

SUBMISSION

to

**The Commission of Enquiry into the
Construction Sector**

on

**RECOMMENDATIONS ON THE
REFORM OF THE PUBLIC SECTOR
PROCUREMENT REGIME**

**Written Statement
of
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1. My name is *Victor Archibald Hart* of La Riviera Apartment 1C, Columbus Circle, Westmoorings, Trinidad and Tobago.
2. I am serving my third term as Chairman of the Trinidad and Tobago Transparency Institute (TTTI) and make this submission on its behalf having been duly authorised by its Board of Directors to do so.

TTTI is the National Chapter of *Transparency International (TI)*, the leader of a coalition of anti-corruption movements that was formed in 1993 and headquartered in Berlin, Germany.

TTTI was formed in 1998 and is one of nearly 100 National Chapters worldwide.
3. I hold a professional qualification as a Chartered Quantity Surveyor (1965) and a Master of Science Degree in Project Management (1979 - University of Reading, UK).
4. I served as one of five Commissioners who were appointed in 2002 by then President of the Republic of Trinidad and Tobago Arthur N. R. Robinson to investigate the Piarco Airport Development Project.

OBJECTIVE AND SCOPE

5. This submission is made in fulfilment of my undertaking given at the hearing of the 24th of March, 2009 to prepare a short paper for the Commission that would address the Chairman's interest in those elements of the White Paper on the Reform of the Public Sector Procurement Regime (hereinafter referred to as 'the White Paper') that TTTI thought should "survive a review" being undertaken by Government.¹

ESSENTIAL ELEMENTS OF REFORM

6. The reforms proposed the White Paper can be grouped under the following main headings:
 - a) a *framework approach* to legislation;
 - b) the prescription and implementation of the *operating principles* of Value for

¹ Cf. *Transcript of Day 19 (Second Session)*, pages 61 & 62

- Money, Transparency and Accountability supported by *sanctions*;
- c) application of the legislation to *all agencies spending public money*; and
 - d) the establishment of an *independent regulatory body* with the mandate to ensure that Government's broad policy objectives are operational.
7. We consider that the essential elements under these all these headings should be retained in any review of the White Paper. However, we see as particularly important the retention of c) and d).

*We therefore urge the Commission to recommend strongly to Government that integrity of process in the Construction Sector requires above all **effective legislation covering all agencies spending public money and the establishment of an appropriate regulatory system.***

Public Money

8. The White Paper states that

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

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

The legal framework will embrace expenditure by –

- a) a public organisation for a public or private purpose; or
- b) a private organisation for a public purpose regardless of the source or type of funding where it can be reasonably inferred that the State is ultimately liable.²

This is a fundamental element of the policy enunciated by the White Paper. It is essential for ensuring value for money and the integrity of the public procurement process.

9. Given that Government is not the only actor in public procurement but acts along with *State-owned enterprises, statutory authorities* and even *non-governmental organisations*, the thrust of the White Paper is to eschew regulating institutions and to

² Cf. Chapter 6, Section 6.1

govern the transaction, once it involves public money. This must be retained in any genuine reform.

An important implication of this is that when a State Enterprise exercises its capacity to contract, its decisions are amenable to *judicial review*.

Recommendation

10. *Any revised legislative model adopted by Government should apply to the procurement transactions undertaken by all agencies using public money, including statutory authorities and State-owned enterprises.*

A Regulatory Regime

11. The new legislation, according to the White Paper, will establish the office of *Independent Regulator* mandated to ensure a relevant, efficient and compliant system.

“The Regulator will be mandated to, inter alia:

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

The Regulator is to be appointed by the President in the exercise of his own discretion after consultation with both the Prime Minister and the Leader of the Opposition. He or she will have investigatory powers equivalent to that of a Commission of Enquiry.”³

The legislation will also

- establish a National Procurement Advisory Council, drawn from civil society and the private sector, to support the operations of the Regulator;
- provide a complaints mechanism; and
- provide for the allocation of adequate human and material resources to the regulatory agency.⁴

12. An important lesson drawn from recent experience in the *financial sector*, both

³ Cf. Executive Summary: Section F, pg xii; see also Chapter 6, Section 6.10

⁴ Ibid; see also Chapter 6, Sections 6.7, 6.11)

international and local, has been the grave danger for the sector and for society that can result from the lack of adequate regulation and control.

It is TTTI's view that a similar lesson for the local construction sector and society is to be learned from the evidence tendered before the Enquiry and, indeed, from the history of public construction in Trinidad and Tobago. In our opinion, if an appropriate regulatory regime had been in place in recent years, the Enquiry might not have been necessary.

It is important to note that the White Paper does not envisage a Regulator that would in any way manage the procurement activities of the various agencies. The office is seen rather as one of a systems auditor of public procurement with the mandate to ensure that Government's broad policy objectives are operational.

Independence

13. Although the elements of the recommended regulatory regime listed above are, in TTTI's view, essential to adequate reform, some are particularly important and deserve special mention.
14. For regulation to be effective, the Office of Regulator, like the office of Auditor General, must be *independent of the executive*. Hence the requirement that the Regulator be *appointed by the President* in the exercise of his own discretion and that he or she *reports to Parliament*. Such an arrangement is clearly not contrary to the Constitution and is very much in the public interest.

Stakeholder involvement

15. According to the White Paper, the *National Advisory Council* will be required to:
 - advise the Regulator in the development of procurement guidelines, procedures and handbooks;
 - oversee and monitor the entire Public Sector Procurement Regime.⁵

It is important to note that its role is purely advisory. It is the Regulator who will have authority to oversee and monitor. He will have the benefit of the Council's advice which he will in no way be obligated to follow.

⁵ Section 6.11

In addition to the civil society and private sector representation required by the White Paper, there should be representation on the Council of the public sector, particularly of the Ministry of Finance.

Complaints

16. The establishment of *mechanisms for dealing with complaints* as envisaged by the White Paper, by giving complainants first recourse to the Regulator, permits matters to be resolved with greater expedition and at much less cost than in the present where the only practical recourse is to the courts. It will be necessary, however, for the details of the mechanisms to be designed carefully with inputs from all stakeholders so that they can operate with fairness and not be abused.

Government's current position

17. In his submission to the Enquiry dated 17 March, 2009⁶, Minister Colm Imbert stated that

... Having re-examined the White Paper the Government does not support the appointment of a independent Regulator with the wide ranging powers recommended in the paper, and is particularly concerned that the establishment of such an office will divest the Government of control of its development programme, especially since the proposed Regulator will not be accountable to the Executive and will have the power to suspend public procurement processes, award damages, void contracts, and act as an arbitrator on public sector contracts for good and services, inter alia. With these proposed powers and the recommended constitutional autonomy, the proposed Regulator, a non-elected official appointed by the President, could easily frustrate the work of the Government and the national development programme without having to account to the electorate. (Para. 5)

18. In TTTI's view, frustration of the work of the Government is more likely to occur when the only way of resolving disputes is through recourse to courts that are not specialised in procurement matters. The proper use of the proposed complaints mechanisms will facilitate more expeditious resolution of disputes at much lower cost to citizens and State.

Nonetheless, there is certainly place for a re-examination by the Government, in consultation with stakeholders, of the rules that should govern the Regulator's

⁶ Cf. <http://www.constructionenquiry.gov.tt/getattachment/99563c32-6edf-441d-82fd-b1a3ee71ceca/Colm-Imbert-statement-03-23.aspx>

exercise of his powers. It might be useful here to look at the *Jamaican experience* of regulation in the implementing of that country's Contractor General Act⁷.

Appropriate regulation, far from being the enemy of national development, is one of its more important safeguards.

19. Minister Imbert sees the establishment of a National Procurement Advisory Council as "... the imposition of non-elected officials and private sector interests ... in [sic] the decision-making process ... (and in Government's view) "... a recipe for confusion." He adds, "Serious conflicts of interest could arise from the involvement of beneficiaries of public sector contracts in the procurement process." (Para. 6)

It is important to note that the White Paper does not envisage any participation by the Regulator or by any purely advisory body of his in the making of procurement decisions. His role is to ensure that the process is carried out in accordance with the policies and guidelines approved by Parliament.

The serious conflicts of interest anticipated by the Mr. Imbert would appear not to be as likely to arise as he seems to assume. However, the review of the White Paper should certainly look into this possibility and provide accordingly, if necessary spelling out even more clearly the role of the Regulator and the Advisory Council.

Whatever changes result from the review there should be effective mechanisms for regulation with appropriate stakeholder participation that can ensure the integrity and efficiency of the procurement process.

20. In his submission Mr. Imbert states that

... the Government proposes to strengthen the public sector procurement regime by standardizing the tender rules, tender criteria and tender evaluation procedures of State Enterprises and Government departments and agencies and making such rules and procedures mandatory, including, if necessary, by way of appropriate legislation. (Para. 25)

In TTTI's view, it would be better to retain the White Paper's more flexible and decentralised approach of establishing mandatory guidelines and empowering the agencies to develop their own rules, criteria and evaluation procedures in accordance with the guidelines.

⁷ Cf. <http://www.ocg.gov.jm/ocg/index.php>

And whether or not this approach is taken, *there must be a body independent of the Executive and answerable to Parliament to ensure that the agencies operate in accordance with the rules.* Lack of such oversight, we believe, allows too many opportunities for corruption.

Recommendation

21. *The establishment of an independent regulatory body along the lines proposed in the White Paper is a key element that must be included in any genuine reform.*