THE PROCUREMENT LAW INTENSIVE

Developing Caribbean Procurement Law

An Overview of the Legal Context for Public Procurement Reform in the Caribbean region

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Over the last quarter century a global revolution has taken place in the perception of the function of procurement within the context of public and private sector business. Across the board, more and more, the highly strategic impact of procurement decision-making on the sustainable development and growth of organisations, countries and regional trading blocks is being appreciated. The impetus for the advancement of public procurement reform initiatives in developing states is escalating as trade liberalisation is exhorted as a universal good. In addition to the mounting external pressures of the globalised economic environment on SIDS, the demands for more accountable governance from an expanding enlightened citizenry and strengthened civil society are causing an increasingly difficult to ignore internal pressure for public procurement reform.

Public Procurement reformative efforts within CARICOM member states are presently plagued by tensions between the varied and oft-times competing objectives of the political desire to retain “policy space” in order to pursue socio-economic development objectives and the demands of trade liberalization and accountable governance. Deeply entrenched commercial, bureaucratic and political interests also present challenges to effective public procurement reform.

This paper briefly provides an overview of the developing legal context for public procurement in the Caribbean and seeks to place international and regional developments in public procurement policy in context. It is suggested that despite external drivers for reform, Caribbean public procurement policy reform must be driven by the development and strengthening of regional and domestic procurement capacity in order to develop and establish a home grown policy framework consistent with the culture, legal traditions and social institutions of the society.

The International Framework for Public Procurement

International harmonization initiatives for domestic public procurement reform have been significantly advanced through three particular systems and each are outlined below: (i) UNCITRAL Model Law on Procurement of Goods, Construction and Services (ii) WTO Government Procurement Agreement and (iii) Donor Regimes

UNCITRAL

UNCITRAL refers to the United Nations Commission on International Trade Law. The UNCITRAL Model Law on Procurement of Goods, Construction and Services was adopted by the UN General Assembly in 1994. The express objective of the Model Law is “to serve as a model for States for the evaluation and modernization of their procurement laws and practices in the establishment of procurement legislation where none presently exists”[1]. The Model law offers a potential regulatory framework for all procurement and its provisions deal with scope (Articles 1-3), qualifications (Articles 6-8), specifications (Article 16), procurement methods and their operation (Articles 18-51) and

[1] Ft.155 WTO paper

review (Article 52-57)[2]. The Model Law covers only the process of acquiring a supplier or service provider and does not deal with the pre-acquisition stage including planning, feasibility and budgeting or the post-award phase including contract administration and implementation. Both of these phases are significant since compromises or weaknesses therein contribute to severely undermining the objectives of transparency, accountability and value for money in the procurement process. Further limitations of the UNCITRAL Model Law are that it does not yet expressly provide for some of the more recent methodologies being employed in the function of procurement e.g. electronic reverse auctions, supplier lists, and framework agreements. Despite these express limitations of the Model Law there is much to recommend it as a guiding template for public procurement reform. Its inherent flexibility through the broad range of procurement formats from which to choose gives the reformer sufficient space to adapt the Model Law to suit the specific needs of a territory.

Several countries have utilized the UNCITRAL Model Law as the basis for domestic public procurement reform e.g. Poland, Albania, the Slovak Republic, Kosovo, Russia, Estonia, Georgia, Azerbaijan, Latvia, Kazakhstan, the Kyrgyz Republic, Uganda, Kenya, Tanzania, Nigeria, Ghana, Malawi and Ethiopia. Notably, all of these states are either transition or developing economies. To date, no developed country has used the UNCITRAL Model Law as the basis for domestic reform. It has been contended that this could be attributed to the fact that these countries had existing comprehensive regulatory public procurement frameworks.

Arrowsmith[3] observes that although the Model Law was formulated to assist countries in general, there are several areas to be reviewed so as to reflect "current and best practice in developed as well as developing countries, encouraging the acceptance of UNCITRAL norms as an alternative to donor regimes, and facilitating the "internationalization" of procurement training and the sharing of experience".

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[2] The full text of the UNCITRAL Model Law on Procurement of Goods, Construction and Services can be downloaded at www.uncitral.org

[3] See Arrowsmith 'The UNCITRAL Model Law on Procurement: its Role in Procurement Reform and Harmonisation' excerpt presented at the Caribbean Public Procurement (Law & Practice) Conference (CPPC) on 19th March 2008 at Hyatt Regency Trinidad.

Of note, the UNCITRAL Model is currently being utilized as the basis for the Draft Regional Government Procurement Protocol being advanced by CARICOM and was used by Guyana as the basis for their Public Procurement Act which was passed in 2003.

The Model Law is presently under review by the UNCITRAL Working Group on Government Procurement which is intended to be finalised by 2009.

WTO GPA

The WTO Agreement on Government Procurement (WTO-GPA) came into force at the conclusion of the Uruguay Round of multilateral trade negotiations in 1994 and seeks to provide an international legal framework for the liberalization and governance of public procurement markets. The following are the main elements covered by the Agreement:

- Guarantees of national treatment and non-discrimination for the suppliers of Parties to the Agreement with respect to procurement of covered goods, services and construction services as set out in each Party's schedules and subject to various exceptions and exclusions noted therein;
- Detailed requirements regarding transparency and procedural aspects of the procurement process, in general, designed to ensure that covered procurement under the Agreement is carried out in a transparent and competitive manner that does not discriminate against the goods, services or suppliers of other Parties;
- Additional requirements regarding transparency of procurement-related information;
- Provisions regarding modifications and rectifications of Parties' coverage commitments;
- Requirements regarding the availability and nature of domestic review procedures for supplier challenges which must be put in place by all Parties to the Agreement;
- Provisions regarding the application of the WTO Dispute Settlement Understanding in this area

- Provisions regarding accession to the Agreement and the availability of Special and Differential Treatment for Developing and Least Developed Countries; and

- A "built-in-agenda" for improvement of the Agreement, extension of coverage and elimination of remaining discriminatory measures through further negotiations

Whilst, the UNCITRAL provisions are arguably more comprehensive than the GPA conditions, there is a large measure of consistency between the two systems.

Currently forty (40) WTO Members are covered by the WTO Agreement on Government Procurement. These comprise Canada, the European Community (27 member states), Hong Kong, China, Iceland, Israel, Japan, Korea Liechtenstein, the Netherlands including Aruba, Norway, Singapore, Switzerland and the United States. Twenty (20) other WTO Members have observer status under the Agreement: Albania, Argentina, Australia, Cameroon, Chile, China, Columbia, Croatia, Georgia, Jordon, the Kyrgyz Republic, Moldova, Mongolia, Oman, Panama, Saudi Arabia, Sri Lanka, Chinese Taipei and Turkey. Four intergovernmental organisations also have GPA observer status: the International Monetary Fund (IMF), the Organization for Economic Co-operation and Development (OECD), the United Nations Conference on Trade and Development (UNCTAD) and the International Trade Centre (ITC). At present, there are eight (8) WTO Members which are in the process of acceding to the GPA: Albania, Georgia, Jordon, the Kyrgyz Republic, Moldova, Oman, Panama and Chinese Taipei.

Notably, no CARICOM or CARIFORUM territory has acceded to the WTO-GPA. Traditional reluctance of developing countries to accede to the WTO GPA has been based on the perception that the non-discrimination and national treatment provisions of the Agreement facilitate increased market opening to foreign competition which in turn, it is felt, would cripple the growth of domestic industry and capacity within the developing state. Victor Mosoti[4] has expressed the following opinion on the failure of African developing countries to readily accede to the WTO – GPA.

[4] See Victor Mosoti 'The WTO Agreement on Government Procurement: A necessary evil in the Legal Strategy for Development in the Poor World?' 25 U. Pa.J. Int'l Econ. L. 593

"What is distressing, however, is that some of the poorer countries' decision not to sign the WTO GPA seems guided by priorities that are defeated by other factors inherent in these countries, and have nothing to do with a careful and honest assessment of what the nations really stand to gain or lose by signing. In offering the explanation that they would like to shield their domestic suppliers from external competition for government tenders, and nurture various strategic sectors, these countries are deliberately missing the point. They are being bled to ruination by terribly warped procurement laws and policies. The poor implementation of procurement laws and policies, or in their absence, effectively kills competition for tender awards and makes it the exclusive preserve of a few well connected businessmen and their contact persons in various government departments. The upshot is that even as they continue to stay out of the agreement, developing countries are not reaping the strategic economic benefits of diminished (or eliminated) external competition in the government supply sector."

Though Mosoti's comments were intended to be descriptive of African countries which were the subject of his paper, the similarity of the challenges expressed to those existing in CARICOM member states is difficult to ignore. It should be noted however that the extent to which accession to the GPA can result in the alleviation of corrupt practices and/or foster good governance and integrity in public procurement is limited by the extent of coverage and thresholds.

Donor Regimes

Aid donors such as the World Bank, IDB, CDB other regional banks and donor blocks and countries such as EU typically would mandate procedures and processes to be used when aid recipients procure utilizing donor funds. For developing countries not excluding CARICOM member states donor regimes have had significant influence on procurement standards. For this reason, within CARICOM member states World Bank and other donor procedures and guidelines are viewed as co-terminous with procurement best practice.

There are serious problems with this perception. Firstly, since there are several donors there are several regimes, resulting in a multiplicity of procedures in states with immature procurement systems and causing confusing among professionals interacting with and implementing the function of procurement. Secondly, there is a lack of domestic ownership of the procedures which stymies long term capacity development. Thirdly, when donors fund procurement reform projects, decisions with respect to the substance of the reforms are at worst heavily influenced by donor regimes with their own objectives or at the very least lack transparency, accountability and sufficient local input. This is not dissimilar to the challenges associated with the concept of tied aid where aid recipients are forced to source materials and inputs for donor funded projects from donor territories.

Although, these problems are largely receding as a result of harmonisation initiatives among donors and the acceptance by the World Bank of UNCITRAL based procurement systems, it is still important to note that donor funded regimes are not necessarily the most appropriate standard for measuring procurement best practice or for implementing domestic reform.

The Regional Framework for Public Procurement

The Caribbean Community including the CARICOM Single Market and Economy (CSME) was established by the Revised Treaty of Chaguaramas 2001. The Community comprises 15 member states Antigua and Barbuda, Bahamas, Barbados, Belize, Dominica, Grenada, Guyana, Haiti, Jamaica, Montserrat, St. Kitts and Nevis, St. Lucia, St. Vincent and the Grenadines, Suriname and Trinidad and Tobago. The Revised Treaty provides the justification for the establishment and implementation of a regional Public Procurement Regime. Article 239 of the Revised Treaty obliges Member States to "elaborate a Protocol relating …to… Government Procurement".

To date, the Community has undertaken and concluded a significant volume of work regarding the establishment of a Community Regime for Public Procurement. A project was commissioned in 2003 by the CARICOM Secretariat with a grant from the IDB and the Canadian International Development Agency (CIDA). The object of the project was to support CARICOM in its efforts to establish an effective regional regime for Public Procurement which would facilitate the full implementation of the CSME and to participate effectively in external trade negotiations relating to Public Procurement. The project comprised three main components. Component 1 – National Government Procurement Frameworks: Analysis, Comparison and Recommended Improvements; Component 2 – Collection and Analysis of

Government Procurement Statistics; and Component 3 – Recommendations for a Regional Best-practice Regime for Government Procurement.

Several findings were highlighted in the Project Report:

- Competitive public procurement regimes in the CARICOM Member States are in a disarray and dysfunctional
- Public Procurement accounts for a significant percentage of public expenditure
- In 2003, 14 of the 15 CARICOM Member States ranked in the top 30 of the World's highly indebted emerging market economies (Guyana, St. Kitts & Nevis, Jamaica, Antigua and Barbuda, Dominica, Grenada and Belize were in the top ten)
- The current legislation governing procurement in CARICOM Member States is made up of poorly coordinated and outdated enactments, regulations and decrees
- The weakness of legislation and/or their enforcement breeds many abusive and manipulative practices in public procurement
- Enforcement of procurement rules is extremely weak and sometimes non-existent due to the absence of a single regulatory authority
- The rights of bidders are not adequately protected
- Capacity to conduct procurement is extremely weak
- Internal and external procurement controls are inadequate
- Procurement related corruption is a major problem
- Due to small size of individual economies, the private sector actively seeks public procurement opportunities, albeit with little or no confidence in the integrity of the public procurement system

- Public Procurement is severely under-developed and rated as high risk
- The general conclusion was that the present procurement regimes are counter productive towards the efforts of CSME

The dismal picture painted by the findings of the CARICOM research project demonstrated the dire need for comprehensive procurement reform. One of the significant recommendations of the project was that the proposed regional and domestic public procurement legislative and policy reforms should be based on the UNCITRAL Model Law.

In 2005 the First Draft of the Community Policy on Public Procurement was developed and disseminated to Member States for review. By April 2006 the Second Draft was finalized. Presently the CARICOM Secretariat has been actively engaged in follow up communications with Member States in pursuit of concluding the national consultations that are required as a key input into the finalisation of the Policy framework and movement towards the Protocol.

Notably, the proposed Community Policy is expressed to be based on the UNCITRAL Model Law on Procurement of Goods, Construction and Services.

CARIFORUM-EC EPA

The CARIFORUM comprises the CSME Member States, Dominican Republic and Cuba. By treaty in 2001 CARICOM and Dominica Republic (CARICOM-DR) entered into a Free Trade Agreement in which the Parties agreed to work toward a harmonized public procurement policy. The CARIFORUM is the agreed umbrella organization for the negotiation of trade agreements with third states.

The negotiation and initialling of the CARIFORUM-EC EPA on December 16th 2007 is the single most significant regional development in public procurement policy and is the next page in the complicated relationship between the

European Community and its former colonies. The EPA was finally executed by the CARIFORUM countries on 15th October 2008. In 1963 the European Economic Community entered into a trade and development relationship with its former colonies in the Treaty of Yaounde. In 1975, the EU granted African, Caribbean and Pacific (ACP) countries unilateral trade preferences under the Lome Agreements (I-IV). The era of the Lome Agreements was not perceived as contributing to the socio-economic growth of the ACP countries as the ACP share of total EU imports more than halved over the ensuing 30 years. The unilateral system of preferences was in fact perceived to contribute to the entrenchment of highly protected, non competitive economies. With the expiry of the last Lome Agreement around the corner, the EC proposed a new trade and development regime and the Cotonou Agreement was entered into in 2000. The Cotonou Agreement envisaged the eventual creation of reciprocal trade agreements between the EU and regional blocks of the ACP countries by establishing EPAs (Economic Partnership Agreements) to be in place by 2008. The EPAs are intended to be asymmetrical trade agreements covering trade in goods and services and more controversially "behind the border" issues such as competition, government procurement, intellectual property and trade facilitation.

The CARIFORUM-EC EPA includes provisions on public procurement and are covered under Chapter 3 of Title IV which deals with Trade Related Issues[5].

The EPA does not provide for non-discrimination and national treatment for foreign based companies but it does provide for non –discrimination and national treatment for foreign companies operating through a locally incorporated subsidiary.

Notably, covered entities are limited to Central Governmental Authorities and the thresholds agreed are stated by the CRNM negotiators to be very high in order to reserve "policy space" for development objectives.

Significantly of the five interim EPAs initialled by ACP territories by December 2007, only the CARIFORUM EPA includes provisions related to Public Procurement. The CARIFORUM EPA also has the notorious position of being the only trade agreement negotiated in the ACP that has included public procurement provisions. It should be

[5] The full text of the Public Procurement Chapter is attached below in **ANNEX 1**

recalled that such inclusion has hitherto been strenuously opposed by developing countries seeking to protect domestic markets from the effects of market opening conditions.[6]

Status of Domestic Public Procurement Reform Initiatives

Public Procurement Systems within CARICOM member states are largely characterized by poorly coordinated and outdated legislation. With the exception of Guyana and to a lesser extent Jamaica and Belize there are no dedicated legislative frameworks governing public procurement. A comprehensive framework at the statutory levels with clear hierarchical structures is absent. Procurement is not specifically addressed in the Constitutions of CARICOM member states with the exception of Guyana and Suriname.

Anti- corruption and Integrity in Public Life legislation exists in Trinidad and Tobago and other CARICOM Member States which provide a complimentary measure of accountability. For example, **PART IV** of **The Integrity in Public Life Act of Trinidad and Tobago**[7] prescribes offences relating to the manner in which public officials must perform their functions and administer public resources, including issues of conflict of interest. Despite the absence of a comprehensive public procurement legislative framework the passage of anti-corruption and Integrity legislation in several Member States is a substantial step forward and their provisions can be used to enforce penalties against public officials engaging in public procurement fraud or other related corrupt activities.[8]

Jamaica and Belize

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[6] A critical assessment of the Public Procurement Provisions contained in the CARIFORUM-EC EPA is undertaken in another paper by Margaret Rose entitled "CARIFORUM-EC EPA – A Critical Analysis of the Public Procurement Conditions"

[7] No. 83 of2000

[8] See **Annex 2** below which outlines the prescribed offences

The Contractor General Act 1983 (as amended in 1985 and 1999) was passed in Jamaica establishing the Office of the Contractor General and the National Contracts Commission. By virtue of the Contractor General Act 2000 Belize adopted a similar public procurement system.

The **Office of the Contractor General** is an independent Commission of Parliament established to monitor and investigate the award and implementation of government contracts, permits and licences, to ensure (i) the award is impartial and based on merit (ii) the award and termination do not involve impropriety or irregularity and (iii) implemented according to terms of the contract. Notably, the Contractor General ***monitors*** the procurement process and does NOT endorse the award of contracts. The Contractor General in the performance of his duties is statutorily imbued with the power to access all books, records and relevant information from any procuring entity and to access any premises where it is believed such information can be found. The Contractor General is not involved in the procurement process.

The principal objects of the **National Contracts Commission** are the promotion of efficiency in the process of award of government contracts and ensuring transparency and equity in awarding such contracts. Its functions include

(i) the examination of applications for the award of government contracts

(ii) the approval and oversight of the award within specified limits

(iii) the making of recommendations to Cabinet for contracts above the limits

(iv) the registration of contractors for works, goods and services and the maintenance of up to date lists

(v) the continuous evaluation of contractors' financial, managerial capability, human resources, technical expertise, performance

(vi) the oversight of the activities of Sector Committees

Detailed prescriptive rules governing the procurement process, outside of thresholds and general guidance on procurement methods is not provided for, thereby affording the procuring agency a measure of flexibility in its procurement processes. The National Contract Commission has however produced guidelines which ought to be used by state procuring entities. The system has been criticised as being confusing with some possible overlap and/or interrelated jurisdictions being perceived between the Office of the Contractor General and the National Contracts Commission. However, this legislative framework, based on the institutional model for procurement reform provides the greatest measure of accountability and enforcement mechanisms among the existing frameworks in CARICOM Member States.

Guyana

Guyana is the first CARICOM Member State to undertake comprehensive procurement reform by amending its Constitution in 2003. By virtue of this amendment and the passage of the Procurement Act 2003, the Public Procurement Commission and a National Procurement and Tender Administration were respectively established. The reforms were based on the UNCITRAL Model Law however to date, neither of the two institutions has been established and the old procurement regime remains operational.

Trinidad and Tobago

The Public Procurement system in Trinidad and Tobago is representative of the systems existing in all other CARICOM Member States which were former British Colonies. The procurement system is characterized firstly, by the Central Tenders Board Ordinance [9]1961 which was originally established 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

[9] Other CARICOM member states have similar legislation - Dominica-Central Tenders Board, Grenada- Public Tenders Board, St. Kitts and Nevis -Tenders Board, St. Lucia - Central Tenders Board, St. Vincent and the Grenadines – Central Supply Tenders Board

surplus or unserviceable articles belonging to the Government or any statutory bodies". The ensuing statutory erosion of the remit of the CTB first in 1979 then in 1987, 1991 and 1993 resulted in the vast majority of sub-central procuring entities procurements being administered outside of the statutory framework. CTB provisions now cover only procurement above thresholds undertaken by Ministries, regional corporations and local government.

The justification proffered for these exclusions is that the bureaucratic CTB procedures hampered commercial efficiency. The view is not without merit given the narrow focus of the legislation, only to the tendering stage of the procurement cycle and without the responsibility or capacity to handle critical issues at the design and planning stage and for the monitoring or implementation of the project.

The consequence of these exclusions however is, that major government contracts are being awarded outside of any statutory framework and therefore with very little hope for real accountability in procurement decision-making. The Joint Select Parliamentary Committees established by Parliament and the Office of the Auditor General under the Exchequer and Audit Acts to provide oversight and to audit these unregulated entities are at best *ex post facto* mechanisms for accountability, relying only on review and audit mechanisms to achieve accountability. The inherent weakness of such approaches in ***preventing*** excesses and abuses is readily apparent.

Following on after the Piarco Airport Development Project procurement scandal where several former Government Ministers, senior public officials and members of the business community were charged for divers' corruption and related criminal offenses, the Government of Trinidad and Tobago appointed a multi-sectoral Committee to make recommendations for public procurement reform. The Committee comprised public sector officials, representatives of civil society, the business and professional sectors. After much research and consultation the Green Paper on Public Sector Procurement Reform was disseminated for national consultation and after revising the document to incorporate contributions from the broader national community, the **White Paper on Reform of the Public Sector Procurement Regime** was laid in Parliament in September 2005 and expressed by the then Prime Minister to be Government's new Public Procurement Policy which it intended to enact by 2006. The White Paper sought to analyse critically some of the main systems for procurement reform, including the UNCITRAL Model Law and the

Institutional Model for Procurement Reform adopted by Jamaica and Belize. The White Paper states the following of the UNCITRAL Model Law

> "The approach manifest in the UNCITRAL Model Law may attract some of the criticisms made of the current regime operating in Trinidad and Tobago. It is highly prescriptive of detail of process. Any failure to follow these detailed processes attracts legal sanctions.
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> By virtue of the need for Parliamentary approval to modify its provisions to suit the market and the time that it takes to get Parliamentary approval, an operational rigidity is built into the legal framework. This raises serious concerns as to whether or not this model is sufficiently flexible to accommodate the challenges of a multi cultural, social and economic environment, and the increasing impact of technology on business processes."

On the Contractor General or Institutional legislative model for reform the White Paper states as follows:

> "This legislative model 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."

Both of the models outlined above were bypassed and the Principle Model for public procurement reform in Trinidad and Tobago was recommended. The Principle Model, of which the Australian procurement regime[10] is an example, is one in which the legislation prescribes principles and establishes broad parameters that promote best procurement practices. This is achieved by the development and implementation of mandatory guidelines which are amplifications of the operating principles. The system proposes a Procurement Regulator directly accountable to Parliament with the role to oversee the procurement system but not to be involved in any actual procurement process. The Regulator is seen as the crux of the system and much like the Contractor General in Jamaica and Belize would have investigative powers equivalent to that of a Commission of Enquiry and the discretion to suspend the procurement process or certain components of it for the purpose of investigation. The effectiveness of the proposed 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.

[10] Financial Management and Accountability Act 1997, Commonwealth of Australia and accompanying Regulations 7 to 12.

When considering the proposals for reform contained in the White Paper in the context of the emerging CARICOM Regional Procurement Protocol, without a determination of the merits or demerits of either approach, the inconsistency of the domestic and regional reform initiatives is apparent. Whilst CARICOM has proposed a Draft Procurement Policy based in large part on the UNCITRAL Model Law and recommends same as the basis for domestic public procurement reforms in Member States, the White Paper[11] criticises this model as being highly prescriptive and proposes a more flexible approach to procurement reform.

Notwithstanding, as the position stands today in Trinidad and Tobago, very little has been done, by way of implementing the recommendations of the White Paper as promised in 2005. In fact, recently, Government Ministers were heard to make public statements to the effect that the White Paper was now under review.

It is difficult to accept that the considered effort put into the White Paper research and consultation did not reveal the inherent conflict between the recommended approach and the regional approach to procurement reform. In any event, if the White Paper is now under review, it is suggested by the writer that effort be made to ensure that more meaningful synergies are explored between domestic and regional initiatives for procurement reform.

Common Law – the golden legal thread of Commonwealth nations

In addition to these initiatives for public procurement reform, for British Common Law territories there are yet some exciting new developments in the common law of competitive bidding, the application of which will serve to complement and enhance accountability initiatives in public procurement.

Both the private and the public law have developed (though sometimes at counter purposes) in very specific ways to respond to the distinctive elements in the strategic function of procurement. One such development is explored below.

[11] As noted above

Implied Tender Contract Doctrine

Under traditional contract law, an invitation to tender has been viewed as a mere invitation to treat attracting no legal liabilities, duties or consequences. Therefore the procuring entity issuing an invitation to tender was under no obligation to deal with the tenders fairly or in compliance with the terms of the Tender Call. The tender or bid was viewed as an offer capable of being accepted by the procurer and thereafter the substantive contract would be formed. In the Supreme Court of Canada case of **Ron Engineering**[12] in 1980 the contractor submitted a tender (bid) to build a project. He also submitted a tender deposit for $150,000 in the form of a certified cheque in accordance with the Information for Tenderers. After the tenders for the construction project had closed the contractor realized that he had made a mistake in his bid. The contractor's (erroneous) bid was the lowest bid. The contractor corresponded with the owner after the closing deadline indicating that there was an error in the total sum and requesting the withdrawal of his tender. He subsequently claimed that although he had not withdrawn his tender it was incapable of being accepted. The owner held the contractor to the bid price. The contractor refused to complete the construction contract and the owner refused to return the deposit. It was HELD that under the terms and conditions of which the tender was made a contract (contract A) arose between the contractor and the owner when the tender was submitted. This is to be distinguished from contract B which is entered into after the owner accepts the bid. The contractor accepted contract A by the submission of his tender. A tender in law is irrevocable if filed in conformity with the terms and conditions under which the call for tenders was made. Under contract A, both parties are under an obligation to enter into contract B once the tender is accepted. The purpose of the tender deposit is to ensure the performance by the contractor of its obligations under contract A. The contractor refused to complete contract B. The deposit is not recoverable.

This Canadian case proved to be a landmark development in the law of competitive bidding and is not unique to that jurisdiction. Nine years later, doubts that such a common law contract would be recognized in the tender process in the UK, were allayed after the BlackPool case[13]. This tender contract in the UK is sometimes referred to as the

[12] [1981] 1 S.C.R. 111

[13] BlackPool and Fylde Aero Club Ltd v BlackPool Borough Council [1990] 1 WLR 1195

Blackpool contract. More significantly for our region the Privy Council recognized this ***Process*** Contract in 2003 in the ***Pratt Contractors***[14] case wherein it was accepted that the invitation to tender could constitute an offer to treat with compliant bids in a particular manner and the submission of the compliant bid an acceptance of the terms of that offer, both parties being thereby bound in law. Although the actual terms and conditions of such a process contract are yet not fully defined, this line of cases specific to the tendering process represents a clear departure from traditional contract law principles.

In the 2005 case of **NH v UDECOTT**[15] the Court of Appeal of Trinidad and Tobago implicitly acknowledged the existence of the 'Process Contract' though it was not necessary to bedevil what the terms of such a contract would be. Canadian jurisprudence has developed significantly since the Ron Engineering case in 1980 and there are now detailed approaches to the nature of the rights, duties and obligations arising out of this tender contract. The writer submits that the Canadian case law should serve as highly persuasive guidance as Caribbean justices seek to fill in the terms and conditions of this implied tender contract.

Interestingly, as we seek to create a harmonized regime for regional public procurement it is important to recognize the golden legal thread which already provides the shared foundation for the development of jurisprudence in all British Common Law territories. It may be that we are not starting from scratch.

Conclusion

According to Hunja[16] an efficient public procurement system is one which has a clear overarching policy framework, supported by institutional arrangements to monitor, review and enforce it and implemented by a mature and well trained cadre of professionals. Despite the efforts at the international and regional level by treaty arrangements to

[14] Pratt Contractors v Transit New Zealand [2003] UKPC 83

[15] NH International (Caribbean) Ltd v UDECOTT Cv. App No. 95 of 2005

[16] Robert Hunja (Senior Procurement Specialist, Procurement Policy and Services Group, The World Bank, Washington DC) 'Obstacles to Public Procurement Reform in Developing Countries' 2001

implement protocols on public procurement reform, it is the view of the writer that these initiatives by themselves will not necessarily foster good governance, accountability, transparency and efficiency in public procurement for the following elemental reasons.

(a) Coverage: The GPA conditions and the CARIFORUM EPA conditions would apply only to entities covered by the Agreement. Member States can determine which entities will be covered and which will not. Therefore by a Member State limiting its covered entities to Central Government Authorities and yet undertaking major procurement through sub-central entities and state-owned enterprises, the Agreement will have limited applicability. Notably within CARICOM Member States, studies indicate that a substantial volume of public procurement contracts are awarded at sub-central governmental levels, for example through State Owned Enterprises, statutory bodies, executive agencies and other sub-central agencies of government. In order to ensure meaningful market access or the establishment of transparent processes it would be important to include both central and sub-central levels of government in the scope of coverage. In respect of the CARIFORUM EPA only the Central Authorities are listed as covered entities.

(b) Thresholds: The GPA conditions and the CARIFORUM EPA conditions would apply only to procurements above thresholds agreed by the Member State. Member States therefore can negotiate by establishing very high thresholds. Procurement undertaken under the thresholds would not attract external conditions relating to non discrimination and transparency. Thresholds are very important to the integrity of a procurement system. The EPA thresholds are said to be quite high deliberately set to provide sufficient “policy space” for the pursuance of development objectives.

Given the above limitations, domestic policy makers and practitioners cannot shirk the responsibility of substantively defining public procurement policy. External initiatives alone can not ensure an efficient, transparent and accountable procurement system. Ensuring that competencies, capacity, and professionalism are developed among both procurement policy makers and practitioners, so that the substantive attributes of the domestic procurement policy framework can be meaningfully explored, established and then properly implemented and sustained, remains essential.

ANNEX 1

CARIFORUM-EC EPA

Chapter 3 Title IV

PUBLIC PROCUREMENT

Article 165

General objective

The Parties recognize the importance of transparent competitive tendering for economic development with due regard being given to the special situation of the economies of the CARIFORUM States.

Article 166

Definitions

For the purposes of this Chapter:

(1) “government procurement” means any type of procurement of goods, services or a combination thereof, including works, by procuring entities listed in Annex VI for governmental purposes and not with a view to commercial resale or with a view to use in the production of goods or the supply of services for commercial sale, unless otherwise specified. It includes procurement by such methods as purchase or lease, or rental or hire purchase, with or without an option to buy;

(2) “procuring entities” means the entities of the Signatory CARIFORUM States and the
EC Party listed in Annex VI that procure in accordance with the provisions of this
Chapter;
(3) “suppliers” means any natural or legal person or public body or group of such persons or bodies of a Signatory CARIFORUM State or the EC Party which can provide goods, services or the execution of works. The term shall cover equally a supplier of goods, a service provider or a contractor;

(4) "qualified supplier" means a supplier that a procuring entity recognises as having satisfied the conditions for participation;

(5) "eligible supplier" means a supplier who is allowed to participate in the public procurement opportunities of a Party or Signatory CARIFORUM State, in accordance with domestic law and without prejudice to the provisions of this Chapter;

(6) "multi-use list" means a list of suppliers that a procuring entity has determined satisfy the conditions for participation in that list, and that the procuring entity intends to use more than once;

(7) “legal person” means any legal entity duly constituted or otherwise organised under applicable law, whether for profit or otherwise, and whether privately-owned or governmentally-owned, including any corporation, trust, partnership, joint venture,
sole proprietorship or association;

(8) “legal person of a Party” means any legal entity duly constituted or otherwise
organised under the law of the EC Party or of the Signatory CARIFORUM States.
Should such a legal person have only its registered office or central administration in the territory of one of the Signatory CARIFORUM States or the EC Party, it may not be considered as a legal person of a Party, unless it is engaged in substantive business operations in any such territory;

(9) a “natural person” means a national of a Member State of the European Union or of a
Signatory CARIFORUM State according to their respective legislation;

(10) services include construction services unless otherwise specified;

(11) "in writing" or "written" means any expression of information in words, numbers or other symbols, including electronic means, that can be read, reproduced and stored;

(12) "notice of intended procurement" means a notice published by a procuring entity inviting interested suppliers to submit a request for participation, a tender, or both;

(13) "open" tendering procedures are those procedures whereby any interested supplier may submit a tender;

(14) "selective" tendering procedures are those procedures whereby, consistent with the relevant provisions of this Chapter, only those qualified suppliers invited by the procuring entity may submit a tender;

(15) "limited" tendering procedures are those procedures whereby the procuring entities may consult the suppliers of their choice and negotiate the terms of contract with one or more of them;

(16) “technical specifications” means a specification which lays down the characteristics of the products or services to be procured, such as quality, performance, safety and dimensions, symbols, terminology, packaging, marking and labelling, or the processes and methods for their production and requirements relating to conformity assessment procedures prescribed by the procuring entities covered by this Chapter;

(17) “offsets” in government procurement means any conditions or undertakings that encourage local development or improve balance of payments accounts, such as the use of domestic content, the licensing of technology, investment, counter-trade and similar action.

Article 167

Scope

1. The provisions of this Chapter apply only to those procuring entities listed in Annex VI and in respect of procurements above the thresholds set out in that Annex.

2. The Parties and the Signatory CARIFORUM States shall ensure that the procurement of their procuring entities covered by this Chapter takes place in a transparent manner according to the provisions of this Chapter and the Annexes pertaining thereto, treating any eligible supplier of either the Signatory CARIFORUM States or the EC Party equally in accordance with the principle of open and effective competition.

A. Supporting the creation of regional procurement markets

1. The Parties recognize the economic importance of establishing competitive regional procurement markets.

2. (a) With respect to any measure regarding covered procurement, each Signatory CARIFORUM State, including its procuring entities, shall endeavour not to treat a supplier established in any CARIFORUM State less favourably than another locally established supplier.

(b) With respect to any measure regarding covered procurement, the EC Party and the Signatory CARIFORUM States, including their procuring entities:

(i) shall endeavour not to discriminate against a supplier established in either Party on the basis that the goods or services offered by that supplier for a particular procurement are goods or services of either Party;

(ii) shall not treat a locally established supplier less favourably than another locally established supplier on the basis of degree of foreign affiliation to or ownership by operators or nationals of any Signatory CARIFORUM State or of the EC Party.

3. Subject to paragraph A.4, each Party, including its procuring entities, shall with respect to any measure regarding covered procurement, accord to the goods and services of the other Party and to suppliers of the other Party offering the goods or services of any Party, treatment no less favourable than the treatment the Party, including its procuring entities, accords to domestic goods, services and suppliers.

4. The Parties shall not be required to provide the treatment envisaged in paragraph A.3 unless a decision by the Joint CARIFORUM-EC Council to this effect is taken. That decision may specify to which procurements by each Party the treatment envisaged in paragraph A.3 would apply, and under which conditions.

B. Valuation rules

Procuring entities shall not choose a valuation method, or divide a procurement, with the aim of avoiding the application of this Chapter. Valuation shall take into account all forms of remuneration, including any premiums, fees, commissions, and interest.

C. Exceptions

1. Nothing in this Chapter shall be construed as preventing a Signatory CARIFORUM State or the EC Party from imposing or enforcing measures relating to goods or services of persons with disabilities, philanthropic institutions, or prison labour.

2. This Chapter does not apply to:

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

(b) non-contractual agreements or any form of assistance that a Party or Signatory CARIFORUM State provides, including cooperative agreements, grants, loans, equity infusions, guarantees, and fiscal incentives;

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

(d) the acquisition, development, production or co-production of programme material intended for broadcasting by broadcasters and contracts for broadcasting time;

(e) arbitration and conciliation services;

(f) public employment contracts;

(g) research and development services;

(h) the procurement of agricultural products made in furtherance of agricultural support programmes and human feeding programmes, including food aid;

(i) intra-governmental procurement;

(j) procurement conducted:

(i) for the direct purpose of providing international assistance, including development aid;

(ii) under the particular procedure or condition of an international agreement relating to the stationing of troops or relating to the joint implementation of a project by a Party or Signatory CARIFORUM State with a non-Party;

(iii) in support of military forces located outside the territory of the Party or Signatory CARIFORUM State concerned;

(iv) under the particular procedure or condition of an international organisation, or funded by international grants, loans, or other assistance where the applicable procedure or condition would be inconsistent with this Chapter.

Article 168

Transparency of government procurement

1. Subject to Article 180(4), each Party or Signatory CARIFORUM State shall promptly publish any law, regulation, judicial decision and administrative ruling of general application, and procedures, regarding procurement covered by

this Chapter, as well as individual procurement opportunities, in the appropriate publications referred to in Annex VII including officially designated electronic media. Each Party or Signatory CARIFORUM State shall promptly publish in the same manner all modifications to such measures, and shall within a reasonable time inform the others of any such modifications.

2. The Parties and the Signatory CARIFORUM States shall ensure that their procuring entities provide for effective dissemination of the tendering opportunities generated by the relevant government processes, providing eligible suppliers with all the information required to take part in such procurement. Each Party shall set up and maintain an appropriate on-line facility to further the effective dissemination of tendering opportunities.

(a) Tender documentation provided to suppliers shall contain all information necessary to permit them to submit responsive tenders.

(b) Where entities do not offer free direct access to the entire tender documents and any supporting documents by electronic means, entities shall make promptly available the tender documentation at the request of any eligible supplier of the Parties.

3. For each procurement covered by this Chapter, procuring entities shall, save as otherwise provided, publish in advance a notice of intended procurement. Each notice shall be accessible during the entire time period established for tendering for the relevant procurement.

4. The information in each notice of intended procurement shall include at least the following:

(a) name, address, fax number, electronic address (where available) of the procuring entity and, if different, the address where all documents relating to the procurement may be obtained;

(b) the tendering procedure chosen and the form of the contract;

(c) a description of the intended procurement, as well as essential contract requirements to be fulfilled;

(d) any conditions that suppliers must fulfil to participate in the procurement;

(e) time-limits for submission of tenders and, where applicable, any time limits for the submission of requests for participation in the procurement;

(f) all criteria to be used for the award of the contract; and

(g) if possible, terms of payment and other terms.

5. Procuring entities are encouraged to publish as early as possible in each fiscal year a notice regarding their future procurement plans. The notice should include the subject-matter of the procurement and the planned date of the publication of the notice of intended procurement.

6. Procuring entities operating in the utilities may use such a notice regarding their future procurement plans as a notice of intended procurement provided that it includes as much of the information set out in paragraph 4 as available and a statement that suppliers should express their interest in the procurement to the entity.

Article 169

Methods of procurement

1. Without prejudice to the method of government procurement used in respect of any specific procurement, procuring entities shall ensure that such methods are specified in the notice of intended procurement or tender documents.

2. The Parties or the Signatory CARIFORUM States shall ensure that their laws and regulations clearly prescribe the conditions under which procuring entities may utilise limited tendering procedures. Procuring entities shall not utilise such methods for the purpose of restricting participation in the procurement process in a nontransparent manner.

3. When conducting procurement by electronic means, a procuring entity shall:

(a) ensure that the procurement is conducted using generally available and interoperable information technology products and software, including those related to authentication and encryption of information; and

(b) maintain mechanisms that ensure the integrity of, and prevent inappropriate access to, requests for participation and tenders.

Article 170

Selective tendering

1. Whenever selective tendering procedures are employed, procuring entities shall:

(a) Publish a notice of intended procurement;

(b) In the notice of intended procurement invite eligible suppliers to submit a request for participation;

(c) Select the suppliers to participate in the selective tendering procedure in a fair manner; and

(d) Indicate the time limit for submitting requests for participation.

2. Procuring Entities shall recognize as qualified suppliers all suppliers which meet the conditions for participation in a particular procurement, unless the procuring entity states in the notice or, where publicly available, in the tender

documentation, any limitation on the number of suppliers that will be permitted to tender and the objective criteria for such limitation.

3. Where the tender documentation is not made publicly available from the date of publication of the notice referred to in paragraph 1, procuring entities shall ensure
that those documents are made available at the same time to all the qualified suppliers selected.

Article 171
Limited tendering

1. When using the limited tendering procedure, a procuring entity may choose not to apply Articles 168, 169(1) and (3), 170, 173 (1), 174, 175, 176 and 178.

2. Procuring entities may award their public contracts by limited tendering procedure, in the following cases:

(a) when no suitable tenders have been submitted in response to an open or selective tendering procedure, on condition that the requirements of the initial tender are not substantially modified;

(b) when, for technical or artistic reasons, or for reasons connected with protection of exclusive rights, the contract may be performed only by a particular supplier and no reasonable alternative or substitute exists;

(c) for reasons of extreme urgency brought about by events unforeseen by the procuring entity, the products or services could not be obtained in time by means of open or selective tendering procedures;

(d) for additional deliveries of goods or services by the original supplier where a change of supplier would compel the procuring entity to procure equipment or services not meeting requirements of interchangeability with already existing equipment or services procured under the initial procurement and such separation would cause significant inconvenience or substantial duplication of costs to the procuring entity;

(e) when a procuring entity procures prototypes or a first product or service which are developed at its request in the course of, and for, a particular contract for research, experiment, study or original development;

(f) when additional services which were not included in the initial contract but which were within the objectives of the original tender documentation have, through unforeseen circumstances, become necessary to complete the services described therein. However, the total value of contracts awarded for the additional services shall not exceed 50 per cent of the amount of the original contract;

(g) for new services consisting of the repetition of similar services which conform to a basic project for which an initial contract was awarded following an open or selective procurement method, and for which the procuring entity has indicated in the notice of intended procurement that a limited procurement method might be used in awarding contracts for such new services;

(h) for products purchased on a commodity market;

(i) in the case of contracts awarded to the winner of a design contest; in the case of several successful candidates, successful candidates shall be invited to participate in the negotiations as specified in the notice of the intended procurement or the tender documents; and

(j) for purchases made under exceptionally advantageous conditions which only arise in the very short term in the case of unusual disposals such as arising from liquidation, receivership or bankruptcy and not for routine purchases from regular suppliers.

Article 172

Rules of origin

The EC Party and the Signatory CARIFORUM States for the purposes of this Chapter shall not apply rules of origin to goods or services imported from or supplied by the EC Party and the Signatory CARIFORUM States as the case may be that are different from the rules of origin applicable at the same time in the normal course of trade to imports or supplies of the same goods or services from the same Signatory CARIFORUM State or the EC Party.

Article 173

Technical specifications

1. Consistent with the objectives of this Chapter, procuring entities shall ensure that technical specifications applied or intended for application to procurement covered by the Chapter are set out in the notices of intended procurement and/or tender documents.

2. A procuring entity shall not seek or accept, in a manner that would have the effect of precluding competition, advice that may be used in the preparation or adoption of any technical specification for a specific procurement from a person that may have a commercial interest in the procurement.

3. In prescribing technical specifications for the goods or services being procured, a procuring entity shall, where appropriate:

(a) specify the technical specifications, in terms of performance and functional requirements, rather than design or descriptive standards; and

(b) base the technical specifications on international standards, where such exist; otherwise, on national technical regulations, recognized national standards or building codes.

4. Where design or descriptive characteristics are used in the technical specifications, a procuring entity shall, where appropriate, include words such as “or equivalent” in the technical specifications and consider tenders that demonstrably meet the required design or descriptive characteristics and are fit for the purposes intended.

5. A procuring entity shall not prescribe technical specifications that require or refer to a particular trademark or trade name, patent, copyright, design or type, specific origin, producer or supplier, unless there is no other sufficiently precise or intelligible way of describing the procurement requirements and provided that, in such cases, words such as “as equivalent” are included in the tender documentation.

Article 174

Qualification of suppliers

1. For procurement covered by this Chapter, procuring entities shall ensure that any conditions and criteria for participating in a public contract award procedure are made known in advance in the notice of intended procurement or the tender documents. Any such conditions and criteria shall be limited to those which are essential to ensure that the potential supplier has the ability to execute the contract in question.

2. The Signatory CARIFORUM States and the EC Party shall not impose the condition that, in order for a supplier to participate in a procurement, the supplier has previously been awarded one or more contracts by an entity of that Party or State or that the supplier has prior work experience in the relevant territory. This paragraph does not apply for procurements in respect of social impact surveys and studies.

3. The procuring entity shall base its assessment of the financial, commercial and technical abilities of a supplier on the conditions that it has specified in advance in notices or tender documentation.

4. Nothing in this Article shall preclude the exclusion of any supplier on grounds such as bankruptcy or false declarations or conviction for serious crime.

5. Procuring entities may maintain a multi-use list provided that a notice inviting interested suppliers to apply for inclusion on the list is:

(a) published annually; and

(b) where published by electronic means, made available continuously in one of the appropriate media listed in Annex VII.

6. Procuring entities shall ensure that suppliers may apply for qualification at any time through the publication of a notice inviting suppliers to apply for inclusion on the list containing the following information:

(a) a description of the goods and services, or categories thereof, for which the list may be used;

(b) the conditions for participation to be satisfied by suppliers and the methods that the procuring entity will use to verify a supplier's satisfaction of the conditions;

(c) the name and address of the procuring entity and other information necessary to contact the entity and obtain all relevant documents relating to the list; and

(d) the period of validity of the list and the means for its renewal or termination, or where the period of validity is not provided, an indication of the method by which notice will be given of the termination of use of the list. Procuring entities shall include in the list all qualified suppliers within a reasonably short time.

7. Where a non-qualified supplier submits a request for participation, and all required documents relating thereto, within the time-limit, a procuring entity, whether or not it uses a multi-use list, shall examine and accept the supplier's request for participation, unless, due to the complexity of the procurement, the entity is not able to complete the examination of the request. Procuring entities shall also ensure that a supplier having requested to be included in the list shall be informed of the decision in this regard in a timely fashion.

8. Procuring entities operating in the utilities may use a notice inviting suppliers to apply for inclusion on a multi-use list as a notice of intended procurement and may exclude requests for participation from suppliers not yet qualified in respect of the procurement on the grounds that the procuring entity has insufficient time to examine the application.

Article 175

Negotiations

1. The Signatory CARIFORUM States and the EC Party may provide for their procuring entities to conduct negotiations:

(a) in the context of procurements in which they have indicated such intent in the notice of intended procurement; or

(b) where it appears from the evaluation that no one tender is obviously the most advantageous in terms of the specific evaluation criteria set forth in the notice of intended procurement or tender documentation.

2. A procuring entity shall:

(a) ensure that any elimination of suppliers in negotiations is carried out in accordance with the evaluation criteria set out in the notice of intended procurement or tender documentation; and

(b) when negotiations are concluded, provide a common deadline for the remaining suppliers to submit any new or revised tenders.

Article 176

Opening of tenders and awarding of contracts

1. All tenders solicited under open or selective procedures by procuring entities shall be received and opened under procedures and conditions guaranteeing the fairness and transparency of the process.

2. Unless a procuring entity decides that it is not in the public interest to award the contract, it shall award the contract to the supplier who has been determined, on the basis of the information presented, to be fully capable of undertaking the contract and whose tender is either the lowest tender or the tender which in terms of the specific evaluation criteria set forth in the notice or tender documentation is determined to be the most advantageous. Awards shall be made in accordance with the criteria and essential requirements specified in the notice of intended procurement or in the tender documentation.

Article 177

Information on contract award

1. The Parties and the CARIFORUM Signatory States shall ensure that their procuring entities provide for effective dissemination of the results of government procurement processes.

2. Procuring entities shall promptly inform suppliers of decisions regarding the award of the contract and, on request, in writing. Upon request, procuring entities shall inform any eliminated supplier of the reasons for the rejection of its tender and of the relative advantages of the successful supplier's tender.

3. Procuring entities may decide to withhold certain information on the contract award where release of such information would interfere with law enforcement or be otherwise contrary to the public interest, would prejudice the legitimate commercial interests of suppliers, or might prejudice fair competition between them.

4. Subject to Article 180(4), no later than seventy two (72) days after the award of each contract covered by this Chapter, a procuring entity shall publish a notice in the appropriate paper or electronic media listed in Annex VII. Where only an electronic medium is used, the information shall remain readily accessible for a reasonable period of time. The notice shall include at least the following information:

(a) a description of the goods or services procured;

(b) the name and address of the procuring entity;

(c) the name and address of the successful supplier;

(d) the value of the successful tender or the highest and lowest offers taken into account in the award of the contract;

(e) the date of the award; and

(f) the type of procurement method used, and in cases where a limited tendering procedure was used, a description of the circumstances justifying the use of such procedure.

Article 178
Time limits

1. In determining any time limits to be applied to procurement covered by this Chapter, procuring entities shall, consistent with their own reasonable needs, take into account such factors as the complexity of the intended procurement and the normal time for transmitting tenders.

2. The Parties and the Signatory CARIFORUM States shall ensure that their procuring entities shall take due account of publication delays when setting the final date for receipt of tenders or of request for participation or for qualifying for the supplier’s list. Such time limits, including any extension, shall be common for all interested or participating suppliers.

3. Procuring entities shall clearly set out the time limits applicable to any specific procurement in the notice of intended procurement and/or the tender documents.

Article 179

Bid challenges

1. The Parties and the Signatory CARIFORUM States shall provide transparent, timely, impartial and effective procedures enabling suppliers to challenge domestic measures implementing this Chapter in the context of procurements in which they have, or have had, a legitimate commercial interest. To this effect, each Party or Signatory CARIFORUM State shall establish, identify or designate at least one impartial administrative or judicial authority that is independent of its procuring entities to receive and review a challenge by a supplier arising in the context of covered procurement.

2. Each supplier shall be allowed a sufficient period of time to prepare and submit a challenge as from the time when the basis of the challenge become known or reasonably should have become known to the supplier. This paragraph does not preclude Parties or Signatory CARIFORUM States from requiring complainants to lodge their complaints within a reasonable period of time provided that duration of that period is made known in advance.

3. Procuring entities shall ensure their ability to respond to requests for a review by maintaining a reasonable record of each procurement covered under this Chapter.

4. Challenge procedures shall provide for effective rapid interim measures to correct breaches of the domestic measures implementing this Chapter.

Article 180

Implementation period

1. In order for the Signatory CARIFORUM States to bring their measures into conformity with any specific procedural obligation of this Chapter, they shall have an implementation period of two years from the entry into force of this Agreement.

2. Should a review by the CARIFORUM-EC Trade and Development Committee at the end of the implementation period reveal that one or several Signatory CARIFORUM States need one more year to bring their measures into conformity with the obligations of this Chapter, the CARIFORUM-EC Trade and Development Committee may extend the implementation period referred to in paragraph 1 by one more year for the individual Signatory CARIFORUM States concerned.

3. By way of derogation from paragraphs 1 and 2, Antigua and Barbuda, Belize, the Commonwealth of Dominica, Grenada, the Republic of Haiti, Saint Christopher and Nevis, Saint Lucia and Saint Vincent and the Grenadines shall benefit from an implementation period of five (5) years.

4. The requirements stipulated in paragraph 1 and the last sentence of paragraph 2 of Article 168, in Article 170(1)(a) and in Article 177(4) will only come into effect for the Signatory CARIFORUM States once the requisite capacity to implement them has been developed, but not later than 5 years after the entry into force of this Agreement.

Article 181
Review clause

The CARIFORUM-EC Trade and Development Committee will review the operation of this Chapter every three years, including with regard to any modifications of coverage, and may make appropriate recommendations to the Joint CARIFORUM-EC Council to that effect, as appropriate. In carrying out this task, the CARIFORUM-EC Trade and Development Committee may, without prejudice to Article 182, also make appropriate recommendations regarding the Parties' further cooperation in the procurement field and the implementation of this Chapter.

Article 182
Cooperation

1. The Parties recognize the importance of cooperating in order to facilitate implementation of commitments and to achieve the objectives of this Chapter.

2. Subject to the provisions of Article 7, the Parties agree to cooperate, including by facilitating support and establishing appropriate contact points, in the following areas:

(a) Exchange of experience and information about best practices and regulatory frameworks;

(b) Establishment and maintenance of appropriate systems and mechanisms to facilitate compliance with the obligations of this Chapter; and

(c) Creation of an on-line facility at the regional level for the effective dissemination of information on tendering opportunities, so as to facilitate the awareness of all companies about procurement processes.

ANNEX 2

Part IV Integrity in Public Life Act No. 83 of 2000

Trinidad and Tobago

PART IV

CODE OF CONDUCT

23. This Part applies to a person in public life and to all persons exercising public functions.

24. (1) A person to whom this Part applies shall ensure that he performs his functions and administers the public resources for which he is responsible in an effective and efficient manner and shall—

(a) be fair and impartial in exercising his public duty;

(b) afford no undue preferential treatment to any group or individual;

(c) arrange his private interests whether pecuniary or otherwise in such a manner as to maintain public confidence and trust in his integrity.

(2) A person to whom this Part applies shall not—

(a) use his office for the improper advancement of his own or his family's personal or financial interests or the interest of any person;

(b) engage in any transaction, acquire any position or have any commercial or other interest that is incompatible with his office, function and duty or the discharge thereof;

(c) use public property or services for activities not related to his official work;

(d) directly or indirectly use his office for private gain.

(3) No person to whom this Part applies shall be a party to or shall undertake any project or activity involving the use of public funds in disregard of the Financial Orders or other Regulations applicable to such funds.

25. A person to whom this Part applies shall not use information that is gained in the execution of his office and which is not available to the general public to further or seek to further his private interests.

26. A person to whom this Part applies shall not use his office to seek to influence a decision made by another person or public body to further his own private interests.

27. (1) A person to whom this Part applies shall not accept a fee, gift or personal benefit, except compensation authorised by law, that is connected directly or indirectly with the performance of his or her duties of office.

(2) Subsection (1) does not apply to a gift or personal benefit that is received as an incident of the protocol or social obligations that normally accompany the responsibilities of office.

(3) Where however a gift or personal benefit referred to in subsection (2) exceeds two thousand dollars in value or where the total value received directly or indirectly from one source in any twelvemonth period exceeds two thousand dollars, a person in public life shall file with his declaration, a statement indicating the nature of the fee, gift or benefit, its source and the circumstances under which it was given or accepted.

28. Matters of a confidential nature in the possession of persons to whom this Part applies, shall be kept confidential unless the performance of duty or the needs of justice strictly require otherwise, and shall remain confidential even after separation from service.

29. (1) For the purposes of this Act, a conflict of interest is deemed to arise if a person in public life or any person exercising a public function were to make or participate in the making of a decision in the execution of his office and at the same time knows or ought reasonably to have known, that in the making of the decision, there is an opportunity either directly or indirectly to further his private interests or that of a member of his family or of any other person.

(2) Where there is a possible or perceived conflict of interest, a person to whom this Part applies, shall disclose his interest in accordance with prescribed procedures and disqualify himself from any decision-making process.