effect greater efficiencies for the agency.

The scope of the legislation applies to direct governmental procurement and depending on regulation, may or may not apply to State-owned enterprises.

The effectiveness of this model is based on the universal application of clearly articulated principles operating as law in all transactions involving public funds and backed by heavy penalties in the event of breach of the principles.

The application of principles amplified by guidelines follows every transaction involving public funds and can apply irrespective of the nature of the procuring agency or its mode of incorporation. It thus effectively can apply to all transactions involving the expenditure of public funds usually by Government ministries, statutory bodies, and State-owned enterprises. However, it can also apply to procurement by other agencies, such as non governmental organizations (NGOs) and community based organizations (CBOs), using public funds.

The hallmark of this approach is flexibility while promoting the clear accountability of decision-makers. It enables various levels of decision-making to be determined by the agency according to the quantum and complexity of the transaction, legally requiring that the details of the decision-maker and the decision be totally transparent.

This model has the flexibility to accommodate a changing market place while promoting adherence to objectives that are clearly articulated. The legal parameters are defined by operating principles for which there is no negotiation while the details of the process are accommodated by subordinate instruments, primarily administrative in nature but having the force of law, thereby providing the flexibility to accommodate a changing market and technological environment.

This results in:

- a fair and open process of considering bids whether by open or selective tendering;
- an evaluation criteria that is clear, objective and transparent;
- the public interest being served by transparent processes; and
- the identification and accountability of decision-makers;

The framework can also accommodate a review at every stage of the procurement cycle thereby enabling strict verification of key milestones by the central agency or an independent third party so as to prevent cost overruns.

The procurement process is characterized by a legal requirement that all stages of the process reflect the highest standards of probity and professionalism so as to engender mutual trust and confidence in the system.

CHAPTER 6 THE PREFERRED PROCUREMENT MODEL

6.1 INTRODUCTION

The emergence of the global economy, increasing decentralization of Government functions, greater discretionary powers of public officials, the disparate objectives of public procurement, and the weaknesses of the current system have led to the need to regulate procurement in new ways.

While the attainment of Government's policy objective is conventionally through the operation of Government Ministries and Departments, the trend increasingly is towards the achievement of public objectives through contractual arrangements with State-owned enterprises, statutory bodies and private organizations, incorporated and unincorporated. Any discussion for a preferred procurement model for Trinidad and Tobago must therefore acknowledge the increasing use of these bodies and agencies as a common means of achieving Governmental objectives.

The success of the procurement system depends on a clear articulation and understanding of what the legal and regulatory framework seeks to achieve. The framework must reflect the various objectives and the relative weights given to these objectives. In the context of Trinidad and Tobago, these objectives must include:

- value for money in public spending,
- greater public accountability,
- promotion of greater transparency in public procurement,
- consistency with and support of government policies,
- effective and efficient contract performance,
- balance between a commitment to develop local businesses and the need to provide a level playing field, and
- a trade-off between control, rules, regulations and accountability on the one hand, and efficiency, flexibility, judgement and innovation on the other.

A regulatory framework that accommodates the demands of these objectives is **the Principle Model**, appropriately modified to take into account the domestic environment.

The underlying philosophy of the Principle Model is that once a body is spending public money there follows an obligation on that body to account for Value for Money - which by definition encompasses efficient and effective delivery of the property and services for which public money is spent. It is the use of "public money" that determines the degree of public accountability for expenditure – not the institutional or organizational framework of the spender.

Critical to the new procurement regime is therefore a clear understanding of “*public money*” which, as articulated in legal models reflecting current best procurement practice and effective accountability, encompasses:

- all money received by a public body, regardless of source; and
- all money received by a non-public body, from a public body.

The legal framework will embrace expenditure by –

- (a) a public organisation for a public or private purpose; or
- (b) a private organisation for a public purpose regardless of the source or type of funding where it can be reasonably inferred that the State is ultimately liable.

In addition, public accountability may exist for private money where that money is used for a public purpose even though the spender may be a private organization generally raising funds independently of the State.

The test lies not with the mode of incorporation or even the extent of public control or funding, but whether or not it can be reasonably inferred that the ultimate financial responsibility is to be borne by the State.

6.2 THE PREFERRED MODEL

Government’s policy, as articulated in Vision 2020, is for greater transparency and accountability in public sector decision-making, and best practice in public procurement. The proposed new procurement regime must deal therefore with all components of the public procurement cycle and affect all involved in public procurement without fear or favour.

From this perspective, the Principle Model, appropriately adapted to the economic, social and political environment of Trinidad and Tobago is the preferred model. It provides an overarching framework for all agencies involved in procurement using public money with immutable parameters in which the operating principles and guidelines are not negotiable.

This Model addresses many of the weaknesses with the current system:

- It recognises the validity of the tendering process of agencies while providing an overarching uniform system which affects all transactions;
- It increases openness and accountability, thereby enabling greater scrutiny by the public;
- It enables stakeholder participation in the development of policies and guidelines;
- It enables flexibility to accommodate technological change;
- It removes ambiguities in the reporting relationships and strengthens Parliamentary oversight of public expenditure in procurement;

- It enables greater monitoring of contract execution;
- It provides a specific dispute resolution mechanism and proposes clear sanctions in the event of breach.

6.3 CONSTRUCT OF THE PREFERRED MODEL - PRESCRIBED OPERATING PRINCIPLES

The following Operating principles are to apply uniformly to the entire public procurement process and be implemented by all procuring agencies using public money:

- Value for Money;
- Transparency of the procurement process; and
- Accountability of participants in the procurement process.

Procuring agencies are required to conform to the operating principles to attain the following objectives:

- Open and effective competition;
- Ethics and fair dealing according to the highest standards of probity and professionalism;
- Promotion of national industry, taking into account the international obligations of Trinidad and Tobago; and
- Promotion of other Government policies.

6.3.1 Value for Money

Value for Money is the core principle underlying public sector procurement. It is evaluated on a whole-of-life basis of the good or service being procured and is influenced by a number of factors:

- the procurement method adopted;
- maturity of the market for the property or service sought;
- performance history of each prospective supplier;
- relative risk of each proposal;
- financial considerations including all relevant direct and indirect benefits and costs;
- the anticipated price that could be obtained at the point of disposal;
- maintenance; and
- evaluation of contract options (e.g. contract extension option).

Any procurement activity represents a cost for buyers and suppliers. Therefore the procurement method chosen should not impose any unnecessary costs or burdens for buyers or suppliers. Officials conducting procurement should ensure the procurement

method adopted represents Value for Money and be satisfied that the best possible outcome has been achieved taking into account all relevant costs and benefits over the whole of the procurement cycle. Accepting the lowest price is not necessarily an indicator of best Value for Money.

Where they exist, Strategic Common Use Arrangements are to be used by procuring agencies to assist in the achievement of Value for Money by delivering cost-effective services.

Similarly with the disposal of public property, agencies are required to ensure that the best value is obtained for whatever is being disposed of by whatever method adopted to so do.

Given that competition is a key element of the policy framework, all potential suppliers should have the same opportunities to compete and must be treated fairly based on their legal, commercial, technical and financial abilities, taking into account, government policy for domestic industry.

Procurement Agencies need to strike a balance between the costs reasonably incurred in promoting competition and the benefits to be obtained. In this context, the costs of bid evaluation, the time taken in the procurement process, and the benefits to be gained from an increase in the number of bidders are all matters for consideration.

Procurement by an agency includes not only the acquisition of services or property for its own use but also for third parties.

6.3.3 Transparency

Transparency provides the assurance to the public that the procurement processes are appropriate and therefore should be an inherent characteristic of all processes and procedures, plans, actions or decisions relating to procurement.

Greater accountability and transparency can be achieved only through an increased dissemination of information. Disclosure is the mechanism by which agencies make their procurement activities visible and transparent. Agencies will be required therefore to comply with the reporting obligations specified by the Regulator including compliance with the following reporting mechanisms:

- report publicly-available procurement opportunities in an adequate and timely fashion in the Purchasing and Disposals Gazette and in electronic format where possible;
- the evaluation criteria for any particular procurement should clearly identify the relative importance of all relevant factors and provide a sound basis for a procurement decision;

- agencies evaluate each offer by applying only the evaluation criteria and methodology notified to bidders;
- where market circumstances limit competition, agencies recognize this and use procurement methods that take account of it;
- bidders are provided with reasonable opportunities to meet any prequalification requirements for participation.

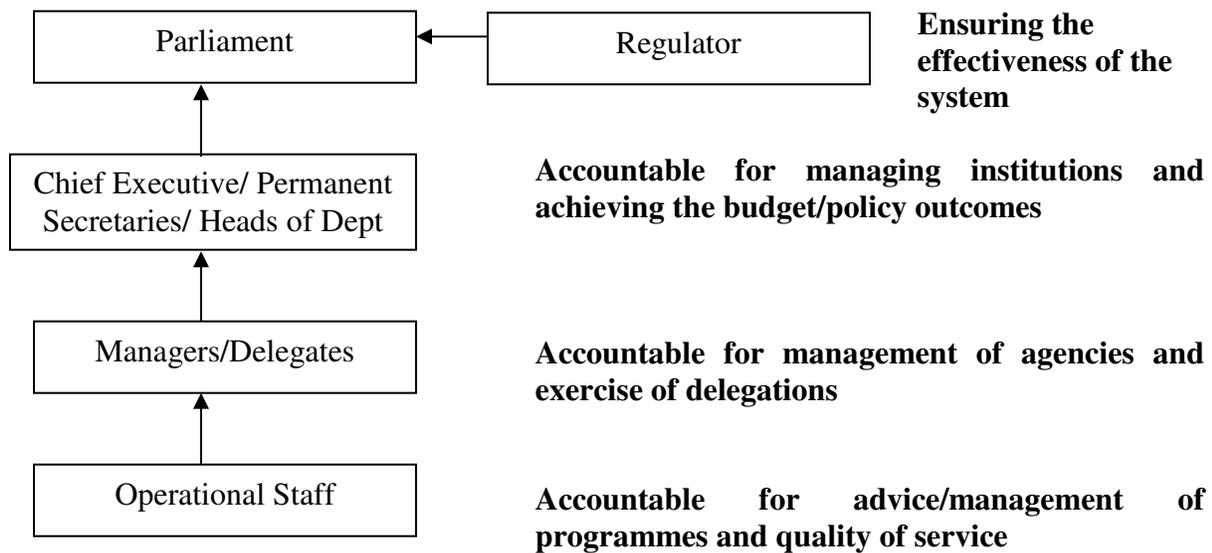
Other reporting and disclosure obligations will include:

- Disclosure of information consistent with the Freedom of Information Act, 1999;
- Disclosure of discoverable information that is relevant to a case before a court.

6.3.2 Accountability

Accountability means that officials are responsible for any plans, actions, decisions and outcomes that involve spending public money.

The accountability framework is as follows:



Each procurement agency is required to appoint an officer who will be responsible and accountable for the overall management of the procurement activities of the Agency. However, the ultimate responsibility resides with the Chief Executive.

Chief Executives are:

- accountable for their agency's procurement performance;

- authorised to issue Chief Executive's Instructions (CEIs), which may include directions to officials involved in procuring property and services; and
- responsible for ensuring adequate systems for recording decisions and reasons for making them are maintained.

Procuring agencies should include provisions in their tender documentation and contracts that alert prospective suppliers and contractors to the public accountability requirements of the State, including disclosure to Parliament and its Committees.

As part of their responsibilities, agencies must consider, on a case-by-case basis, the inclusion of a provision in contracts to enable the Auditor General access to contractors' records and premises to carry out appropriate audits in respect of the particular contract.

6.4 DISPOSAL OF PUBLIC ASSETS

These Operating Principles and Objectives will apply not only to the acquisition of property and services involving public money, but also to disposal of public assets including lands, buildings, intellectual property rights, and other assets real and financial, fixed and moveable, owned or managed by the State or State agencies whether by sale, lease, concession or licence.

6.5 SANCTIONS

The firmness of the Operating Principles is attained by a mandatory legal requirement of compliance in every transaction involving expenditure of public money, and supported by prescribed penalties in the event of non-compliance. Because of the high standard of care required of those spending public money as defacto stewards of the public interest, the penalties in event of breach should be unequivocal, and the process of investigation swift.

Failure to observe the operating principles of Value for Money, Transparency and Accountability will result in remedies available to the public under the Proceeds of Crimes Act, 2000.

6.6 NATIONAL COMPETITIVENESS AND INDUSTRY DEVELOPMENT

The State, through its agencies, is a major purchaser of property and services, and as such can act as a force to promote national competitive advantage and to develop competitive local industries including small and medium enterprises (SMEs). To facilitate this policy objective, domestic industry will be given a **10%** price differential over foreign suppliers of goods and services^{viii}.

This will be supported by the Government's commitment that procuring agencies will ensure that as a first option all of their requirements for goods and services are produced,

generated or provided by domestic firms, once they satisfy the criteria of competitive quality, price, standards, and delivery schedules. Resort to imported goods and services will be entertained only where domestic suppliers are unable to meet the requirements of procuring agencies.

The Government will therefore ensure that a proportion of public agencies contracts are reserved for small and medium sized enterprises. Agencies should be aware therefore of Government's Policy on the development of the small business sector, and in particular Government's "**Fair Share Programme**" which seeks to set aside contracts of a specified value solely for the small business sector.

When setting selection criteria, procuring agencies should ensure that they encourage participation by SMEs as direct suppliers or as subcontractors. Unless there is a strong reason to do otherwise, agencies should not attribute weightings to particular criteria that might discriminate against small businesses.

In all procurement projects, agencies are required to clearly identify in the tender documentation, all preferences for the domestic industry as well as, and where appropriate, opportunities for SME participation. Agencies should ensure that the relevant industry is fully and consistently briefed on the nature of the evaluation criteria, and that they have an opportunity to comment and seek clarification from the agency.

6.7 COMPLAINT MECHANISM

The new procurement model provides for the introduction of a complaints mechanism. The complaints process will accommodate complaints from or about procuring officers or potential suppliers or executive directives that result in activities contrary to the Operating Principles, Objectives, Guidelines, and Processes, by a person or a group of persons with an interest in the contract or process under examination.

6.7.1 Pre Award Complaints

Where a complaint concerning the procurement process arises before a contract is awarded, a complaint can be made to the Regulator within a specified period. The Regulator will investigate the complaint and arbitrate. In so doing, the Regulator will have the discretion to suspend the process during the course of the investigation, and for investigative purposes exercise the powers of a Commission of Enquiry to which the Commission of Enquiry Act applies.

The Regulator may make a finding of corrupt practice by virtue of a breach of the Operating Principles and Guidelines, and void the process. The Regulator may also operate as a mediator and mediate a settlement to the satisfaction of all parties which may include a revision or strengthening of certain contractual terms.

6.7.2 Post Award Complaints

Where a complaint concerning the procurement process arises after the contract is awarded, the contractual requirements are enforced and operate even during the course of the investigation. However, the Regulator may assess damages upon the offending party which will be payable to all those who have a direct interest in the decision, including the unsuccessful bidders. The Regulator may also void the contract and order a prohibition, for some specified period of time, from further dealings with the private party both individually and in his corporate incarnation.

The consequent investigative report is also to be referred to other relevant institutions including the DPP, the Auditor General and the Parliament.

6.7.3 Frivolous complaints

In the event the Regulator is of the view that the investigation is initiated by a frivolous complainant or collusion, the Regulator can find accordingly and impose a surcharge on the frivolous complainant as well as order a prohibition from future dealings up to a specified period.

6.8 REVIEW

The new procurement regime provides for a review of the procurement process and adherence to the operating principles and guidelines at critical stages in the procurement cycle, commencing with the identification of the need, by an independent panel within a specified time frame. The intent is to ensure that Value for Money and Transparency issues are adequately addressed. The review will occur at scheduled milestones in the life of the project for which the procurement is occurring. The complement of the Review Panel can comprise civil society representatives, staff of the Regulatory Agency and even from within the organisation.

The review process is mandatory for all procurement projects, including the disposal of public property, above a specified threshold value to be determined by the Regulator.

The benefits of this review process are that it effectively replaces pre-contract audits, and can be conducted so as not to impair the efficiency of the procurement cycle. It operates as a check and balance on the actual procurement process, reinforces the integrity of the process, and facilitates greater efficiencies in procurement.

6.9 PROPOSED LEGAL AND INSTITUTIONAL FRAMEWORK

The proposed system effects a shift from institutional spending or the source of funding as the focus of the public procurement system to an emphasis on public expenditure

governed by the underlying operating principles of Value for Money, Transparency and Accountability. The test for the application of the law is whether or not the public is ultimately liable for the expenditure.

Establishment of the re-engineered procurement system based on the principles and design outlined above will require the repeal of the Central Tenders Board Ordinance with its subsidiary legislation, and its replacement by a new Act.

The proposed legislation will provide an overarching legal and regulatory framework applicable to all procuring entities using public money in contrast to the current legal environment of parallel procuring systems.

It will apply also to all transactions involving expenditure of public money, and acquisition or disposal of public property. This framework approach enables flexibility of policy formulation to accommodate market and technological change, and separates policy issues from operational issues.

The Act will therefore:

- prescribe the principles governing the system;
- define the general managerial and accounting responsibilities of the purchasing agencies and prescribe penalties for infringement of the principles and of the guidelines embodying them;
- establish a Regulatory Body to be considered a statutory authority for the purpose of Parliamentary oversight under section 66A of the Constitution;
- institutionalise Civil Society and stakeholder representation on a National Procurement Advisory Council to support the operations of the Regulatory Body thereby providing an invaluable monitoring mechanism;
- mandate the Regulator to ensure a relevant, efficient and compliant system by:
 - ✓ monitoring all procurement and divestment activities involving public funds to ensure general application of the operating principles;
 - ✓ developing and keeping under constant review with civil society participation the mandatory guidelines;
 - ✓ providing support to the users of the system and assisting them in development of their own procedures and processes; and
 - ✓ promoting public awareness of the processes.
- provide a complaints mechanism for those aggrieved by the conduct of a party to the transaction;

Correlative administrative issues to support the legal and regulatory framework for the preferred model will need to be simultaneously and urgently addressed.

These include:

- the establishment of procurement units in all State agencies;
- the reorganization of the Central Tenders Board Division of the Ministry of Finance, with the attendant training and remuneration implications, so as to provide support for the Regulator. It is anticipated that, given the demands to be made of agencies, a professional cadre of purchasing officers will evolve and be appropriately trained, and remunerated;
- designing appropriate IT systems to support the Regulator's reporting requirements and communication with the public; and
- e-procurement.

6.10 ROLE OF THE REGULATOR

It is recognized that the Regulator is the crux of the re-engineered procurement system. The Regulator must not only be, but also be seen, to be technically competent and "above reproach."

Because of the administrative environment of Trinidad and Tobago, the office of the Regulator will be statutorily established. Statutory prescription will also enable Parliamentary oversight of the performance of the Regulator under section 66A of the Constitution.

The Regulator would not be accountable to the Executive. He or she will be directly accountable to Parliament. In this regard, the Regulator is analogous to the Auditor General, for the reason that procurement involves public expenditures approved by Parliament. Parliamentary oversight will therefore strengthen public confidence in the integrity of the procurement process and the quality of governance generally.

The Regulator is to be appointed by the President in the exercise of his own discretion after consultation with both the Prime Minister and the Leader of the Opposition.

The Regulator is to be on contract for a minimum of 5 years and is subject for reappointment. This will enable securing an appropriately qualified person to take up the position.

The prime function of the Regulator is to proactively ensure an efficient and relevant procurement system that conforms to the Operating Principles, Objectives and Guidelines. This will require constant review of policies and guidelines, which will be submitted to Parliament by the Regulator for approval by negative resolution, after consultation with the National Procurement Advisory Council comprising of representatives of civil society appointed by the President.

The Regulator will also design templates for the production of handbooks and monitor the process from an audit perspective so as to ensure general application of the Operating Principles and Guidelines in the public interest.

Like its counterpart in Jamaica, the Regulator will have investigatory powers equivalent to that of a Commission of Enquiry and the discretion to suspend the procurement process or certain components of it for the purpose of investigation. Enforcement of its findings by way of legal proceedings will reside with other responsible agencies such as the Director of Public Prosecutions (for criminal breach and fraud) and the Service Commission (for misconduct of public official and vitiating of contracts).

In addition, the Regulator will be required to:

- establish a central procurement database with information on procurement opportunities, processes, contract awards and prices;
- promote quality control in the procurement process;
- promote public understanding of the procurement process;
- enable the operation of the Operating Principles and objectives in the guidance of the process;
- proactively support new approaches to implementing the Operating Principles such as e-procurement and provide support to agencies and the public in implementing and using these new approaches;
- develop a code of ethics for procurement officers;
- monitor agency compliance with the operating principles, objectives and guidelines;
- report to Parliament on the results of investigations;
- report to Parliament on an annual basis;
- develop and review guidelines and practices in consultation with the Advisory Council; and
- provide advice and consultancy services to procuring agencies.

Operating expenses of the office of the Regulator and related staff should be a direct charge on the Consolidated Fund. The Regulator should also be provided with adequate staff to perform the functions required.

6.11 THE NATIONAL PROCUREMENT ADVISORY COUNCIL

The National Procurement Advisory Council will comprise -

- Nominees of three (3) Non-Governmental Organisations
- Nominees of three (3) organisations representing the manufacturing, retail and construction sectors in Trinidad and Tobago; and
- A nominee of a financial institution.

These organisations, chosen by the President after taking into account the organisations' effectiveness in serving the public interest will nominate its representatives to serve on the Council. A nomination to the Council will be for a period of three (3) years in the first instance.

The Council, will be required to:

- advise the Regulator in the development of procurement guidelines, procedures and handbooks;
- oversee and monitor the entire Public Sector Procurement Regime.

6.12 GUIDELINES

The operating principles are to be supplemented by Guidelines, compliance with which is also mandatory. The Guidelines are to be designed by the Regulator in consultation with the National Procurement Advisory Council so as to ensure public understanding and endorsement. A sample of the contemplated Guidelines is included in Annex 1.

The Guidelines will address the following issues:

- the requirement that procurement specifications are rendered in functional and performance terms;
- means of improving the cycles of competitive tendering and contracting;
- the determination of Value for Money;
- the achievement of good governance;
- bonded suppliers;
- preferential treatment afforded to local suppliers and small businesses;
- open and effective competition which would include public notification of opportunities and of evaluation criteria to be used in the bid process;
- public consultation on major contracts;
- a joint undertaking by all parties to comply with an agreed code of ethics with sanctions;
- publication of details of contracts;
- an endorsed supplier system;
- the consideration of other government policies;
- an independent review process at critical points in the procurement process;
- advertising rules and time limits;
- rules on participation and qualification;
- tender documentation and technical specifications;
- tender evaluation and award criteria;
- reporting requirements;
- complaint review procedures; and
- procurement review procedures.

The actual details of the processes involved in public procurement will be found in handbooks specifically designed, for example, for the procurement of Information Technology, construction services, acquiring and disposing of property or licensing and consulting services. All of these handbooks will contain, amongst other things, standard forms of agreement and contract as well as pro forma clauses. These handbooks can be produced by the procuring agencies themselves according to a template to be provided by the Regulator. They must, of course, conform strictly with the Operating Principles and Guidelines.

6.13 SUPPORT INSTRUMENTS – HANDBOOKS AND CHIEF EXECUTIVE INSTRUCTIONS

The concern of the process is procedural transparency and objectivity of criteria without the prescription of a uniform procedure for all procurement. In addition, the process must be capable of verification. The details of the various procurement methods and the reasons for the procurement method selected must be available to all. The UNCITRAL Model Law provides a useful reference point for the detailing of procurement methods for inclusion in the Handbooks. This reduces the dangers of asymmetrical information, collusion between the buying agent and the supplier, and subjectivity in the decision making process.

In order to take into account the peculiarities of specific agencies, the Chief Executive Officers, including Permanent Secretaries and Heads of Departments, will be empowered to issue specific instructions to supplement the handbooks.

6.14 BENEFITS OF THE PREFERRED PROCUREMENT MODEL

The major change envisaged is that the procurement system will be operationally fully decentralised, flexible and transparent. All procuring agencies will be directly responsible for their own procurement and therefore directly accountable for the quality of their decisions and the efficiency of their systems.

The law will enable Permanent Secretaries, Heads of Departments and Chief Executive Officers of public bodies to issue instructions on the conduct of the processes within their agencies, subject to mandatory compliance with the Operating Principles as prescribed and amplified by mandatory Guidelines developed by the Regulator. Mechanisms will be put in place to support agency accountability.

As the details of the procurement system are easily available in non-statutory documents such as the handbooks, the preferred procurement model accommodates the current tendering processes of State-owned enterprises while placing them firmly within an overarching legal and regulatory framework reflecting the Operating Principles.

This proposed framework design, while ensuring open and effective competition, ethics and fair dealing, and promotion of national industry, also promotes:

- greater accountability and transparency of expenditure of public money on property and services;
- greater efficiency of implementation of Government policies within the context of best procurement practice;
- public confidence in the manner by which Government conducts its business particularly in the acquisition of property and services;
- ethical conduct of all parties in the procurement process thereby engendering mutual trust and respect;
- civil society overview of the procurement process;
- the responsibility of Parliament in the procurement process;
- equal opportunity for bidders and greater confidence in decision making;
- inclusion of other financial arrangements such as Build Own Operate Transfer (BOOT), Build Own Lease Transfer (BOLT), Design Finance Construct (DFC) under the legal and regulatory framework.

Establishment of a Regulator directly accountable to Parliament with responsibility of ensuring the relevance, effectiveness and compliance of procurement practices should ensure greater accountability and transparency.

In addition, prescribed civil society participation in the design of mandatory guidelines, enabling stakeholder participation in operating policies and entrenching stakeholder communication with the regulator, will further strengthen public trust in the procurement process of public agencies.

ANNEX 1: SAMPLE PROCUREMENT GUIDELINES

Note: This Annex provides an example of the more general Guidelines to be developed by the Regulator. It does not predetermine the final product nor bind the Regulator in any way.

Acknowledgement: These sample guidelines draw from the Commonwealth Procurement Guidelines issued by the Department of Finance and Administration of the Government of Australia in February 2002 and January 2005.

1.0 INTRODUCTION

(a) The purpose of the Guidelines is to ensure that agencies involved in public procurement achieve Value for Money, Transparency and Accountability in their procurement activities. Failure to conform to these guidelines attracts heavy penalties under the law.

(b) Officials involved in any aspect of procurement must be aware of and understand:

- the relevant legislation and related regulations;
- their individual responsibilities and accountabilities under these Guidelines; and
- their Chief Executive's Instructions (CEIs).

(c) To assist agencies, procurement circulars are issued on a regular basis. Additionally, the Regulator has developed best practice advice for conducting procurement. Government procurement officials are encouraged to refer to these sources of information on a regular basis to obtain guidance and information on procurement.

1.1 PROCUREMENT PRINCIPLES

(a) The Guidelines are issued according to law. They apply to the procurement of all property and services^{ix} involving the use of public money. By outlining the fundamental policies and principles that underpin procurement, they articulate the expectations that exist of officials, or agents conducting procurement.

(b) The principles governing State procurement are as follows:

- Value for Money
- Transparency
- Accountability

(c) The principles are supported by the following mandatory objectives:

- Efficiency and effectiveness;

- Ethics and fair dealing according to the highest standards of probity and professionalism;
- National competitiveness and industry development; and
- Promotion of other Government policies.

(d) These principles are also complemented by other Government policies. Fundamental to all State procurement is that it is sufficiently transparent to allow the Government, Parliament, and the public to have the utmost confidence in the procurement process.

(e) Officials undertaking procurement-related activity are expected to:

- act in accordance with these Guidelines;
- ensure their procurement reflects the policies and principles contained in these Guidelines;
- ensure their actions meet any additional requirements addressed in their CEIs; and
- recognise that they are accountable, within the framework of Ministerial responsibility, to the Government, Parliament and the public.

(f) If using private financing, agencies are required to have regard to the policies outlined in these Guidelines.

1.1.1 VALUE FOR MONEY

(a) Value for Money is a concept evaluated on a whole-of-life basis of the property or service being procured and is influenced by a number of factors:

- the procurement method adopted;
- market maturity;
- performance;
- financial considerations;
- the anticipated price that could be obtained at the point of disposal; and
- maintenance.

(b) Officials buying property and services need to be satisfied that the best possible outcome has been achieved, taking into account all relevant costs and benefits over the whole of the procurement cycle. Accepting the lowest price is not necessarily an indicator of achieving best Value for Money.

(c) Any involvement in a procurement activity represents a cost for buyers and suppliers. Officials conducting procurement should ensure the procurement method adopted represents Value for Money. The procurement method chosen should not impose any unnecessary costs or burdens for buyers or suppliers.

(d) Procurement is a significant strategic business function. Major agency activity should be market tested so as to assess the need which then drives the nature of the procurement process. Agencies are also required to ensure their procurement functions are appropriately managed to provide best value.

(e) Where they exist, Strategic Common Use Arrangements (bulk purchasing) are to be used by agencies to assist in the achievement of Value for Money by delivering cost-effective services.

(f) Similarly, with the disposal of public property, agencies are required to ensure that the best value is obtained, for example, by public auction or by a bidding process involving a minimum of three quotations.

(g) Agencies must choose procurement methods that will promote open and effective competition to the extent practicable. The legislation does not prescribe the procurement method to be used, nor does it set minimum limits on the number of offers that must be sought. As requirements and market conditions vary, the procurement agency must consider each case on its merits. However, Procurement Agencies need to strike a balance between the costs reasonably incurred in promoting competition and benefits to be obtained. In this context, the costs of bid evaluation, the time taken in the procurement process, and the benefits to be gained from an increase in the number of bidders are all matters needing consideration.

1.1.2 TRANSPARENCY

(a) Transparency through internal and external scrutiny is an essential element of accountability and should be an inherent characteristic of all processes and procedures, plans, actions or decisions relating to procurement. As a consequence, procurement officials must offer unsuccessful bidders a written or oral debriefing as to why their offers were not successful.

(b) Where an agency has outsourcing arrangements in place, that agency must ensure that the outsourced provider maintains appropriate systems for recording decisions and the reasons for making those decisions relating to the outsourced service or function.

(c) To ensure transparent procurement, officials must comply with the following reporting mechanisms:

- report publicly-available procurement opportunities in an adequate and timely fashion in a Purchasing and Disposals Gazette^x and in electronic format where possible;
- as soon as an agency is aware of a failure to gazette within the prescribed six week timeframe the agency is to remedy that failure by immediate Gazetteal;

- the evaluation criteria for any particular procurement should clearly identify the relative importance of all relevant factors and provide a sound basis for a procurement decision;
- agencies evaluate each offer by applying only the evaluation criteria and methodology notified to bidders;
- bidders are provided with reasonable opportunity to meet any prequalification requirements for participation in state business.

(d) If the Chief Executive of an agency decides that details of a contract or standing offer are exempt matters under the *Freedom of Information Act 1999*, he or she may then direct in writing that the details are not to be notified in the Gazette.

(e) Officials should always ensure they refer to the Government's policy, to their agency's Chief Executive's Instructions, and State insurance cover when considering liability and indemnity.

(f) Chief Executives are required to advise their respective Ministers of any sensitivity in relation to disclosure before publishing information on contracts entered into by their agency.

(g) Those wishing to respond to procurement opportunities must be given adequate information to enable them to do so effectively and ensure that the same information is made available to all bidders.

(h) Agencies should not exclude, without good cause, those who have expressed interest in supplying property or services. If agencies exclude any potential suppliers they should document the reasons for doing so and make them available to the supplier.

(i) With respect to the disposal of public property, agencies are required to ensure adherence to Government's policy and a transparent process.

1.1.3 ACCOUNTABILITY

(a) Officials, departments and agencies are answerable and accountable for any plans, actions and outcomes that involve spending public money. Good record keeping is an essential element of accountability. Agencies are to include provisions in tender documentation and contracts that alert prospective providers to the public accountability requirements of the State, including disclosure to Parliament and its Committees.

(b) Each procurement agency is required to appoint an officer who will be responsible and accountable for the overall management of the procurement activities of the Agency. However, the ultimate responsibility resides with the Chief Executive.

- (c) Chief Executives are:
- accountable for their agency's procurement performance;
 - authorised to issue Chief Executive's Instructions (CEIs), which may include directions to officials involved in procuring property and services;
 - responsible for ensuring adequate systems for recording decisions and reasons for making them are maintained; and
 - responsible for ensuring adherence to the guidelines with respect to the disposal of property.
- (d) Officials with procurement duties must act in accordance with their CEIs and these Guidelines.
- (e) As part of their responsibilities, agencies must consider, on a case-by-case basis, the inclusion of a provision in contracts to enable the Auditor General access to contractors' records and premises to carry out appropriate audits in respect of the particular contract.
- (f) Agencies should consider, on a case-by-case basis, what might be commercial-in-confidence when designing any contract. Typically, things that may be commercial-in-confidence may include details of a company's commercial strategies or fee structures, intellectual property or information that could benefit competitors.
- (g) Agencies must include a contract provision requiring outsourced service providers to comply with the Government's equal opportunity requirements.

1.2 OBJECTIVES

1.2.1 EFFICIENCY AND EFFECTIVENESS

- (a) Officials approving expenditure proposals must satisfy themselves that the proposed expenditure will make efficient and effective use of public money.
- (b) As no single purchasing method suits all situations, the Government does not prescribe a specific purchasing method or any arbitrary thresholds. Buyers must consider the requirements and existing market conditions of each procurement, and select a procurement method on its merits.
- (c) The procurement function can contribute significantly to agencies' efficiency and effectiveness. Agencies should therefore ensure that procurement arrangements are:
- monitored and evaluated to be certain that they continue to offer the expected benefits; and
 - integrated into corporate governance mechanisms to most effectively contribute to agencies' outcomes at a strategic level.

(d) In order that agencies can take advantage of public purchases or discounts in key industry segments, agencies should consult with the Regulator to confirm the existence of Strategic Common Use Supplier Arrangements.

1.2.2 ETHICS

(a) Procurement must be conducted ethically to enable buyers and suppliers to:

- deal with each other on a basis of mutual trust and respect; and
- conduct business fairly, reasonably and with integrity.

(b) The public expects Government officials to act ethically and fairly. High ethical standards support good procurement outcomes, through:

- encouraging suppliers to participate in the Government marketplace; and
- reducing the costs of managing risks associated with potential improper behaviour, including fraud, theft or corruption.

(c) Officials involved in procurement, particularly those dealing directly with suppliers, should ensure they:

- recognise and deal with conflict of interest;
- deal with suppliers even-handedly;
- consider seeking appropriate probity advice;
- do not compromise the Government's standing by accepting gifts or hospitality;
- are scrupulous in their use of public property; and
- comply with the duties and obligations specified in the Code of Conduct as set out in the Integrity in Public Life Act, 2000, Civil Service Regulations, the Prevention of Corruption Act 1987, the information privacy principles of the Freedom of Information Act, the security provisions of criminal law and their CEIs.

(d) Agencies should ensure that service providers are aware of this obligation at an early stage of contract negotiation.

(e) A useful tool for ensuring the demonstrable integrity of public contracting is Transparency International's Integrity Pact (IP)^{xi}. This is an undertaking signed jointly by all with direct or indirect interest in a project by which they agree to be bound by specified behaviour and values.

All parties to the IP agree:

- not to collude or solicit any undue benefit, or offer or grant bribes or awards;
- to disclose payments to intermediaries and comply with specified ethical principles;
- to sanctions for violation of the pact such as denial of contract, forfeiture of performance bonds and agreed liquidated damages;

- to submit disputes to arbitration; and
- to have their observance of the provisions of the agreement monitored by an independent body.

Agencies are recommended to consider incorporating the essential elements of this anti-corruption tool in major projects.

1.2.3 NATIONAL COMPETITIVENESS AND INDUSTRY DEVELOPMENT

(a) Domestic industry will be given a **10%** price differential over foreign suppliers of property and services. In addition, procuring agencies will ensure that they access their requirements of goods and services from domestic companies as a first recourse and will only seek to import these requirements where supplies are not available or domestic goods and services are not competitive in terms of price, quality or standards.

(b) When setting selection criteria, agencies should ensure that they encourage participation by SMEs as direct suppliers or as subcontractors. Unless there is a strong reason to do otherwise, agencies should not attribute weightings to particular criteria that might discriminate against small businesses.

Agencies will therefore ensure that a proportion of their contracts are reserved for small and medium sized enterprises, in keeping with Government's policy on the development of the small business sector.

(c) In all procurement projects, agencies are required to clearly identify in the tender documentation, all preferences for the domestic industry as well as opportunities for SME participation. Agencies should ensure that the relevant industry is fully and consistently briefed on the nature of the evaluation criteria, and that they have an opportunity to comment and seek clarification from the agency.

**ANNEX 2: MEMBERS OF THE PROCUREMENT REFORM
WHITE PAPER COMMITTEE**

Mr. Kamal Mankee (Chairman)
Permanent Secretary,
Ministry of Finance

Ms. Merlyn Marcano
Director of Contracts,
Central Tenders Board

Mr. Anthony Guiseppi
Trade Consultant,
Trinidad and Tobago
Manufacturers Association

Ms. Carla Herbert
Legal Drafter &
Law Reform Advisor,
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Mr. Alvin Pascal
Senior State Counsel,
Tobago House of Assembly

Mr. Lawrence Placide
Representative,
Trinidad and Tobago
Chamber of Industry
and Commerce

Mr. Boyd Reid
Representative,
Trinidad and Tobago
Transparency Institute

Mr. Winston Riley
President,
Joint Consultative Council

EX OFFICIO MEMBER:

Ms. Aretha Romany
Project Unit,
Ministry of Finance

ANNEX 3: ENDNOTES

ⁱ There is lively debate about the meaning of ‘procurement’, the distinction between ‘procurement’ and ‘purchasing’ and the scope, content and activities that these terms encompass. On the one hand, some identify ‘purchasing’ as involving three concerns: the decision on what to buy, the specific processes and procedures for purchasing the goods or services and, lastly, finding the goods and services the agency requires at the lowest possible cost. ‘Procurement’ is viewed as a narrower concept – the application of the specific processes and procedures for buying the goods and services. See B. J. Reed and John W. Swain, *Public Finance Administration* (1990), and Stephen B. Gordon, *Purchasing* (1991).

On the other hand, others view ‘procurement’ in the wider context of the procurement cycle. Donald W. Dobler, David N. Burt and Lamer lee, Jr., *Purchasing and Materials Management* (1990), however, regard the procurement concept as “encompassing a wider range of supply activities than does the purchasing concept”, for instance, participation in development of requirements and specifications, administering purchase contracts, and a number of other roles.

Similarly Michiel R. Leenders and Harold E. Fearon in *Purchasing and Materials Management* 10th Edition (1993) conclude that it is ‘purchasing’ that describes the process of buying and that ‘procurement’ is a “somewhat broader term that includes purchasing”.

Support for the broader conceptualization of ‘procurement’ is adopted by the US Commission of Government Procurement, whose 1967 – 1972 reports described ‘procurement’ as methods of contracting, legal remedies, planning and budgeting, drafting procurement legislation and many other processes which observers may construe as ‘purchasing’ but not ‘procurement’.

Finally, it may be noted that the broader more encompassing definition of ‘procurement’ reflects private sector practice while the use of ‘purchasing’ or ‘acquisition’ appearing in the legal authority for public sector procurement tends to promote a narrower view of ‘procurement’ focussing as it does on the tender process.

A sample of various legal definitions from FTAA countries supports the argument of ambiguity of definition while providing invaluable guidance for translating the meaning of ‘procurement’ into law. See www.ftaa-alca.org/wgroups/wggl.eng.gpdoc2/CHAP1

ⁱⁱ In Trinidad and Tobago the Central Tenders Board Ordinance, 1961, has determined how public procurement is perceived. It establishes in section 4(1) the principal function of the Central Tenders Board to be to act for the Government in “... inviting, considering and accepting or rejecting offers for the supply of articles, or for the undertaking of works or any services in connection therewith, necessary for carrying out the functions of the Government or any of the statutory bodies;” and “... to dispose of surplus or unserviceable articles belonging to the Government or any of the statutory bodies.”

Earlier, in section 2, it defines:

“articles” to mean “... all goods, materials, stores, vehicles, machinery, equipment and things of all kinds;”

“works” to mean “... buildings and engineering works of all kinds.”

ⁱⁱⁱ Delivered by the Honourable Prime Minister, Dr. Eric Williams, on April 12th 1961.

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

^v Design-build is a method of project delivery in which one entity, a design-builder, forges a single contract with an owner to provide architectural/engineering design and construction services.

http://www.thehaskellco.com/assets/asp/dynamic_generator.asp?pageid=28

^{vi} These are augmented by the Commonwealth of Australia, Procurement Guidelines: Core Policies and Principles (March 1998) and (January 2005); see www.finance.gov.au/ctc, www.apec.gov.au/publication.

^{vii} However the Government of Jamaica has endorsed these principles in its *Public Sector Procurement Policy*.

^{viii} In this context, the following definitions apply:

Local good - a good for which a Certificate of Origin can be obtained.

Certificate of Origin - a document issued by the Certifying Authority that identifies that a product has been produced in Trinidad and Tobago, in accordance with the Rules of Origin of the Caricom Treaty.

Certifying Authority - the body identified by the Government under the Caricom Treaty to conduct Certification for purposes of Rules of Origin.

Services - includes *consultancy services*, which are services of various kinds relating to any profession, science art or trade such as advice, professional opinion or work.

Domestic services suppliers will fulfil the requirement of Chapter III of the revised Treaty of Chaguaramas demonstrating ownership (greater than 50% equity) and control (ability to appoint the Board of Directors) of the service company.

^{ix} In addition to the ordinary meaning of the term property and services, that term includes:

- consultancies and professional services of all types;
- real property activities;
- construction and related services, including works;
- financial and operating leases for equipment and real property;
- individual and collective training programs;
- services obtained from public utilities suppliers; and
- outsourcing or contracting out activities (such as programme delivery and programme support).

^x Gazette means the Proposed Purchasing and Disposals Gazette.

^{xi} Further information on the IP can be found at www.transparency.org