



REPUBLIC OF TRINIDAD AND TOBAGO

**REFORM OF
GOVERNMENT'S PROCUREMENT REGIME**

A Green Paper

Ministry of Finance
Government of the Republic of Trinidad and Tobago
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REFORM OF GOVERNMENT'S PROCUREMENT REGIME

THE PROCUREMENT POLICY VISION

*AN EFFICIENT, EFFECTIVE AND TRANSPARENT
PROCUREMENT SYSTEM REFLECTING THE PRINCIPLES
OF VALUE FOR MONEY, TRANSPARENCY AND
ACCOUNTABILITY*

THE PROCUREMENT POLICY GOALS OF TRINIDAD AND TOBAGO

- An efficient and equitable system of procurement and disposal of state assets consistent with good commercial practices;
- The application of the principles of Value for Money, Transparency and Accountability reflected by
 - Purchasing best practices in a level playing field;
 - Probity and transparency of transactions;
 - Risk management;
- Promotion of good governance generally through the operation of the principles of transparency and accountability in procurement of services and assets disposal;
- Support for local industry and business enterprises in a manner that is consistent with international obligations;
- Indisputable public and internal confidence in procurement practices of Trinidad and Tobago.

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EXECUTIVE SUMMARY

A. The Need for a New Procurement Policy

Public procurement, as understood in this Green Paper, 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 Green 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 our 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.

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 appoint 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.

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

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 checked 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 goods 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. However, the internal operations of these agencies are subject to monitoring by a Central Audit Committee, established within the Ministry of Finance. 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.

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.

However, with disposal of real property, (i.e. vacant property, including those that are vandalized, as well as those subject to unauthorized tenancies) Government's policy directive is that properties be sold through public auction with an upset price and with an initial deposit of 10% being required, the balance to be paid within three (3) months.

C. Critical Review of the System

The weaknesses of the current procurement system have long been recognised and from as early as 1987 there were some largely unsuccessful attempts made to reform it. Some weaknesses identified are as follows:

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 by awarding, with Cabinet approval, contracts to State-owned companies who in turn award sub-contracts 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 systematic monitoring and dispute resolution within an accepted policy framework.

iv. Inadequate Public Information

There is no system in place to provide suppliers of goods and services as well as the public at large with full, up-to-date, and electronically accessible information on tender opportunities, the publication and 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.

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 goods 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 (Whole of Government supply arrangements); 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 into 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 are clearly identifiable as are their responsibilities. 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. Thus, 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 in some Commonwealth jurisdictions 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 UNCITRAL Model Law

This model law 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 Ordinance.

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.

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, under pain of severe sanction, to comply with the principles, policies, and guidelines.

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. Stakeholder input into the content of the guidelines is to be prescribed.

To implement this option, the Ordinance and its subsidiary legislation will be repealed and replaced by a new Act that will treat with the legal framework and prescribe the 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.

Benefits of the Preferred Option

It 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;
- 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 Chapter 7. These guidelines are to assist Government agencies in achieving Value for Money, Transparency and Accountability in their procurement activities.

H. RECOMMENDATIONS

In order to successfully implement the Principle Model in Trinidad and Tobago, the following are recommended:

1. Decentralise the current procurement process;
2. Repeal the Central Tenders Board Ordinance;
3. Develop new legislation towards decentralisation and incorporating the operating principles of Value for Money, Transparency and Accountability;
4. Appoint an Independent Regulator who will monitor and audit the process of all state agencies spending public money and who must:
 - be accountable to Parliament;
 - establish a central procurement database with information on procurement opportunities, process, contract awards and prices;
 - establish a national training programme for public and private sectors;
 - train and certify procurement experts;
 - develop a code of ethics for procurement officers;
 - establish an e-procurement system;
 - prepare Guidelines and Handbooks on procedures and process.
5. Establish procurement units in all Ministries/Departments/Divisions and other Agencies. Staff of these units should include Procurement Specialists. The Ministries that are involved in extensive contracts should include the services of senior Procurement Specialists. This would entail consultation with the Chief Personnel Office and Public Management Consulting Division of the Ministry of Public Administration and Information.
6. Appoint Committees in all Ministries/Departments/Divisions and other Agencies to award contracts.

CHAPTER 1 THE NEED FOR A NEW PROCUREMENT POLICY

PUBLIC PROCUREMENT

The term *public procurement*, for the purposes of this Green 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

The legal and regulatory framework for public procurement is based primarily on the Central Tenders Board Ordinance, 1961 (The Ordinance). Subsequent amendments made and administrative measures taken have sought with some success to meet the challenges of a rapidly evolving national and international environment. It has become increasingly evident, however, that if public procurement is to be carried out in such a way as to strengthen the local economy, build public confidence in the system and the institutions involved in the procurement process, improve the quality of governance and promote the public interest, a new framework supporting better procurement practice is required.

Procurement by the State is essentially about spending the people's money. The State therefore needs to clearly indicate its objectives for public procurement. It must also state clearly how it intends to achieve these objectives.

This Green Paper presents for public discussion, proposals for reform of the current public procurement system. It is a draft statement of policy that seeks to make clear the State's objectives for public procurement and how these objectives are to be achieved.

This first chapter, after clarifying the concept of public procurement, discusses the need for a new policy and raises some of the questions that need to be discussed in determining its scope. Subsequent chapters examine the evolution and weaknesses of the current system, the main features of current best practice and legislative models that effect best practice and the option preferred for Trinidad and Tobago. The last chapter provides sample procurement guidelines.

1.2 WHAT IS PUBLIC PROCUREMENT?

Procurement involves more than just purchasing.¹ Generally, procurement begins with a design phase in which needs are identified, scope of works determined, costs estimated and bid packages prepared. This is followed by the tendering phase in which offers of supply are invited, evaluated, and accepted or rejected. Award of the contract is followed by the implementation phase in which the performance of the contract is managed.

Public procurement differs from private procurement in the source of funding. Public procurement, because of the involvement of public money, must submit to the test of serving the wider public interest. Private procurement, on the other hand, serves narrower commercially-oriented interests.

The perception of the scope of public procurement in Trinidad and Tobago, as influenced by the Ordinance, is largely limited to the tendering phase². Because of this limited view, insufficient attention has been paid to the other phases. This has led to the legal framework being regarded as inadequate, particularly by the private sector. In fact, the legal framework does not apply objective standards evenly across all phases of the process nor to all the actors in the process. It allows scope for executive intervention without clearly defined decision-making criteria. This in turn contributes to the weakening of public and private institutions.

Furthermore, the legislative history of public procurement, since the country's Independence, reflects the proliferation of parallel procuring agencies. This has weakened the original mandate of the Central Tenders Board (CTB) established by the Ordinance to be the sole agency responsible for Government procurement.

The wider view proposed in this Green Paper sees public procurement occurring wherever public money is spent on the acquisition of property and services. This means that the legal framework must apply to not only Government ministries and departments but also to statutory authorities, State-owned enterprises (SOEs) and civil society bodies funded by the State. Wherever public money is being spent, the public interest must be paramount. This framework should also continue to apply to the disposal of property, real and otherwise.

Thus, the wider view is the more appropriate platform to treat with the fundamental issue of integrity in public expenditure. From this perspective two important issues arise:

- 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 flexibility, judgement and innovation, on the other.

1.3 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 Government has stated that one of its strategic priorities is to make this country a major commercial and financial hub of the Americas. 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. In 2004, for example, it is expected that Government will spend \$16 billion on goods and services. This volume of purchases by State agencies must profoundly impact upon the sustainability of small and medium sized enterprises. In the interests of social and economic development, Government procurement policy must therefore address the guaranteeing of substantial market share to local business 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 relating to sole tendering in the public sector 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. The extent and speed of the change of technology affects what people procure and how they procure. The advancement of cross-border trading and e-commerce places additional pressure 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 rather than a manual platform. The imperative, therefore, is for a procurement system that takes advantage of these changes without compromising the public interest.

Conformity to Best Practice

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

Regional and International Developments

In the Caribbean Region, the formation in 2005 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 free movement of capital, goods 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 the principles.

Judicial Notice

A White Paper containing 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 of property and disposal of public property involving public money, particularly in the context of judicial review.

Weaknesses

Prevailing deficiencies in the legislative framework have weakened the current system. These weaknesses are exasperated by a shortage of skilled procurement staff in the various 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.

1.4 WHAT WILL A NEW POLICY DO?

A policy on procurement, clearly based on the principles of good governance and with 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. This will in turn promote value for money, transparency and accountability and will ensure equal opportunity in the acquisition of property, works and services involving public money, as well as the disposal of property.

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.

1.5 SOME KEY ISSUES OF SCOPE

In the determination of the scope of a procurement policy some key issues must be addressed, including:

- Should the same regime apply irrespective of the source of funding?
- Should the regime extend beyond ministries and departments of Government to Statutory bodies, State-owned enterprises, Community Based Organizations (CBOs), Non-Governmental Organizations (NGOs), and companies registered under the Companies Act in which the Government or agencies of the Government can, by shareholding or financial input, directly influence their policies?
- Should the principles underlying procurement policy also apply to Government contracts 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 for the supply of any goods or services?” (cf. Contractor-General Act, Jamaica)

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 system transformation. This chapter shows how changes in policy have affected the legal and regulatory framework leaving us with a system that is in part a highly centralised and in part a highly decentralised regulatory system. 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 Speech³:

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 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, as was understood at that time, 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.
- 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 significant importance:

- (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 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.”

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

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.

- (b) 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.
- (c) 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. No other forms of inviting offers were allowed.

- (d) 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.

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

Nevertheless, in 1969, the Third Five Year Development Plan recognised the need for greater emphasis on pre-planning as one method 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 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.⁴

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, however, has not to-date been brought into a 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 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 oil 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 Delivery⁵ 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 itself the right to contract directly. This authority is exercised by Cabinet.

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 sets 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...*”
 - c) “*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...*”
 - d) “*it enters into a contract with a company for the purchase of books for official purposes*”.

Under the government-to-government arrangements, six ministries, four statutory bodies and three wholly state-owned development companies were used as executing agencies. The National Insurance Property Development Company (NIPDEC) was not wholly state-owned but was used nonetheless as an executing agency. This was later regularised by Act No 3 of 1993. This Act also increased the powers of the CTB to give it the authority and responsibility

for appointing consultants in connection with any project. Section 27D of the Ordinance sets out the procedure for appointing consultants while section 27E gives the Board authority to negotiate fees.

Act No. 22 of 1987

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

Act No. 39 of 1991

This amendment provided for a Special Ministerial Tenders Committee to be established at the Ministry of National Security to procure certain items for the Trinidad and Tobago 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. by 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 Board.

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

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

Subsequent to the Board'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 has to be entered into. This is prepared by the Chief State Solicitor.

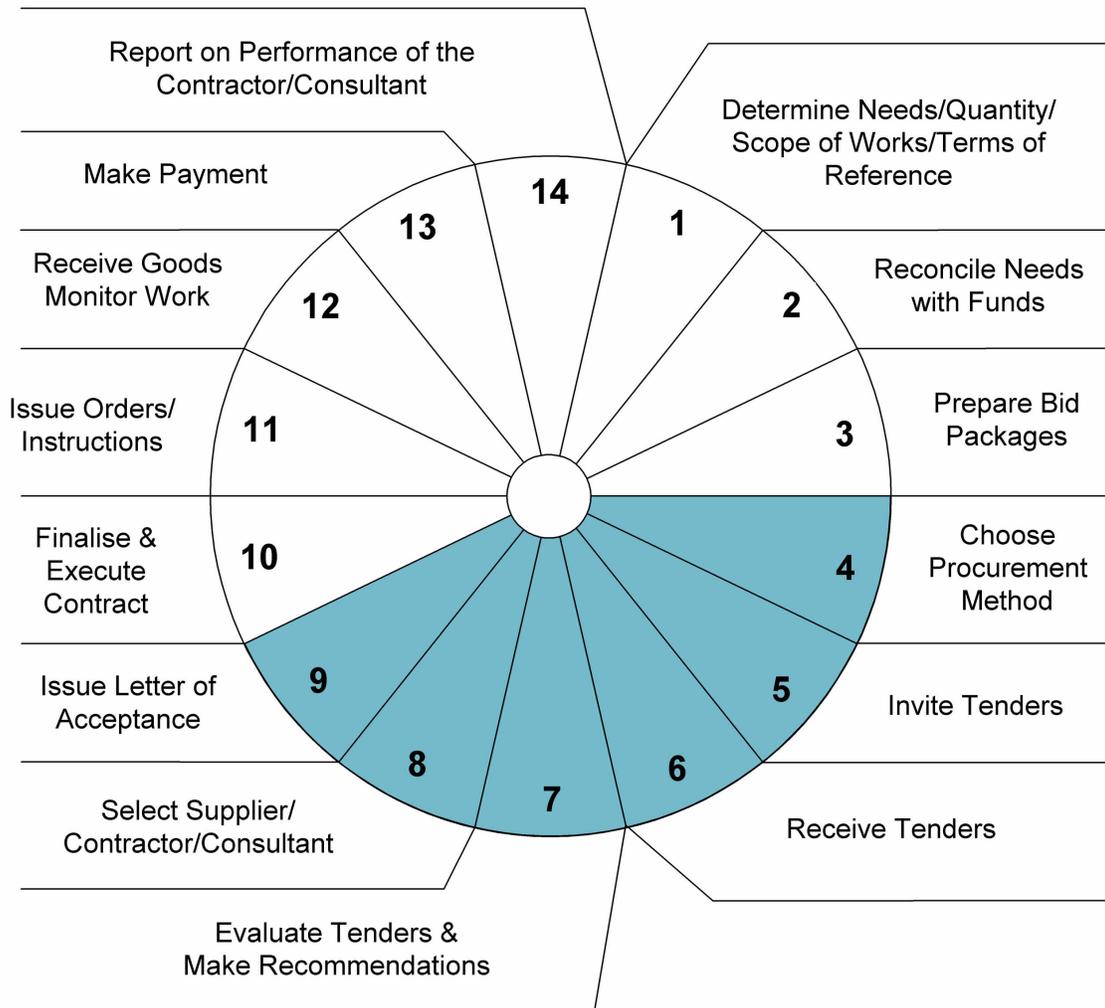
In practice, the Chief State Solicitor reviews all major contracts, mainly in the works and services areas. However, the Chief State Solicitor's office is neither staffed nor structured to deal efficiently with the volume and complexity of the work involved. This contributes to delays in the award of contracts and is a major deficiency in the system.

Issuing instructions to the contractor and the actual administering 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. This is the responsibility of the Auditor General.

**Figure 1
The Procurement Cycle**



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.”

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.”*

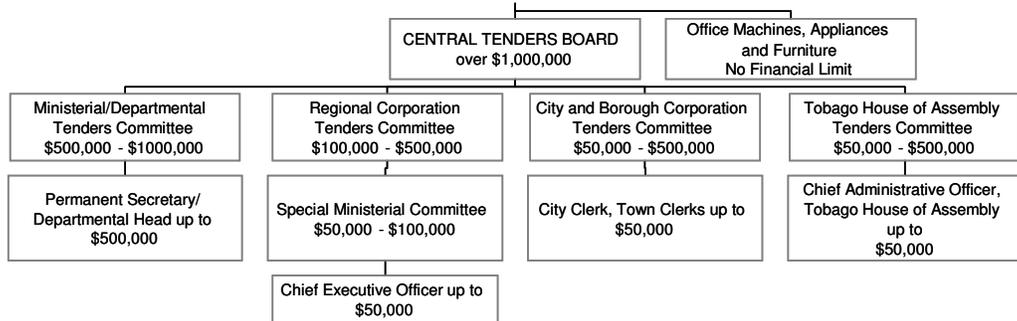
Act No 22 of 1983 increased the financial limit to one hundred thousand dollars. Sub-section 35(e) of the 1961 Ordinance allows the Governor in Council to make such regulations

“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 - \$1000
C.T.B. - OVER \$1000

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 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. These rules are required to be submitted to the CTB for vetting, but **not all comply.**

Most Statutory bodies, State-owned Enterprises and NIPDEC are therefore fully responsible for their own procurement activities. They are in charge of setting up 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 goods 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 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 goods and services. Furthermore, the Committee is expected to ascertain whether State agencies are conforming to agreed guidelines when spending public funds.

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 the proliferation of agencies acting 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 Board invites all tenderers to submit bids. The opening of these bids is done publicly before being evaluated by the evaluation team.

While the CTB is not involved in all steps of the procurement process, it does provide support for agencies within its purview, particularly in the design stage of the process. The CTB has a good reputation for ensuring that the procurement processes and procedures within its ambit are properly followed.

There is a repository of expertise within the CTB available to other agencies within its ambit.

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 law of procurement 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 particularly in relation to the award of contracts as prescribed 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 the tender prices and more often than not justify their price increases since the validity period of three months expires before a contract is awarded.

Because of the concerns that the procurement procedures are outdated, different forms of project delivery systems such as Design Build Finance, BOLT and 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, the use of such off-budget arrangements creates significant difficulties in the management of Government economic and budgeting policies.

3.3.2 ABSENCE OF UNIFORMITY IN THE TENDERING PROCESS

State-owned enterprises and NIPDEC are fully responsible for their own procurement activities. While the CTB has striven for uniformity in the tendering process, in practice this uniformity has not been achieved. Several State-owned agencies and NIPDEC do not conform to the procedures in place to achieve uniformity. The net result is a complete lack of standardisation at all levels of the procurement cycle. This is particularly so in the standardisation of bidding documents.

The various procuring entities tend to use their own standard bidding documents (SBD's) and procedures, thereby creating unnecessary parallel systems. 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 constrains the Board's ability to service the relevant ministries and departments. The Board is also restricted in its ability to be current with present practices in a rapidly changing technological environment.

Currently, the office of the Chief State Solicitor checks all major contracts, mainly in the 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 award 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. Additionally, the majority of large value contracts and projects are awarded directly to State-owned companies through single sourcing. In most cases, these companies lack the technical capability to conduct these activities under contract and award sub-contracts using their own procurement rules and procedures. Ministries and Departments therefore by-pass the CTB in awarding government contracts.

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

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 therefore a lack of a national registry of contractors, consultants and suppliers. This, in effect creates additional work for consultants and contractors by having to register with the various agencies.

3.3.7 INADEQUATE PUBLIC INFORMATION SYSTEM

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

3.3.8 INVOLVEMENT OF LOCAL SUPPLIERS

Despite the Government's objective of supporting the development of local industry, local suppliers do not believe that they are being fairly considered in the tendering process. There are also concerns about the use of selective tendering to negate fair competition. The CTB may restrict participation to registered suppliers through a direct invitation. The legislation does not stipulate any guidelines or restrictions limiting the use of this method of procurement.

Another weakness in the system impacting on local suppliers is the use of other international agencies, such as the International Bank for Reconstruction and Development and the Inter-American Development Bank, to procure on behalf of the government.

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 the records and the maintenance period that is applicable to all procuring entities. Furthermore, there is no requirement for centralised reporting of the awards of 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 administrative measures to ensure greater efficiency and changes to the Ordinance and Regulations chiefly for the same purpose.

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.

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

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, Accountability and Transparency. 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 goods and services for the price that is paid, or the lowest price for the acceptable quality of goods 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 goods and services procured, but also the following:

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

Measures employed to effect Value for Money include:

- Public consultation on the rationale and elements of major projects during the design phase before the bidding documents are finalised;
- Incorporation of the draft Agreement and/or Contract in the tender documents;
- Publication of bids and awards with price and reasons for award;
- Incorporation of specified ethical standards and codes of conduct into the Terms of Reference, Requests for Proposal, tender notices and letters of invitation;
- Greater use of standard clauses in Conditions of Contract;
- A transparent 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, the cost of which is factored into the award, and participation of civil society in the design of the procurement process;
- 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;
- Coordinated purchasing by Government departments to take advantage of volume discounts (Whole of Government supplies);
- 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 thus 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, usually over the Internet, of all business opportunities in an adequate and timely fashion and in a separate gazette, for example a Procurement and Disposals Gazette;
- reporting of details of successful awards and agreements, reasons and evaluation criteria;
- use of the Internet in the dissemination of information;
- greater use of e-procurement;
- preparation of strategic purchasing plans and management plans for major purchases;
- oral debriefing of all unsuccessful bidders by the awarding agency; and
- public access to details of different tendering procedures.

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.

Officials in current best practice regimes 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 any transaction 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;

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 Good Governance and 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). In Trinidad and Tobago, it is envisaged that such an approach would not only guarantee a percentage of contracts being awarded to local SMEs, but also promote skills development in the domestic private sector and increase local value added.

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 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 capital works 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 an independent regulator who plays no role in the actual operation of the procurement process.

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 regulatory agency 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;
- offer training in procurement to buying agencies;
- monitor and audit the procurement process;
- investigate complaints; and
- audit contracts.

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 a central agency or the procuring agencies themselves. These handbooks are publicly available and provide step-by-step guidance on the procedures to be used for different categories of purchase. Appropriately trained purchasers follow these procedures, particularly when determining needs and specifying requirements.

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 through electronic procurement and payment methods 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.

Best Practice therefore requires the procuring agency to:

- describe clearly and fairly what is purchased;
- 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 bidders;
- award the contract in accordance with predetermined rules for selection in which importance is attached to the capacity of the bidder to deliver quantitatively and qualitatively;

- 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; and
- recognise that Value for Money does not equate with awarding the contract to the lowest bidder.

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 indicate the range of options used in promoting current best practice:

- 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 and Regulations 7 to 12, Commonwealth of Australia.⁶

5.2 THE UNCITRAL MODEL LAW

This model is highly prescriptive as it specifies different procurement processes depending on the kind of transaction. The model reflects the assumption that the decision maker is the purchaser and purports to affect 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 by administrative means.

It allows greater flexibility for the different types of transactions in that there is a prescription of a greater range of processes that are designed to reflect the principles of Value for Money and Good Governance.

The high value contracts face a more rigorous process – in some instances, Parliamentary approval, if not that of Cabinet in respect of the award.

The approach manifest in the UNCITRAL Model may attract some of the criticisms of the current legal regime operating in Trinidad and Tobago. It is considered by some to be too highly a regulatory process and thus not sufficiently flexible to accommodate the challenges of a multicultural, social, and economic environment, not to mention the impact of technology on business processes. This model has been adopted in various countries including, Kenya, Mauritius, Poland and Uganda.

5.3 THE INSTITUTIONAL MODEL

This legislative model is reflected in the Contractor General Act of Jamaica and is classified as institutional because it concentrates on establishing the institutions involved together with their reporting relationships in managing procurement. This approach is in stark contrast to the detailed prescription of the processes of procurement in the UNCITRAL Model. 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 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, 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 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 the institutions. There is also an emphasis on complaint resolution.

This legislative model does not explicitly adopt the core principles of Value for Money, Transparency and Accountability⁷ nor does it explicitly draw the link between procurement and policy objectives. The emphasis is on investigation and sanctions, despite the 1999 amendments inserting the National Contracts Commission as the designated regulator of the procurement process. However, the penalties on officials for non-compliance with the process are dealt with in other legislative instruments and the criminal law.

This model is nonetheless laudable in the scope of activities that fall within its ambit. It also reflects current best practice with respect to the independence of the institutions from the Executive by prescribing in that Act, the direct accountability of the institution to Parliament. The Legislation, however, is supplemented by the adoption of a policy, which refers to the principles.

5.4 THE PRINCIPLE MODEL

This model adopts the legislative approach of prescribing the principles of Value for Money, Transparency and Accountability underlying procurement and indicating the broad parameters that promote best procurement practices. The principles are amplified by operating policies and guidelines that are formulated by a central agency; either a statutory body established for the purpose or an administrative unit within the Ministry of Finance.

The policies and guidelines 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;
- how Value for Money is determined;
- how good governance is achieved;
- bonded suppliers in the case where the prime responsibility for procurement resides with individual buying agencies;
- preferential treatment afforded to local suppliers up to a fixed percentage of available transactions;
- 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 code of ethics in the procurement process including the giving of a joint undertaking to comply with a standard which, in the event of non-compliance results in forfeiture and liquidated damages;
- publication of details of any contract and, where relevant, of details of actual purchasing officers;
- an endorsed supplier system;
- the consideration of the impact of the contract on local industry; and
- the consideration of other government policies such as those pertaining to labour and sustainable development.

Compliance with the principles, policies and guidelines is mandatory. Non-compliance by any decision-maker in the process attracts heavy penalties.

The details of the tender process pertinent to specific types of transactions are found in handbooks prepared by the central agency as guidance material. 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.

A Central Agency or Regulator, usually administratively established, oversees the system but is not involved in the actual procurement process. The responsibility for procurement rests squarely with the decision-makers in the procuring agencies.

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 policies and guidelines follows every transaction involving public funds, irrespective of the nature of the procuring agency. It thus effectively applies to all transactions involving the expenditure of public funds usually by Government ministries, Statutory bodies, and State-owned enterprises. However, it can apply to other publicly funded agencies, such as NGOs and CBOs

The hallmark of this approach is flexibility and the clear accountability of decision-makers. It provides for various levels of decision-making, determined by the agency and the quantum and complexity of the transaction.

Flexibility to accommodate a changing market place is provided in the design of a legal and regulatory framework that prescribes the operating principles while allowing the details to be fleshed out by administrative instruments.

This results in:

- a process of considering bids that is fair and open;
- 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 process is characterized at all stages by 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 underlying conceptual objectives of any re-engineered procurement system must include the following:

- Firmness of principles, yet flexibility of practice;
- Institutionalization of proactive management of the processes;
- Resonance with good commercial practice;
- Promotion of the public interest; and
- Engenderment of public trust.

Government's policy in Vision 2020 is for greater transparency and accountability in public sector decision-making, and best practices in public procurement. The system must deal 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 are not negotiable. This Model addresses many of the weaknesses with the current system as follows:

- It recognises the validity of the tendering process of agencies but provides an overarching uniform system, which affects all transactions thereby ensuring non-negotiability on the fundamental operating principles of Value for Money, Transparency and Accountability. The model eliminates the issues in the current system, arising from the co-existence of parallel systems and the comparative lack of controls on those currently outside the ambit of the Ordinance.
- It increases openness and accountability 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.

6.2 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 State agencies:

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

The following Objectives are to be addressed by all parties to a transaction:

- 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;

The Operating Principles will apply not only to the acquisition of property and services involving public funds, but also to divestment of public assets such as lands and other resources owned or managed by the State or State agencies. They apply to major concessions and licences including but not limited to those related to energy and communications, granted by the State and State agencies.

The firmness of these Operating Principles is attained by a mandatory legal requirement of compliance in every transaction involving expenditure of public money. This must be supported by appropriate penalties in the event of non-compliance. This 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 serving the public interest. Public expenditure in this context means the expenditure of funds for which ultimately, the public is liable.

Compliance with these principles is fostered by training and guidance in conjunction with monitoring by an independent regulator, directly answerable to Parliament, similar to the Auditor General.

Flexibility of practice is attained by allowing the procuring agency to obtain goods, works and/or services directly from suppliers according to a process that incorporates all the Operating Principles. The principles are to be supplemented by Guidelines, compliance with which is also mandatory. The Guidelines are to be designed by the independent regulator in consultation with stakeholders including civil society so as to ensure public understanding and endorsement. A model of the contemplated Guidelines is included in Chapter 7.

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 independent regulator. They must, of course, conform strictly with the Operating Principles and Guidelines.

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.

6.3 THE ROLE OF THE INDEPENDENT REGULATOR

Because of the administrative environment of Trinidad and Tobago, an independent regulator should be statutorily established. Statutory prescription would also enable Parliamentary oversight of the performance of the Regulator under section 66A of the Constitution, as it would be a statutory authority.

The Regulator should not be accountable to the Executive. He or she should be directly accountable to Parliament as in the case of the Auditor General, for the reason that procurement involves public expenditures approved by Parliament. Parliamentary oversight should therefore strengthen public confidence in the integrity of the procurement process.

The prime function of the Regulator is to proactively ensure an efficient and relevant procurement system that conforms to the Operating Principles. 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 stakeholders including civil society.

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 in the public interest.

Like its counterpart in Jamaica, the Regulator should have investigatory powers and the discretion to suspend the procurement process or certain components of it for the purpose of investigation. Enforcement by way of legal proceedings will reside with other responsible agencies such as the Director of Public Prosecutions.

In addition, the Regulator will also be required to:

- promote an understanding of the procurement process;
- enable the operation of the Operating Principles 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;
- report to Parliament on the results of investigations;
- report to Parliament on an annual basis.

6.4 DISPOSAL OF PUBLIC ASSETS

In the event of disposal of public property, be it unserviceable or surplus articles, as well as real estate, the same principles of value for money, transparency and accountability must be observed.

Failure to do so must result in remedies under the Proceeds Against Crimes Act, 2000.

Therefore, the disposal of property must refer to how public property is disposed of, be it by sale, lease, transfer or in some cases such as in the area of telecommunications, by concession or licence.

As Policies and Guidelines for procurement are to be developed by the Independent Third Party Regulator, so too should the Policies and Guidelines for Disposal of property be developed in like manner. This will enable civil society participation, input from stakeholders and oversight of critical policy by Parliament. This mechanism would facilitate transparency of process, uniform promotion of objective criteria in the disposal of state assets and increased accountability for asset management while accommodating current mechanisms in operation so long as they promote the public interest. Publication of the details of each disposal transaction by all State agencies will guarantee the public its right to know how public property is managed.

6.5 BENEFITS OF THE PREFERRED PROCUREMENT MODEL

The major change envisaged is that the procurement system will be fully decentralised. 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 to Parliament. The law will enable Permanent Secretaries, Heads of Departments and Chief Executive Officers to issue instructions on the conduct of the processes within their agencies, subject to mandatory compliance with the Operating Principles as prescribed and as amplified by policy Guidelines prepared by the Regulator. Mechanisms will be put in place to support agency accountability.

As the details of the procurement system will be easily available in non-statutory documents such as the handbooks, the preferred procurement model can accommodate 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 for expenditure of public money through the identification and location of decision makers;
- a process designed to specify the responsibility of Parliament in the procurement process;
- a process that guarantees publication of details of all bids and awards so as to ensure equal opportunity for bidders and greater confidence in decision making;
- a process accommodating procurement not only by direct expenditure but also by other financial arrangements for which the public is ultimately liable including such arrangements as Build Own Operate Transfer (BOOT), Build Own Lease Transfer (BOLT), Design Finance Construct and Design Build.

The establishment of an independent regulator directly accountable to Parliament with the 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, by enabling stakeholder participation in operating policies and entrenching stakeholder communication with the Regulator, will further strengthen public trust.

6.6 PROPOSED LEGAL AND INSTITUTIONAL FRAMEWORK

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

The new Act will essentially treat with the legal and regulatory framework in contrast to detailing with the process of the procurement regime. 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 rules embodying them;
- establish an independent 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 an advisory body to support the operations of the regulatory body thereby providing an invaluable monitoring mechanism;
- mandate the Regulator to ensure, in the public interest, a relevant, efficient and compliant system by:
 - ✓ monitoring from an audit perspective, all procurement and divestment activities involving public funds to ensure general application of the principles;
 - ✓ developing and keeping under constant review with civil society participation the mandatory guidelines; and
 - ✓ providing training and support to the users of the system and assisting them in development of their own procedures and processes.
- provide for the allocation to the regulator of adequate human and material resources for the carrying out of its functions.

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

- the establishment of procurement units in all State agencies to treat with procurement and the training and remuneration implications of this;
- the reorganization of the Central Tenders Board Division of the Ministry of Finance, with the attendant training and remuneration implications, to provide support for the Regulator;
- designing appropriate IT systems to support the Regulator's reporting to Parliament and communication with the public; and
- preparation and publishing of support documents and e-procurement.

CHAPTER 7 SAMPLE PROCUREMENT GUIDELINES

Acknowledgement: These sample guidelines draw heavily on the *Commonwealth Procurement Guidelines* issued by the Department of Finance and Administration of the Government of Australia in February, 2002.

7.1 INTRODUCTION

The purpose of the Guidelines is to assist so as to ensure that Government agencies achieve Value for Money, Transparency and Accountability in their procurement activities. Failure to conform to these guidelines attracts heavy penalties under the law.

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).

To assist agencies, procurement circulars are issued on a regular basis. Additionally, the Independent 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.

7.2 PROCUREMENT PRINCIPLES

The Guidelines are issued according to law. They apply to the procurement of all property and services⁸ on behalf of the State. By outlining the fundamental policies and principles that underpin procurement, they articulate the expectations that exist of officials, or agents conducting procurement.

The principles governing State procurement are as follows:

- Value for Money
- Transparency
- Accountability

These 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.

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.

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.

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

7.2.1 VALUE FOR MONEY

Value for Money is a concept evaluated on a whole-of-life basis of the property or services 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

Officials buying goods 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 best Value for Money.

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.

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 as a strategic business function.

Where they exist, strategic Common Use Arrangements are to be used by agencies. These Arrangements are established either by the agreement of relevant portfolios or where the Minister of Finance, following consultation, concludes that the interests of Trinidad and Tobago as a whole are best served by a Strategic Common Use Arrangement. Appropriate Strategic Common Use Arrangements can help agencies achieve Value for Money by delivering cost-effective services for the State.

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.

7.2.2 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. As part of the accountability and transparency process, procurement officials must offer unsuccessful bidders a written or oral debriefing as to why their offers were not successful.

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

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

- report publicly-available business opportunities in an adequate and timely fashion in the Purchasing and Disposals Gazette⁹ 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;
- procurement opportunities must be made available publicly and consistently;
- 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;
- there is reasonable access for suppliers to procurement opportunities and that available opportunities are notified publicly;
- where market circumstances limit competition, agencies recognize this and use procurement methods that take account of it;
- adequate and timely information is provided to suppliers to enable them to bid;
- bidders are provided with reasonable opportunity to meet any prequalification requirements for participation in state business.

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.

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.

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.

Those wishing to respond to 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. Agencies must choose 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.

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

With respect to the disposal of public property, the process must perforce be transparent. Agencies are therefore required to ensure adherence to Government's policy.

7.2.3 ACCOUNTABILITY

Officials, departments and agencies are answerable and accountable for any plans, actions and outcomes that involve spending public monies. Good record keeping are essential elements of accountability. Agencies should 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.

Each procurement agency is required to appoint a Senior Executive 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 goods and services; and
- responsible for ensuring adequate systems for recording decisions and reasons for making them are maintained.

Officials with procurement duties must act in accordance with their CEIs and these Guidelines.

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.

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.

Agencies must include a contract provision in future contracts requiring outsourced service providers to comply with the Government's equal opportunity requirements.

The Chief Executive will also be responsible for ensuring adherence to:

1. its policy with regard to the disposal of surplus and unserviceable articles; and
2. Government's policy regarding disposal of real property.

This will enable accounting to Parliament and the public at large.

7.3 OBJECTIVES

7.3.1 EFFICIENCY AND EFFECTIVENESS

Officials approving expenditure proposals must satisfy themselves that the proposed expenditure will make efficient and effective use of public money.

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.

The procurement function can contribute significantly to agencies' efficiency and effectiveness. Agencies should therefore ensure procurement arrangements are:

- monitored and evaluated to ensure they continue to offer the expected benefits; and
- integrated into corporate governance mechanisms to most effectively contribute to agencies' outcomes, at a strategic level.

In order to effect efficiency and effectiveness in Government procurement, consideration should be given to Whole of Government supplier pre-qualification arrangements. Agencies are advised to consult with the Independent Regulator as to the status of the arrangements.

Supplier Pre-qualification Arrangements

In order that agencies can take advantage of public purchase or discounts in key industry segments such as information technology, major office machines and commercial office furniture, agencies should consult with the Independent Regulator to confirm the existence of whole-of-government supplier arrangements.

7.3.2 ETHICS

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.

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.

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.

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

A useful tool for ensuring the demonstrable integrity of public contracting is Transparency International's Integrity Pact. This is an undertaking signed jointly by all with direct or indirect interest in the project, including financiers by which they agree to be bound by specified behaviour and values. Parties to the integrity pact agree not to collude or solicit any undue benefit, or offer or grant bribes or awards. Parties agree to disclose payments to intermediaries and comply with stated ethical principles. All parties agree to sanctions such as denial of contract, forfeiture of performance bonds and agreed liquidated damage such as 15% of the total value of the contract to be disbursed to all parties to the integrity pact. All parties further agree to submit disputes to arbitration and 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.

7.3.3 NATIONAL COMPETITIVENESS AND INDUSTRY DEVELOPMENT

The State, through its agencies, is a major purchaser of goods and services, and as such can act as a force to promote national competitive advantage and to develop competitive local industry including small and medium enterprises (SMEs). Domestic industry will be given a **10%** price differential over foreign suppliers of goods and services.

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 should be aware that SMEs often have an important competitive advantage in their ability to provide tailor-made goods and services and to be flexible in the kinds of services they provide.

The Government would therefore ensure that **10%** of all Public Sector contracts are reserved for small and medium sized enterprises.

In all procurement projects, agencies are required to clearly identify in the tender documentation, any industry development criteria, such as the transfer of technology, the impact on downstream industry and sustainable development, and associated evaluation methodology 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.

ANNEX 1: TERMS OF REFERENCE OF THE PROCUREMENT REFORM COMMITTEE

By Cabinet Minute No. 2297 of September 11, 2003, the Cabinet of the Government of Trinidad and Tobago agreed to the appointment by the Minister of Finance, of a Procurement Reform Committee with the following Terms of Reference:

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

Cabinet also agreed that the Ministry of Finance engage the services of a Procurement Reform Specialist to assist the committee with its work and that the Procurement Reform Committee co-opt such other individuals as may be necessary to assist the committee in its work.

A list of the members of the Committee is presented in Annex 2.

ANNEX 2: MEMBERS OF THE PROCUREMENT REFORM COMMITTEE

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

Ms. Merlyn Marcano
Director of Contracts,
Central Tenders Board

Mr. Rudin Austin
Deputy Permanent Secretary,
Ministry of Works and Transport

Ms. Sandra Gobin
Assistant Director of
Contracts,
Central Tenders Board

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

Ms. Carla Herbert
Legal Drafter &
Law Reform Advisor,
Ministry of Finance

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
Chairman,
Trinidad and Tobago
Transparency Institute

Mr. Winston Riley
President,
Joint Consultative Council

EX OFFICIO MEMBERS:

Mr. Hugh Moore
Project Unit,
Ministry of Finance

Ms. Aretha Romany
Project Unit,
Ministry of Finance

ANNEX 3: ENDNOTES

¹ 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

² 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.”

³ Delivered by the Honourable Prime Minister, Dr. Eric Williams, on April 12th 1961.

⁴ 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.*”

⁵ 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

⁶ These are augmented by the Commonwealth of Australia, Procurement Guidelines: Core Policies and Principles (March 1998); see www.finance.gov.au/ctc, www.apec.gov.au/publication.

⁷ However the Government of Jamaica has endorsed these principles in its *Public Sector Procurement Policy*.

⁸ 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).

⁹ Gazette means the Proposed Purchasing and Disposals Gazette.