The Republic of Trinidad and Tobago

Preliminary Comments on The Public Procurement & Disposal of Property Bill No. 2 of 2014

24th May 2014

This commentary on the Trinidad and Tobago Public Procurement & Disposal of Property Bill 2014 should be read in conjunction with the CPI Submissions on the Public Procurement Reform Package in 2010 hereto attached and marked ***Appendix A.*** *In the previous submissions a comprehensive overview of the nature of the public procurement regulatory landscape in Trinidad and Tobago, the gaps and international resource guides and practices were described and referenced. Herein, we assess the current 2014 reform bill against that backdrop.*

Prepared by
Caribbean Procurement Institute Ltd
& Caribbean Association of Procurement Professionals
120 Abercromby Street
Port of Spain
Trinidad and Tobago
1(868)624 4997
info@caribbeanprocurementinstitute.com
www.caribbeanprocurementinstitute.com

Introduction

1. The primary objective of any government is to manage the resources of a country in such a way as to maximize social impact and sustainable economic development.

2. This management of public resources is for and on behalf of the citizens and the country.

3. The public procurement system is the process through which the government by its various instrumentalities and actors uses public resources to acquire the goods, works and services necessary for the achievement of development goals.

4. An effective public procurement regulatory system is one that:

    (a) Is **Transparent** thereby ensuring that citizens know why, how and for what purpose public resources are being used by public officials;
    (b) Is **Accountable** thereby ensuring that both public and private participants are held to account for their actions and activities and that they are acting in the public interest;
    (c) Is **Fair** thereby providing access to public contracting opportunities to all equally circumstanced citizens;
    (d) Provides **Best Value** for the citizens thereby achieving efficient and sustainable development; and
    (e) Maximizes **Social Impact** of public procurement expenditure.

5. The **Trinidad and Tobago Public Procurement & Disposal of Property Bill 2014** (PP&DP Bill 2014) must be assessed by measuring its capacity to meet each of the five criterion highlighted above.

6. **Section 5** outlines the objects of the Act: "(a) the principles of accountability, integrity, transparency and value for money; (b) efficiency, fairness and equity; and (c) local industry development, sustainable procurement and sustainable development, in public procurement and the disposal of public property." This is, on its face, consistent with paragraph 4 (a) – (e) above.

7. From international sources[1], the key mechanisms through which (a) to (e) are usually met include:

    (i) A comprehensive framework of rules, regulations and policy guidelines and public procurement processes;
    (ii) An independently resourced, institutional structure empowered to guide, monitor and enforce the framework;
    (iii) A sophisticated cadre of personnel responsible for implementing the framework, sufficiently resourced and able to demonstrate appropriate levels of professionalism, skill and integrity;

[1] OECD Procurement Toolbox and Building Blocks for Integrity in Procurement, World Bank Guidelines and UNCITRAL Model Law on Public Procurement 2011

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

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

8. What is notable is that the PP&DP Bill 2014 appears to replicate the provisions contained in the UN Model Law 2011 in many respects but departs from the Model Law in very specific and what appear to be deliberate respects. Though we are not at all advocating the whole-scale copying of the UN Model Law, this issue ought to be scrutinized carefully and explanations of the policy behind the departures from the Model Law should be obtained and interrogated against the criterion in 4(a)-(e). We have attached the **UNCITRAL Model Law on the Procurement of Goods Works & Services 2011** (hereinafter referred to as the "UN Model Law") as **Appendix B**.

A. Transparency

9. The traceability and transparency of decision-making in procurement procedures is essential for ensuring sound procedures, including efficiently fighting corruption and fraud. Transparency is a tool that allows the exercise of discretion to be monitored and, where necessary, challenged; it is considered a key element of a procurement system that is designed, in part, to limit the discretion of officials, and to promote accountability for the actions or decisions taken. It is thus a critical support for integrity in procurement and for public confidence in the system, as well as a tool to facilitate the evaluation of the procurement system and individual procurement proceedings against their objectives[2].

10. Transparent frameworks for public contracting are also inextricably linked to operational benefits such as saving time and money on finding and processing bids. At the same time transparent processes create conditions for open competition, supporting the goal of securing goods and services that deliver greater value money.[3]

11. Public procurement disclosure obligations comprise four categories (i) statutory obligations imposing a duty to publish (ii) statutory obligations in respect of requests for access to information,[4] (iii) obligations to disclose procurement information under common law[5] and (iv) obligations to disclose reasons for public procurement decisions under public law.[6]

12. According to the Guide to the UN Model Law published in 2012, in order to build transparency into the procurement process five elements are usually involved.

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[2] Excerpt from Guide to the UN Model Law 2012 paragraph 6.33 at page 34

[3] Kaspar, L & Puddephatt, A 2012 'Benefits of transparency in public procurement for SMEs General lessons for Egypt' Global Partners and Associates.

[4] For example under the TT Freedom of Information Act 1999 citizens have a statutory right of access to documents held by a public body subject to certain exemptions.

[5] See *Tercon Contractors Ltd. v. British Columbia (Transportation and Highways),* 2010 SCC 4

[6] Although as a general rule, judicial review is not the first port of call for complaints in respect of procurement decisions, where there is evidence of fraud, corruption or bad faith access to judicial review of public procurement decisions is allowed *(NH v UDeCOTT 2005).* Further, where there is a sufficient statutory underpinning for the public procurement function as is the case with statutory bodies, judicial review of public procurement decisions and the obligation to provide sufficient reasons for those decisions will be imposed.

- The public disclosure of the rules that apply to the procurement process;
- The publication of procurement opportunities with adequate notice;
- Prior determination and publication of what is to be the procurement method and how submissions are to be considered;
- The visible conduct of procurement according to the prescribed rules and procedures; and
- The existence of a system to monitor that these rules are being followed and to enforce them if necessary.[7]

13. Depending on the jurisdiction, statutes may impose on public purchasers duties to disclose information to the public, to tenderers and suppliers and also to oversight bodies. Statutes can also expressly make provision for the publication of procurement information in each of the three phases in the procurement cycle; (a) Pre-Tender Call (b) Tender Call (c) Post Tender Call.

14. As a rule of thumb, transparency obligations in each of the phases are geared toward not only ensuring the public has access to the procurement decisions made by a public agency but also access to the reasons for the decisions:

    - Why the public agency decided to buy?
    - How the public agency bought?
    - Why did the public agency choose that particular selection method?
    - Why did the public agency choose that particular supplier?
    - Why did the public agency buy on those terms?
    - Has the public agency received value for money?

15. Under the UN Model Law, the minimum threshold to be met by laws regulating transparency in public procurement comprise the following:

    - That the applicable law, procurement regulations and other relevant information are to be made publicly available (article 5);
    - Requirements for prior publication of announcements for each procurement procedure (with relevant details) (articles 33-35) and ex post facto notice of the award of procurement contracts (article 23);
    - Requirements for qualification procedures and permissible criteria to determine which suppliers or contractors will be able to participate, and the particular criteria that will determine whether or not suppliers or contractors are qualified in a particular procurement procedure to be advised to all potential suppliers or contractors (articles 9 and 18);
    - A requirement for communications with suppliers or contractors to be in a form and manner that does not impede access to the procurement (article 7); and
    - A requirement for mandatory standstill period between the identification of the winning supplier or contractor and the award of the contract or framework agreement, in order to allow any non-compliance with the provisions of the Model Law to be addressed prior to any such contract entering into force (article 22(2)).

[7] See Guide to UN Model Law 2012 paragraph 6.32 at page 34

16. Articles 165-182 of the CARIFORUM EC EPA 2008 which provisions were ratified by the Parliament of Trinidad and Tobago in the CARIFORUM (Caribbean Community and Dominican Republic) European Community Economic Partnership Agreement Act, Act No. 9 of 2013 (hereinafter referred to as the "EPA Act")[8] also includes transparency obligations. The EPA transparency obligations are consistent with the UN Model Law provisions though not as detailed. The requirements include:
    - Publication of Tender Rules and Procedures (Article 168);
    - Individual Procurement Opportunities and modifications (Article 168);
    - All information necessary for responsive tenders (Article 168);
    - Advanced Notice of Intended Procurement (Article 168);
    - Detailed Technical Specifications (Article 173);
    - Annual Procurement Plans (Article 168);
    - Conditions and Criteria for participation (Article 174);
    - Annual publication of Notice of Invitation to apply for inclusion in multi-use supplier lists (Article 174); and
    - Information on Contract Awards (Article 177).

PP&DP Bill 2014 – Transparency Provisions

17. It should be noted at the outset that like its predecessor in 2010, the PP&DP Bill 2014 does not include detailed provisions governing transparency in the public procurement process. It is left to the Procurement Regulator to issue and review guidelines,[9] prepare, update and issue model handbooks,[10] and approve in respect of each procuring entity special guidelines and model handbooks.[11]

18. *Ex poste facto* transparency obligations can be found at section 24 providing for the publication of an annual report by the Procurement Regulator detailing inter alia, the total value of contracts as awarded by public bodies, and another figure representing the cost of the total value of procurement contract variances for that year and considerable contract information relating to all procurement over the threshold of fifty thousand TTD. Also sections 36 and 37 provide for procuring entities to publish notices of award electronically and submit quarterly reports to the Procurement Office.

19. Other transparency obligations can be found at section 26 establishing a Central Depository whereby suppliers and contractors must submit information relating to their qualifications and to which public access must be provided; section 27 which provides that procuring entities should submit annual procurement plans; section 28 which provides that where the procuring entity chooses to limit a procurement exercise to promote local industry and local content the record of the procurement proceedings must include a statement of the reasons and circumstances on which it relied.

20. All of this notwithstanding, substantial gaps remain as there is no statutory obligation for the *ex ante* publication of tender rules and procedures, individual procurement opportunities and modifications, information necessary for

[8] By virtue of section 2 the Act will take effect upon proclamation. As of the time of writing the Act is not yet proclaimed.
[9] section 13 (1) C
[10] section 13 (1) D
[11] section 13 (1) E

responsive tenders, notices of intended procurements (over and above annual procurement plans), detailed technical specifications, conditions and criteria for participation, or for the annual publication of invitation for multi-use supplier lists and framework agreements, all of which is required by the EPA Act, UN Model Law and accepted international best practice.

Notable Omissions

21. Articles 7 and 25 of the UN Model Law[12], which provide for the communication of procurement information and require procuring entities to maintain detailed records of procurement proceedings, are omitted entirely from the PP&DP Bill 2014. The purpose of article 25 is to promote transparency and accountability by requiring the procuring entity to maintain an exhaustive documentary record of the procurement proceedings and providing appropriate access to it. This record summarizes key information concerning the procurement proceedings; ensuring timely access where such is authorized is essential for any challenge by suppliers and contractors to be meaningful and effective. This in turn helps to ensure that the procurement law is, to the extent possible, self-policing and self-enforcing. Furthermore, observing robust record requirements facilitates the work of oversight bodies exercising an audit or control function and promotes the accountability of procuring entities.

22. If the Procurement Regulator does not eventually establish guidelines for procuring entities to keep proper records and to publish procurement information in *advance*, it is not unrealistic to assume that the opaque nature of the current public procurement system will persist. The power of transparency to curb corrupt activity is severely compromised when information is only available after the fact. If citizens do not know beforehand, what the rules are, what the procuring entities are buying, why they are buying and how they are choosing to buy e.t.c., then they are unable effectively to participate in public procurement exercises and/or pursue accountability measures *before* third party rights have been engaged.

23. One important implication of this omission is that there is no oversight on the choice of procurement methodology. There is no *ex ante* or even *ex post facto* statutory requirement for the reasons for the choice of procurement methodology to be published. There is no circumscription on the use of sole source procurement, fast track and other procurement methods that are typically employed under the public radar.

Excessive Secrecy

24. Further, the confidentiality provision contained in section 39 of the PP&DP Bill is almost exactly coterminous with Article 24 of the UN Model Law. However it differs in an important respect. Whereas Article 24 is subject to the transparency obligations in Article 25 no such circumscription on confidentiality is contained in section 39. This serves to exacerbate the secrecy surrounding a bidding exercise contrary to accepted best practice.

[12] Article 7 and guidance thereon can be found in Appendix C at pages 5-10 and Article 25 and guidance thereon can be found in Appendix C at pages 13 - 17

25. Moreover in section 39 (4) there are imposed greater secrecy obligations in respect of "procurement involving classified information". In section 4 of the PP&DP Bill, "classified information" means information that is exempted under the FOIA99 *and such other information as prescribed by Regulations*. "Regulations" are defined as regulations made under section 62 which in turn *empowers the Minister* (on the recommendation of the Office) to make regulations to give effect to the Act and in particular with respect to "(a) the conduct of challenge proceedings under Part V; and (b) the addition to or removal from an ineligibility list under section 58". Of significance, section 62 (2) expressly provides that the regulations may provide that contravention of any regulation constitutes an offence and may prescribe penalties for any offence with a maximum fine of one million dollars and imprisonment for five years.

26. Not only do theses provisions seriously undermine the express objective of transparency defined in section 5[13] but the danger presented by the cooperation of these provisions is readily apparent. Notably, the UN Model Law does not include any definition of "classified information". The Model Law presumes that the scope of classified information (referred to in, for example, Articles 7 and 24) is clear in the legal system of the enacting State.

27. The potential for the section 39(4) power to be abused must be carefully considered. What is the policy behind the granting of these powers to the Minister to make regulations rendering some procurement information over and above the exemptions provided for under the FOIA99, "classified"?

28. The point must be made that the passage of skeletal public procurement regulation to assuage public demand for statutory reform without carefully addressing these issues and in particular the issue of *ex ante* transparency will render the reform effort unsatisfactory. To pass the bill in this form, with no guarantee that the Procurement Regulator will put the appropriate transparency obligations in place in the guidelines and model handbooks, is to rely on a mere hope that the reform effort will be effective.

29. This can be addressed by either providing for *ex ante* transparency in the parent statute (as outlined in the EPA provisions[14] or as provided under the UN Model Law[15]) or by the development of specimen guidelines and model handbooks now to be approved by the Parliament. After the passage of the legislation the Procurement Regulator can then, if deemed necessary, amend in accordance with his powers under section 13.

B. Accountability

30. In addition to transparency of public procurement rules, processes and procurement information and decisions, accountability is fostered through robust institutional arrangements, oversight structures and enforcement mechanisms.

[13] See paragraph 6
[14] See Articles 165-182
[15] see paragraph 15 above

31. The key is to have an independent body, properly resourced to guide, monitor and enforce the public procurement policy. According to the Guide to the UN Model Law, the structure of the bodies that exercise administrative, review, oversight and enforcement functions, and the precise functions that they will exercise, will depend, among other things, on the governmental, administrative and legal systems in the State, which vary widely from country to country.

32. Systems that are excessively costly or burdensome either to the procuring entity or to participants in procurement proceedings, or that result in undue delays in procurement, will be counterproductive. In addition, excessive control over decision-making by officials who carry out the procurement proceedings could in some cases stifle their ability to act effectively. Enacting States may consider that investment in systems to ensure that procuring entities have sufficient capacity, and that they and procurement officers are adequately trained and resourced, will assist in the effective functioning of the system and in keeping the costs of administrative control proportionate.[16]

Office of Procurement Regulator

33. The establishment of the Office of Procurement Regulator with the functions outlined in section 13 is commended. It is noted that several of the 2010 recommendations made by the Caribbean Procurement Institute, relative to the tenure, structure and supporting infrastructure of the Procurement Regulator have been taken on board in the PP&DP 2014 Bill.

34. Care must be taken however to ensure that the Office of the Procurement Regulator is statutorily empowered to perform these functions effectively.

35. Firstly, there is a distinction being made between the Office of Procurement Regulator and the Procurement Regulator.[17] Section 13 statutorily defines the functions of the *former* and not the *latter*. Similarly, section 14 statutorily defines the powers of the *former* and not the *latter*. The investigative and enforcement powers under Part IV are similarly reposed in the Office of Procurement Regulator. One can readily appreciate a situation where for some technical non-compliance or logistical challenge, the Office is incapable of functioning in accordance with the statutory requirements. In such a situation the Procurement Regulator is toothless to perform the functions.

36. In order to prevent such a stymying of the work of the Office, an amendment should be made granting the Procurement Regulator the power to act in accordance with sections 13 and 14 in statutorily circumscribed situations.

Committees

37. Section 16 provides for the Office to appoint such committees as it considers necessary and section 16(3) proscribes the membership to include or consist of *only* of persons who are not members of the Board.

[16] Excerpt from Guide to UN Model Law 2012 para 81 at page 19.
[17] See sections 9 and 10

38. This requirement is curious and in fact means that the Board cannot create sub-committees of its own members. This requirement for non board members to be appointed on committees seems to be an indirect mechanism for compelling citizen participation. While citizen participation is critical in a modern democracy, the mechanism for their involvement ought to be transparent.

39. The current approach under the Bill, with no circumscription on the qualifications, professionalism and integrity of the members of the committees and no requirement for the publication of the members of the committee fosters a situation vulnerable to abuse and conflicts of interest.

40. Further, as the Office may appoint any committee it considers necessary, situations may arise where these committees may be performing critical and/or even sensitive functions. The public interest must be safeguarded in the operation of these committees. Mechanisms to hold these committee members to account must be introduced. Mechanisms could include:

    - Clear guidelines on the qualifications of the members and robust conflict of interest provisions excluding persons from being appointed who are or are affiliated with entities having an interest in public sector contracting opportunities.[18]
    - Requirements relating to the publication of the names of Committee members and the functions of the respective committees
    - Members should be expressly defined as public officials for the purposes of the Integrity in Public Life Act 2000.

Regulations

41. The power of the Minister to make regulations subject to the negative resolution of Parliament under sections 38 and 62 are broad and far reaching. This is different to the provisions under the 2010 Bill that had stipulated under section 44 that the President would make the regulations for giving effect to the Act.

42. Though fairly novel to have the President responsible for making regulations it was no doubt proposed in an attempt to create some oversight over executive power and influence over public procurement rules and processes.

43. Given that the substance of the procurement reform is to be fleshed out in the Regulations, the operation of Sections 38 (eProcurement) and 62 (Challenge & Ineligibility list) substantially diminishes the role and functions of the Office of the Procurement Regulator. Particularly in respect of eProcurement where "all procurement" under the Bill "may be undertaken" in this way and no provisions for its use are made under the Bill.

Whistleblower Protection

44. There are several aspects that are heartening in the PP&DP Bill from an accountability perspective, including the creation of procurement fraud offences

[18] over and above those defined in section 17.

(sections 59, 60, 61), strengthening of whistleblower protection provisions (section 40), and the strengthening of conflict of interest provisions (sections 17, 59). Despite these improvements, the whistleblowing provisions in particular should be further considered.

45. Section 40 does seek to provide protection from victimization for persons speaking up against or acting in a way to prevent and/or not facilitate a breach of the Act. This is welcome and commendable. It is a more robust provision than that which was contained in the 2010 Bill.

46. However, how the section will operate, provide protection and be enforced is not clear. The section creates a right to the whistleblower not to be dismissed, suspended, demoted, harassed or denied a benefit if the person is seeking to expose or prevent a breach of the Act. However, there is no express mechanism for dealing with a complaint, receiving compensation or for enforcement under this section.

47. Accordingly, in order to enforce the protection and/or receive compensation for the victimization, the victim may accordingly have to resort to judicial review and would therefore have to pin point a decision to be reviewed and/or satisfy other conditions relating to public law claims including the limitation periods etc. Damages are not usually granted in public law claims unless there is a right to compensation under law. No such express right to compensation has been created here.

48. Moreover, the section does not specifically create a whistleblowing offence. In order to hold someone accountable for breach of section 40, reliance may have to be placed on section 61 that provides a general offence and penalty where any person contravenes the Act. The lack of an express offence, means that the courts would have to reverse engineer the section to identify the elements of the criminal offence including *mens rea* (mental element) and *actus reus* (physical act).

49. The burden of proof on the person alleging breach is quite high, requiring an action *"in good faith"* and based on *"a reasonable belief"* before the protection from victimization would apply. This is similar to the burden of proof required in the Public Interest Disclosure Act 2011 in the United Kingdom.

50. Whilst "in good faith" connotes an honest belief in the truth of the disclosre, the "reasonable belief" test involves both subjective and objective elements (a) Did the employee have a reasonable belief (b) an objective assessment of whether that belief could reasonably have been held.[19]

51. Further, it is not sufficient for the employee to have a reasonable belief that what he is saying on its face, if true, shows a failure. Reasonableness of belief is to be tested having regard not only to what was set out in the disclosure but also to the basis for that information and any allegation made.[20]

[19] *Babula v Waltham Forest College* [2007] EWCA Civ 174
[20] *Darnton v University of Surrey* [2003] IRLR 133; *Babula v Waltham* supra.

52. It is suggested that the model in Jamaica, for example provides a more realistic and achievable burden of proof. Section 5 of the Protected Disclosures Act 2011 reads: "A disclosure shall not qualify for protection under this Act unless it is made *in good faith* and *in the public interest.*"

C. Fairness

53. In order to meet the objective of fairness procuring entities should treat with bidders equally and in an unbiased fashion. Procurement procedures should not be restrictive and burdensome and the procuring entity must preserve the integrity of the bidding process. Integrity in procurement involves both the avoidance of corruption and abuse and the notion of personnel involved in procurement applying the rules act ethically and fairly, avoiding conflicts of interest. It requires the procurement system to be devoid of institutionalised discrimination or bias against any particular group.[21]

Right to Cancel

54. Limiting of the discretion of public procurement decision-makers is a key mechanism for ensuring the ability to justify procurement decisions as being fair and objectively justified. Particularly recognized as an area for particular oversight, is the exercise of discretion by a decision-maker to change the rules of the bidding exercise and/or cancel an exercise after it is already underway.

55. The right of the procuring entity to cancel a procurement provided for in section 33 of the Act is troublesome. Again, like the confidentiality provisions referred to above[22] the section is almost exactly coterminous with the right to cancel provision contained in Article 19 of the UN Model Law. The manner in which the provisions differ may be an oversight, but one with very significant implications for the fairness and preservation of integrity of the bidding process.

56. Article 19 (1) reads as follows:

> "The procuring entity may cancel the procurement at any time prior to the acceptance of the successful submission and, after the successful submission is accepted, under the circumstances referred to in paragraph 8 of article 22 of this Law. The procuring entity shall not open any tenders or proposals after taking a decision to cancel the procurement."

57. Paragraph 8 of Article 22 provides for the cancellation of the procurement where after the successful submission is accepted there is some contractor default. Article 22 reads as follows:

> "If the supplier or contractor whose submission has been accepted fails to sign any written procurement contract as required or fails to provide any required security for the performance of the contract, the procuring entity may either cancel the procurement or decide to select the next

[21] See Guide to UN Model Law 2012 at page 86
[22] Section 39 of the Act and see paragraphs 24.0– 26.0 herein

successful submission from among those remaining in effect, in accordance with the criteria and procedures set out in this Law and in the solicitation documents. In the latter case, the provisions of this article shall apply mutatis mutandis to such submission."

58. The purpose of Article 19 is to enable the procuring entity to cancel the procurement. It has the unconditional right to do so PRIOR to the acceptance of the successful submission. After that point, it may do so only if the supplier or contractor whose submission was accepted fails to sign the procurement contract as required or fails to provide any required contract performance security.[23]

PRIOR to Acceptance

59. Inclusion of this provision is important because a procuring entity may need to cancel the procurement for reasons of public interest, such as where there appears to have been a lack of competition or to have been collusion in the procurement proceedings, where the procuring entity's need for the subject matter of procurement ceases, or where the procurement can no longer take place due to a change in government policy or a withdrawal of funding or because all the submissions have turned out to be unresponsive, or the proposed prices substantially exceeded the available budget. The provisions of the article thus recognize that allowing the procuring entity to cancel undesirable procurement rather than requiring it to proceed may best serve the public interest.[24]

60. This notwithstanding, there are several very obvious and compelling reasons why such a right should be carefully conditioned. Suppliers have invested time and resources in the process and perhaps held off on doing other work. Also, there is the obvious suspicion that the right to cancel could be abused to favour certain suppliers. For these reasons, this right has been carefully conditioned and safeguards introduced in the UN Model Law.

61. The Article provides for safeguards against any abuse of this right. The first safeguard is contained in the notification requirements in paragraph (2), which are designed to foster transparency and accountability and effective review. Under that paragraph, the decision on cancellation together with reasons therefor should be promptly communicated to all suppliers or contractors that presented submissions so that they could challenge the decision on cancellation if they wish to do so. Although the provisions do not require the procuring entity to provide a justification for its decision (on the understanding that, as a general rule, the procuring entity should be free to abandon procurement proceedings on economic, social or political grounds which it need not justify), the procuring entity must provide a short statement of the reasons for that decision, in a manner that must be sufficient to enable a meaningful review of the decision.

62. An additional safeguard is in the requirement for the procuring entity to cause a notice of its decision on cancellation to be published in the same place and manner in which the original information about procurement was published. This measure is important to enable the oversight by the public of the procuring

[23] See para 1 at page 81 of the Guide to the UN Model Law 2012
[24] See para 2 at page 81 of the Guide to UN Model Law 2012

entity's practices in the enacting State.

63. The right to cancel PRIOR to acceptance of a successful submission in section 33 of the PP&DP Bill is expressed exactly in similar terms as Article 19 of the UN Model Law and reads as follows:

> "(1) A procuring entity may cancel a procurement –(a) at any time prior to the acceptance of the successful submission; or (b) after the successful submission is accepted under the circumstances referred to in section 35(6)."

64. As well, the Model Law safeguards requiring the provision of reasons and notice can also be found in the PP&DP Bill[25].

> "(1) A procuring entity may cancel a procurement –(a) at any time prior to the acceptance of the successful submission; or (b) after the successful submission is accepted under the circumstances referred to in section 35(6)."

AFTER Acceptance

65. After acceptance of a successful submission, the UN Model Law only provides for a right to cancel arising out of contractor/supplier default.[26] It is at this point that the PP & DP Bill differs considerably from the Model Law provisions. Notably, no similar circumscription of the right to cancel based on contractor/supplier default as detailed in paragraph 8 of Article 22 of the UN Model Law has been provided.

66. This thereby gives statutory approval for the right to cancel a procurement process even after acceptance of a successful submission. The reference to section 35(6), could easily be mistaken for a similar circumscription upon the right to cancel as found in paragraph 8 Article 22. However, section 35 (6) reads as follows:

> "(6) Upon expiry of the standstill period or, where there is none, promptly after the successful submission is ascertained, a procuring entity shall dispatch the notice of acceptance of the successful submission to the supplier or contractor who presented that submission, unless the Office orders otherwise."

67. Perhaps the drafters of section 33 had intended to refer therein to section 35 (10) as opposed to section 35 (6); the former of which reads as follows:

> "10) If the supplier or contractor whose submission has been accepted fails to sign any written procurement contract as required or fails to provide any required security for the performance of the contract, a procuring entity shall withdraw the award and either –(a) select the next highest ranked submission from among those remaining in

[25] see section 33 (3) duty to include reasons for decision in procurement proceedings and promptly to communicate to same to suppliers and section 33(4) requiring prompt publication of the notice to cancel in the same manner and place in which the original information regarding procurement proceedings was published.
[26] See paragraph 8 of Article 22

effect, in accordance with the criteria and procedures set out in this Act and in the solicitation documents; or (b) terminate the procurement proceedings."

68. This is a very grave mistake as it statutorily empowers a public procuring entity to cancel a procurement exercise at anytime, eliminating recourse even relief based on recent common law developments[27]. This must be corrected as it grants a blanket power to a procuring entity to cancel any procurement process which result does not suit their objectives regardless of bidder compliance. This erodes fairness, good faith and ultimately public confidence in the public procurement process.

D. Social Procurement, Efficiency & Sustainability

69. The overriding ethos of the UN Model Law and other international instruments for harmonization of public procurement policy is based on the promotion of trade through open competitive policies.

70. This notwithstanding, for centuries industrial nations have carefully crafted the rules of the market for what the state buys, how it buys, from whom it buys and to whom it sells, in a manner that ensured a dominant, and asymmetrical space in the global economy. A cursory survey of some of the most successful industrial nations like the United States, United Kingdom and Japan, reveal deliberate public procurement policies (albeit shrouded within foreign investment and trade modalities), engaged in since prior to the industrial revolution pursuing protectionist agendas aimed at stifling foreign competition and stimulating domestic growth.[28]

71. Up to present day, the United States, a nation birthed out of a revolution from economic domination of its colonizers, aggressively pursues protectionist *Buy American*[29] policies in its Government procurement of goods and works implemented by legislation in 1933 and 1983. This policy was further extended and reinforced in 2009 in in the wake of the financial crisis[30].
72. Additional 20th century examples can be found in the carefully designed interventionist measures of states like Singapore and Hong Kong combined with selective liberalization measures and foreign investment regulation which, have been touted as the reasons for their singular growth.[31]

73. Social Procurement involves the use of the procurement process to acquire goods, works, services and social value in the same procurement exercise. Socially responsible public procurement extends beyond conventional job creation and employment opportunities for disadvantaged groups and has far deeper impact by promoting "decent work" including fair wages, promoting compliance with social

[27] see *Tercon Contractors Ltd. v. British Columbia (Transportation and Highways),* 2010 SCC 4
[28] See Appendix D for fuller discussion on this issue of open competitive procurement policy versus protectionist procurement policy, in particular at pages
[29] *Buy American Act* (BAA-41U.S.C. ss10a-10d) 1933 which requires the US Government to prefer US made products in its purchases; *Buy America Act* 1983 which applies to mass-transit-related procurements;
[30] American Recovery and Reinvestment Act of 2009 1605 – See also Frank, D. *Buy American: The Untold Story of Economic Nationalism*, Beacon Press, Boston, 1999 at page 4.
[31] Sornarajah, M. *The International Law on Foreign Investment* 3rd Edition Cambridge University Press 2010 at pg 2 ft.2

and labour rights, and supporting social inclusion.[32] Social procurement offers public procuring entities a way to:

- Build and sustain stronger communities, promoting social inclusion and breaking cycles of disadvantage;
- Open new opportunities for strengthening the local and state skill base;
- Strengthen local economic development;
- Grow and strengthen innovative partnerships with corporate and community stakeholders and across the public sector;
- Demonstrate leadership; and
- Achieve greater value for money and ensure that this value reflects triple-bottom line principles.

74. There are three primary ways in which to implement social procurement (a) To indicate that an organisation has screened their supply chains to ensure that they are socially responsible and ethical, that is, that they do no harm in relation to social indicators such as labour conditions and human rights of workers; (b) To link the generation of social impact with the purchase of goods, services and works, thereby value-adding to the purchase; (c) To refer to the procurement of social services – the contracting of services related to social care, social service and social welfare.

75. At present across the globe and particularly post 2012 there seems to be a resurgence of social procurement policy agendas.

United Kingdom

76. In March 2012, the UK passed the Public Services (Social Value) Act. Under the Act, for the first time, all public bodies in England and Wales are required to consider how the services they commission and procure might improve the economic, social and environmental well-being of the area. We hope it will transform the way public bodies choose to buy services.

77. Section 3 of the Act expressly mandates that the public procuring entity must The authority must consider— "(a) how what is proposed to be procured might improve the economic, social and environmental well-being of the relevant area, and (b) how, in conducting the process of procurement, it might act with a view to securing that improvement."

78. The Act sits alongside other procurement laws. Value for money is the over-riding factor that determines all public sector procurement decisions. But there is a growing understanding of how value for money is calculated, and how "the whole-life cycle requirements" can include social as well as economic requirements. The new legislation reinforces the best practice of what can already take place but too often doesn't.

[32] See McCrudden, Buying Social Justice, Oxford University Press 2007

Europe

79. In January 2014 the European Parliament voted to approve amendments to new measures intended to strengthen the hand of the European Union (EU) in trade talks with Non-EU (Third Country) jurisdictions. The measures were initially tabled by the European Commission in March 2012 and then endorsed by the Parliament's International Trade Committee.

80. The aim behind this new trade tool is to introduce additional reciprocity into the international procurement system and to correct what the EU views as a trade imbalance. Under the proposals the EU would be able to prevent Third Country bidders from bidding for EU public procurement contracts worth €5 million or more excluding VAT. This exclusion of Third Country bidders will only apply to bidders which have more than 50% Third Country "content". The EU has suggested that any contracts made in breach of these provisions would be declared ineffective under the remedies directive. Parliament has recommended, however, that there be an "exception for least-developed countries" and among these, those countries that are considered "to be vulnerable due to a lack of diversification."[33]

Canada

81. In March 2012, Toronto Canada established a Working Group to maximize the City's economic, workforce and social development goals when determining best value for public funds. The Working Group was tasked with developing a social procurement framework that effectively aligns with existing City policies, practices, and experience, and builds from the experiences of other government jurisdictions across Canada and internationally.

82. The City of Toronto has a long history of using its procurement to achieve strategic social development goals. Examples include the adoption of the following procurement-related policies:

    - Fair Wage (1893);
    - Declaration of Non-Discrimination (1998);
    - Environmentally Responsible Procurement Policy (1999);
    - Purchase of Products Manufactured in Factories where Children are Used as Slave Labour or Other Exploitive Circumstances Which Impeded Child Development (2000);
    - Live Animal Testing (2000); and
    - Purchase of Garments and Other Apparel from Responsible Manufacturers (No Sweatshop) (2006).

83. Through these policies, and through the adoption of the City's main procurement by-laws, policies and procedures, City Council has created a procurement culture of policies and practices that promote and contribute to a fairer, more ethical, and

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[33] Ives, Tupper & Traurig, *European Union (EU) Parliament Supports Bid for Reciprocity in International Public Procurement,* National Law Review March 28th, 2014

http://www.natlawreview.com/article/european-union-eu-parliament-supports-bid-reciprocity-international-public-procureme

more sustainable city.

Australia

84. Australia as well has a history of embracing social procurement policy to address inequities in society and the challenge of developing indigenous communities. There are no Commonwealth or Victorian legislation, or common law cases, that prevent governments and councils from including social procurement requirements in procurement documents or contracts as long as they are not discriminatory. Some legislative requirements in fact actively support the inclusion of social procurement provisions. For example, Section 208B of the Victorian Local Government Act 1989 specifies the Best Value Principle requirement that all services provided by a council must be responsive to the needs of its community.

85. Detailed policy guidelines are available to assist organisations in developing a transparent public procurement policy.[34]

Trinidad and Tobago

86. It is against this backdrop that the current Trinidad and Tobago public procurement reform efforts should be measured. This is arguably the single most important aspect of the public procurement reform effort as it is the measurement of the social impact and outcomes of public procurement expenditure.
87. It is commendable that in the definitions section of the PP&DP Bill a definition of "socio-economic policies" is advanced as including the social dimension : "environmental, social, economic and other policies of Trinidad and Tobago authorized or required by the Regulations or other provisions of the laws of Trinidad and Tobago to be taken into account by a procuring entity in procurement proceedings."

88. Nonetheless, despite statutory power to limit participation in procurement in order to encourage local industry development and local content in section 28, there are no provisions guiding its evidence-based application, save that reasons should be provided. It is disappointing to note that the fleshing out of this policy is left, once more, to be articulated in regulations or other provisions of the laws of Trinidad and Tobago. In fact, reference to "socio-economic policies" is not made anywhere else in the Bill. This is indeed unfortunate and an opportunity missed.

89. Further the granting of a general discretion to limit participation in procurement in order to promote local industry or content, without transparent criteria being articulated for the exercise of that discretion, creates an accountability conundrum. While the promotion of local industry and/or local content provides social value, if the process is not underpinned by fair, objective and transparent criteria, it is vulnerable to executive abuse.

[34] See *Social Procurement in Australia*, Report of The Centre for Social Impact, University of NSW Report 2010

90. Social requirements can be fully embraced in procurement practice providing certain criteria are met. These criteria usually stipulate that social requirements should (a) reflect policy expressly adopted by the public body (b) be capable of being measured in terms of performance (c) be drafted in the specifications and become part of the contract and (d) be defined in ways that do not discriminate against bidders.

E. Miscellaneous

Excluded Procurement

91. The removal of section 7 is commended. It should be noted that we have not had sight of the new provisions and accordingly are not able to comment on them.

Civil Society Participation

92. We note that the National Procurement Advisory Council (NPAC) of the previous 2010 bill has been removed from the new 2014 Bill. However, no alternative for civil society involvement has been included, barring the section 16 power to the Office of the Regulator to appoint committees as it deems necessary, comprised of non-members of the board.

93. The issue of public participation in public procurement is not a simple issue and requires a careful balancing of the executive's power to make policy decisions in the public interest and the concern of citizens to be involved in that decision making process. It therefore strikes at the heart of the issue of democratization of the public procurement function. An effective citizen engagement model in public procurement provides a meaningful mechanism for compelling the government to listen over and above unilateral communication via print, broadcast and increasingly social media. The non-mandatory committee model does not provide a compellable avenue for citizen involvement in public procurement.

Debriefing

94. Debriefing is an informal process whereby the procuring entity provides information, most commonly to an unsuccessful supplier or contractor on the reasons why it was unsuccessful or, less commonly, to successful suppliers or contractors. The overall objectives are to reduce the potential for challenges, to hold the procurement officials accountable for their decisions, and to enhance the effectiveness of the procurement process and the quality of future submissions.

95. The UN Model Law does not include an express requirement for the procuring entity to notify (or debrief) unsuccessful suppliers or contractors about the grounds upon which they were unsuccessful. However, debriefing upon the request of a supplier or contractor represents best practice and is encouraged by enacting States.[35]

96. Nonetheless, for practical purposes, the requirement for prompt notification to each participating tenderer of procurement award decisions and the provision of a

[35] See Guide to UN Model Law 2012 at p.104 para.8

standstill period[36] to enable tenderers to file a challenge before the contract comes into force does provide a window for debriefing consultations to occur as an initial step to rapid dispute resolution.

Public Private Partnerships

97. The inclusion of Public Private Partnerships (PPPs) under the purview of the Act is commendable. However care must be taken to recognize that the application of standard procurement rules and procedures to PPPs may not allow the necessary flexibility to drive the innovation and maximize the value which can be derived from the PPP model. Specialized PPP rules and procedures would have to be developed and guidelines such as the UN Model Law Guidelines on Public Private Partnerships can be considered as a template.

Savings of Certain Procurement Proceedings

98. Section 64 reads as follows: "Where any procurement proceeding is in force upon the commencement of this Act, it shall be deemed to be in conformity with this Act and to the extent that the transaction would have been valid prior to the commencement of this Act, it shall be deemed to be so valid for the purposes of this Act."

99. By virtue of section 4 procurement proceedings in relation to public procurement is defined as including "the process of procurement from the planning stage, soliciting of tenders, awarding of contracts, and contract management to the formal acknowledgement of completion of the contract;"

100. The clause appears to be deeming any current procurement proceeding as "in conformity with this Act" and accordingly valid. This clause may be excessive and objectionable on two fronts:

    (i) Section 69 of the Bill already addresses the issue of preserving existing procurement proceedings and contracts. It reads as follows: "Nothing in this Act affects the validity of any proceedings commenced, or contract entered into, before the commencement of this Act, but if this Act would have been applicable to the proceedings or the contract if the proceedings had commenced, or the contract had been entered into after the commencement of this Act, the conduct of the proceedings and the performance of the contract shall, from the commencement of this Act, be subject to such directions as the Office may issue under section 14(1)(c) for the purposes of achieving the objectives of this Act." This section however brings the proceedings and the performance of contract under the purview of the Office of the Procurement Regulator, thereby allowing accountability in accordance with the Bill to be brought to bear on existing procurement proceedings and contracts.

    (ii) To keep both sections 64 and 69 would create a legal futility in terms of the powers of the Office of Procurement Regulator to exercise

[36] section 35(2)

powers under section 14 (1) (c) on existing procurement proceedings as allowed under 69. What is the consequence of having the power to issue directions to public bodies to ensure compliance with the Act, if the proceedings are already deemed compliant under section 64.

(iii) Given the scope of the definition of procurement proceedings there may be hundreds or even more procurement exercises that are in either the planning stage, solicitation stage and/or awarding stage. A clause such as 64 rendering all of these procurement proceedings in conformity with the Act is dangerous and removes the ability of the Office of the Procurement Regulator to question or interrogate and accordingly stop an improper procurement proceeding.

Margaret Rose
Executive Director
Caribbean Procurement Institute Ltd
120 Abercromby Street, Port of Spain, Trinidad
info@caribbeanprocurementinstitute.com
www.caribbeanprocurementinstitute.com

APPENDICES

APPENDIX A	Submissions of the Caribbean Procurement Institute on the TT Public Procurement Reform Package 2010
APPENDIX B	UNCITRAL Model Law on the Procurement of Goods, Works & Services 2011
APPENDIX C	Key UN Model Law Provisions & Guidance on Transparency and Confidentiality
APPENDIX D	Public Procurement Policy Considerations in the Caribbean by Margaret Rose