

**COMMENTS OF THE LAW ASSOCIATION OF TRINIDAD AND TOBAGO ON THE
PUBLIC PROCUREMENT AND DISPOSAL OF PUBLIC PROPERTY (AMENDMENT)
BILL, 2020.**

INTRODUCTION

1. The Bill contains ten (10) clauses. Those clauses seek to amend sections 4, 7, 13, 29, 50, 59 and 66 of the Public Procurement and Disposal of Public Property Act, No. 1 of 2015 ("the Parent Act"). The Parent Act was passed by with a special majority in accordance with section 13 of the Constitution of the Republic of Trinidad and Tobago ("the Constitution").
2. The Parent Act was later amended by Act No. 5 of 2016 which provided for *inter alia* the establishment of a Public Procurement Review Board and appeal from the said Review Board; inserted a new Part VIa on the disposal of state land, which may be subject to regulations made by the Minister, the State Lands Act notwithstanding. That amendment Act was passed by a simple majority.
3. The Parent Act was then amended to by Act. No. 3 of 2017 that reduced the term of office of the Regulator and the Board of the Office of Procurement Regulation. Similarly, that amendment Act was passed by a simple majority.
4. The Bill at present is fashioned to be pass with a simple majority.

CLAUSES 1, 2 and 3

5. Clauses 1, 2 and 3 are merely formal clauses that provides for the short title, commencement and the definition of "Act" respectively. There are no objectionable parts to those clauses.

CLAUSE 4

6. Clause 4 seeks to delete and substitute the definition of "bid rigging" in **section 4** of the Parent Act. Under the Parent Act, the definition of "bid rigging" was:

"... the collusion between persons for the purpose of manipulating the proceedings"

7. The proposed definition for "bid rigging" is as follows:

"... collusive price-fixing and anti-competitive behaviour designed to unfairly influence the outcome of a competitive tender process in favour of one or more bidders."

There is no definition as to "anti-competitive behaviour" in the proposed Bill. For certainty, especially since conduct resulting in anti-competitive behaviour is criminalised, persons ought to know what amounts to "anti-competitive behaviour".

8. It is therefore proposed that a clause be inserted to define "anti-competitive behaviour" and any guidelines for such behaviour.

CLAUSES 5 and 6

9. Clause 5 seeks to amend **section 7(2)** of the Parent Act. **Section 7(2)** of the Parent Act currently reads:

"(2) To the extent that this Act conflicts with an obligation of the State under or arising out of the following:

- (a) a treaty or other form of agreement to which Trinidad and Tobago is a party with one or more States or entity within a State;*
- (b) an agreement entered into by the Government of Trinidad and Tobago with an international financing institution; or*
- (c) an agreement for technical or other cooperation between the Government of Trinidad and Tobago and the Government of a foreign State,*

the requirements of the treaty or agreement shall prevail except that the procurement of goods, works or services shall be governed by this Act and shall promote the socio-economic policies of Trinidad and Tobago and shall adhere to the objects of this Act."

10. The proposed **section 7(2)** is as follows:

"(2) To the extent that this Act conflicts with an obligation of the State under or arising out of the following:

- (a) a treaty or other form of agreement to which Trinidad and Tobago is a party with one or more States or entity within a State;*
- (b) an agreement entered into by the Government of Trinidad and Tobago with an international financing institution; or*
- (c) an agreement for technical or other cooperation between the Government of Trinidad and Tobago and the Government of a foreign State,*

the requirements of the treaty or agreement shall prevail. ~~except that the procurement of goods, works or services shall be governed by this Act and shall~~

promote the socio-economic policies of Trinidad and Tobago and shall adhere to the objects of this Act."

11. It also seeks to create an exemption of legal services, financial services, accounting and auditing services, medical services or other such services as the Minister may by Order determine and such Order by virtue of the proposed amendment will be subject to negative resolution of Parliament.
12. Further Clause 6 seeks to delete paragraph (o) of **section 13(1)(o)**. **Section 13(1)(o)** provides:

"13.(1) The functions of the Office are to—

- (o) act for, in the name and on behalf of the State to dispose of real property owned by the Government in such manner as the Government may consider appropriate and desirable."*

13. The marginal note of **section 7** of the Parent Act reads; **"Application of the Act"**

THE EFFECT OF CLAUSES 5 AND 6

14. The proposed clause 5 seeks to allow a Government by arrangements made pursuant to treaties or agreements with foreign states or international financial institutions to procure goods, works or services outside of the confines of the Act and without the need to promote the socio-economic policies of the country or the objects of the Parent Act.
15. The objects of the Parent Act can be found at **section 5** thereof. **Section 5** provides as follows:

"5(1) The objects of this Act are to promote—

- (a) the principles of accountability, integrity, transparency and value for money;*
- (b) efficiency, fairness, equity and public confidence; and*
- (c) local industry development, sustainable procurement and sustainable development,*

in public procurement and the disposal of public property."

16. The removal of the words *"except that the procurement of goods, works or services shall be governed by this Act and shall promote the socio-economic policies of Trinidad and Tobago and shall adhere to the objects of this Act"* from **section 7(2)** means that the application of the objects of the Parent Act and the Act itself do not apply to treaties or agreements with foreign states or international financial institutions creating a parallel procurement machinery outside of the Parent Act.

17. **Section 7(2)(a)** of the Act also applies to agreements between Trinidad and Tobago and private entities within a foreign state. It is also possible to construe **section 7(1)(a)** as applying to public-private partnership arrangements between Trinidad and Tobago and private entities within Trinidad and Tobago since **section 7(1)(a)** applies to agreements between the State and an "entity within a State" without specifying whether the 'State' referred to is a foreign State. The upshot of the amendment therefore is also to create a parallel procurement mechanism outside of the Act in relation to agreements with foreign private entities as well as, arguably, agreements with private local entities, and all without promoting the objects of the Parent Act or in accordance with the socio-economic policies of the country.
18. Under the existing law, Non-Profit Organisations are under the scrutiny of the Financial Intelligence Unit and must disclose their international funding arrangements. Likewise, international funding arrangements whether it be by the State or the State-enterprises should also be subject to a similar level of scrutiny.
19. If not, it is open for abuse. For example, if an international financial institution agrees to lend money to Trinidad and Tobago under the proposed **section 7(2)(b)** for a large infrastructural project and there is a term in the agreement that in return the international financial institution's contractors must be utilised in the project (the cost of the contractors are far in excess of the market value for that service), then it would be unfair and unjust as the said loan would ultimately have to be repaid with tax-payers money.
20. It is therefore proposed that the amendment to **section 7(2)** be deleted from the Bill.
21. Further, the conjoint effect of the proposed **section 7(5)** and **section 7(6)** are quite troubling. While the exemptions created in **section 7(5)** as it relates to services provided to public or State-controlled enterprises are not objectionable, the fact that the Minister may by Order create exemptions subject to negative resolution of the Parliament is worrying.
22. What this means is that the Minister may by Order subject to negative resolution exempt:
 - (a) services provided to public or State-controlled enterprises that do not promote the socio-economic policies of the country or adhere to the objects of the Parent Act through treaties or other forms of agreements to which Trinidad and Tobago is a party;
 - (b) services provided to public or State-controlled enterprises that do not promote the socio-economic policies of the country or adhere to the objects of the Parent Act through agreements entered by the Government of Trinidad and Tobago and an international financing institution; and

- (c) services provided to public or State-controlled enterprises that do not promote the socio-economic policies of the country or adhere to the objects of the Parent Act through agreements for technical or other cooperation between the Government of Trinidad and Tobago and the Government of a foreign State.
23. What this in effect does is create a second gateway for public-private partnership arrangements with local entities involving services provided to public or State-controlled enterprises that do not promote the socio-economic policies of the country or adhere to the objects of the Parent Act thereby circumventing the Parent Act.
24. It is proposed therefore that the Order of the Minister be subject to affirmative resolution rather than negative resolution in order to provide sufficient oversight that may be akin to that which exists in the Parent Act.
25. Further, the proposed Clause 6 which amends **section 13** of the Parent Act prevents the Office of Procurement Regulation from acting on behalf of the Government vis-à-vis disposal of real property owned by the Government. What this means is that scrutiny for disposal of real property owned by the Government outlined in **section 14** of the Parent Act will not apply.
26. **Section 14** of the Parent Act provides:
- "14.(1) In the performance of its functions, the Office may –*
- (a) *monitor the procurement of goods, works and services, and the disposal of public property, by public bodies to ensure compliance with this Act;*
- (b) *conduct audits and periodic inspections of public bodies to ensure compliance with this Act;*
- (c) *issue directions to public bodies to ensure compliance with this Act;*
and
- (d) *carry out such other activities and do such other acts as it considers necessary or expedient for the carrying out its functions.*
- (2) *A public body or person who, without reasonable justification, fails to comply with a direction issued under this Act commits an offence and is liable on summary conviction to a fine of one hundred thousand dollars.*
- (3) *At all times the Office shall, in the performance of its functions and exercise of its power act in an objective and non-discriminatory manner."*
27. The question that therefore arises is who then would be acting for or in the name of the State to dispose of real property owned by the Government and what oversight and

scrutiny is there to preserve and maintain its objectivity and the non-discriminatory disposal. There is nothing in the Bill to provide of such.

28. It is therefore proposed that if the deletion of **section 13(1)(o)** is maintained, a clause be inserted to deal with the manner of disposal of the real property of the Government.

CLAUSES 7, 8 AND 9

29. Clause 7 seeks to expand the due diligence that a procuring entity must satisfy as it relates to its suppliers and contractors in **section 29(c)** of the Parent Act. This clause is not objectionable.
30. Clause 8 seeks to amend **section 50(12)** of the Parent Act to expand the time frame for giving reasons for a decision or action taken by the Office of the Procurement Regulator from 20 working days to 30. This clause is not objectionable.
31. Clause 9 seeks to amend **section 59** of the Parent Act to include "relative" and defines same in accordance with the Cohabitational Relationships Act. This clause is not objectionable.

CLAUSE 10

32. Clause 10 seeks to amend **section 66** of the Parent Act to amend the effective dates of operationalisation of Part VIII in relation to public officers exercising options under the Parent Act. This clause is not objectionable.

CLOSING REMARKS

33. Trinidad and Tobago by virtue of **section 1** of the Constitution has pronounced itself to be a sovereign democratic State. Certain basic underlying principles point to the existence of a basic 'deep' structure that "*underpins, informs and constitutes certain non-derogable features, principles, and values*" of Trinbagonian constitutionalism that "*the Constitution itself as text, and all executive, legislative and state administrative actions can be subject to it.*" (see Jamadar JCCJ in **Belize International Services Limited v Attorney General of Belize** [2020] CCJ 9, (AJ) (BZ) at paragraph 320.
34. Jamadar JCCJ continued:
- "... it is proper to assert that in Belize the rule of law, and in particular its requirements of fairness, good faith, accountability and good governance, are part of the basic 'deep' structure of Belizean constitutionalism that appropriately sets the standards for evaluating the State's actions in this matter. The rule of law is essential to the integrity of the legal system in Belize."*
35. At paragraph 340 of the Judgment he further stated that:

"Notice how accountability, equality, and respect for persons, contracts and property, as well as administrative fairness, feature as essential aspects of the rule of law. The rule of law, accountability, and transparency (open government) intersect to produce government that is legitimate. In a democracy, accountability and transparency are essential for public trust and confidence. In a democracy, based on the rule of law, it is now the expectation that all aspects of government ought to be appropriately accountable. This value and principle of accountability can broadly be said to refer to the idea that, generally, state decision makers are accountable for their actions. Thus, the constitutional value and principle of, even the right to, good democratic governance demand accountability of all public institutions and decision makers."

36. In our view, the removal of oversight, scrutiny, accountability and administrative fairness in the procurement process in relation to the treaties and agreements referred to in section 7(1) amounts to constitutional impropriety degrading public trust and confidence.

Dated 8th day of December 2020

Respectfully submitted
The Law Association of Trinidad and Tobago