# REPORT

RESEARCH

into

# PUBLIC PROCUREMENT IN GUYANA WITH SPECIAL REGARD TO OPENNESS AND FAIRNESS

Commissioned by:


Submitted by:

Donald Rodney

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REPORT ON RESEACH INTO PUBLIC PROCUREMENT IN GUYANA WITH SPECIAL REGARD TO OPENNESS AND FAIRNESS.

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## Executive Summary

### Research Context

1 Research was carried out into public procurement activity in Guyana over the period January to April 2007. The research was commissioned by the Ethnic Relations Commission.

2 The research was placed into context, globally, by reference to the World Trade Organisation (WTO) procurement rules introduced in 1995. These rules linked public procurement to international trade. Since the new rules, there has also been an increase in knowledge-based services offered world-wide, including services in procurement itself. Recognition is made in the introductory text to a school of thought that WTO rules facilitate continued domination of less developed countries by wealthy ones; this is cited as a major difficulty to less developed countries.

3 In the national context, procurement is identified in the National Development Plan of Guyana where it can be linked to transparency, enhanced efficiency and deployment of the private sector as important “prongs” of the Plan. The background and significance of the Guyana Constitutional Amendment of 2000 introducing the Public Procurement Commission is outlined. The consequence of this Amendment on the later Procurement Act 2003 is addressed, as far as time allowed, in the Findings and Analysis section.

4 Finally, the opening sections outline the relevant structure of the current Procurement Act 2003, then touch on recent legal developments, internationally, which could have a bearing on legal challenges made by bidders to contract award decisions.

Methodology

5 The assessment methodology used is adapted from one developed by a joint working party of the Organisation of Economic Development and the World Bank in 2006. The original methodology anticipates inclusion of civil society groups and bidders in the research and is amenable to a scored assessment of research results. For this shorter research however, restricted as it is to research amongst procurement entities only, assessments of findings are wholly descriptive.

6 Key personnel in selected Ministries and Regional Boards, (two each) as well as personnel from the National Board of Procurement and Tender Administration were interviewed. Responses were compiled and evaluated against the methodology guidelines, the selected research standard for transparency in public procurement (see page 7) and the stated objectives of the Procurement Act 2003 (see Appendix A).

Findings

7 The research found that openness, or transparency, in existing procurement practice in the public entities examined could be improved in the five prominent areas, namely:

(a) *Power to Award Contracts:* No express power to award contracts was found in the Procurement Act 2003 (the Act).

This clouds vision of who is responsible for awards and whether such decisions are being made with adequate statutory authority, or that there is guard against interference with the authorised decision-maker

(b) *Complaints* : The composition of the Bid Protest Committee results in overwhelming Government influence. This counteracts the effectiveness of the Committee when discharging its quasi-judicial function. *Contribution to compliance* : In addition, the rules for complaint and appeal are not consistent between the Act and the ensuing Regulations. These rules are unclear; they make it difficult for any complainant to expeditiously verify the procedures and criteria applied to a particular procurement and they do not facilitate timely self-corrective compliance by the entity concerned.

(c) *Documentation, technical specifications; Definition of processes :* To date no operational rules or mandatory guidelines have been published as provided for in the Regulations. Potential bidders have no independent standard against which to assess the particular bid documents they receive and procurement managers have wide discretion at the technical level of documentation.

(d) *Coverage of legislative framework* : Certain functions to be carried out by the Public Procurement Commission have been assigned under the Act to the National Board of Procurement and Tender Administration (NBP&TA). Yet the mode of creation and manner of oversight of the NBP&TA is

qualitatively different from those constitutionally provided for the Public Procurement Commission. It is recommended that the ERC consider seeking legal opinion on how well the activities of the NBP&TA conform to the Constitution.

(e) *Anti-corruption measures : S*ection 60 of the Act, regarding a declaration of interest to be made by procurement officials, appear to omit a requirement of a written statement to be signed by the official. It is hard to see how a prosecution of an allegation of a violation could be sustained where the declaration is not required to be written and signed.

8 A full list of findings and corresponding proposals for action follow in a Summary of Findings.

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Summary of Findings

(a) Scope of coverage of legislative framework.

*The ERC should consider obtaining legal opinion of how well the functions exercised by the National Procurement and Tender Administration conform to the Constitution.*

(b) Procurement methods

*Prescription of open tender and control of departure there from seem adequate.*

(c) Advertising rules and limits.

*No time limits are prescribed under the Act or the Regulations, nor are mandatory guidelines laid down in practice.*

(d) Tender documentation and technical specifications.

*The National Procurement and Tender Administration should be urged to expedite the issue of standard documents referred to under section 8 of the Regulations.*

(e) Tender evaluation and award criteria.

*(i) Disclosure of score sheets after a tender is accepted seem not to recognise that any later successful complaint would have little chance of allowing remedial action on the particular procurement. It is proposed that the ERC consider recommending that this aspect of the law should*

*be reviewed with a view of meeting fully the objective (e) of the Act.*

*(ii) Correction of arithmetic errors in tenders after close of bids could easily be misconstrued. This rule should be reviewed or amended with a view of meeting fully the objective (d) of the Act.*

(iii) Proposed that the ERC consider making recommendations to the following effect:

*The objectives of transparency of, and integrity in, the public procurement system under the Procurement Act would be much enhanced by providing for authority for contract-award decisions to be conferred on identified functionaries or units within the Act.*

*Given that the Evaluation Committee is necessarily privy to public business and activity, the tenure and conditions of work of Committee members, and indeed the role of the Committee, should be clarified.*

(f) Complaints

*The composition of the Bid Protest Committee seems to result in an overwhelming Government influence. This could counteract the effectiveness of the National Procurement and Tender Administration when seeking to discharge its quasi-judicial function. Proposed that the ERC consider recommending that this aspect of the law be reviewed with a view to furthering objectives (e) and (f) of the Act.*

*Recommendation made under (a) above, also applies here.*

(g) Verifying the existence of Regulations and Manuals

*The comments made under (d ) above also apply here.*

(h) Procedures for pre-qualification.

*Statutory provisions for pre-qualification seem adequate, though these are not added to by the Regulations.*

*It could not be validated whether pre-qualification is generally applied according to the laid down procedures. This would require a sampling of relevant procurement cases.*

(i) Provision for technical capacity as a criterion.

*Statutory provisions laid down for evaluation of consultant services seem adequate.*

*However the range of responses provided by interviewees suggests that there are no consistent guidelines for use of appropriate methods for different circumstances.*

(j) Guides for use by both procurement and bidding parties.

*This issue may be addressed through the use of standard bidding documents which are mandatory and made public. [Also see comment at (d) above.]*

(k) Legal requirement to audit procurement.

*No "non-financial" audit report has been carried out by the Auditor General on the National Procurement and Tender Administration to date. However a quality audit section on the Administration is scheduled to be included in the next Report of the Auditor General (for 2005).*

(l) Follow up on recommendations.

*The response given (that recommendations are carried out) could not be validated. Such validation would normally be carried out starting with relevant records of the National Procurement and Tender Administration and procurement entities. Records were not available in the time allotted for this study.*

*[The methodology for assessing procurement systems, as promoted by the OECD and World Bank, suggests recommendations are implemented within six months, as a reasonable time].*

(m) Functioning of the internal control system.

*Proposed that ERC consider recommending that systems be put in place for monitoring of the performance of procurement bodies with respect to adherence to regulations and efficiency (as, in fact, is provided for in the Constitution, at Art. 212AA).*

(n) Contribution of (appeal mechanisms to) compliance.

*It seems difficult for any bidder to make an effective protest against a bid outcome, if the rules appear to be violated. This falls below the comparative standard of transparency.*

*The present complaint system seems not to be consonant with objective (d) and (f) of the Procurement Act. In particular, the procedural rules and time frames in the Act and the Regulations are not co-ordinated. These should all be rationalised.*

(o) Publication of review decisions.

*The National Procurement and Tender Administration should be urged to expedite the reported plans to publish such information and to provide target dates for implementation.*

(p) Independence of review body

*The state of information presents little opportunity for reporting on the organic system in place for the management of administrative reviews. Further, see comments at (f) above.*

(q) Publication of general information.

*The National Board of Procurement and Tender Administration should be urged to expedite establishment of the website in accordance with its mandate and to provide target dates for implementation.*

(r) Anti-corruption programmes.

*The provisions in the Procurement Act regarding a declaration of interest appear to omit requirement of a written statement signed by the declarant. Proposed that the ERC consider recommending that this omission be addressed with a view to enhancing the objective (e) of the Act.*

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# REPORT ON RESEACH INTO PUBLIC PROCUREMENT IN GUYANA WITH SPECIAL REGARD TO OPENNESS AND FAIRNESS.

by: Donald Rodney[1]

## 1. INTRODUCTION

### Background

This report is furnished under a commission from the Ethnic Relations Commission [ERC] of Guyana to provide a "comparative assessment" of whether, or not, there is "an equitable approach by public entities towards all stakeholders" in the following two areas :

- Tendering and procurement of goods and services; and
- Award of contracts.

The Report examines the existing procurement practice in selected public entities in Guyana at a national, regional and Ministerial level with focus on the openness and fairness of their practice. Research for the Report was conducted over the period January to April 2007.

The objective of the Report is to provide an empirical basis for the ERC to identify matters in its mandate within the subject area and to possibly make recommendations to the National Assembly, or other relevant body. The mandate of the ERC, under the constitution of Guyana, is to promote ethnic harmony and security in the country.

[1] Chartered quantity surveyor; Diploma holder in Development Studies (University of Guyana) and in Arbitration (College of Estate Management); holder of LLb (Hon) and of Diploma in Legal Practice (School of Law, University of Central England). Assisted by Norman Dalrymple, BSc (Sociology), Diploma in Development Studies (University of Guyana).

Any view expressed in the Report does not necessarily reflect the views of the ERC and the Report recommendations are open for endorsement, acceptance or rejection by the ERC.

"Tendering and procurement of goods and services" and "Award of contracts" are two activities on a single continuum. The first activity being a process in which public entities invite and examine bids from interested service providers, suppliers and contractors; the latter activity being the conclusion of deciding "which bidder ?" would be formally notified of success. Hence this study does not attempt to separate the two activities and the report is the result of a single approach to data collection and methodology.

Limitations

Two limitations to the research and report need to be declared. Firstly, research into public procurement may well seek to examine beyond the stage of award of contracts and go on instead to examine how such contracts are administered, after award. However, in the time allocated for the research the examination has been curtailed at the award stage.

Secondly, a research report such as this may, with great effect, include survey results on the satisfaction of participating bidders in the public procurement system and survey results of the confidence of civil society. The results of these surveys would provide assessment of public confidence in the procurement system. However, such surveys not been attempted for this research. The first reason for this is again time allocated for the research and report. The other reasons, though impacted on by time, are the separate issues of adequate planning for such a survey and adequate methods of identifying bidders to be interviewed in a genuinely random manner. In addition it would have been desirable that procurement officials of the various entities be

allowed enough time to comment on statements of the interviewees. It was considered that there was not enough time and resources available to undertake such a survey.

Terminology

This Report focuses on the openness and fairness of existing tender practices in public procurement. By "openness" is meant simply transparency. Evenett and Hookman have defined transparency in public procurement as being manifested where: the procurement process is conducted and the criteria on which decisions will be based are properly documented and made widely available; the award decision is made publicly available and motivated; and it is possible to verify, expeditiously, that the documented procedures and criteria were applied.[2]

The essential elements of the approach of Evenett and Hookman may be summarised as :

- General operational rules are made publicly available and criteria for specific procurement are declared beforehand to bidders.
- Award decisions are publicised, with clear indication of what motivated the decision. The unit accountable for the award decision is clear.
- It is possible for the bidders and other interested parties to verify that those rules and criteria, were in fact applied.

To the above elements we have added another attributable to Hunja, namely, that bidders should have a legal basis and an

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2 Simon Evenett and Bernard Hoekman, *Transparency in government procurement: what can we expect from international trade agreements?* Article available at : http://www.evenett.com/chapters/evenetthoekman.pdf., see Chapter 1.

enforceable right to award decision review.[3] This arises out of the latter element of the Evenette definition itself, but Hunja finds that systems which provide for enforceable reviews are the more successful systems and he holds this as important.

Here we add, and hereby submit, that where remedial action is taken following a review, as appropriate, then the system may be self-correcting and so develop it own "best practice" in relation to its peculiar current contentious issues.

By "fairness" in relation to procurement we mean that: award decisions are made impartially, as between bidders; and all bidders are given adequate notice of the operational rules and adequate hearing in the event of complaints.

## 2. GLOBAL ASPECTS OF PROCUREMENT

### International Marketplace

Prior to 1995 and the Uruguay Round of global trade agreements, public procurement was largely viewed as merely a buying function, carried out behind the scenes and often implemented by non-specialist government staff. Since the Uruguay Round trade, and the

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3 Robert Hunja, *Obstacles to Public Procurement Reform in Developing Countries,* at p2, available at: http://www.wto.org/English/tratop_e/gproc_e/wkshop_tanz_jan03/hunja2a2_e.doc

World Trade Organisation [WTO] new trade rules, there has been a series of binding commitments undertaken by developing countries.[4] Though procurement was not included in the binding commitments, member countries were required to either incorporate into their national legislation the WTO Agreement on Government Procurement, or embark on a reform programme to achieve such incorporation.

In wealthy industrialised countries procurement reform is pushed in the main by changing concepts of what governments can buy from the private sector, particularly in the areas of financing and knowledge-based services. Less developed countries, (LDCs) with less buying power, have been differently motivated to reform. Their incentive has been the offer of increased export opportunities under the WTO arrangements, in return for increased access into their own markets by bidders from off-shore. LDCs aspiring to WTO membership seek to reform their procurement systems to meet the threshold acceptable to the WTO; thereafter reforms proceed under the surveillance of the WTO. Guyana attained WTO membership in 1995.[5]

There has also been the general desire of LDCs to reform and harmonise their systems following entry into other trading blocs, like NAFTA and Caricom, if only as part of fostering intra-community trade between the public and private sectors within the bloc. [6]

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[4] This is achieved in two parts. Governments have to inform WTO and fellow members of specific measures taken, or laws enacted, through regular "notifications"; and WTO conducts regular reviews of individual country's trade policies and laws to monitor and pronounce on their attainment of their trade commitments.

[5] The relevant issues covered by WTO in 1995 are : partial removal of European farm subsidies and increase in textile imports from developing countries; agreement to promote financial services internationally; and, protection of trade-related intellectual property rights.

[6] See Press Release of October 21, 2004 by Caribbean Regional Negotiating Machinery, titled *Government Procurement Takes Centre Stage,* which reported on a workshop. Therein, Caricom Secretariat reported on government procurement regime in the context of the then proposed CSME.

Governance, transparency and efficiency.

Reform in procurement led many LDCs to increasingly consider and improve their position in transparency in this area. At the same time development agencies are paying increased attention to the reform development. Possibly as an off-spring from this, the International Trade Centre and other development agencies have developed performance measurement methodologies for national procurement systems to be used for various applications : from risk assessment of borrower countries, to self-assessment by government departments, to facilitation of capacity development in a measurable manner. One of these methodologies has been selected for use in carrying out this research and is elaborated on below.

The increased attention to public procurement has also promoted an increased international consulting and training industry, no doubt as a result of opportunities to sell services in connection with public procurement. For example, the International Law Institute have developed specialties in procurement. [7] These private services in turn need to be regulated for transparency when being adjudicated upon. Often loan-funding is available from bilateral or multi-lateral international sources and a developing country is the ultimate customer.

Difficulties of Less Developed Countries

Yet public procurement still retains an aspect as a commercial buying function of goods and services. Under normal operation, it initiates a contract, which in turn authorises the expenditure of vast amounts of public funds, disbursed under specified conditions, to

[7] The Centre for Public Procurement Law and Policy of the Institute lists the subject areas in which if can provide services at : www.ili.org/pplp.htm ; as at January 2007, seven major subjects were listed.

private entities. All of this occurs legitimately within a system of overall political control. Well-organised balance of political and private elements can show savings and benefits. Failure to organise well can lead at best to wasted effort and poor development results, possibly within the most important single market in a particular LDC.[8]

Poorly organised, the balance of political and private elements can allow abuse of the procurement process through patronage by some in control in collaboration with some in the private sector. Hunja records that in some developing countries procurement is manipulated to facilitate access to public funds as rewards to political supporters and to effectively finance political parties.[9] He posits that the most stubborn obstacle to development in this regard is lack of political will.

However not everyone believes that internal politics is the main obstacles in meeting WTO rules. Joy and Hardstaff believe that WTO rules themselves are an incursion into internal policy-making, pushing developing countries into domestic regulation when the WTO mandate is to oversee international fair treatment.[10] The rules "doubled" their reach from goods into knowledge-based services; at the same time the rules facilitate the penetration of corporations into the markets of developing countries. They believe the trade rules should be reformed radically to benefit poor countries.

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8 Wayne Wittig, *Public Procurement and the Development Agenda,* at p2, available at : www.wto.org/english/tratop_e/gproc_e/wkshop_tanz_jan03/itcdemo1_e.pdf

9 Robert Hunja, *Obstacles to Public Procurement Reform in Developing Countries,* above (p4).

10 C. Joy and P Hardstaff, *Whose Development Agenda?* Available online at: http://www.wdm.org.uk/resources/reports/trade/whosedevelopmentagenda01042003.pdf at p5.

Chrispin and Jegede believe that the scheme of world trade originates from the period of colonialism and dependency and that the WTO has failed to address this disadvantage. They believe that the development of poor countries would likely be linked to new information technologies.[11]

## 3. CONTEXT OF PROCUREMENT IN GUYANA

### Development Extract

In the UN Human Development Report 2006 Guyana is grouped in the band of medium income countries and ranked at 103 (amongst 177 countries, in year 2004). Also in 2006, the country's Corruption Perception Index, or CPI, was rated at 2.5 by Transparency International (on a scale of 1 to10, 10 being the least corrupt), the same index rating as the previous year. [Comparative figures with adjacent Caricom countries are shown in box below].

| ***Human Development and Perception of Corruption -- at a Glance*** | | |
|---|---|---|
| | HD Ranking<br>Out of 177 Countries | CPI Ranking<br>On scale of 1 to 10.<br>10 being least corrupt |

[11] Jane Chrispin and Francis Jegede, *Population, Resources and Development. Harper* Collins Publishers Ltd, London (2002), p 142.

| | [*Lower the ranking, the better]* | [*Higher the ranking, the better]* |
|---|---|---|
| ***Guyana*** | 103 | 2.5 |
| ***Suriname*** | 89 | 3.0 |
| ***Trinidad & Tobago*** | 51 | 3.2 |

Guyana is classed as a highly indebted poor country and currently pursues a poverty reduction and external debt reduction programme with the International Monetary Fund. The country is a sovereign republic within the Commonwealth. Politically it has a strong Presidency; rather than being elected separately, the Prime Minister is appointed by the President, as is the Cabinet. Though the Cabinet is answerable to the National Assembly, not all Cabinet members need to be elected.[12]

The Government pursues public sector investment with significant support from development agencies, mainly the World Bank and Inter-American Development Bank (support broadly for a range of poverty reduction reform commitments, which consists of a number of priority areas - including economic growth, infrastructure development and strengthening of governance). In return Government is required to

[12] Information in the sub-section and the one following from The Economist, Economist Intelligence Unit: Country Report on Guyana, July 2006.

enhance the regulatory framework and oversight, amongst other things. For example, the Government is committed to strengthening procurement procedures, though implementation may be uneven. This uneven progress is manifested, in part at least, by the fact that the Procurement Act 2002 was repealed just one year later and superseded by the Procurement Act 2003.

Race, Ethnicity and Political Consensus

Legitimate differences between African and East Indians, the two largest ethnic groups in Guyana, have been marred by open antagonism at times, to a degree that gave Regional bodies cause for concern. In 1998 after ethnically related political antagonism reached the street in connection with national elections, the Regional body, Caricom, invited the party political forces, which reflected the two major races, to talks. These talks were aimed at ameliorating the situation and culminated in the Herdmanston Accord and the St Lucia Statement.

Antagonism between Africans and East Indians has its beginning in the historical era when the colonial authorities developed official programmes which engendered divisions between the two races. In the St Lucia Statement the political parties and Caricom gave a number of undertakings to effect changes in the then prevailing Constitution of Guyana including, amongst other things, changes to effect the following:

> "*Measures and arrangements for the improvement of race relations in Guyana, including the contribution which equal opportunities legislation and concepts drawn from the*

*CARICOM Charter of Civil Society can contribute to the cause of justice, equity and progress in Guyana*[13]*"*

Following recommendations of the Constitutional Reform Committee, a Committee formed as part of the change implementation process, Guyana Constitution was amended in 2000 to provide for a procurement regime at this level for the first time and to provide for the creation of a Public Procurement Commission as an oversight body. However this latter Commission is yet to be established. This constitutional step in relation to procurement is significant for a number of reasons:

- The idea of addressing the activity of procurement at a Constitutional level is unprecedented in Guyana.

- Participants in the Herdmanston talks, as taken forward by the Constitutional Reform Committee, obviously believed that public procurement was an issue vital enough to be included in the scheme for the alleviation of ethnic political antagonism and the "improvement of race relations in Guyana".

- Public procurement in Guyana, like all Constitutional matters, should now demand special attention. It is reasonable to conclude that the political forces consider that public procurement should be managed by political consensus.

Procurement Reform – Links with Development

[13] Extracted from the St Lucia Statement as released by Caricom on July 3, 1998.

Public procurement is within the portfolio of the Ministry of Finance and hence institutionally is located in the area of budgets and budgetary control. In this mode the focus is on efficient acquisition of goods and services and achieving value for money. These are legitimate objectives in themselves since they remain core functions of a properly working public procurement system.

Nonetheless different groups inside and outside of Guyana may each have a different focus, some overlapping, when viewing the working of the public procurement system.

(i) The private sector suppliers, contractors and consultants may focus on the availability of business opportunities. However this may be tempered with other considerations, including a consideration of whether, or not, the government has their own favoured firms for contract award.[14] Also, entities in the sector would be interested in "how?" a particular tender was won and would want to know how to re-align their own bidding strategy, if unsuccessful in the first instance.

(ii) International financial institutions may be concerned about opportunities for businesses both local and international. These institutions may also have capacity building concerns: building public procurement capacity and helping businesses and/or their trade bodies. These elements are generally necessary for a third component, that of fostering public-private alliances. These institutions are also concerned about efficient expenditure of loans and grants.

[14] Witting outlines how some local firms in developing countries do not participate in government bidding because the governments are seen as slow payers, difficult to work with or have their own favoured entities for contract award. Wayne Witting, above: p 2.

(iii) Political forces and sections of the media may be more concerned about the pace of constitutional reform; and about undue political control over the contract-award process.[15] Witness the propulsion of public procurement into the annals of the Guyana Constitution.

(iv) Apart for procurement as a buying function, the Government may be concerned about meeting their restructuring obligations, about meeting conditionalities for loan-funding and about the implications of procurement reform.[16]

Public procurement may also be linked more directly with the development efforts of the country in two broad areas. [17] Firstly, two of the prongs of the NDS (National Development Strategy) are transparency in Government (first prong) and enhancing efficiency of Government institutions (second prong). Procurement has strong links with these two prongs; it may be noted that the Procurement Act 2003 was enacted, as part of an institutional strengthening process, together with the Fiscal Management and Accountability Act 2003 and the Audit Act 2004. But further, given that a basic consideration of the NDS is "removing the scourge of racism", and given the recent history of procurement and its present nascent constitutional juncture, it may be held that development in public procurement in

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15 See Sunday Stabroek News October 2, 2006, p 3 and article entitled : '*Guyana plugging procurement openness but key local body still not in place'.* Article reminded readers that essential parts of the Constitutional amendment were not in place as at that date.

16 See Government Information New Agency release of May 10, 3003 (prior to Procurement Act 2003), titled *Constitutional Commissions have tremendous powers*. The President of Guyana gave a special briefing after the signing of agreement between himself and the Leader of the Opposition, which agreement made way for, amongst others, the Public Procurement Commission.

17 See Guyana National Development Strategy 2001-2010 : The Overview.

the near future could be a test for race relations, political consensus and, indeed, for the future development of the country.

Second, procurement is pivotal in its own right in the strategy of deploying private sector finances as a device for implementing the NDS (tenth prong). The activity is operated across the public-private interface and may be seen a "linch-pin" between an effective and efficient public sector and a vibrant private sector.

*The symbols of power, authority, unity and democracy at the National Assembly Buildings in Georgetown, Guyana. Public procurement administration has been addressed by the National Assembly at the Constitutional level.*

## 4. LEGAL ASPECTS OF PROCUREMENT

### The Guyana Constitution

By amendment in 2000 the Constitution of Guyana provides for a procurement regime under policy guidelines to be determined by the National Assembly.[18] Management of the procurement system is to come under a Public Procurement Commission whose members are appointed by consensus, to the extent that they are appointed by the President following nomination by special majority of the National Assembly.

The Commission members are independent to the extent that appointments run for fixed terms (though no grounds for early removal are expressed). The body reports to the National Assembly, whose Public Accounts Committee, in consultation with the Commission itself, determines emoluments payable to Commission members.

The Commission is tasked with a number of functions, including investigating complaints from both bidders and public entities, proposing remedial action in this connection and enforcing remedies using powers to be invested by Parliament. The regime includes a Public Procurement Commission Tribunal which may be created to hear appeals against decisions of the Commission. When the Tribunal is in place, further appeals lie to the Court of Appeal. When the Commission is in place it can create a secretariat to help carry out its functions.

### The Statutory Basis

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[18] See the Constitution of Guyana : Article 212W

The Procurement Act 2003 (the Act) helps to flesh out the concept of public procurement. The Act is made subject to applicable provisions of any international treaty and the objectives of the Act gave recognition to the encouragement of participation by international bidders. See objective (b) of the objectives, which are reproduced at Appendix A.

(Public) procurement is defined as :

> "*the acquisition of goods by any means including purchase, rental, lease or hire-purchase, and the acquisition of construction, consulting, and other services*"[19]

*In scope the Act applies to all procurement where the invitation to bid declares it to apply, but the Act does not apply to procurement involving national security.*

To provide implementing capacity, the Act creates a National Procurement and Tender Administration as an agency of the Ministry of Finance, to be managed by a National Board. Board members are appointed by the Minister. Many of the functions of the Board are functions anticipated to be carried out by the Public Procurement Commission, but assigned to the National Board, pending establishment of the Commission. These functions include reviewing decisions of the procurement entities following protests against such decisions and "adjudicating debarment proceedings"[20]

The National Board carries out reviews via a Bid Protest Committee comprising members appointed by the Minister of Finance and Attorney General. The Board also appoints a pool of Evaluators and is tasked with maintaining records and quality assurance systems. Though the Board is expressly assigned certain functions pending

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[19] Procurement Act 2003 s2(j). It would be noticed from the definition that acquisition of land is excluded from the Act, as is disposal of Government assets.

[20] See Procurement Act 2003 s17(1) for listing of functions.

establishment of the Public Procurement Commission, the mode of creation of, and the forms of control exercised over the Board, make it qualitatively different to the Public Procurement Commission. See Appendix B for a comparative summary of these differences.

Public Law and Other Legal Principles.

Both the Public Procurement Commission and the National Procurement and Tender Administration are agencies created by Parliament. As such, the general administrative law governing relations between individuals and the state come into operation where a bidder may challenge a decision of either of these agencies, or may otherwise be adversely affected by their action, as public bodies. A remedy may be available from the Courts, apart from the respective Acts of Parliament, using the principal tool of judicial review. Professor Fiadjoe has outlined, in particular, how the Courts of Guyana have the power of judicial review.[21]

[21] Albert Fiadjoe, *Commonwealth Caribbean Public Law,* Cavendish Publishing Ltd (London) (pp 17 – 18)

It is mentioned above that developing countries seek opportunities through WTO Agreements. In particular the WTO Agreement on Government Procurement (GPA) (1994) provide for a framework of rules which member countries must incorporate into their national procurement legislation.[22] Guyana may not be signatory to the GPA but nonetheless may be required to embark on a restructuring programme which includes voluntary compliance with those rules as a target.[23]

A body of procurement case law of a supranational nature has developed alongside the establishment of the WTO agreements, other multilateral agreements and, indeed, alongside domestic law in some jurisdictions. Many national courts recognise the current precedents, so established, when settling disputes surrounding evaluation of tenders.[24] A new doctrine within this development is the recognition of a "tendering contract" once a responsive bid is received by the procurement authority.[25] Historically such receipt only constituted an offer. The salient points of this tendering contract are :

- Duty to reject non-conforming bids: If this is not done other bidders may be prejudiced by their own reliance on the original terms of the tender.
- Strict application of the 'privilege clause': It is common to find a privilege clause in tender notices to the effect that "[the procurement authority] *reserves the right to reject*

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22 On-line version of Agreement on Government Procurement (GPA) (1994) available at WTO website : www.wto/English/ Note that this is quite separate from Constitutional requirements of Guyana.

23 Twelve countries are presently signatory; these do not seem to include Guyana.

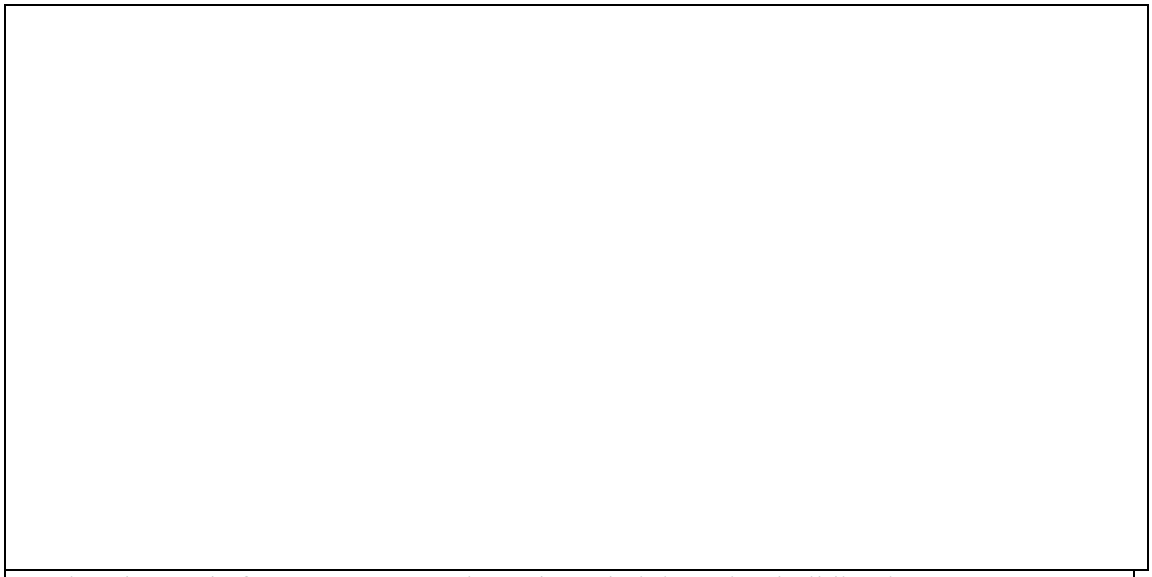
24 This happened in a Caricom country. See judicial remarks in *NH International (Caribbean) Ltd –v- Urban Development Corporation of Trinidad & Tobago Ltd : CvA No 95 of 2005,* CA T&T.

25 For further information on the "tendering contract" and the 'salient points' which follow later in the section, see Low Sui Pheng *et al*, The Price-Quality Method : Legal Implications of the Evaluation Process *International Construction Law Review,* Informa Professional (London), *April 2007 (pp 168 – 188)* and in particular, pp 180 – 188.

*any tender*"; or, *"… does not bind itself to award to the lowest tenderer*". However a privilege clause does not override an authority's duty of fairness to all tenderers, so that, for example, all responsive bids must be considered. Additionally where tenders have been evaluated unfairly, e.g. on undisclosed criteria, terms may be implied by the court and, if so, those implied terms may override the privilege clause itself.

- Insistence on clear criteria: Vague or subjective criteria cannot be relied upon by a procurement authority, if challenged. Where no criteria are stated beforehand, cost will be presumed by the court to be the sole criterion.

Financially the courts in jurisdictions abroad have awarded substantial damages where procurement authorities have transgressed these laws and have been guilty of misfeasance in public office. In Guyana the race to achieve and maintain a credible level of transparency and genuine ethnic political trust is what may be at stake.



*National Board of Procurement and Tender Administration building in Georgetown. The Board has been assigned certain powers pending establishment of the Public Procurement Board.*

## 5. ANATOMY OF PUBLIC PROCUREMENT IN GUYANA

### Legislative Structure, Procurement Regulations

The National Procurement and Tender Administration is empowered to administer all public tenders over certain prescribed threshold values. In addition the Administration must establish Regional Tender Boards and may establish District Tender Boards. Government Ministries, Departments, agencies or any unit of Government engaged in procurement may establish Tender Boards. All of the Tender Boards, e.g. Regional, Ministry, are restricted in their procurement up to certain prescribed values. Presumably the Administration establishes a centralised tender board to assist it with administration of tenders above the prescribed values, but this is not expressly stated.

The Act empowers the Minister of Finance to make regulations necessary for the administration of the Act. Regulations have duly been issued in the form of Regulations No. 9 of 2004, whose objectives are to add "specific instructions on the implementation of the Act". The Regulations elaborate on Administrative Review and mandate the Administration to establish a website for posting of :

- Public general information; public, specific technical information like pre-qualification and bidding documents.
- Other forms and guidelines *"... in response to demand from procurement entities, suppliers or contractors."*[26]

Public corporation and other bodies in which the State has a controlling interest may conduct procurement according to their own rules, providing such rules do not conflict with the Act or Regulations. Presumably this right includes a capacity to establish their own tender committees, though such capacity is not expressly stated.

Evaluation of Tenders, Contract Formation and Administrative Review.

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[26] Regulation 8, Regulations No. 9 of 2004.

Evaluation Committees evaluate all bids and make recommendations to the procurement entity on contract awards. Neither the Act nor the Regulations expressly identifies a functionary or body empowered to make a contract-award decision by endorsing the recommendation of the Evaluation Committee, or otherwise. This is an area to be clarified in the research.

Should the procurement entity not concur with the determination by the Evaluation Committee, the entity must issue "an advisory recommendation" to the Committee. There is no written procedure on how this impasse is to be resolved thereafter: s39. This too is an area to be clarified in the research.

Where the entity does concur with the determination of the Committee, the entity is required to publicise the name of the tenderer identified by the Committee. Notice of acceptance of the tender must be dispatched to the bidder within 14 days, upon which dispatch a procurement contract is created. This is varied where the tender documents lay down that a written contract is to be signed (s42). After contract formation the unsuccessful bidders are informed of the name of the successful bidder and of the contract price: s43.

The Act and the Regulations make provision for an unsuccessful bidder to protest to the procurement entity. The procurement entity may review the protest (s53), or must consider the complaint (Regulation 11), within five days.

If the review is not made within a period of five days, or the complaining bidder is not satisfied with the outcome, a review may be sought from the Bid Protest Committee. This latter Committee must give a reasoned decision within 15 days. The time-frames for all of these activities are not clear, in particular the point from which the

time for making complaints begin to run is open and must end is ambiguous.

Decentralisation

Guyana is divided into 10 Regions for local government administrative purposes. Each Region is given capacity in procurement through the Regional Tender Boards created by the National Procurement and tender Administration. There are also 65 Neighbourhood Democratic Councils formed by grouped villages, where District Tender Boards may be created at the discretion of the Administration.

This may suggest a fair extent of decentralisation, but regional autonomy is reduced by a number of factors. Not least of these are fact that the Regional Boards are creatures of the Administration, who appoints the majority of the Regional Board members (three out of five) including the Chair.

It has already been mentioned that there is only an implication that the Administration establishes effectively a central tender board to assist it with administration of tenders within it jurisdiction. Another grey area, also referred to, is that it is left to interpretation whether or not "exercise jurisdiction over tenders" (s17(1)), or "oversee the administration of procurement" (ss20(2) and 23(1)) includes a power to make contract-award decisions, in relation to all tender boards. Nonetheless the various tender boards (whether at a national, regional or Ministry level) in both their legislative aspects and physical location remain key operatives in public procurement in Guyana.

*Regional Tender Board of Region 9 (Upper Takatu/Upper Essequibo). Though decentralisation could be much strengthened, the various tender boards remain key operations in public procurement.*

## 6. METHODOLOGY AND PROCEDURE

### 6.1 The OECD-World Bank Methodology for Procurement Systems.

6.1.1 The methodology selected for this research is a methodology for assessment for procurement systems promoted jointly by the OECD and the World Bank. The joint group, working currently and over a number of years, first developed "tools" for guiding procurement. This was taken up later by a related Working Party, which advanced the development of procurement assessment to a stage where a methodology was achieved,

complete with baseline and performance indicators and a scoring system.[27]

6.1.2 The intention is that the tool and methodology will be officially tested at a country level by 2008, with a view to further refinement. The following can be noted in connection with the methodology:

- It arises out of work between representatives of developing and donor countries, sponsored by the OECD and World Bank.

- It is intended to be used for self-assessment of the state of procurement in developing countries, as well as for risk-assessment by donors.

- A main aim is to assist with development of a country's long-term procurement capacity through regular assessment and the strengthening of the weaker areas so revealed.

6.1.3 For the purpose of analysis the methodology segregates the subject procurement system into four main pillars: legal framework, institutional framework, procurement operations and integrity and transparency. Each pillar is sub-divided and each sub-division is assigned a sub-indicator. The methodology also minimises subjective judgement by providing for scores to be used to measure the extent to which the sub-indicator has been met.

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[27] A copy of the Methodology and an official guide to its use may be obtained online at : http://www.oecd.org/dataoecd/1/36/37390076.pdf

6.2 Amended Methodology for this Research.

6.2.1 For the purpose of this research only two pillars, namely, legal framework and integrity and transparency, have been used. Furthermore, all of the sub-divisions under these two pillars have not been applied. However the numbering and letters of the sub-indicators used in the methodology have been retained unchanged for this research. This approach, we believe, would allow recognition of sub-indicators between this study and others, which may follow, and would facilitate comparisons.

6.2.2 The other major amendment to the 'adopted' methodology made for this study, is that scoring has been omitted from assessment of the sub-indicators, which instead are the assessed wholly on a descriptive basis. Given the partial nature of the study (i.e. bidders not interviewed; only two out of four pillars examined) it was considered that scoring would be more appropriate where the Administration is able to do a self-assessment, possibly along with an independent body or peer evaluator.

6.3 Data Collection.

6.3.1 It was initially intended to collect data via :

(i) Content analysis of relevant legislative provisions, including regulations and mandatory manuals. Some sub-indicators are only amenable to examination in this way.

(ii) Interview of key personnel. This would be the major means of data gathering. Where information is obtained by (i) above, interview data would also inform what is the practice, to be compared with the legal requirement.

(iii) Random examination of procurement cases: for validation of responses received via interview; for testing of measures taken to achieve equal treatment of tenders ('fairness'); if time, for tracing selected procurement cases from time of submission to time of award; and similarly tracing cases where protests or appeals were lodged.

A schedule of the mode of data collection is shown at Appendix C.

6.3.2 As it happened, the examination of cases as at (iii) above could not be attempted. This was due to the unavailability of staff and files at the Administration through pressure of their own work.

6.4 Key Personnel Interviewed

6.4.1 Personnel identified as playing key roles in the public procurement process were personally interviewed by the researcher or assistant. A copy of the questionnaire was given to the interviewee immediately before the interview in each case, but notes and responses for subsequent analysis were recorded by the interviewers.

6.4.2 Personnel interviewed were :

- Chief Executive Officer, National Procurement and Tender Administration.
- Deputy Permanent Secretary, Ministry of Education.
- Permanent Secretary, Ministry of Works and Transport.
- Regional Executive Officer, Region Nine.

- Sub-treasury Supervisor and Regional Engineer, Region One.

*Interviewees were informed that responses provided were to be used only for this Report, otherwise responses are confidential. We wish to thank all the interviewees for their time and assistance.*

| Sub-indicator 1(a)—Scope of coverage of legislative framework. |
|---|
| Purpose of sub-indicator<br><br>This sub-indicator determines the following :<br><br>a) Structure of the regulatory framework governing the public procurement.<br><br>It is important that the legislative framework be differentiated between laws, regulations and standard procedures and that precedence is established to minimise inconsistencies in application.<br><br>It is also important to note that public procurement in Guyana is treated as a vital issue and is provided for in the Constitution of the country.<br><br>b) Extent of coverage of public procurement.<br><br>Uniformity of coverage contributes to predictability and savings in the operation of the procurement system.<br><br>c) Public access to the laws and regulations.<br><br>Access to the rules and regulations contribute to transparency and hence to public confidence. |
| Findings<br><br>*Via interview*: ***At the national level :***<br>***The Procurement Act 2003 (hereafter the Act) and Regulations Nr 9 of 2004 (hereafter the Regulations) comprise the legislative framework within which the agency of National Procurement and Tender Administration (the Administration), under the management of the National*** |

***Board, carries out its duties. The Act and Regulations are not published by the Administration or its Board, but by others.***

***The Procurement Act and the Regulations apply to all Government departments, public bodies and enterprises which are funded in whole or in part by public funds. There are no administrative exceptions made.***

Sub-indicator 1(a)—Scope of coverage of legislative framework. (Contd)

***Copies of the Procurement Act and Regulations are distributed by the Administration to Government Ministries and Heads of Departments. Copies of both documents are available free of charge to bidders, upon request from the Administration.***

*Comment:* This is not fully validated. The researcher discovered copies of both documents on the website of the Office of the Auditor General, and not on the website of the Administration. The researcher was also required to pay for a copy of the Procurement Act from the Parliamentary Buildings, which copy stated a price on its cover together with a direction that the document is to be purchased at the Office of the President.

Findings

Via legal framework :

**By virtue of s3(2) the Procurement Act does not apply to procurement involving national defence and security.**

**The legislative framework for public procurement in Guyana consists of the Constitutional amendment 212W to 212EE, the Procurement Act and the Regulations. The framework is without benefit of mandatory guidelines or standard documents which operationalise the Regulations.**

These findings raise the following issues:

- Absence of mandatory guidelines leaves the procurement managers with wide discretion at the technical level of documentation and bidders would have little or no grounds for challenging the bid documents themselves. At the same time bidders must depend on an interpretation of the relatively legalistic and broad-based Regulations to set the

basis for their legitimate expectations of what the technical documentation should contain.

Sub-indicator 1(a)—Scope of coverage of legislative framework. (Contd)

- Coherence of the procurement system depends on the Procurement Act conforming with the provisions of the Constitution, to which it is subordinate. Under the Act the Administration is empowered to carry out certain functions pending the establishment of the Public Procurement Commission (s17 (2)) (the Commission). However the Administration is qualitatively different to the Commission in the appointment of members and in the essential attributes of the respective bodies when discharging certain quasi-judicial functions. [See Appendix B]

- Given that procurement is treated as a vital issue and is provided for in the Constitution, this mis-match between the Commission and the Administration brings into question the constitutional aspects of the activities of the Administration.

Recommendation

*The ERC should consider obtaining legal opinion of how well the National Procurement and Tender Administration conform with the Constitution, particularly in regard to objectives of seeking political consensus and of maximising public perception of impartiality.*

Sub-indicator 1[b] – Procurement methods

Purpose of sub-indicator

This sub-indicator determines whether or not the legislative framework includes the following :

a) a clear definition of permissible procurement methods.

The law and regulations should make open competitive bidding the default method of procurement and should define other acceptable methods.

b) The circumstances under which each method is appropriate.

The law and regulations should define the situations in which other less competitive methods can be used.

Does the legal framework establish procurement methods and define when each must be applied?

Findings

*Via interview* : [ Not applicable ]

*Via legal framework* :

***At sections 25 to 29 the Procurement Act identifies a number of procurement methods and describes circumstances when each should be applied. Open tender is effectively the default tender.***

***There is a means of internal control over the use of exceptions to open tender. Procurement methods (other than open tender) are subject to monetary thresholds set out at sections 6 and 7 of the Regulations.***

Comment

*Prescription of open tender and control of departure there from seem adequate.*

Sub-indicator 1[c] – Advertising rules and limits

Purpose of sub-indicator

This sub-indicator determines whether:

a) There is a wide and easily accessible publication of business opportunities.

b) There is adequate time allowed between publication and submission date to prepare and submit bids, consistent with

complexity of the procurement.

The law and regulations should establish the criteria for setting the minimum time between advertisement and submission of bids.

What provisions exist for regulating sufficient time and notice [from last required advertisement] for prospective bidders to obtain documents and respond to advertisements?

Findings

Via interview :

a) ***At a national level, the interviewee reports that standard bidding documents which are to be completed would address the issue of advertising time. Presently a bid invitation is made in at least one newspaper of wide circulation and on the Government website.***

b) ***At the Regional and Ministerial levels, all interviewees report that presently there are no mandatory internal guidelines on the issue of advertising time.***

   ***(i) One interviewee reports that they are guided by documents discussed in workshops.***
   ***(ii) Another report that "We advertise for 2 or 3 occasions. We advertise for a minimum of 2 weeks [before close of tenders]".***
   ***(iii) Another report that their Board makes a majority decision on these matters***

Sub-indicator 1[c] – Advertising rules and limits. (Contd.)

Comment

*The OECD/ World Bank methodology for assessment of procurement systems suggests an average of four weeks from the time of last advertisement to the close of bids.*

Recommendation

*The National Procurement and Tender Administration be urged to monitor advertisement times with a view to providing uniform guidelines to the various procurement entities.*

Sub-indicator 1[d] not applied.

Sub-indicators 1[e] – Tender documentation and technical specifications.

Purpose of sub-indicator

This sub-indicator assesses the degree to which the legislative framework lays down the content of bidding documents:

a) To permit interested parties to find out what should be the minimum contents of bid documents.

It should be mandatory that bid documents contain sufficient information to enable the submission of a responsive bid.

b) To help set the limits of legitimate expectation for bidders.

Does the legislative framework set the minimum content of bid documents and require that content is sufficient for bidders to make responsive bids?

Findings

Via interview : [ Not applicable ]

Via legal framework: ***The Procurement Act provides for contents of bid documents to be determined by the National Board (s32(2); but standard bidding documents which the Board is mandated to furnish on a dedicated website, under section 8 of the Regulations, are not yet in place.***

The following issues arise :

- Standard documents demonstrate the standards expected of procurement documents. Standards in specific procurement documents which conflict with those in the standard bid documents should not be enforceable, unless clearly drawn to the attention of bidders.

- This is an important fallback safeguard for bidders, in the absence of any sanction or penalty against procurement officers for acting contrary to the Procurement Act or the Regulations when finalising and issuing bid documents for any procurement.

Comment

The National Procurement and Tender Administration should be urged to expedite the issue of standard documents referred to under section 8 of the Regulations.

| Sub-indicator 1[f] – Tender evaluation and award criteria |
|---|
| Purpose of sub-indicator<br><br>This sub-indicator determines the quality of the legal framework provisions in regard to objectivity and transparency of the evaluation |

process.

Pre-disclosed and objective criteria are essential for fairness, transparency and efficiency in evaluations of bids. Objectivity means here that there is little room for subjective interpretation by the evaluator. For this reason it is desirable that evaluation criteria be quantifiable as far as possible, or stated in pass/fail terms.

What rules exist for regulating the application and use of evaluation criteria?

Findings

*Via interview :*

**At the national level, the interviewee reports that standard evaluation reports are used. The researcher is also referred to the procurement entities as the proper persons to answer such questions**.

***At the Regional and Ministerial levels, all interviewees report that evaluation criteria are not laid down in any manual, but rather are stated as precisely as possible in the bid documents.***

***(i) One interviewee reports that they do not consider standardisation as practical since there is wide variation in criteria requirements between projects.***

Findings

*Via legal framework:* ***Evaluation of tenders dealt with in Procurement Act at ss38 to 43. These are not elaborated on by the Regulations*****. Some relevant provisions are :**

**(ii) Provision is made for prices tendered to be announced: s38(3).**

Sub-indicator 1[f] – Tender evaluation and award criteria. (Contd)

**(iii) Evaluation may be based on additional criteria (s39(6)). Though score sheets may be disclosed upon request of bidders this can only be done after a tender is accepted**

**(s10(3)(b)).**

**(iv) Pure arithmetic errors made by a bidder and discovered by the Evaluation Committee during examination must be corrected, such a correction must not influence the evaluation (s39(4)(b); yet tenderers who do not accept such corrections must have their bids rejected (s39(5).**

The following issues arise:

- Announcement of prices tendered is only of benefit where price alone is the basis of tender evaluation and where the lowest bidder would normally be awarded the contract.
- Where evaluation is based on additional criteria, public announcement contribute little to transparency.
- Standard evaluation reports, as implied in one response, also contribute little to transparency where bid results are not disclosed to the public before a tender is accepted; even though criteria are disclosed in advance to bidders to the extent that criteria are disclosed in bidding documents as precisely as possible.

Recommendation *:*

*Disclosure of score sheets after a tender is accepted seem not to recognise that any later successful complaint would have little chance of allowing remedial action on the particular procurement. It is proposed that the ERC consider recommending that this aspect of the law should be reviewed with a view of meeting fully the objective (e) of the Act.*

Sub-indicator 1[f] – Tender evaluation and award criteria. (Contd)

- It is hard to see why an arithmetic correction should be made when such a correction does not influence the evaluation and when bidders must stand by a mistake, unilaterally made.
- More important and regarding transparency, acceptance of an arithmetically corrected bid could be construed as acceptance of a bid adjusted after close of bids and hence patently unfair to other

bidders. Fairness would be better served if, for example, the bidder is notified and then given the opportunity of voluntarily electing to stand by their unadjusted bid, or withdrawing.

Recommendation:

*Correction of arithmetic errors in tenders after close of bids could easily be misconstrued. This rule should be reviewed or amended with a view of meeting fully the objective (d) of the Act.*

**Follow-up indicator** – Personnel or body empowered to make

contract-award decision.

Purpose of indicator

This special indicator verifies the functionary or unit empowered to make a contract-award decision.

a) Proper contract-award action must be done within the bounds of the procurement legislation, both in regard to proper procedure and adequate authority.

b) In addition to conforming to the law, proper contract-award contributes to accountability within the procurement system: the responsible personnel can be identified, or improper delegation detected.

c) Action in accordance with the law contributes to transparency of operation and public confidence in the procurement system.

Sub-indicator 1[f] – Tender evaluation and award criteria. (Contd)

Special indicator – Personnel or body empowered to make contract-

award decision. (Contd)

*Supplementary question* (under follow-up indicator) :

With regard to s39(3) of the Procurement Act, if the procurement entity does not concur with the determination of the Evaluation

Committee, what happens after the advisory recommendation is issued to the latter body?

Findings

Via interview :

a) At the national level, the National Administration "would get involved" where the tender is within its jurisdiction by virtue of the tender value.

***b) At the Regional and Ministry levels, three interviewees report that they are not aware of instances of non-concurrence between their respective procurement entities and the Evaluation Sub-committee.***

- ***(i) Of these, one interviewee reports that the Ministerial Tender Board "would advise the Evaluation Sub-committee of any non-compliance [of the bid in question]".***
- ***(ii) Another interviewee reports that the "Ministry of Finance ( sic ) would write (his procurement entity) requesting an explanation".***
- ***(iii) Another interviewee reports that the tender board would have the final say.***

Sub-indicator 1[f] – Tender evaluation and award criteria. (Contd)

Special indicator – Personnel or body empowered to make contract-award decision. (Contd)

*Via legal framework* :

***The Evaluation Committee makes a recommendation under s39(2)of the Act but no provision found for this recommendation to be acted upon. No provision found for any functionary or statutory unit to make contract-award decision. The Act is unclear where the* procurement entity does not concur with the recommendation of the Evaluation Committee. The *Evaluation Committee is appointed by National Board for such period that Board decides : s17*.**

The following issues arise :

- No express power to make contract-award decision found in the Act. This clouds vision of who is accountable for such awards.

- The Evaluation Committee seems to be a resource provider since it makes a recommendation, which may or may not be accepted. Yet this Committee is the only body in the Act directly associated with a contract-award decision.

- Interviewees gave varying responses concerning what happens when the recommendation of the Evaluation Committee is not concurrent with the determination of the procurement entity. Indeed, the range of responses does not clarify who makes the contract-award decision even when the recommendation is acceptable.

- The appointment and tenure of the Evaluation Committee is at sole discretion of National Board on terms not discernible to others.

- Apart from being of "appropriate expertise and experience", it is not clear whether the Evaluation Sub-Committee comprises public officers (with or without top-up salaries) or private sector individuals (being volunteers or consultants, or both). If private sector individuals, procurement of these very services should be subject to transparency principles.

| Sub-indicator 1[f] – Tender evaluation and award criteria. (Contd) |
|---|
| Special indicator – Personnel or body empowered to make contract-<br><br>award decision. (Contd) |
| <br><br><br>Recommendation: |

Proposed that the ERC consider making recommendations to following effect:

*The objectives of transparency of, and integrity in, the public procurement system within the Procurement Act would be much enhanced by providing for authority for contract-award decisions to be conferred on identified functionaries or units within the Act.*

*Given that the Evaluation Committee is necessarily privy to public business and activity, the tenure and conditions of work of Committee members, and indeed the role of the Committee, should be clarified.*

Sub-indicator 1[g] not applied

Sub-indicator 1[h] – Complaints

Purpose of sub-indicator

This sub-indicator assesses whether the legislative framework establishes:

a) The right to protest and a right to a review if the response to the protest is not satisfactory to the protesting party.

These rights are strong contributors to confidence of bidders and potential bidders in the procurement system. This confidence is a powerful incentive to participation and, in turn, competition.

b) The matters which are subject to review.

c) The time-frame of review.

This time-frame should include special time limitations on access to administrative review. The time-frame must also allow the procuring entity, as part of a Government Ministry or Department, to carry on its executive function with a minimum of delay. This time-frame is apart from the statutory rules on the limitation of action for action in the courts.

d) The steps in the review process.

Does legislative framework provide for the right of unsuccessful bidder to complain and for review by an independent body with authority to grant remedies?

Findings

*Via interview :* (Not applicable)

*Via legal framework* :

**(i) Right to complaint dealt with by sections 52 to 54 of the Act with a Bid Protest Committee constituted under section 53. Regulations 10 to 15 are also relevant.**

**(ii) The section lists matters which may be complained about. The Regulations limits the right by barring complaints and protests against decisions of the Cabinet (regulation 10).**

Sub-indicator 1[h] – Complaints (Contd)

The following issues arise :

- It is hard to recognise the decision of Cabinet referred to. The Act only describes a review by Cabinet, which review for the avoidance of doubt is not authorised to substitute an award for any already made by any other body : s54(4). On the other hand, if Regulation 10(2) is a specific instruction on some aspect of the Act, this explanation should be made clearer.

- Review of the legislative framework to confer power on a body to make contract-award decisions, unfettered by any other body, would improve transparency in this area considerably.

Comment

*Recommendation made under the special follow-up indicator is repeated here. Clear authority for contract-award decisions should be conferred on identified functionaries or units within the Act.*

- Two of the Bid Protest Committee members are nominated by the Minister, (to whom the National Board already reports) the other by the Attorney General. This, more likely than not, results in a Committee with an overwhelming Government influence.

- The extent of unsuccessful bidders seeking to enforce a right to appeal could not be established. Such information would normally be followed up through interviews with bidders.

Recommendation

*The composition of the Bid Protest Committee seems to result in an overwhelming Government influence. This could counteract the effectiveness of the Administration when seeking to discharge its quasi-judicial function. Proposed that the ERC consider recommending that this aspect of the law be reviewed with a view to furthering objectives (e) and (f) of the Act.*

Recommendation made under Sub-indicator 1(a) also applies here.

Existence of Implementing Documentation

| Sub-indicator 2[a] – Verifying the existence of Regulations and Manuals |
|---|
| Purpose of sub-indicator<br><br>This sub-indicator aims at verifying the existence, clarity, accessibility and comprehensiveness of Regulations and manuals. Regulations should explain the application of the Procurement Act; manuals should be consistent with the Regulations and in turn enable their application in a variety of situations. |
| What Regulations exist to detail and explain the application of the Procurement Act 2003? |

Findings

*Via interview :*

***a) At the national level, the Regulations are available to the public; no amendments have been issued since the Regulation was made. It is not known where the responsibility for updating the Regulations would rest.***

***b)* At the Regional and Ministry level. (Not applicable)**

Via legal framework : ***No mandatory manuals or standard documents appear to be in place. The latter are required by the Regulations to be posted on a dedicated website, but are not yet in place.***

Comment

The comments and recommendations made under Sub-indicator 1

(e) also apply here.

Sub-indicator 2[b] – Not applied

Sub-indicator 2[c] – Procedures for pre-qualification.

Purpose of sub-indicator

This sub-indicator covers the existence of procedures for pre-qualification for a specific procurement and a specific project.

Pre-qualification procedure is normally applied to proposed projects of high level of complexity or cost in order to identify interested bidders who possess the capacity to perform. It is desirable that pre-qualification is evaluated using pass/fail criteria.

What documents exists to give guidance on the application of pre-qualification procedure?

Findings

*Via interview :* ***At the Regional and Ministerial levels, all interviewees reported that there is no mandatory document prescribing the application of pre-qualification procedure.***

i. ***Two interviewees report that pre-qualification is carried out once per calendar year. This is done for works earmarked to be procured for that year under the jurisdiction of the Ministry or Region.***

ii. ***One of these two also reports that annual pre-qualification bid invitation usually elicits "hundreds of responses". A list of those selected is not published.***

iii. ***Another interviewee from the hinterland region reports that the practice of pre-qualification was suspended due to local conditions (of low numbers of tenderers).***

Findings

*Via legal framework* : **Pre-qualification is dealt with at s6 of the Act. There is no clarifying regulations notwithstanding specific reference to regulations to establish additional requirements for pre-qualification documents at s6(3)(e).**

Sub-indicator 2[c] – Procedures for pre-qualification. Contd

Comment

*Statutory provisions for pre-qualification seem adequate though these are not added to by the Regulations.*

*It could not be validated whether pre-qualification is generally applied according to the laid down procedures. This would require a sampling of the relevant procurement cases.*

| Sub-indicator 2[d] – Provisions for the use of technical capacity as a criterion. |
| --- |
| Purpose of sub-indicator.<br><br>Technical capacity is often the only or a key criterion for selection of knowledge-based consultant services. Technical capacity is often hard to evaluate on an objective basis and hence the law should regulate how this should be done.<br><br>It is sometimes possible to assess technical capacity or qualifications after a pass/fail review. The system should strive to apply this type of review where it is not possible to apply a scored evaluation. |
| What documentation exists for regulation of technical capacity as a key criterion for consulting services? |
| Findings<br><br>*Via interview :*<br>***a. At a national level, interviewer is referred to the s46 Procurement Act which deals with criteria for the evaluation of proposals.***<br><br>***b. At the Regional and Ministerial levels, interviewees report that there is no mandatory documentation on the regulation of technical capacity as a key criterion.*** |

i. ***One interviewee reports using documentation currently proposed by procurement consultants.***

ii. ***Another (from the hinterland region) reports that they did not consider that the situation was relevant to their work as "no unusual design [was] undertaken".***

iii. ***Another interviewee (also from the hinterland region) reports that consultants were not engaged due to the minor size of procurement projects there.***

Sub-indicator 2[d] – Provisions for the use of technical capacity as a criterion. (Contd)

Via legal framework :

c. ***Evaluation of consultant services is dealt with at sections 46 and 47 of the Act; these set out four methods of selection of consultant services. There are no regulations elaborating on the mechanisms of this evaluation.***

d. ***Regulations bar consultant bidders complaining against exclusion for a shortlist following invitations of Expressions of Interest. (Regulation 10(3)).***

Comment

Statutory provisions laid down for evaluation of consultant services seem adequate.

However the range of responses provided by interviewees suggests that there are no consistent guidelines for use of methods for different circumstances.

There seems to be no special authority (i.e. in writing) required to control the use of selection based exclusively on technical capacity, though the circumstances of use are, in fact, described in the Act.

| Sub-indicator 2[e ] – Guides for use by both procurement and bidding parties. |
| --- |
| Is there a document used for administration, which also exists as a guide for bidders? |
| Findings<br><br>Via interview : **At the national level, the researcher is referred to procurement consultants apparently currently engaged by the Government.**<br><br>Comment : It was not possible for the Administration to arrange an interview with the consultants in the time available.<br><br>***At the Regional and Ministerial levels, interviewees report that there is no manual specifically for use by both procurement entities and potential bidders.***<br><br>***i. One interviewee reports that project information varies too widely for such documentation to be practical.*** |

ii. ***Another interviewee from a hinterland region reports that bidders in that region generally have low estimating and pricing capacity and such a manual would only be of benefit if it addresses this issue.***

Via legal framework : (Not applicable)

Comment

*This matter can be addressed through the use of standard bidding documents which are mandatory and made public. Bidders may then legitimately expect that the technical standard of specific procurement documents would conform to those of the standard bidding documents. (See also comments and recommendations at Sub-indicators 1(e) and 2(a).*

*With regard to the response concerning low capacity of bidders in the hinterland, such an issue would need to be the subject of a separate research. (Involving perhaps a study of support for small enterprise bidders).*

INTERGRITY & TRANSPARENCY

Effectiveness of control and audit systems

| Sub-indicator 9(a) – Legal requirement to audit procurement |
|---|
| Purpose of sub-indicator<br><br>This sub-indicator aims at verifying and assessing:<br><br>a. The legal requirement for oversight and control that should normally culminate at the legislative body.<br><br>The legislative body may review the reports of watch-dog agencies or may have a direct line of supervision over the procurement body.<br><br>b. The system for audit of the procurement functions by legal watch-dog agencies.<br><br>This comprises quality audit for compliance with procurement legislation, apart from financial audit of the accounts of procurement offices.<br><br>c. Any provision for internal audit of procurement functionaries. |
| Is there a legal requirement for (quality) audit of the procurement |

system in Guyana?

Findings

*Via interview*:
***At a national level, the interviewer is referred to the Office of the Auditor General, in regard to external audit of the procurement function. In regard to internal audit the interviewee reported that such a system was not in place, but officers of the Procurement Administration made impromptu visits to Regional Tender Boards for various reasons.***

***At a Regional and Ministry level.*** (Not applicable)
*Via legal framework**:*** (Not applicable)

Comment
*A phone query to an audit manager in the Office of the Auditor General disclosed that no "non-financial" audit report has been carried out in the Administration to date. However a quality audit section on the Administration is scheduled to be included in the next Report of the Auditor General (for 2005).*

Sub-indicator 9(b) – Follow up on recommendations

Purpose of sub-indicator

This sub-indicator assesses the extent to which the recommendations from official watch-dog bodies, like audit departments and legislative sub-committees, are implemented.

This is essential for effective control over the procurement function by the legislative body. It is also facilitates social audit of the procurement function by interested groups.

How often are audits carried out [on the procurement system] and recommendations responded to?

Findings

*Via interview* :
***At a national level, the interviewee reports that relevant recommendations of Public Accounts Committee are carried out, in time. Audit of Regional and Ministry tender functions is not a role of the National Procurement and Tender Administration***.

***At the Regional and Ministry level***. (Not applicable)

*Via legal framework*: (Not applicable)

Comment:

- *Implementation of recommendations is invaluable for improving transparency.*
- *The response given above could not be validated. Such validation would normally be carried out starting with relevant records of the Administration and procurement entities. Records were not available in the time allotted for this study.*
- *The methodology for assessing procurement systems, as promoted by the OECD and World Bank, suggests recommendations are implemented within six months, as a reasonable time.*

| Sub-indicator 9(c) -- Functioning of the internal control system – *key provisions*<br><br>Sub-indicator 9(d) – Functioning of the internal control system – *general provisions* |
|---|
| Purpose of sub-indicators<br><br>These sub-indicators assess the internal control system |
| Findings<br><br>Via interview:<br><br>At a national level : (See response under Sub-indicator 9(b) to effect that the Administration does not have an audit role).<br><br>**At a Regional and Ministry level :** (Not applicable)<br><br>*Via legal framework :* There is no express requirement under the Act for an internal audit, though the requirement may be implied under the s17 requirement of "…maintaining …quality assurance systems." |
| Comment:<br>o From the response, no internal procurement audit is carried out at Regional and Ministry levels. It remains to be seen whether the quality audit of the Office of the Auditor General would be extended to these levels.<br><br>o *Note however that monitoring of the performance of procurement bodies with respect to adherence to regulations and efficiency is* |

*expressed as one of the functions of the Public Procurement Commission, to be established.*

Recommendation:

*Proposed that ERC consider recommending that systems be put in place for monitoring of the performance of procurement bodies with respect to adherence to regulations and efficiency as provided for in the Constitution, at Art. 212AA.*

Efficiency of appeal mechanisms

| Sub-indicator 10(a) – Contribution of appeal mechanisms to compliance, to confidence in the public procurement system and resolution of protests outside of the courts. |
|---|
| Purpose of sub-indicator<br><br>This sub-indicator assesses the following mechanisms within the practice of complaints and appeals, namely:<br><br>a) Uncovering and addressing genuine protests against contract-award decisions.<br><br>The means of initiating protests should be simple and well-know to participating bidders. At the same time it is vital that the procurement officer or unit making the decision which is challenged has the first call in responding to the complaint. This facilitates the issue of reasons first-hand and helps to filter out unmeritorious complaints.<br><br>b) Contribution to compliance.<br><br>The practice should facilitate *early* corrective action, if necessary, either by the officer or unit making the decision which is challenged; or by enforcement by the protest review body.<br><br>c) Clarity of procedure.<br><br>The route from initial complaint to final review should be clear to all. |
| What are the stages of review of protests received by a procurement |

entity?

Findings :

Via interview :

***a) At a national level, the interviewer is referred to the Procurement Act, s52 dealing with review by the procurement entity and Regulations 11.1, 12.1 and 12.2, dealing with complaints and the Bid Protest Committee.***

Sub-indicator 10(a) – Contribution of appeal mechanisms to compliance, to confidence in the public procurement system and resolution of protests outside of the courts. Contd.

***b) At the Regional and Ministry levels***

**i.** ***One interviewee reports that they consider it strange for the particular procurement entity to answer challenges, since contract-award decisions are "made by" the particular Evaluation Sub-committee and not by the procurement entity. The interviewee reports having to face informal protest by phone, on at least one occasion.***

**ii.** ***One interviewee reports being unaware of any formal protest.***

***iii.*** ***One interviewee reports being aware of more than one case of formal protest and personally involved on one of these.***

***iv.*** ***The interviewer was able to see a copy of a current complaint. The complaint was addressed to the Chairperson of the Tender Board concerned and was in respect of a tender of a truck for hire by the procurement entity. A written response, signed by all members of the tender board, was made to the complainant within two days.***

*Via legal framework*:

***i.*** ***The initial stages for making a complaint are dealt with by both the Act and the Regulations, with terminology and time-frames of the latter not correlated with the Act.***

***ii. Though the procurement entity is required to publicise the name of the tenderer identified by the Evaluation Committee, no time-frame is prescribed for publication : s39(3). After contract formation, unsuccessful bidders are to be informed, but again there is no obligation for this to be done within a specified time : s43.***

Sub-indicator 10(a) – Contribution of appeal mechanisms to compliance, to confidence in the public procurement system and resolution of protests outside of the courts. Contd.

***iii. Notwithstanding this absence of time-frames, an unsuccessful bidder wishing to complain must do so, according to the Act, within five days following "****publication of the contract award decision****" [emphasis added] : s52(3). However according to the Regulations, the complaint must be made within seven days of when the bidder "****became aware of the circumstances giving rise to the complaint or when it should have become aware …****" : Regulation 10(6).***

***iv. If the review is not made within five days (s53(1); Regulation 10(4)(b)), or if the bidder is not satisfied with the response, a request for review by the Bid Protest Committee must be made within three further days. A registration fee set by the Administration and published on their website is payable when submitting this request.***

The following issues arise:

- The range of interviewee responses does not address the question of what stages of review exist in practice. However it can be reasonably inferred that there is little in place for quick and orderly resolution of complaints in the first instance.

- The rules for crucial time markers are ambiguous. Also, it is hard to see how a complainant can sustain, or even initiate, a protest in circumstances where so much discretion rests with the Administration or procurement entity, against whom the complaint is being made. Under the Act both the publication of any result and notification to unsuccessful bidders may be delayed by the Administration or procurement entity, acting with wide discretion and without sanction.

- Note that since the Act anticipates that no response may well be

provided to the initial complaint, the bidder may be left to proceed with an appeal without an initial answer and hence without knowing if there is a case worthy of appeal. This in circumstances where an application fee (of an unknown amount) is payable upon filing the appeal.

Sub-indicator 10(a) – Contribution of appeal mechanisms to compliance, to confidence in the public procurement system and resolution of protests outside of the courts. Contd.

- Note the reference at this point of the Act to "contract award decision". There is no similarly clear reference to personnel or units responsible for making such "contract award decision". (See under Sub-indicator 1(f) and follow-up indicator).

- Note also the responses at Sub-indicator 11(a) to the effect that, in practice, all outcomes of tenders are not published.

- The responses also suggest that there is a low level of awareness or enthusiasm for the complaint system as a means of self-corrective compliance, confidence building or alternative dispute resolution. No statistical data on complaints was referred to.

- In addition society depends on vindication of bidders' right to complain to activate compliance within the system, particularly given the sometimes specialist and technical nature of procurement cases.

- Ironically the complaint seen by the interviewer was submitted before any official announcement of the tender result, with the implication that the complainant was in receipt of information still confidential to the Tender Board. This, in turn, raises the question of the security of confidential information.

  Comment

  *It seems unnecessarily difficult for any bidder to complain, if the rules appear to be violated. This falls below the comparative standard of transparency whereby verification should be straightforward.*

  Recommendation

  *The present complaint system, where much discretion is left with procurement administrators, seems not to be consonant with objectives (d) and (f) of the Act. In particular, the procedural rules*

| |
|---|
| *and time frames in the Act and the Regulations are not co-ordinated. These should all be reviewed.* |

| |
|---|
| Sub-indicators 10(b) and 10 (c) not applied. |

| |
|---|
| Sub-indicator 10(d) – Decisions are published and made available to all interested parties. |
| Purpose of sub-indicator<br><br>This sub-indicator assesses transparency surrounding decisions on protests and administrative reviews.<br><br>a) Publication of decisions enables interested parties to be better informed as to the consistency and fairness of the process.<br><br>b) Parties who may be adversely affected by the responses to complaints or by administrative reviews ought to have access to such responses and review decisions. |
| How are decisions on protests accessed by interested parties? |
| Findings<br><br>*Via interview* :<br><br>***At a national level, systems are now being put in place for publication of review decisions.***<br><br>***At Regional and Ministry level.*** (Not applicable)<br><br>Via legal framework: (*Not applicable)*<br><br><u>*Comment*</u><br><br>Public access to decisions on complaints and appeals are invaluable for contributing to transparency and allaying |

suspicion. The Administration should be urged to expedite the reported plans to publish such information and to provide target dates for implementation.

| Sub-indicator 10(e) – The system ensures that the complaint review body has independence for resolution of complaints. |
|---|
| Purpose of sub-indicator<br><br>This sub-indicator assesses the degree of autonomy that the complaint decision body has from the rest of the system to ensure that its decisions are free from interference or conflict of interest. |
| What measures are in place to ensure the autonomy and independence of the final review body? |
| Findings<br><br>*Via interview* :<br>***At a national level, the interviewer is referred to s53 Procurement Act.***<br><br>***At Regional and Ministry level.*** (Not applicable)<br><br>Via legal framework: **In addition to s53 above, administrative reviews are elaborated on at regulations 10 to 15.**<br><br><u>Comment</u><br><br>The state of data presents little opportunity for disclosing the organic system in place for the management of administrative reviews. Attributes of the Administration and National Board in respect of perceived fairness and the quasi-judicial procedure |

| |
|---|
| are commented on at Sub-indicators 1(a) and 1(h). |

Access to Information

| Sub-indicator 11(a) – Information published and distributed through easily available media. |
|---|
| Purpose of sub-indicator<br><br>This sub-indicator assesses public access to procurement information.<br><br>a) Public access is vital to transparency and lays the basis for audit by interested sections of society.<br>b) The information should be user friendly, providing information of relevance.<br>c) The procurement legal system should include provisions to protect disclosure of proprietary, commercial, personal or financial information of a confidential nature. |
| What measures are in place to ensure easy access to (a) the outcome and (b) the eventual performance of the selected bidder? |
| Findings<br><br>*Via interview* :<br>***At a national level, the outcomes of all tenders in excess of G$ 50 million are published on the Government website. The outcomes of all tenders are to be published in the future. Information on the eventual performance of bidders is not published.***<br><br>***At the Regional and Ministry levels, interviewees report that no information is published.*** |

*Via legal framework:* ***The Administration is mandated by the Regulations to create a dedicated internet website to disseminate information about public procurement.***

Sub-indicator 11(a) – Information published and distributed through easily available media. Contd.

Comment

Easy public access to initial bid results, eventual bid outcome and final performance is invaluable for transparency. The Administration can also develop heads of information specific to Guyana based on "frequently asked questions" in its own experience.

*Recommendation*

The Administration should be urged to expedite establishment of the website in accordance with its mandate and provide target dates for implementation.

Ethics and Anti-corruption Measures in Place

| Sub-indicator 12(a) – Anti-corruption programmes |
|---|
| Purpose of sub-indicator<br><br>This sub-indicator assesses the extent to which the law and the regulations compel procuring entities to address fraud and corruption, conflict of interest and unethical behaviour references in the tendering documentation. |
| What general anticorruption programme is in place that procurement entities may apply?; or, what special measures are in place to detect and penalise corruption in procurement? |
| Findings<br><br>*Via interview* : ***At a national level:***<br>***i. The interviewer is referred to s53 Procurement Act dealing with confidential information; and to s60 dealing with the provision of disclosure of interest of personnel engaged in any aspect of the public procurement process.***<br><br>ii. ***There is no documented report of anyone being prosecuted following corruption allegation; or no known case of the law [against corruption] being enforced in any particular instance, after due process.***<br><br>Via legal framework : **Under section 60 of the Act, it is the duty of a Member of a Body who is in any way involved in deliberation regarding the bidding process to declare the nature of their interest at a meeting of the Body. A Body is defined in section 55(1).**<br><br><u>Comment</u> |

It is hard to see how a prosecution of an allegation could be sustained where the declaration under s60 is not required to be in writing and signed by the Member.

Preferably, for example, Members should be required to sign to a code of conduct, renewed periodically, and to sign a declaration attesting to their interest (or non-interest, as the case may be) for each procurement case in which they are involved in deliberations.

Sub-indicator 12(a) – Anti-corruption programmes. Contd

Breach of the code could result in termination of service. Breach of the declaration of interest, in addition to termination, could result in further sanctions.

Recommendation

*The provisions in section 60 of the Act regarding a declaration of interest appear to omit requirement of a written statement signed by the declarant. Proposed that the ERC consider recommending that this omission be addressed with a view to enhancing the objective (e) of the Act.*

Other Aspects of Procurement

| Special indicator – Equal opportunities policy in regard to ethnicity |
|---|
| Purpose of indicator<br><br>This indicator seeks to establish the following :<br><br>a) Stated policy that exists in regard to ethnicity of bidders and equal opportunities for participating in the bidding process.<br><br>The ERC, which has commissioned this study, has a mandate to monitor practices which have an impact on ethnic relations in Guyana and a duty to enquire about policies which have a similar impact.<br><br>b) Records kept on ethnic patterns of bid participation and bid success. |
| Does the National Procurement and Tender Administration have an equal opportunities policy in regard to ethnicity?<br><br>Does the Ministerial / Regional Tender Board monitor and record levels of tendering and success in regard to ethnicity? |
| Findings<br><br>Via interview :<br>a) ***At the national level, there is no written equal opportunity policy in regard to ethnicity. However there is a definite policy [though not written] of non-discrimination and any*** |

***grounds, including on grounds of ethnicity***.

**b)** ***At the Regional and Ministry levels, no records are made.***

Comment

*Where the public procurement system is genuinely fair there would be no discrimination on any grounds, including on grounds of ethnicity.*

*Where the system is not fair, that state of affairs needs to be addressed so that the system is equitable in all respects.*

Special indicator – Equal opportunities policy in regard to ethnicity Contd.

*Regarding the responses provided by interviewees, it may be administratively onerous and inefficient to seek to initiate records on ethnicity. Bidders would have to be given the opportunity to state their ethnicity at the time of tendering; all bidders may not take up the option. Moreover, a proportion of bidders would be incorporated businesses and, as such, without ethnicity.*

*Though race and ethnicity are contentious issues surrounding public procurement in Guyana, these issues seem provided for at a high Constitutional level by provision of an independent commission appointed through political consensus and via a regime that seeks to maximise public perception of impartiality.*

*The operation of such a Constitutional arrangement ought to be adequately tried and tested, rather than divert resources to other mechanisms.*

Concluding Remarks

The objective of this report is to provide some basis for the ERC to identify possible matters within its mandate in the area of public procurement in Guyana, with particular regard to openness and fairness. It is considered that there are two broad matters that emerge.

The first is the very capacity of the procurement system for such openness, or transparency. This matter amounts to a concern. Where 'fairness' has been examined, in regard to adequate hearing of complaints, this too has also raised concerns. Underlying areas to both these concerns have been expressed as issues under the appropriate headings, or sub-indicators.

Here it should be noted that capacity development of the procurement system is the prime long-term objective of the methodology adapted and used in this research . The aim is continuous improvement to "international" standards through periodic assessments and targeting of weaknesses. In turn, this demands that administrators of the procurement system embrace the methodology in its full rigour, complete with periodic surveys of appropriate sections of civil society and of bidders who use the system.

The other matter to emerge is that public procurement in Guyana is a vital issue touching on ethnic harmony. This is evidenced by the

racial, ethnic and political background from which the constitutional amendment on procurement has emerged, as well as the nature of the amendment itself.

APPENDICES

A Objectives of the Procurement Act 2003.

B Schedules of Comparison of Bodies Created by the Procurement Act and the Constitution.

C Mode of Data Collection.

APPENDIX -- B

Schedule Comparing Mode of Creation and Management of The National Procurement and Tender Administration by The Procurement Act, with those of The Public Procurement Commission by The Constitution.

| The Procurement Act<br><br>The National Procurement and Tender Administration | The Constitution.<br><br>The Public Procurement Commission |
|---|---|
| Managed by National Board, appointed by Minister. s16(3) | Members appointed by President in conjunction with National Assembly. Art212X (2) |
| Chairman of National Board, appointed by Minister. s16(4) | Chairman elected by member of Commission. Art 212 Y(3) |
| Salaries determined by Minister. s16(7) | Emoluments determined by PAC in conjunction with Commission. Art 212 Z(8) |
| Secretariat of Administration established by National Board, in consultation with Minister. s18(1) | Secretariat established independently by Commission, CEO appointment terms subject to National Assembly approval. Art 212 Z(2) |

APPENDIX -- B

Schedule Summarising Functions of the Public Procurement Commission as laid down by Constitution, alongside those assigned to the National Procurement and Tender Administration by the Procurement Act, pending establishment of the Public Procurement Commission.

| Statutory Authority<br><br>National Board of National Procurement and Tender Administration | Constitutional Mandate<br><br>Public Procurement Commission (PPC) |
|---|---|
| Appoints evaluators. s17(1) | -- |
| Manages records and quality assurance systems (pending PPC). s17(2) | Monitors performance of procurement bodies. Art 212 AA(1) |
| Organises training (pending PPC). s17(2) | Promotes awareness to bodies, including public bodies. Art 212 AA(1) |
| Reports to Minister on effectiveness (pending PPC). s17(2) | Reports to National Assembly on legislation, policies and compliance. Art 212 AA(1) |
| Reviews 'decisions' of procurement entities (pending PPC). s17(2) | Investigate complaints from private and public sectors. Art 212 AA(1) |
| Adjudicate debarment proceedings (pending PPC). s17(2) | Investigate cases of irregularity and mismanagement. Art 212 AA(1) |

APPENDIX -- C

# Mode of Data Collection

| | | Mode | | |
|---|---|---|---|---|
| | | Content analysis of legislation | Interview of key personnel | Case study |
| LEGAL FRAMEWORK | | | | |
| Act, regulations, manuals and guidelines | | | | |
| Sub-indicator | | | | |
| 1 a | *Coverage of legal framework* | X | X | |
| | | | | |
| 1 b | Procurement methods | X | | |
| | | | | |
| 1(d) - not applied | | | | |
| | | | | |
| 1 c | Advertising rules and time limits | | X | X |
| | | | | |
| 1 e | Documentation and technical specifications | X | | |
| | | | | |
| 1 f | Evaluation & award criteria | | X | X |
| | | | | |
| 1 (g) - not applied | | | | |
| | | | | |
| 1 h | Complaints | X | | |
| | | | | |

APPENDIX -- C

# Mode of Data Collection Contd

| | | Mode | | |
|---|---|---|---|---|
| | | Content analysis of legislation | Interview of key personnel | Case study |
| Existence of Implementing Documentation | | | | |
| Sub-indicator | | | | |
| 2 a | Definition of processes not included in legislation | X | X | |
| 2 (b) - not applied | | | | |
| 2 c | Procedures for pre-qualification | | X | |
| 2 d | Provisions for evaluating technical capacity | | X | |
| 2 e | Guidelines for use by contracting parties | | X | |
| INTERGRITY & TRANSPARENCY | | | | |
| Effectiveness of Control & Audit Systems | | | | |
| Sub-indicator | | | | |
| 9 a | Legal requirement to audit procurement | X | X | |
| 9 b | Follow up on recommendations | | X | |
| 9 c | Internal control system - key provisions | | X | |
| 9 d | Internal control system - general provisions | | X | |

APPENDIX -- C

# Mode of Data Collection Contd

| | | Mode | | |
|---|---|---|---|---|
| | | Content analysis of legislation | Interview of key personnel | Case study |
| Efficiency of Appeal Mechanisms | | | | |
| Sub-indicator | | | | |
| 10a | Contribution to compliance | | **X** | |
| 10 (b) & 10(c) - not applied | | | | |
| 10d | Publication of review decisions | | **X** | |
| 10e | Independence of review body | | **X** | |
| Access to Information | | | | |
| Sub-indicator | | | | |
| 11a | Publication of general information | | **X** | |
| Ethics and Anti-corruption | | | | |
| 12a | Anti-corruption programme | | **X** | |
| OTHER ASPECTS OF PROCUREMENT | | | | |
| [ Indicator ] | Equal Opportunity Policy | | **X** | |