ENGINEER WINSTON RILEY RECEIVES NATION'S SECOND HIGHEST AWARD

The Republic of Trinidad and Tobago celebrated its 54th anniversary of Independence on August 31st, 2016. On this aupicious day, some of our outstanding nationals were presented with National Awards for their contribution to the nation. APETT is pleased to advise that amongst these recipients was Eng. Winston Riley, a distinguished Member of our fraternity, and Past President of our Association. Eng. Riley received the nation's second highest award; the Chaconia Gold Medal for distinguished and outstanding service to the country.

APETT takes this opputunity to publicly congratulate Eng. Riley on his achievement. Such an award augers well for the engineering profession and sets the standard for all others within the profession.

The following is an excerpt from Eng. Riley's extensive biography:

Eng. Winston Riley, FAPETT gained his Bachelor's degree in Civil Engineering in 1967. He first worked in the Drainage and Hydraulics Division of the Ministry of Works (DHD of MOW) from 1967 to 1969, before entering the private sector. At the DHD of MOW, he became the engineer in charge of construction and considered the following two projects to be the most creative:

i. The construction of an earthen dam in the Caroni Swamp utilizing derelict vehicles and mangrove piles to prevent pollution of the swamp by effluent from the Fernandez Distillery.
ii. The use of Lake Asphalt materials and wire mesh as a replacement for the imported gabion mattresses for coastal erosion protection.

In 1969 Eng. Riley joined the firm of Trinidad Engineering and Research (TER) where he honed his experience in the design of structures, housing developments and the preparation of project proposals. To him, the most exciting events at TER included:

i. The analysis and design of the drainage requirement for the Uriah Butler Highway, which determined the road profiles for the north-bound lanes. These lanes have not flooded to date.
ii. Identifying deficiencies and proposing amendments to the existing code BS 1449 while designing Z purlins.
iii. Project management of the design and the supervision of the first phase of construction of the Claude Noel Highway in Tobago.

In 1975, he formed the construction firm ENDECO Trinidad Limited. Under his leadership, ENDECO successfully undertook the construction of 32 projects, the main ones being the design and construction of the former TRINRE building and the Barrackpore Senior Secondary School

utilizing lift-slab tilt up systems, the former Crown Life Building, the Development Finance Corporation building utilizing a climbing crane, and the Townhouses at Flagstaff utilizing flying forms.

In 1975, Planning Associates Ltd. (PAL) was turned over to Eng. Riley and his brother Eng. Martin Riley. This led to a profitable relationship with the international consulting firm Stantec Inc. resulting in the formation of the joint venture firm Planning and Stantec Limited (P&SL).

As Managing Director of PAL, Eng. Riley managed the following projects:

i. The design phase of the rehabilitation work on the Drakes and Blackburne Highway (Tortola B.V.I.),
ii. The design and construction supervision of the Belmont Road in Tobago

He was project director for the rehabilitation of over 1,000 kilometers of roads in Jamaica; the rehabilitation of roads and bridges in Trinidad under the NREP phases I and 2, and the design of the San Fernando to Princess Town highway.

Eng. Riley's entrepreneurial skills and understanding of the shifts in technology led to the formation of EQS Limited (Quantity Surveying) and the acquisition of interest in Reynald Associates Limited (RAL) (architects) and Wallace Evans Jamaica Limited (engineering).

Eng. Riley also operated as project principal for the design of airports in Tobago and Dominica, the design and supervision of the construction of several Junior secondary schools and the design and supervision of the E-Teck flagship Building, which won two industry prizes in 2006.

Eng. Riley has demonstrated a long-standing commitment to the development of the Construction industry in Trinidad and Tobago and is a past president of APETT and the Contractor's Association of Trinidad and Tobago. As President of APETT, he initiated and managed the first Caribbean Housing Conference. He also served on several Cabinet Appointed Committees in the industry. Eng. Riley served as president of the JCC for ten years. During his tenure he prepared and presented the industry's submissions at the Commissions of Inquiry into the Piarco Airport Construction project and the Construction Sector (UFF Commission). He also successfully lobbied for the introduction of a Master's Programme in Project Management at UWI and initiated and managed a training arrangement in the FIDIC forms of contract in the Caribbean. To date, over 3000 professionals have been trained.

Winston has advocated relentlessly for the reform of public procurement processes and practices. He is currently the Chair of the Private Sector Civil Society Group for public procurement that has successfully campaigned for the introduction of procurement legislation

that recently received the partial proclamation. He currently serves on the Cabinet Appointed Oversight Committee for Public Procurement.

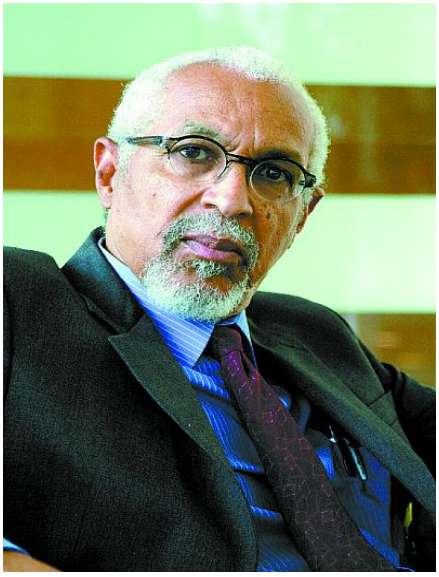
Eng. Riley has authored several technical papers, some of which are published in international technical journals. He is Chairman of the Lloyd Best Institute and has written many non-technical papers on matters of cultural and national interest. He was the first recipient of a Bursary from APETT, which he declined when he was awarded an additional national scholarship. At UWI, he formed and managed the Literary and Debating Society.

Eng. Riley was the recipient of the R.V.S. Aleong Sterling Service to APETT Award in 2010 and the Career of Excellence in Engineering Award in 2015. He was also awarded for his contribution to the development of Engineering, UWI 1985 and APETT 1987. Eng. Riley attended St. George's College and Queen's Royal College where he was outstanding at chess and athletics.

The 2016-2017 Executive Council of APETT congratulates Eng. Riley on his achievement and wishes him well as he continues in service for the profession and the nation.

Author: Eng. Vince Ramlochan

DR. JAMES ARMSTRONG-JCC's PRESIDENT



Dr. James Armstrong was elected President of the Trinidad and Tobago Joint Consultative Council for the Construction Industry (JCC) on 16 December 2015. He holds a Bachelor's degree in Environmental Design; an M. Sc in Urban and Regional Planning, and Ph. D in Development Planning. He has had a distinguished career at the United Nations (Centre for Human Settlements) where he has been a Chief Technical Advisor to many governments around the world in the areas of institutional strengthening, city management, housing, building and planning.

Since his return to Trinidad and Tobago in 2000 he has been involved in a number of activities contributing to national and regional development, including, *inter alia*: lecturing at the University of the West Indies; being a member of the Vision 2020 Sustainable Communities team; a member and President of the Trinidad and Tobago Society of Planners (TTSP); Vice President of the Commonwealth Association of Planners (Americas – Canada and Caribbean); Chairman of the Highway Review Committee and, more recently, a member of the Police Service Commission. He has served as an Independent Senator in the Parliament of Trinidad and Tobago. He has also served on a number of Boards. While being President of the TTSP he was also that organization's representative on the Joint Consultative Council and has assisted the Council with a range of activities from time to time.

JOINT CONSULTATIVE COUNCIL (JCC)

SEMINAR

"ECONOMIC REVITALIZATION THROUGH MOBILISATION OF THE CONSTRUCTION SECTOR"

Wednesday November 23rd 2016

The Radisson Hotel, Port of Spain

Presentation by
Franka Costelloe
Director - Trinidad and Tobago Manufacturers' Association (TTMA)

TOPIC: <u>Manufacturing for the Construction Sector - Challenges and Solutions</u>

BIO OF PRESENTER (quarter Page)

Mrs. Franka Costelloe-Mackenzie holds a

- (MSC) Master's Degree in Building and Construction Management (with distinction) from the University of West Indies, Cavehill Campus,
- (MBOS) Associate Degree in Project Management from Fanshawe College, Canada
- (BSC) Bachelor of Science Degree in Business Administration with a Major in Human Resources from University of Western Ontario, Canada and a
- Masters Certificate in Corporate Governance from the Caribbean Corporate Governance Institute.

Franka Costelloe-Mackenzie is a Manager of Lifetime Roofing Ltd; a manufacturer, distributor and contractor specialized in "Building Envelope Solutions", particularly metal roofing, flat roof waterproofing and windows & doors. She has experience in various departments including; Human Resources, Project Management, Contracts, Budget Planning & Administration, Strategic Planning, Sales and Marketing.

Mrs. Costelloe-Mackenzie currently sits on the Trinidad and Tobago Manufacturer's Association Board, First Citizens and associate boards and Chairs the Human Resource Committee of First Citizens.

Distinguished Ladies and Gentlemen - Good Afternoon.

I am honoured to be invited to address such a prominent gathering - encompassing some of the Who's Who of the construction industry, including its partners in sectors such as finance, manufacturing and services.

When I was asked to speak wearing my TTMA directorship hat on Manufacturing as it relates to the Construction sector, I was hard pressed, really, to draw a line between the two sectors. With my mother sitting on the TTCA Board, me sitting on the Board of the TTMA, and both of us working for a roofing company, I have first-hand perspective of the issues and challenges confronting both sectors.

The local manufacturing activities that impact the construction sector can collectively be described as the Construction Materials sector. It includes companies that mine, process, and produce materials, including cement and its aggregates, ready-mix concrete, asphalt, sand, gravel, and other construction products used in buildings, such as glass, plasterboard, insulation, bricks, and roofing materials, among others.

Ladies and Gentlemen, economic growth in emerging markets is accompanied by expansion in construction activity, especially of industrial and transportation infrastructure. Production volumes reflect economic activity as demand is influenced by the private sector, as well as government infrastructure investment making construction materials essential to driving economic growth.

This Government needs to have an aggressive plan to kick start the T&T economy that is centered on construction and local manufacturing materials.

In addition to mitigating a slowdown in work, manufacturers and contractors are managing problems that are affecting future and day to day business. I, and many others I have spoken with, feel passionately about these issues and so I hope I articulate them as strongly as they would, and I look forward to a lively discussion afterward.

Manufacturers are wired to be creative, introduce new products, be as efficient and cost effective as possible, all the while producing a superior product than the one before. Although we are pressured by regulators, customers, and the general public to be innovate and develop a wider product selection of durable, safe, technologically advanced products - quicker and cheaper – we already have this inert desire to do so. It is frustrating when we can't, because we are craftsmen of a particular trade that we are continuously trying to improve.

Manufacturer's efforts are not only to be competitive with the local market but also the international market. We consult with architects, contractors and engineers, visit trade shows and stay abreast of new technologies – there is passion in what we make.

Unfortunately, while we strive to be the best and most competitive partners and suppliers to the markets, our best efforts are undermined by obstacles, which absorb our energies and attention on elements that should be readily available and supportive to building a manufacturing hub in Trinidad.

Just to elaborate on a few of these, Ladies and Gentlemen:

Industrial Parks were originally setup to support local manufacturers and encourage entrepreneurship by being subsidized at peppercorn rates. The pricing strategy of eTeck has changed to being a self- sustainable and profit making enterprise.

What is happening now is that leases are priced at market rates, using real-estate models for pricing which start ups simply cannot afford. On the other extreme, successful tenants who would like to buy out their leases at a fair market value and turn a liability into an asset, are refused. Why not mandate that Leases should be available for purchase after 20 years - giving eTecK the needed capital to create new parks?

And what are some of the features any new industrial park should have? Well, apart from being properly located and safe, the basic infrastructure of a park built in the 21st century should include underground cables for electricity, cable and gas lines; a multi-parking facility with transit parking roads designed for container deliveries, should be a green park, have easy access to transport for employees, house support centers such as day care, cafeterias and physical fitness facilities.

Traffic congestion results in many employees spending an average of three to five hours commuting. This unproductive waste of time creates a frustrated, exhausted working class and adds costs to end consumers. Employers can take the initiatives to organize car pools, company transportation, flexible hours and work from home alternatives. But the Government needs to invest in building a sustainable, dependable public transport system that networks the entire nation so that people can leave their private cars home and ease congestion on the road.

Rising crime rates have given “Security Measures” a place on the balance sheet where they did not exist 20 years ago. Today, companies are forced to invest heavily in armed guards, security cameras, beams, alarms, dogs, gates, locks, and so on. Companies are forced to constantly write off theft and vandalism.

As if these were not sufficient to put you out of business - or make you bald - there are several other issues plaguing manufacturers in the local construction sector that our global counterparts certainly do not have to face.

The dreaded topic of the Shortage of US Dollars. First to state the obvious - demand is not being met.

- Manufacturers are struggling to maintain a healthy inventory of raw materials, resulting in prioritizing the necessities as opposed to expanding product lines.

- It has increased the cost of business, not only due to the higher exchange rate, paying demurrage charges, losing credit terms with suppliers and having to take loans in US dollars.

As difficult as this situation is, we cannot just cry about it and go bald. So I offer two recommendations.

One - Government could allocate a quota of US currency to the manufacturing sector to be managed by the Eximbank who would verify that legitimate material orders exist. This is a suggestion I first heard made by former TTMA past President Stuart Dagliesh.

My second recommendation - Manufacturers must become USD earners by exporting services and products.

On this second point, let me say that I understand, first-hand, that this is easier said than done, for some manufacturers, particularly those who have not ventured outside the T&T market before. But in this small society of ours, we have to form alliances, share our experiences and be willing to help each other. At Lifetime Roofing, we've taken the plunge. We are in CARICOM, we're looking at Cuba and elsewhere. On certain projects, the client will ask us to provide other goods or services which is an opportunity we can pass on to another Trini provider. This is an example of what we can be doing for each other.

Local Content – Major projects at high values are contracted to international companies, mostly because local companies cannot get the bonds needed to support the tenders. The money leaves the country and many times local contractors are either left out entirely or not paid in full. A great saying is "Dirty hands are an indication of clean money" and the recommendation is simple:

- Break up tenders and work plans into bite size portions more palatable to the local contractors and manufacturers, as suggested on several occasions by the TTCA's Mikey Joseph and Chris Garcia.

- Procurement of specialty items that are not available locally should still be channeled through a local manufacturer of a like business, giving them the opportunity to be a part of the project, engage new suppliers, learn about new technologies, and advance their training and expertise.

Quality Control

The National Building Code, though set out by the JCC, has not been enforced and there seems to be little political will to do so. Therefore, regulation on the materials being used in construction is up to architects, engineers and contractors. Markets are flooded with unregulated materials of low quality at low prices.

Recommendation:

- The measn in which to beat this back is there – TTBS, which has done significant work in putting standards and regulations in place. But it needs to become a true regulator with hard fast consequences for being out of regulation and not a merit stamp for marketing. Manufacturers need to be assessed, certified and regulated to a set code. If you are not certified than you cannot be allowed to operate. Currently, non-conforming manufacturers are simply asked to pay a higher fee. This means that for a certain price the TTBS allows manufacturers to operate outside of regulations.

Poor Work Ethic - Manufacturing is a labour of love. Making a product from scratch in the most efficient, cost effective manner and then packaging it to inspire a consumer is a passion that every manufacturer will tell you is unique to each. Not everyone has this passion for roofing material, cement, windows, bricks, steel, tiles, cabinetry, mortar etc. But, it is each manufacturer's dream to inspire their workforce with a passion and drive to work towards excellence and pride in the product and service they deliver. This is the challenge – to both inspire the workforce and be inspired. Training, education and discipline is needed.

Recommendation:

- Discipline teaches us to operate by principle rather than desire, overthrowing our immediate wants and reinforce truth, virtue, and integrity to rule our minds instead. The IR rulings that we hear of are comical in nature – we all have them – but the joke is old and not only is business suffering – but the very fabric of the nation is. The Industrial Relation system must become equitable to both the employer and the employee in an aim to generate a productive nation of the highest integrity. There is a dire need to balance the employee bias which exists.

- On the other hand, companies need to offer support for development of staff and invest in training and education - creating a career and not just a job for employees. Rewards for ingenuity, efficiency, excellent customer service and performance need to be offered by companies.

Labour Shortage -- With half the nation's manufacturing workers nearing retirement, 90% of T&T's manufacturers say they are struggling to find workers. Unfortunately, there is a misconception that manufacturing jobs are dead-end jobs requiring little or no skills. Attracting students to many of the highly skilled careers in manufacturing and machining will require a concerted effort to completely change the perception of these jobs

Recommendations:

- Allow Caricom nationals to enter T&T with limited Visas for skilled and semi-skilled workers - a recommendation I first heard made by Rolph Balgobin.
- Government can help by subsidizing only those training programs that are specific to skills needed, for example Engineer Mechanics, Machine Maintenance and Operation Analysis - a suggestion from former TTMA President, the late Paul Quesnel.

Delayed Payments – Main Contractors have a difficult task of managing cash flow, particularly on Government jobs. The trickle effect is that sub-contractors and suppliers feel the crunch. The reality is that manufacturers work on economies of scale and their margins and cash flows cannot sustain the lengthy waiting times. As a result, we have extreme cases of manufacturers and sub-contractors going out of business or turning away government-related work for fear of lengthy payment schedules or having to offer credit terms to main contractors.

Recommendation:

- Government needs to pay suppliers, i.e. manufacturers, for their products upfront or pay interest for credit.

Anti-Dumping – The anti-dumping law is clear but too often investigations are lengthy and onerous, resulting in no impact on the perpetrators. The law states that action can only be taken when enough harm to the local company is proven – e.g. shutting down.

Recommendation:

- The law on this needs to be reviewed and adjusted.
- TTBS to regulate with enforcement
- Heavy fines to be put in place and implemented swiftly.
- Temporary stop on business while the investigation is undergoing and banning companies from operation for a time period if convicted.

Conclusion

Ladies and Gentlemen, a vibrant construction and manufacturing sector are essential for a vibrant economy. Blocking their development are issues ranging from US dollar shortages, payment delays, local content, quality control, anti-dumping, work ethic, labour shortage, and limited infrastructure.

To blast away these obstacles, Policymakers could:-

- Invest in Infrastructure , and package it in a way that supports local contractors
- Channel USD to manufacturers
- Focus Training on needed skills
- Improve and Build New Industrial Parks
- Provide performance incentives that encourage investment in manufacturing
- Promote a vibrant, productive working population of the highest integrity through targeted training and correcting the deficiencies of the IR system

Manufacturers also have to play a role in their own salvation by:

- Investing in technology
- Investing in their staff
- Becoming a USD earner
- Exploring and practicing their IR rights

With a competitive, supportive business climate, local manufacturers could export, expand our production lines and become the manufacturing hub of the Caribbean we so badly want to be. And then, who knows, maybe President-elect Trump would be talking about stopping Trinidad & Tobago from taking away American jobs!

Let me close by saluting the tremendous work that the JCC has done and is doing to get our business climate right. My presentation focuses on issues that need improvement, and the list is daunting, but as a current and the future of a manufacturing company I am passionate about this because I have immense dreams and hopes. This country has immense resources that are gifts to our nation and people who are creative, vibrant and genuine – when inspired. Our landscapes are bountiful with opportunity for almost every industry imaginable. We have all the ingredients to become a manufacturing force to be reckoned with – we just need to get the recipe right to make an amazing product – and that is what we are discussing today.

Thank you for your attention and I look forward to hearing your ideas about how we can work together to make T&T great again.

Thank You.

Building Infrastructure in a Changing Economy

1.0 Introduction

This paper focuses on building infrastructure in a changing Economy.

Our economy has been dependent upon the good fortunes of oil and gas for many years. The recent sudden changes in this sector have yielded unanticipated consequences on all other sectors of our economy.

The oil and gas sector has been our economy's major foreign exchange earner. As such, we in Trinidad and Tobago have experienced the effects of peaks and troughs associated with the fluctuation in revenue coming out of the oil and gas sector.

Notwithstanding the effects of these peaks and troughs arising from oil and gas revenues, the construction sector still remains a key part of our economy. Infrastructural development, the construction of houses, new buildings, repairs and maintenance are ongoing activities that overtime vary in intensity with the country's revenue stream.

In this context, this presentation seeks to review the recent experiences and identify the role building infrastructure plays in a changing economy; the following areas will be discussed:

1. **The Current Economic Challenges**
2. **The Contribution of the Construction Sector to the National Economy**
3. **The Impact of Infrastructure Construction on the Economy**
4. **The Building Infrastructure and the Path Forward**
5. **Conclusion and Recommendations**

2.0 Current Economic Challenges

The present description of the economy is one that currently has a very low level of construction activities. This situation has generated no end of debate among industry players. Additionally it is doubtful that oil and gas revenues will return to what the country had experienced in the last decade.

In going forward our major challenge would be our ability to earn Foreign exchange, we must understand foreign exchange fuels our economy and the economy will further experience challenges once there is a limited supply of foreign exchange.

Another challenge is that the economic experts have started to recommended defensive prescriptions which include cutbacks in government spending. If an unplanned approach to restructuring government spending is adopted this action is likely to continue to impact the construction sector negatively.

Research have shown when the economic valve is closed off by cutbacks in public sector spending within the construction sector there will be a reverse multiplier effect on unemployment.

Also maintenance programmes tends to suffer as technocrats don't perceive maintenance as an income generating stream. As such, one will consequently expect an accelerated or shortened service life on our existing infrastructure asset, an example just to mention is the current state of deterioration on our road network and building assets.

The construction sector is one of the few sectors which today hold the promise of sustaining national economic development inclusive of supporting economic diversification away from oil and gas and would assist in the revitalization of our economy, while at the same time satisfying basic and urgent domestic needs.

3.0 The Contribution of the Construction Sector to the National Economy

The construction sector is an important contributor to Trinidad and Tobago economy, for the recent period 2010 to 2015 the construction sector repeatedly accounted for approximately 5% of Trinidad and Tobago's GDP, fluctuating from 5.4% in 2010 to 4.7% in 2012.

The Ministry of Finance's "Review of the Economy 2015" indicated the sector accounted for 5.3% of GDP and was estimated to employ around 95,000 or 14.8% of the country's workforce.

The Trinidad and Tobago construction sector is often described as being formed by three major industries:

1. Building Construction
2. Civil & Infrastructure Construction
3. Energy and Industrial Construction

While the energy construction segment of the industry started to slow down at the end of 2014, following the drop in oil and gas prices, government led building and infrastructure activities continued to perform during 2015, noting that 2015 was an election year.

Even though there was a slowing down of construction activities after September's 2015, Central Bank data reported, based on cement sales a growth of 7.3% in the third quarter of 2015 was experienced, however in the last quarter of 2015 construction activity declined. During 2016 the sector continued to decline.

The current government continues to experience reducing cash flow due to the declining oil and gas revenues and a reduction of foreign exchange earnings; as such they adopted to review the public construction programme in their first year.

Today construction activities are no longer vibrant. The large private and public sector projects have either been completed or will soon be completed. Consultants and Contractors are now without new projects, and some firms have begun the reduction of their labour force.

Notwithstanding the current situation of the sector, there may be light at the end of the tunnel with the announcement by government of some major projects which are set to go ahead, some of projects mentioned are:

1. Proposed Highway to Manzanilla and the first class road to Toco with associated sea port
2. The Fishing Port at Mourga
3. The Completion of Highway to Point Fortin
4. The HDC housing construction programme

5. The recently mention road network improvement programme

If these mentioned projects truly materialise with local lead participation an early positive impact to the economy will be experienced, however if foreign lead participation is allowed the sector will most likely experience prolong recovery.

4.0 The Impact of Infrastructure Construction on the Economy

The construction of infrastructure works is considered to be one of the major mechanisms to stimulating economic growth. Construction plays an important role in the economic upliftment and development of a country. It can be regarded as a tool for generating employment and offering job opportunities to mass amounts of unskilled, semi-skilled and skilled work force.

Additionally construction has the potential for generating foreign exchange earnings derived from overseas trade in construction services, construction materials and engineering services; this was the experience when the industry ventured into the Caribbean territories during the mid 80's

When infrastructure projects are undertaken, example construction of a new road, water and sewer reticulation systems and bridges, these infrastructure assets creates a huge multiplier effect on the wider economy. Research conducted by the US Federal Reserve Bank indicates that a dollar spent on infrastructure, equates to an outcome which is greater than two dollars to the economy.

Likewise if we are to undertake the construction of light industrial parks, infrastructure and associated warehouse construction will not only generate employment directly through construction but also create an economic space where entrepreneurs can establish factories to manufacture goods and services for local consumption or export markets. These factories will employ more labour enabling workers the buying power to obtain goods from the market etc., creating a virtuous cycle.

If we examine the construction components of developing a light industrial park, most of the material inputs are sourced or manufactured locally. The only major materials input which may be required to imported would be rebar for associated concrete structures and structural steel for the factory shell framing. If projects of this nature are pursued, completed facilities can be used to support Agro-processing industries which have the potential of generating foreign exchange.

The multiplier effect created by the construction of infrastructure works has the potential to touch a wide and diverse cross section of the population.

5.0 The Building Infrastructure and the Path Forward

The period for undertaking monumental and or legacy projects can no longer be afforded. Our proposed construction projects must be linked to delivering an economic, financial or social outcome in the short, medium or long term.

Any strategy to organise and propel the construction sector using infrastructure construction must first define clearly the outputs and projects to be delivered. These planned construction projects must be prescribed and prioritised by the country's national development plans. The sectors for generating foreign exchange should be given priority , example Agriculture, Manufacturing, Tourism which all have the potential of earning foreign exchange.

Given our foreign exchange earner challenges, a serious and thorough survey and inventory of natural resources needs to be undertaken with specific focus on construction materials, example quarry products and timber. Timber should also be explored as a potential industry which can be revitalized and developed, the potential of downstream timber production can be a stream for foreign exchange.

With respect to quarry products, within the last ten plus years we have seen an upsurge in the importation of aggregates from regionally and extra-regional countries. With our foreign exchange shortage, we must pursue our untapped aggregate reserves and organize our sector to harvest these reserves to support our upcoming infrastructure construction projects and thereby conserve foreign exchange.

Designers must have a concerted drive to maximise the utilisation of local construction materials. This would in turn stimulate local production, ultimately reduce construction cost and produce engineering works more appropriately integrated with our social and economic environment.

In moving our construction sector forward, we must develop an integrated programme through our existing institution such at UWI, UTT or CARIRI to facilitate research and development in an effort of creating and improving local construction materials and process.

While we continue to erect structures and generate construction activities, we urgently need to establish the much talked about national building codes, this would ensure construction works undertaken will remain in service for as long as was intended.

A serious review of the present approach to the training and certification of trade and craftsmen is also needed if we are to undertake technically challenging construction projects, we need to develop a highly skill workforce, we must follow our sub-sector in Energy and

Industrial Construction which have successfully organized their manpower training and certification needs.

6.0 Conclusion and Recommendations

In conclusion, the building infrastructure in a changing economy has the unique potential of generating and maintaining a level of employment and a quality of life unchallenged by the other sectors of the economy, it also has the potential of supporting the earning of foreign exchange.

The experience of Trinidad's economy with its historic dependence on oil and gas being the dominant economic sector is not unique. Our problems are the same problems which many countries have faced.

A systematic approach to building infrastructure is being recommended here for Trinidad in this period of reflection.

The following recommendations are being proposed for consideration:

1. A national survey and inventory of local construction materials available for use in infrastructure construction, example the quality and quantities of aggregates and timber available.

2. Development of an integrated approach to research and development of indigenous construction materials to support infrastructure construction.

3. Based on the national development plan, establish priorities for construction projects. Projects with the greater return to be treated as first priority.

4. Accelerate programmes for training and certification of trades and craftsmen to support Building Construction, Civil & Infrastructure Construction.

5. State recognition of the importance and potential of the construction sector as a vehicle of growth and development and the need for locally lead participation.

6. Development and encouragement of the linkage between the construction sector and other related sectors of the economy e.g. banking / financial sector to support the project delivery model example 3'Ps

7. The establishment of a national building code to ensure our future investments the sector are protected with well-engineered construction.

I thank you and hope my contribution this afternoon would make progressive changes towards the development of our nation as we move forward in this changing economy

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MEDIA RELEASE

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FOR IMMEDIATE RELEASE

Date: 5th December, 2012

START OF MEDIA RELEASE

PORT OF SPAIN – PORT OF SPAIN – After consultation with the government and the Highway Re-Route Movement, the JCC and its Civil Society Kindred Associations – Federation of Independent Trades Unions and NGOs (FITUN), Trinidad & Tobago Transparency Institute (TTTI) and Women Working for Social Progress (Working Women) - are pleased to confirm that we have appointed an independent working group to examine the several matters of concern on the disputed Debe to Mon Desir segment of the Solomon Hochoy Highway to Point Fortin.

The JCC and its Civil Society Kindred Associations have appointed Independent Senator, Dr. James Armstrong, as Chairman of the Independent Working Group.

The JCC and its Civil Society Kindred Associations has agreed the attached Terms of Reference for the examination of the facts in this matter and identified the required disciplines for the review.

The JCC and its Kindred Associations are now committed to this process for independent, civil society oversight of large-scale development in our country.

We regard this as a solid framework for the transparent ventilation of the matters in dispute.

This is a real advance in the development of our country, so we would like all parties to work in good faith within this process. The Independent Working Group will be inviting oral and written submissions within this exercise.

The Civil Society Groups are confident that these efforts would lead to a resolution of this protracted impasse and would signal the heralding of a new era of civil society's participation in the national development agenda.

TERMS OF REFERENCE

- Review all the documentation provided by NIDCO, HRM and other interested parties
- Invite written and oral submissions from interested parties
- Ascertain transparency and compliance with prevailing statutory requirements
- Examine the process of public consultation and public information Examine the TOR issued by the EMA for an Environmental Impact Assessment, along with any other relevant documentation, in order to ascertain implications for social, economic and environmental impacts of the highway development, including consideration of land tenure, land acquisition and costs, land use and displacement of families and attendant settlement development. This component of the review will consider cost-benefit analysis; social impact assessment; terrestrial and marine ecology, hydrology, drainage and public utilities.
- Examine the route selection process including the consideration of alternatives and the choice criteria
- Make recommendations for Best Practice
- Undertake any related tasks which will enhance the content of the Report

REQUIRED DISCIPLINES

- Environmental
- Transportation
- Hydrology / Drainage
- Social Economic
- Archaeology
- Planning / Settlements
- Economic Analysis
- Highway Engineering
- Property Valuation

END OF MEDIA RELEASE

The Land Surveyor in National Economic Development Planning

Prepared by

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BACKGROUND

Land surveyors have an important part to play in national economic development planning. They set the information foundation that has integrity and is reliable, robust and can be used for socio-economic planning, land use planning, fiscal and other national development policy.

The foundation is built on the concept that land is the source of all material wealth and from it we get all the things that we use of value. It is the key to our existence and its distribution and use is of vital importance.

Historically, civilisation profiles man's effort to satisfy his material wants - the wants started with simple food and shelter. Beyond these simple needs developed the desire for elaborate food, dwelling place, fine clothing, comforts and luxuries. As society evolved and became complex and sophisticated, land ownership became the source of wealth generation when invested, the security it affords and social / economic power and prestige it may confer.

Land surveyors produce cadastral plans, mapping services, geodetic surveys, sea level monitoring (**note the economic impact of climate change**) and other types of measuring services. However, we will focus on cadastral surveys as this survey produces and defines the limitation of property rights of the smallest registerable land parcel. Rights and interests are the benefits or enjoyment in real property that can be conveyed, transferred, or otherwise allocated to another for economic remuneration. Rights and interests are recorded in land record documents. The spatial information necessary to describe rights and interests includes the cadastral surveys and legal descriptions.

An important feature of the unit of the parcel record is that it gives a distinctive appellation and so provides a means for any information regarding the parcel to be recorded. The core set for the development of a land information system will therefore be the base mapping, the title records and the cadastral plans for each parcel unit.

MANAGING DIGITAL INFRASTRUCTURE

One of the critical issues in the development of a digital land information system is the management of the digital data infrastructure for long term utility. The Lands and Surveys Division is currently

developing and testing a Cadastral Map Information System (CMIS) which is the start for the development of a comprehensive national land information system.

It is without exaggeration to say that the Lands and Surveys Division have successfully established good standards and protocols for construction of the CMIS with the potential for the integration of other spatial databases that are necessary for the creation of a truly sustainable national land information system to assist with national development policies.

In the field of infrastructure and construction, there is a logical requirement for all of the many types of digital data created. All spatial digital data created in connection with infrastructure projects is tied to a particular physical location on earth. This obvious fact can serve as a superb organising paradigm for infrastructure project data. After all, whether a project is on local control, a globally geo-referenced datum such as WGS84, or the national datum, it is ultimately on some sort of grid or coordinate system. And translation from one datum to another has proven to be a nearly trivial problem in today's computerised world. For this reason, geo-referencing has the potential to be an effective, long lasting data standard underlying the collection and management of all infrastructure project data.

The Lands and Surveys CMIS have developed an interface that is spatially organised which is usually the easiest way to organise and retrieve data. This method more or less, will eliminate location and retrieval complications.

Organising data such as survey plans, title documents, survey control data, video, inspection reports, point clouds, soil data, etc., by selectable location of interest, will acknowledge the simple fact that projects exist in space—that is, everything really is somewhere. Project managers and engineers involved in infrastructure projects will benefit from this concept.

LAND AS A COMMODITY

As a commodity, land has a unique feature, namely, it is immovable and cannot be destroyed. In creating a cadastral plan or map, cadastral records are created so that the unit of land can be located readily, surely and unambiguously at any time on the ground. In the circumstances, the land parcel is the fundamental unit in a cadastral information system / land information system in a digital environment.

The land surveyor is the first land science professional to lay the foundation for the development of a parcel-based land information system where a number of technical and socio-economic information can be overlaid – fiscal, legal, planning, land use, CSO data, etc.

The integrity of the land surveyor's information is the strength of the development of a national land information system that can be used at the macro level of socio-economic national planning and the micro level for infrastructural development where the information is readily available for the decision making and development of business plans and project financing.

Time is money, and the information that will be readily available will be landowners name, property location, general land use, planning restrictions, valuation, soil type, and other critical information that will be required for decision making and budgeting.

NEED FOR DIGITAL LAND ADMINISTRATIVE SYSTEM

Poor land records are causing the government to lose millions of dollars in property tax revenue annually as a number of parcels are not registered with the District Revenue Office due to the creation of new parcels by illegal subdivision. Some of the negative effects of this situation are the sterilisation of real property collateral, an inefficient land market, loss of property value and loss of millions of dollars in annual revenue to the State.

Land markets are made up of a constantly developing portfolio of legal interests and transaction types, including both direct and derivative interests. The general rationale for land markets is that, under appropriate institutional frameworks, they will tend systematically to move land towards the most economically efficient ownership and use. The range of types of interests and transactions in land is typically related to the level of sophistication of the related functions in the economy, particularly in the context of the financial services and related professional sectors.

From a sustainable development perspective, land has the capacity for wealth generation, for attracting and locating investment, and for opening up vital opportunities for the development of the financial sector. Land is equally an asset for economic and social development, and particularly supporting land markets and revenue generation.

As professional land surveyors, we are quite aware that our land administration systems need to be re-engineered. For example, in many developing countries, land administration is still based on a relatively narrow land administration paradigm centred on land registration and cadastral surveying

and mapping. But efficient land information infrastructures are now required to meet the information demands for successful implementation of sustainable development. The Lands and Surveys Division has taken the initiative in developing a CMIS that is the first step in the development of a modern digital national land information system.

The Lands and Surveys initiative will eventually evolve to achieve increased revenue generation and collection by the State. It will also create the following:-

(i) Development of a national land information system;
(ii) Investment opportunities;
(iii) A healthy land market;
(iv) New economic activities;
(v) Employment generation;
(vi) Identify abandon land;
(vii) Arrest of the issue of land grab of State land.

EVOLUTION OF THE CONSTRUCTION INDUSTRY?

The State has committed to national infrastructure development programmes. The State needs to get value for money for its investment in development projects. The State therefore needs to commit and develop a robust means of measuring productivity. We know that no private sector organisation, faced with the disciplines of competing in the open market, would invest resources without a clear understanding of the rate of return.

In the circumstances, we have to examine current industry trends and future expectations for the construction and services industry, especially those dealing with processes to improve planning, design, construction, and operations / maintenance of civil infrastructure.

For example, transportation is a nation's lifeblood. Therefore the following must be noted:-

- Decaying transportation system is costly to our country;
- It costs the country millions of dollars annually in lost time, fuel and productivity;
- We must invest billions per year over the next 20 years to maintain and enhance our internal transportation systems;
- We have to understand the current rates of increase of the different modes of vehicular traffic expansion on the nation's road– what is the rate over a ten year period?
- Our economy is related to export trade –highly dependent on a strong, transportation system;

- What is the percentage of infrastructure projects cost that is related to rework from errors, omissions or delays due to requests for information!
- We have to look at urbanisation – what is the trend – is it increasing – what does it mean?
- Congestion – is building more roads the answer – it lacks logic;
- There is need to refocus and pay attention to repair, recondition and retrofit as part of our national strategic development programmes and as part of our budget control and cost management;
- We must have a vision - we must review and build on our 2020 Vision.

THE LAND SURVEYING PROFESSION IN NATIONAL DEVELOPMENT

Land surveying is a land science profession – cadastral surveying is the most popular but it is a small module of the land surveyor's training. It is the most visible part that the public sees and understands - the establishment of boundary lines and preparing cadastral plans to support a conveyance - is not the only function of a land surveyor.

However, land surveyors have a lot to contribute to national development – it is a profession whose knowledge and expertise are underutilised. The information that we generate form the base for the development of a parcel based land information system that integrates technical and socio-economic data. Land surveyors are expert measures and trained in spatial information management. Our training enables us to assist in the construction sector with their development programmes by putting together core datasets on the following: –

- Landownership, valuation, location of property boundaries, planning requirements and other critical data sets for planning, decision making (is the project feasible) and budgeting for development projects;
- We understand the effect of climate change and sea level rise and its effect on industries along the coastal areas;
- we understand tectonic movement and monitoring fault lines (Trinidad has a lot of fault lines) that produce movement patterns;
- We understand international boundaries.

We are a learnt profession that is willing to be part of the professional team that will contribute to national development planning.

Brief Bio - Fitzherbert Reyes is a Licensed Land Surveyor

Fitzherbert Reyes is a Licensed Land Surveyor and a member of the Land Survey Board of Trinidad and Tobago, the Institute of Surveyors of Trinidad and Tobago, the Geographic and Land Information Society, Inc. of the United States of America. In addition to obtaining a Diploma and Professional Diploma in Engineering and Land Surveying respectively, he hold a Master of Sciences Degree in Land Information Management and Cadastre* from the Polytechnic of East London (now the University of East London). He has experience working as a Land Surveyor not only in Trinidad and Tobago but also in Spain, France, Germany, The Netherlands, England and St Vincent and the Grenadines. He has held various positions in the Land & Surveys Division, including but not limited to Supervisor of Surveys, Supervisor of State Land, the Hydrographic Unit and the Project Manager for the Land Records Management Project). He is an expert in Land Information Systems / Geographic Information Systems / Land Management & Cadastral Science. He is also the principal author of more than 20 local and international consultancy reports and papers. Presently he is the Managing Director of the firm **Total Solutions Surveying Services Limited**.

***The Cadastre** is a specialised discipline that deals with ownership, tenure, precise location, dimension, area, land-use, value of individual parcels of land and land management; the cadastre science is used extensively in dispute and lawsuits between landowners.*

JOINT CONSULTATIVE COUNCILFOR THE CONSTRUCTION INDUSTRY

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10 October, 2014

Dr. Carson Charles
President
National Infrastructure Development Company Limited
#3 Melbourne Street
Port of Spain

Dear Dr. Charles,

Re - The Debe-Mon Desir Link of the San Fernando-Point Fortin Highway

Once again, the disputed Debe-Mon Desir highway link has become a matter of heated public debate, and it is our respectful view that the Public Interest now requires a decisive intervention to move this matter towards resolution. The Report of the HRC, now known as '*The Armstrong Report*', contained ten recommendations in relation to the disputed link and there is no clear position at this stage as to the Government's treatment of the Armstrong Report.

Given that over 18 months have now elapsed since publication of '*The Armstrong Report*', the JCC's view is that the Review process commenced in December 2012 can only be completed if the public is briefed as to the specific steps taken in relation to its recommendations

It is our considered opinion that the Public Interest would be best served by a formal, clear statement issued by NIDCO as the State's implementing Agency for this project, at the earliest opportunity, to specify what were the steps taken in relation to each recommendation of the '*The Armstrong Report*'. Such a statement would inform the public as to which recommendations (if any) were accepted and on what terms (if any); which were rejected and for what reasons; which are the subject of further consideration/examination, with details of those further studies; and finally, of course, which ones may have been 'embargoed' for decision pending the results of litigation.

We trust that our proposal would be given due consideration and would close by confirming our willingness to meet at short notice if requested.

Yours sincerely,
JOINT CONSULTATIVE COUNCIL
FOR THE CONSTRUCTION INDUSTRY

Afra Raymond, BSc, FRICS
President

MINISTER OF WORKS AND INFRASTRUCTURE

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Phone: 625 – 1225 Ext. 2050/2109/2457/2458
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Press Statement

Re: The Extension of the Solomon Hochoy Highway to Point Fortin

The Government welcomes the inputs of the Joint Consultative Council (JCC) and other civil society organizations namely the Federation of Independent Trade Unions (FITUN), the Trinidad and Tobago Transparency Institute (TTTI) and Women Working for Social Progress (Working Women) in meeting today to progress this matter involving the extension of the Solomon Hochoy Highway Extension to Point Fortin. The discussions have been very fruitful in pointing the way forward.

The meeting concluded as follows:

1. The National Infrastructure Development Co. Ltd. (NIDCO) undertook to make available to the JCC all the relevant documentation in its possession on the project in respect of the Debe to Mon Desir segment of the highway extension.

2. The JCC undertook to examine all the documentation on the project provided by NIDCO and all other relevant documentation and to produce a report within 60 days from today's date to NIDCO for its consideration and its publication thereafter.

3. Work will continue on sites of the highway released to the Contractor.

PRESIDENT JCC

December 03, 2012

E. George

Stacy Ragnarine - FITUN PRESIDENT

Emile P. Elias

Chandra Singh NIDCO Consultant

25 November, 2013

Senator Dr. the Honourable Bhoendradatt Tewarie
Minster Planning & Sustainable Development
Level 14 Eric Williams Financial Building
Independence Square
Port of Spain

Honourable Minister,

We thank you for your letter of 14th November 2013. In response to your invitation we submit for the consideration of the LRC, the following ***comments on the Government's Public Procurement Bill*** ('the Government Bill').

The Private Sector/Civil Society Group (PSCSG) is of the opinion that *any Bill on procurement reform must be based on five indispensable elements which we consider crucial to a modern, well-managed, fully accountable and flexible procurement regime in a democratic State.* These elements express the principles of good governance—transparency, accountability and value for money—which should inform the function and structure of the legislation. *These are at the heart of the Draft Bill that we are proposing* and have been made publicly available on www.jcc.org.

The five elements are as follows:

1. use of *Public Money* as the cornerstone of any public procurement process;
2. definition of *Procuring Agency* encapsulating any organisations responsible for transactions in the use of public money;
3. effective independence of mechanisms of *regulation and grievance resolution*;
4. *Value for Money* linked to performance/efficient use of public money; and
5. imbedded *participation of Civil Society* in the maintenance of the integrity of the procurement system.

In what follows we explain in greater detail our understanding of these elements, highlight what appear to be some of the loopholes in the Government Bill and note some important provisions in it that do not appear to have been considered by the Joint Select Committee of Parliament (JSC).

Public Money

The main objective of public procurement legislation is to ensure the efficient and transparent use of public money in the procurement cycle. The underlying assumption is that the use of public money necessarily entails some level of public accountability regardless of the source of funds or the status or type of the body/agency responsible for its use. *The use of Public Money is therefore the cornerstone of any public procurement process* and as such must inform every aspect of any legislation pertinent to public procurement. The definition of public money will determine the boundaries of accountability as well as identify the accountable agency and accountable person within the accountable agency

The litmus test to be incorporated in any definition of public money is the liability of the taxpayer. In this regard *the definition of public money and its operation is dealt with thoroughly in the PSCSG Bill* and should form the cornerstone of any Bill under discussion.

The definition of public money utilized in the Government Bill is similar to the one used in the PSCSG Draft Bill. However, in the Government Bill the definition hangs on its own. It is not used in the definition of public procurement or in identifying responsible agencies. Instead, the Government Bill defines "procurement" or "public procurement" as the acquisition of goods, works or services by a public body.

In the PSCSG Draft Bill "public procurement" means procurement involving the use of public money. This definition is designed, *inter alia*, to encompass BOLT (Build, Own, Lease, Transfer), BOOT (Build, Own, Operate, Transfer) and DFC (Design, Finance, Construct) schemes or other funding schemes for the provision of capital works which may be found to be ultimately to the benefit of the public.

Procuring Agency

'Agency' refers to the category of organisations where persons are required to provide explanations about their stewardship of public money – in other words the **'who'** of accountability, transparency and value for money—*sine qua non* in any law relating to public procurement.

The system of accountability for public money in Trinidad and Tobago is currently rooted in the *Exchequer and Audit Act* (Act #20 of 1959) a replica of an Act of the same name introduced by William Gladstone and passed in the United Kingdom in 1866. The Act focuses on ministerial responsibility to Parliament for the quality of public expenditure, with the Permanent Secretary as the accounting officer.

It is to be noted that the environment in respect of public expenditure in which the Exchequer and Audit Act was conceived was considerably less complex than what prevails today.

In the PSCSG Draft Bill '"agency" means a body incorporated or otherwise that uses public money and includes:

a) a ministry or department of government;
b) a statutory body and any corporate body in which that statutory body has a controlling interest or is in a position to directly or indirectly exercise control over affairs of that corporate body;
c) a state controlled enterprise and its subsidiary;
d) a person prescribed in the Guidelines for the purposes of this definition
e) a corporate body that is established for a public purpose;
f) any other body that is involved in public procurement; and
g) a person as prescribed for the purposes of this definition

This definition should be incorporated in any Bill to go to Parliament to enable a comprehensive accountability system for public expenditure for the acquisition of property and services. It is the link of these bodies to the use of public money which triggers the requirement for accountability, transparency and value for money.

Item (f) above —"any other body that is involved in public procurement"—is missing from the Government Bill. This omission denies oversight of the use of delivery systems such as Build Operate Lease Transfer (BOLT), of Public Private Partnerships (PPPs) where a private special purpose organisation not controlled or owned by the State is in control of the project. It also denies oversight of Government to Government arrangements.

In the Government Bill the use of the term "procuring entity" is restricted to public bodies, being defined as '... a public body that engages in public procurement'. Yet "Procurement" or 'Public Procurement' have previously been defined in the same Government Bill as '… the acquisition of goods, works or services by a public body".

The PSCSG Draft Bill states that 'procurement' means "the process of acquiring property or services commencing with the identification of the need of the property or services and ending with the performance of the related contracts." 'Public procurement' is defined as "procurement involving the use of public money".

Mechanisms of Regulation and Grievance Resolution

The functional and financial independence of the Procurement Regulator from the government of the day is a prerequisite for the integrity of any procurement system. In accordance with sound accountability criteria neither a Minister nor a Regulator is to be directly involved in the award of contracts.

The PSCSG Bill derived this third element from the history of public procurement in Trinidad and Tobago—a history in which changes in the institutional framework arose out of corruption issues.

The Central Tenders Board (CTB) was established by the CTB Act of 1961 and came into operation in 1965. This Act took away the power to award tenders from the elected representatives of local government bodies and gave the CTB "sole and exclusive authority … save as is provided in section 35 …" (thereby creating loopholes) " … to Act on behalf of the Government and the statutory bodies". In addition "In the exercise of its powers and in its performance of its duties the board shall conform to any general or special directives given to it by the Minister" meaning the "the Minister to whom responsibility for the Central Tenders Board is assigned". This was the Minister of Finance. *The CTB Act not only centralised control of public procurement but placed the CTB and thus the award of contracts under the direct control of a Minister.*

According to Section 75 (1) of the Constitution, *Cabinet's responsibility is for the "general direction and control of the Government of Trinidad and Tobago and shall be collectively responsible therefor to Parliament".*

The evidence emanating out of the *Commission of Enquiry into the Piarco Airport Project* revealed, not just *general* direction and control but direct interference in the procurement process by Ministers, to the extent that some of those Ministers are before the courts.

During the proceedings of the *Uff Commission of Enquiry*, particularly with respect to the operations of UDeCOTT, the question of ministerial involvement in the procurement process came under intense scrutiny.

It is clear that, *in regard to ministerial involvement in the procurement process, reformed procurement legislation must be true to the letter and spirit of Section 75 (1) of our country's Constitution.*

The issue of cabinet accountability to Parliament may require that there be *a permanent Joint Select Committee* responsible for public procurement. This could ensure that matters that fall within the purview of a Regulator are in the public domain as well as under Parliamentary oversight.

The role of Civil Society is critical in this context and should be reflected in any policy and legislation with respect to procurement.

The role of a regulatory authority in the Government Bill is no different from that which exists in the CTB Act of 1966. There is however some merit in what is proposed in it for grievance resolution.

Value for Money

Value for Money is the cornerstone of modern procurement systems. A procurement governance structure utilising the principle of value for money emphasises performance management approaches rather than regulatory procedures managed at clerical levels.

In this context, procurement is perceived as a management function based on:

(a) methodologies for optimising Value for Money to achieve stated economic and social-outputs on a whole-of-life basis.

(b) best practice accountability and transparency principles.

Methodologies

As far as methodologies are concerned we note that the PSCSG Draft Bill requires that Guidelines, Agency Handbooks and Agency Instructions apply value for money methodologies that take into account:-

(a) identification of needs and of economic and social outputs and outcomes (that must be explicitly promoted by the procurement contract) so that specification in these terms will facilitate cost benefit analysis and the proper identification, assessment and comparison of the costs and benefits at each phase of the procurement cycle; and
(b) planning that includes the selection of an appropriate delivery method and evaluation criteria and takes into account:

i Government and agency policies;
ii. market maturity;
iii the need to implement a competitive process of a scale commensurate with the size and risk profile of the particular procurement;
iv admission requirements for tenderers;
v the performance history of each tenderer

Civil Society

A body comprising civil society and others should assist in reinforcing independently the integrity of the system and report accordingly in the public domain. The role of the National Procurement Advisory Council as envisaged in the PSCSG Draft Bill is to consider the effectiveness and efficiency of the procurement system and to make recommendations to Parliament. Good governance can only be permanently established if political participation functions effectively through Civil Society. It is thus incumbent on Parliament to act objectively in forming and nurturing active and responsible civil society participation in the policy formulation process.

Loopholes

We also take this opportunity to draw to your attention to some of the legislative loopholes in the Government Bill that need to be addressed.

Avoiding the CTB

By Act No. 36 of 1979 the Government amended the CTB Act and qualified the CTB's sole and exclusive authority in the procurement process by giving itself *the right to contract directly if "it enters into a contract with a company which is wholly owned by the State"*. This amendment effectively bypassed the philosophy of centralising procurement and led to a proliferation of State Owned Enterprises (SOEs) with independent tendering processes.

SOE's effectively spent public money for property and services outside the purview of the CTB.

We understand there are over seventy such SOEs which are responsible to the Minister of Finance as Corporation Sole. These SOEs are under the purview of Cabinet and the perception of the public is that they serve as vehicles for the distribution of patronage. It is thus imperative that a procurement regulator report directly and only to Parliament and be

supported by a statutory body the expenses of which should be a charge on the Consolidated Fund. This approach will reinforce Parliamentary sovereignty in accordance with the intent of the Constitution.

Avoiding Judicial Review

Clear legislative expression will also inform future jurisprudence on the operation of the principles of good governance. Currently the jurisprudence of Trinidad and Tobago indicates confusion as to the meaning of public procurement which in turn informs the jurisprudence on the meaning of good governance. *In NH International CvA. No. 95 of 2005 procurement processes were classified as essentially commercial thereby excluding the outcome of those processes from judicial review* notwithstanding the public nature of the agencies involved and the use of public money. The minority judgement of the then Chief Justice Sharma, focusing as it did on the significance of the use of public money, was prescient and to be preferred.

Avoiding the Integrity in Public Life Act (IPLA)

On June 27th, 2013 the Court of Appeal ruled that *Telecommunications Services of Trinidad and Tobago* (TSTT) was not a State Enterprise and as a result, was not subject to the provisions of the IPLA since, the government terminated its *de jure* control of TSTT when it transferred its majority shares in the company to National Enterprises Limited. This Court of Appeal decision overturned a 2007 decision which held that TSTT was a public authority as it was supported by Government funds over which Government was in a position to exercise control. Consequently this may affect SOE's in general and may determine whether or not *they now fall outside the purview of the Integrity Commission*. This decision affects the jurisprudence of the '**who**' of accountability.

Significance

These loopholes are significant as they are being tackled in other jurisdictions in the Commonwealth in respect of public sector arrangements where Government agencies attempt

to acquire information on projects when public money is involved. The current definitions in the PSCSG Draft Bill will remove these anomalies by ensuring, very simply, that once there is public money involved the principles/rules pertaining to good governance should apply, regardless of the status of these agencies.

The critical issue is not the constitution of the agency but rather its involvement with public money for a public purpose.

Provisions of the Government Bill not addressed by the JSC Recommendations

It appears that the documents originally laid in Parliament as 'Legislative Proposals' that were then referred to successive JSCs and drawn upon to some extent in the second JSC's report to Parliament, have been largely side-lined in the production of the Government Bill.

At the same time, issues that apparently were not addressed by both JSCs have found their way into the Government Bill. Prominent among these are:

- the *exclusion of Government to Government arrangements*; and
- the *introduction of Framework Agreements* using text that appears to have been copied word for word from the 2011 *UNCITRAL Model Law on Public Procurement* which has been determined by the World Bank as not being efficient in supporting developing countries' policies.

For further discussion of the first of these issues, please see the attached paper entitled '*Local Content, Government to Government and Procurement which demonstrates how g2g arrangements should be brought under our procurement legislation without being in conflict with international agreements.*

Conclusion

In the light of the above, the PSCSG is constrained to conclude that, ***without radical and extensive redrafting that would place the elements that we consider indispensable at its core and would address the loopholes as well as the other concerns that we have identified, the Government Bill could never be considered legislation that was "modern, progressive and transparent".***

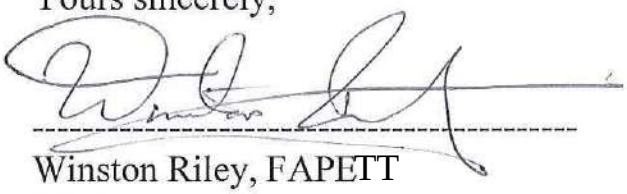
In contrast, the PSCSG Bill qualifies eminently for such a description. Not only does it address adequately the issues that we have identified above, it is also a thoroughly updated version dated 29th October 2010 of the second of the two legislative proposals that were laid

in Parliament and placed before the LRC It is in fact the result of eleven years of public sector/private sector/civil society collaboration.

It would greatly advance the reform process along sound and efficient lines if, rather than a re-draft of the current Government Bill, the document eventually laid in Parliament and sent to the LRC were substantially the PSCSG Draft.

Please rest assured that the PSCSG remains committed to continue collaborating with Government and all other stakeholders in seeking genuine public procurement reform.

Yours sincerely,



Winston Riley, FAPETT
Chairman

CC: Mr. Moonilal Lalchan, Chairman, Trinidad and Tobago Chamber of Industry and Commerce
Mr. Hugh Howard, President, American Chamber of Commerce of Trinidad and Tobago
Mr. Nicholas Lok Jack, President, Trinidad and Tobago Manufacturers Association
Dr. Thackwray Driver, Chief Executive Officer, The Energy Chamber of Trinidad and Tobago
Mr. Nirad Tewarie, Chief Executive Officer, Trinidad and Tobago Coalition Services Industry
Mr. Afra Raymond, B.Sc., FRICS, President, The Joint Consultative Council for the Construction Industry
Mr. Deryck Murray, Chairman, Trinidad and Tobago Transparency Institute
Mr. Christopher Garcia, President, Trinidad and Tobago Contractors Association
Mr Joseph Yearwood, Chairman, Board of Architecture of Trinidad and Tobago
Ms. Margarita Leonard, President, The Association of Professional Engineers
Mr. Lennox Austin, President, Trinidad and Tobago Society of Planners
Mr. Lennox Sirjuesingh, President, Trinidad and Tobago local Content Chamber
Mr. Joseph Remy, President, Federated independent Trade Unions and NOO's
Mr. Ganga-Persad Kissoon, President, Institute of Surveyors of Trinidad and Tobago
Mr. Keith Spencer, President, Trinidad and Tobago Chapter International Facility Management Association
The Honourable Prakash Ramadhar, Chairman of Legislative Review Committee
The Honourable Roodal Moonilai, Leader of Government Business, House of Representatives
The Honourable Ganga Singh, Leader of Government Business, Senate
The Honourable Prime Minister, Mrs. Kamla Persad Bissesar
Ms. Jennifer Smith, President, Trinidad and Tobago Institute of Architects

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TRINIDAD & TOBAGO CONTRACTORS'
ASSOCIATION

Local Content, Government to Government and Procurement

Winston Riley (FAPETT)

The Joint Consultative Council (JCC) and the Trinidad and Tobago Local Content Chamber (TTLCC) met on July 16th 2013 to discuss issues of Local Content, Government to Government (G2G) arrangements and Public Procurement. The primary concern of Local Content, Government to Government and Procurement Paper was the impact of G2G arrangements on local content, procurement regulations and the development of local institutions and organisations.

G2G arrangements were initially analysed in the context of the existing legislation on procurement– i.e., The Central Tenders Board (CTB) Act 1961 amended in 1979, section 20A which allows Government to act on its own behalf where:-

i. *'...as a result of an agreement for technical or other co-operation between it and the Government of a foreign State, the latter designates a company to supply the articles or to undertake the works or any services in connection therewith;*
ii. *the articles or works or any services in connection therewith are to be supplied or undertaken by a company which is wholly owned or controlled by a foreign State;*
iii. *it enters into a contract with the National Insurance Property Development Company Limited or a company which is wholly owned by the State, for the supply of articles or for the undertaking of works or services in connection therewith'*

Subsequently, the Private Sector/Civil Society Group (PS/CSG) became aware of a Draft Public Procurement Act to be placed before the Legislative Review Committee (LRC) by the office of the Chief Parliamentary Council (CPC). The document states:-

"This Act does not apply to the procurement of goods and services arising out of –

(a) a treaty or other form of agreement to which Trinidad and Tobago is a party with one or more other States;

(b) an agreement entered into by Trinidad and Tobago with an I intergovernmental international financing institution; (IFI)

(c) an agreement with CARICOM; or

(d) an agreement for technical or other cooperation between the Government and the Government of a foreign State,

Where the treaty or agreement provides for rules or regulations regarding the procurement of goods or services."

The government bill follows the UNCITRAL 2011 draft model which states

Article 3

International obligations of this State relating to procurement [and intergovernmental agreements within [this State]

To the extent that this Law conflicts with an obligation of this State under or arising out of any:

(a) Treaty or other form of agreement to which it is a party with one or more other States; [or]

(b) Agreement entered into by this State with an intergovernmental international financing institution, [; or]

[(c) Agreement between the federal Government of [name of federal State] and any subdivision or subdivisions of [name of federal State] or between any two or more such subdivisions,]

the requirements of the treaty or agreement shall prevail, but in all other respects the procurement shall be governed by this Law.

We should use our ingenuity to insure that when public money is involved the procurement laws of our country prevail.

A review of G2G arrangements reveals the following:

i. G2G arrangements in Trinidad and Tobago were initiated in 1979 when 'money was not a problem'. At present, G2G arrangements are continuing

when the local banks are flush with funds and bonds could be raised at 2.5%. There is no resource deficiency in T&T.

ii. G2G arrangements are not only instruments for procurement of goods and services from foreign countries but also provide for the outsourcing of the procurement process. As a result, human and institutional systems/structures are placed entirely in the hands of the foreign country thus making any procurement legislation irrelevant.

iii. All capital projects can be initiated under G2G arrangements

iv. Public monies utilised for the procurement of goods and services leave generations of T&T citizens responsible for the public debt incurred.

PS/CSG hereby advocates that:

i. Procurement legislation should state that "*whenever and wherever public money is involved, all procurement of goods and services are subject to the procurement regulations of the country*."

ii. Our procurement rules should be in keeping with international best practice.

iii. The local implementing agencies should establish and express the measurable development objectives of each project before implementation.

Other provisions should include for:-

a) The optimising of local value added along supply chains.
b) The enforcing of laws and regulations related to labour, health and safety
c) The linking and optimising of Value for Money to stated measurable development objectives as the prescribed approach in decision making along the value chain.
d) The tabling of all G2G arrangements in Parliament upon signing, for public consideration.
e) The immediate tabling in Parliament of all G2G arrangements already signed. These should include, inter alia-:
    - The Declaration of POS with the People's Republic of China
    - The 2012 Canadian agreements,

- The agreement with the Austrian Government (San Fernando Hospital).

Trinidad and Tobago's history and experience in oil and gas has allowed this country, a former British colony, a strategic advantage over developed countries in becoming a provider of goods and services to other former colonial countries with potential in extractive industries.

Thus G2G arrangements can be used by Trinidad and Tobago to develop:

i. Business through the supply of goods and services from home companies;
ii. The banking sector through the provision and or organisation of private or State funded loans to developing countries;
iii. Learning institutions through the provision of training to foreign students.

Canadian Commercial Corporation (CCC) , SNC Lavalin and the Penal Hospital Project

The Government of Trinidad and Tobago signed a G2G arrangement with the Government of Canada for the development of health-care facilities. The Canadian Government named the Canadian Commercial Corporation (CCC) as the implementing agency under the agreement and the Trinidad and Tobago Government named the Urban Development Corporation as its counterpart. SNC Lavalin through CCC undertook preliminary designs for a Hospital at Penal.

Recently, a ten year ban was imposed by the World Bank and the Canadian International Development Agency on SNC Lavalin Inc. and its affiliates for corruption. A series of newspaper articles both in Trinidad and Tobago and abroad called for clarification of the role of CCC with respect to SNC Lavalin on the Penal Hospital project. CCC has stated that they are at present undertaking a due diligence exercise on the Hospital project.

Trinidad and Tobago's sovereignty is in question here. Due diligence being undertaken by the CCC at this stage with respect to SNC Lavalin Inc. is an insult to the Government of Trinidad and Tobago.

The following should now be undertaken, as public money is involved:

i. Abandon any existing or future contractual agreement with SNC Lavalin Inc. in Trinidad and Tobago, for the next ten years;
ii. Implement UDECOTT's procurement rules for the procurement of consultants and contractors;
iii. Conduct a value engineering exercise at the preliminary design stage to optimise value for money and local content;
iv. Allow the CCC, after undertaking due diligence, to recommend a firm or firms to UDECOTT for the construction of the Penal Hospital;
v. UDECOTT should manage its own due diligence procedures on the firms recommended by CCC;
vi. Encourage Canadian firms to enter into an agreement with local firms for submission of tenders;
vii. Permit local firms to tender provided that the import component from Canada for goods and services are in keeping with Trinidad and Tobago's national interest;
viii. Implement UDECOTT's tendering procedure with amendments to facilitate evaluation and verification of local content by setting up technical specifications with requirements and procedures that define, measure and allow for the declaration and verification of the local content of goods, services and works.

Local Content should be expressed as a percentage of the Tender price, and shall be calculated as follows:

LC = (1 - x/y) x 100 where (x) = imported component in T&T Dollars and (y) = tender price in Trinidad and Tobago Dollars.

It is to be noted that The Chinese Exim Bank stipulates... ***"The portion of the Chinese content of exported goods should be no less than 50% of the total value"*** of project financing from China. Statements made in the local media about 40% local content are not at all palatable.



PARLIAMENT OF THE

REPUBLIC OF TRINIDAD AND TOBAGO

(ELEVENTH PARLIAMENT- 2015/2016 SESSION)

REPORT

OF THE

JOINT SELECT COMMITTEE

ON

THE PUBLIC PROCUREMENT AND DISPOSAL OF PUBLIC PROPERTY (AMENDMENT) BILL, 2015

Ordered to be printed

TOGETHER WITH THE MINUTES OF PROCEEDINGS

PARL:

HOR PAPER NO: / 2016

THE COMMITTEE

APPOINTMENT

1.1 Pursuant to resolutions of the House of Representatives on Friday November 13, 2015 and of the Senate on Friday November 17, 2015, a Joint Select Committee was established:

"to consider and report on a Bill entitled the "Public Procurement and Disposal of Public Property (Amendment) Bill, 2015"; and…to report within eight weeks, that is to say, on or before January 22, 2016".

MEMBERSHIP

1.2 The following persons were appointed to serve on the Committee:

- Mr. Colm Imbert, MP
- Mrs. Cherrie-Ann Crichlow-Cockburn, MP
- Mr. Adrian Leonce, MP
- Dr. Bhoendradatt Tewarie, MP
- Mr. Franklin Khan
- Mrs. Paula Gopee-Scoon
- Mr. Wayne Sturge
- Mr. David Small

CHAIRMANSHIP

1.3 At its first meeting on Friday December 4, 2015, your Committee elected Mr. Colm Imbert to be its Chair, in accordance with House of Representatives Standing Order 97(3) and Senate Standing Order 87(3).

SECRETARIAT

1.4 During the session Ms. Jacqui Sampson Meiguel, Clerk of the House and Ms. Chantal La Roche, Legal Officer II were appointed to serve as Secretary and Assistant Secretary respectively and Ms. Tanya Alexis provided legal support to the Secretariat.

MEETINGS

1.5 Your Committee held five meetings on the following dates:

1. Friday December 4, 2015;
2. Friday January 8, 2016;
3. Friday January 22, 2016;
4. Friday February 12, 2016;
5. Friday February 19, 2016

1.6 The Minutes of the meetings and attendance records are attached at Appendix I.

INTERIM REPORT

1.7 On Friday January 22, 2016 and Monday January 25, 2016 the Committee reported to House and the Senate, respectively, that it required additional time for the completion of its report.

1.8 The Committee's request for a further period of six (6) weeks to present a final report was granted.

CONSIDERATION OF THE BILL

APPROACH TO DELIBERATIONS

2.1 At its First Meeting held on Friday December 4, 2015, your Committee agreed that all Members of the Committee should familiarize themselves with several documents, namely:

a) the Bill before the Committee (the Public Procurement and Disposal of Public Property (Amendment) Bill, 2015);

b) the parent Act (the Public Procurement and Disposal of Property Act 2015, Act No.1 of 2015 (partially proclaimed)); and

c) the reports of the Joint Select Committee on Public Procurement and Disposal of Property Bill (Tenth Parliament).

2.2 During preliminary discussions it was agreed that the assistance of technical persons and other experts in the field would be required.

2.3 The following persons comprised the Technical Team that was present during the consideration of the Bill:

Office of the Chief Parliamentary Counsel

Mr. Milton Sorzano - Assistant Chief Parliamentary Counsel (Ag.)

Ms. Sharmaine Williams - Assistant Chief Parliamentary Counsel (Ag.)

Mr. Parvin Sookhai - Parliamentary Counsel II (Ag.)

Ministry of Finance

Mr. Maurice Suite - Permanent Secretary

WRITTEN SUBMISSIONS

2.4 Your Committee received written submissions from:

- Private Sector/Civil Society Group
- Mr. Timothy Hamel Smith, Attorney-at-Law
- Mr. Afra Raymond, Member of the Public
- The Board of Permanent Secretaries
- The Insurance Brokers of Trinidad and Tobago (IBATT)

2.5 Your Committee noted that most of the submissions received related to the parent Act and were beyond the scope of the Committee. All submissions received are attached at Appendix II.

WITNESSES

2.6 The Committee agreed to meet with the representatives of the Private Sector/ Civil Society Group and allow them to make a short presentation of their comments on the amending Bill. On February 12, 2016, the Committee met with the Group and a presentation was made on their behalf by the Chairman of the Group, Mr. Winston Riley. Attached at Appendix III are the Verbatim Notes of the presentation made before the Committee.

MAIN ISSUES DISCUSSED

3.1 Based on its discussions with the technical team and with the Private Sector/ Civil Society Group, the Committee identified four (4) areas of the Bill for review:

a. *The process for the removal of the Procurement Regulator in relation to Trading with the Government*

The Bill referred to the Committee proposed an amendment to the parent Act to provide for the removal of the Regulator by a resolution of each House of Parliament where the Regulator trades with the Government, without prior approval. It also sought to establish a tribunal appointed by the President, comprised of sitting or retired judges to enquire into the conduct of the regulator and to determine whether he should be removed from office. However during its deliberations, the Committee was satisfied that the provisions of the parent Act sufficiently addressed this issue.

b. *The ability of Board Members to trade with the Government*

The Committee agreed that the legislation required an amendment to restrict Members of the Board from trading with the Government without prior approval of the Minister. It was agreed that the phrase "trades with Government" should include instances where a Board Member becomes a party to any contract with the Government.

c. *The procedure for the making of regulations in relation to the remuneration, staffing and other operational matters of the Review Board*

After due consideration the Committee agreed that the Bill should be amended to subject Regulations made by the Minister with respect to the staffing, remuneration, funding and other operational matters of the Review Board to the negative resolution of Parliament.

d. *The procedure for the making of regulations in relation to the disposal of State Lands.*

The Committee noted that the parent Act did not address the disposal of State Lands and real property owned by the Government, a State-controlled enterprise, or a statutory body for which a Minister of Government is responsible.

The Committee also acknowledged that Clause 7 of the amending Bill may affect the disposal of State Lands under the Minerals Act and Petroleum Act and as such Regulations when drafted should be made subject to these Acts. It was also agreed that Regulations in respect of the disposal of State Lands should be subject to the negative resolution of Parliament.

REPORT AND RECOMMENDATIONS

4.1 In accordance with Standing Orders 114(1) and 104(1) of the House of Representatives and the Senate, respectively, your Committee wishes to report that it has completed its work.

4.2 Your Committee recommends that the House agree with its proposals for amendments to the Bill, attached at Appendix IV. Your Committee further recommends that the House consider and adopt the (amended) Public Procurement and Disposal of Public Property (Amendment) Bill, 2015. A consolidated version of the amended Bill is attached at Appendix V for ease of consideration.

Respectfully submitted,

Mr. Colm Imbert, MP
Chairman

Mrs. Cherrie-Ann Crichlow-Cockburn, MP
Member

Mr. Adrian Leonce, MP
Member

Mr. Franklin Khan
Member

Dr. Bhoendradatt Tewarie, MP
Member

Mrs. Paula Gopee-Scoon
Member

Mr. David Small
Member

Mr. Wayne Sturge
Member

List of Appendices

Appendix I……Minutes of Proceedings and Attendance Record

Appendix II……Submissions Received by the Committee

Appendix III……Verbatim Notes of evidence taken before the Committee

Appendix IV……List of Recommended Amendments

Appendix V……Consolidated Version of Bill (with amendments)

Appendix VI……Comments of Dr. Bhoendradatt Tewarie, MP (under S.O. 114(6))

MINUTES

OF

PROCEEDINGS

AND

ATTENDANCE RECORD

ATTENDANCE RECORD

Attendance Record of
the Joint Select Committee appointed to consider and report on Public Procurement and Disposal of Public Property (Amendment)Bill, 2016

Member	1st Meeting (4-12-2015)	2nd Meeting (8 -01-2016)	3rd Meeting (22-01-2016)	4th Meeting (12-02-2016)	5th Meeting (19-02-2016)
Mr. Franklin Khan	PRESENT	EXCUSED ABSENT	PRESENT	PRESENT	PRESENT
Mrs. Paula Gopee-Scoon	PRESENT	PRESENT	PRESENT	PRESENT	PRESENT
Mr. Wayne Sturge	EXCUSED ABSENT	EXCUSED ABSENT	EXCUSED ABSENT	EXCUSED ABSENT	EXCUSED ABSENT
Mr. David Small	PRESENT	PRESENT	PRESENT	PRESENT	PRESENT
Mr. Colm Imbert	PRESENT	PRESENT	PRESENT	PRESENT	PRESENT
Mrs. Cherrie-Ann Crichlow-Cockburn	PRESENT	PRESENT	PRESENT	EXCUSED ABSENT	PRESENT
Mr. Adrian Leonce	PRESENT	PRESENT	PRESENT	PRESENT	PRESENT
Dr. Bhoendradatt Tewarie	EXCUSED ABSENT	PRESENT	PRESENT	EXCUSED ABSENT	PRESENT

PARLIAMENT
Republic of Trinidad and Tobago
Levels G - 7, Tower D
The Port-of-Spain International Waterfront Centre
1A Wrightson Road, Port-of-Spain

JOINT SELECT COMMITTEE ON THE PUBLIC PROCUREMENT AND DISPOSAL OF PUBLIC PROPERTY (AMENDMENT) BILL, 2015

MINUTES OF THE FIRST MEETING HELD IN THE ARNOLD THOMASOS ROOM (EAST), LEVEL 6, OFFICE OF THE PARLIAMENT, TOWER D, IWFC, #1A WRIGHTSON ROAD, PORT OF SPAIN ON DECEMBER 04, 2015 at 11:30 a.m.

PRESENT

Mrs. Brigid Annisette-George	-	Speaker of the House

Committee Members

Mr. Colm Imbert, MP	-	Member
Mrs. Cherrie-Ann Crichlow-Cockburn, MP	-	Member
Mr. Adrian Leonce, MP	-	Member
Mr. Franklin Khan	-	Member
Mrs. Paula Gopee-Scoon	-	Member
Mr. David Small	-	Member

ABSENT/EXCUSED

Mr. Wayne Sturge	-	Member
Dr. Bhoendradatt Tewarie, MP	-	Member

Secretariat

Mrs. Jacqui Sampson Meiguel	-	Secretary
Ms. Chantal La Roche	-	Assistant Secretary

COMMENCEMENT

1.1 The meeting was called to order by the Speaker of the House at 11:35 a.m.

ELECTION OF CHAIRMAN

2.1 The Speaker advised that her role was to facilitate the election of a Chair and she invited nominations.

2.2 Mr. Franklin Khan nominated Mr. Colm Imbert for the chairmanship and this nomination was seconded by Mrs. Paula Gopee-Scoon.

2.3 There being no further nominations, Mr. Imbert was declared Chairman.

2.4 The Speaker of the House informed Members that Mrs. Jacqui Sampson Meiguel would serve as Secretary to the Committee and Ms Chantal La Roche as Assistant Secretary.

2.5 Mr. Imbert was invited to take the Chair.

2.6 The Chairman took the Chair and thanked Members for their unanimous support for his nomination.

QUORUM

3.1 The Chairman proposed a quorum of 4 persons, inclusive of the Chair, provided that at least one Member from each House was present. The Committee agreed to this proposal.

TERMS OF REFERENCE

4.1 The Chairman reminded Members of the Terms of Reference of the Committee as follows:

i. to consider and report on a Bill entitled "An Act to amend the Public Procurement and Disposal of Public Property Act, 2015";

ii. to discuss the general merits of the Bill along with its details; and

iii. to report by **January 22, 2016.**

DISCUSSIONS ON THE WAY FORWARD

5.1 The Chairman invited discussion on the approach to be taken by the Committee in achieving its mandate.

5.2 The Chairman suggested, and the Committee concurred, that the Committee would first conduct a clause by clause analysis of the Bill.

5.3 The Committee also agreed that a work plan would be settled during its Second meeting, and the Chairman recommended that the Committee should meet on a weekly basis.

5.4 Members also requested that the Secretary circulate the report of the Joint Select Committee appointed during the Tenth Parliament to consider and report to the Parliament on the legislative proposals to provide for public procurement disposal of public property.

External Expert Assistance

5.5 The Committee also identified the need for external assistance during its deliberations and agreed to the following:

i. The Chief Parliamentary Counsel would be invited to assist with a clause by clause analysis on the Bill, as well as to assign an officer to assist the Committee during its deliberations; and

ii. The Permanent Secretary of the Ministry of Finance would also be invited to assist the Committee during its deliberations.

ADJOURNMENT

6.1 There being no other business, the Chairman thanked Members and adjourned the meeting to Friday January 8, 2016 at 10:00 a.m.

6.2 The adjournment was taken at 11:45 a.m.

I certify that these Minutes are true and correct.

Chairman

Secretary

December 4, 2015

PARLIAMENT
Republic of Trinidad and Tobago
Levels G - 7, Tower D
The Port-of-Spain International Waterfront Centre
1A Wrightson Road, Port-of-Spain

JOINT SELECT COMMITTEE ON THE PUBLIC PROCUREMENT AND DISPOSAL OF PUBLIC PROPERTY (AMENDMENT) BILL, 2015

MINUTES OF THE 2ND MEETING HELD IN THE ARNOLD THOMASOS ROOM (EAST), LEVEL 6, OFFICE OF THE PARLIAMENT, TOWER D, IWFC, #1A WRIGHTSON ROAD, PORT OF SPAIN ON JANUARY 8TH 2016 AT 10:00 AM

COMMITTEE MEMBERS

Present

Mr. Colm Imbert, MP	-	Chairman
Mrs. Cherrie-Ann Crichlow–Cockburn, MP	-	Member
Mr. Adrian Leonce, MP	-	Member
Mrs. Paula Gopee-Scoon	-	Member
Mr. David Small	-	Member
Dr. Bhoendradatt Tewarie, MP	-	Member

Absent/Excused

Mr. Franklin Khan	–	Member
Mr. Wayne Sturge	-	Member
Mrs. Jacqui Sampson Meiguel	-	Secretary

SECRETARIAT

Ms. Chantal La Roche	-	Assistant Secretary
Ms. Tanya Alexis	-	Legal Officer I

OFFICE OF THE CHIEF PARLIAMENTARY COUNSEL

Mr. Milton Sorzano	-	Assistant Chief Parliamentary Counsel (Ag)
Ms. Sharmaine Williams	-	Assistant Chief Parliamentary Counsel (Ag)
Mr. Parvin Sookhai	-	Parliamentary Counsel II (Ag)

MINISTRY OF FINANCE

Mr. Maurice Suite	-	Permanent Secretary

COMMENCEMENT

1.1 The meeting was called to order by the Chairman at 10:20 a.m.

1.2 The Chairman indicated that Mr. Franklin Khan and Mr. Wayne Sturge were excused from the day's meeting.

CONFIRMATION OF MINUTES

2.1 The Committee considered the Minutes of the 1st Meeting held on December 4, 2015.

2.2 The motion for confirmation of the Minutes was moved by Mrs. Crichlow-Cockburn and seconded by Mr. Small.

MATTERS ARISING FROM THE MINUTES

3.1 **Item 5.5**

- The Chairman informed Members that the following persons from the Office of the Chief Parliamentary Counsel would be assisting the Committee during its deliberations,
  - Mr. Milton Sorzano, Assistant Chief Parliamentary Counsel (Ag);
  - Ms. Sharmaine Williams, Assistant Chief Parliamentary Counsel (Ag); and
  - Mr. Parvin Sookhai, Parliamentary Counsel II (Ag).
- The Chairman also advised that the Permanent Secretary of the Ministry of Finance, Mr Maurice Suite had also agreed to assist the Committee with its deliberations on the Bill.

CLAUSE BY CLAUSE ANALYSIS OF THE PUBLIC PROCUREMENT AND DISPOSAL OF PUBLIC PROPERTY (AMENDMENT) BILL, 2015

4.1 The Committee invited Mr. Sorzano, Ms. Williams and Mr. Sookhai to join the meeting to give a brief presentation on the Public Procurement and Disposal of Public Property (Amendment) Bill, 2015.

4.2 The Committee then engaged in a clause by clause discussion on the

Bill.

4.3 The Committee approved and adopted Clauses 1 and 2 of the Bill.

4.4 The Committee noted the use of the term "The President" in Clause 3 and its practical effect in relation to authority to remove the Regulator. The Committee agreed to suspend discussions on this clause until a written opinion was provided by the Office of the Chief Parliamentary Counsel.

4.5 The Committee approved and adopted Clause 4 of the Bill.

4.6 In relation to Clause 5, Dr. Tewarie noted that there was a similar provision in the Public Procurement and Disposal of Public Property Act, 2015. The Committee agreed to suspend consideration of this clause until the next meeting to allow for further discussion.

4.7 The Committee agreed to suspend discussions on Clause 6 pending the submission by the Chairman of a paper relating to the creation of a Review Board.

4.8 The Committee approved and adopted Clause 7 of the Bill

OTHER MATTERS

5.1 The Chairman advised the Committee that the following correspondence had been received:

i. Letter dated January 4, 2016 from Private Sector Group/Civil Society, requesting a meeting;
ii. Electronic mail dated January, 6 2016 from Mr. Timothy Hamel-Smith inquiring on invitations for written submissions; and
iii. Letter and CV dated November 30, 2015 from Cherryl-Ann Simmons Project Management Consultant, offering assistance to the Committee.

5.2 The Committee agreed as follows:

i. the Committee will meet with the Private Sector Group/Civil Society on a date to be decided during its next meeting;
ii. written submissions on the Bill would be received from Mr. Hamel-Smith; and
iii. There was no need to engage the services of an external Consultant at this time.

DISCUSSIONS ON THE WAY FORWARD

6.1 Discussion ensued on the effect of the imminent reporting deadline on the work of the Committee.

6.2 As a consequence, the Committee agreed that a report would be tabled to bring to the attention of the Parliament:

i. the decisions of the Committee thus far;
ii. its inability to complete its work in the mandated period; and
iii. its request for an extension to the end of February 2016.

The Committee concurred that this report would be approved by round-robin.

6.3 The Committee agreed that its next meeting will be held on Friday January 22, 2016 at 10:00 a.m., to continue clause by clause analysis of the Bill.

ADJOURNMENT

7.1 The Chairman thanked Members and adjourned the meeting to Friday January 22, 2016 at 10:00 a.m.

7.2 The adjournment was taken at 11:20 a.m.

I certify that these Minutes are true and correct.

Chairman

Secretary

January 8, 2016

PARLIAMENT
Republic of Trinidad and Tobago

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1A Wrightson Road, Port-of-Spain

JOINT SELECT COMMITTEE ON THE PUBLIC PROCUREMENT AND DISPOSAL OF PUBLIC PROPERTY (AMENDMENT) BILL, 2015

MINUTES OF THE 3RD MEETING HELD IN THE ARNOLD THOMASOS ROOM (EAST), LEVEL 6, OFFICE OF THE PARLIAMENT, TOWER D, IWFC, #1A WRIGHTSON ROAD, PORT OF SPAIN ON JANUARY 22nd 2016 AT 10:00 AM

COMMITTEE MEMBERS

Present

Mr. Colm Imbert, MP	-	Chairman
Mrs. Cherrie-Ann Crichlow–Cockburn, MP	-	Member
Mr. Adrian Leonce, MP	-	Member
Mrs. Paula Gopee-Scoon	-	Member
Mr. David Small	-	Member
Dr. Bhoendradatt Tewarie, MP	-	Member
Mr Franklin Khan	-	Member

Absent/Excused

Mr. Wayne Sturge	-	Member

SECRETARIAT

Mrs. Jacqui Sampson Meiguel	-	Secretary
Ms. Chantal La Roche	-	Assistant Secretary
Ms. Tanya Alexis	-	Legal Officer I

OFFICE OF THE CHIEF PARLIAMENTARY COUNSEL

Mr. Milton Sorzano	Assistant Chief Parliamentary Counsel (Ag)
Ms. Sharmaine Williams	Assistant Chief Parliamentary Counsel (Ag)
Mr. Parvin Sookhai	Parliamentary Counsel II (Ag)

COMMENCEMENT

1.1 The meeting was called to order by the Chairman at 10:07 a.m.

1.2 The Chairman indicated that Mr. Wayne Sturge was excused from the day's meeting.

CONFIRMATION OF MINUTES

2.1 The Committee considered the Minutes of the second Meeting held on January 8, 2016.

2.2 The Minutes were amended by correcting the spelling of Mrs. Crichlow-Cockburn's name on page 1.
On page 3, the phrase "Whistleblower Protection Bill", was removed and "Public Procurement and Disposal of Public Property (Amendment) Bill" was inserted.

2.3 The motion for the confirmation of the Minutes was moved by Mr. Small and seconded by Mrs. Gopee-Scoon and the Minutes were confirmed by the Committee.

MATTERS ARISING FROM THE MINUTES

Item 4.4

3.1 The Committee considered an opinion on the use of the phrase "The President" in clause 3 prepared and circulated by the Office of the Chief Parliamentary Counsel. After discussion on the matter the Committee was satisfied that the word "President" meant on the advice of Cabinet. Clause 3 of the Bill was approved.

Item 5.2

3.2 The Committee agreed that it would meet with the Private Sector /Civil Society Group (PSCSG) during its next meeting on February 12, 2016 at 9:30 a.m.

CONTINUATION OF CLAUSE BY CLAUSE DISCUSSION ON THE PROCUREMENT AND DISPOSAL OF PUBLIC PROPERTY (AMENDMENT) BILL, 2015

4.1 The Committee agreed that Dr. Tewarie would circulate a written report on the effect of the establishment of a Review Board pursuant to Clause 6 of the Bill before the next meeting of the Committee.

4.2 The Committee also agreed to suspend further discussions on Clause 6 of the Bill until Members received Dr. Tewarie's report and had a chance to read the Public Procurement Administrative Review Board draft procedure manual from Kenya which was circulated via e-mail.

4.3 In relation to Clause 5, Dr. Tewarie noted that there was a similar provision in the Parent Act to the Amendment Bill at section 50 (9).

4.4 After discussion on the issue, the Committee agreed, that Clause 5 of the Bill was not captured by section 50 (9) of the Parent Act and that Clause 5 should remain.

4.5 The Committee approved the replacement of Clause 3 of the Bill with an amendment of Clause 12 of the parent Act, and inserting 12 (h) and retain the definition of trades with Clause 3 of the Bill. Section 12 (h) will now read:

"Trades with the government without the prior approval of the Minister"

4.6 The Committee agreed to suspend deliberations on Clause 7 of the Bill until the Office of the Chief Parliamentary Office circulated a written opinion on the effect of broadening the definition of disposal of state lands to include leases and the jurisdictional responsibilities of all state lands and mining leases.

OTHER MATTERS

5.1 The Chairman advised the Committee that correspondence had been received from the Board of Permanent Secretaries and Heads of Departments, requesting a meeting with the Committee.

5.2 The Committee decided as follows:

i. to request from the Board of Permanent Secretaries and Heads of Departments written submissions on the Public Procurement and Disposal of Public Property (Amendment) Bill, 2015; and

ii. the Committee agreed that upon receipt of the submissions, the Committee will consider the submissions and set a date for a meeting if it finds a meeting is required thereafter.

5.3 The Committee agreed to consider the submissions of Mr. Hamel-Smith and Mr. Afra Raymond at a later date.

5.4 The Committee agreed that its next meeting will be held on Friday 12th February, 2016 at 9:30 a.m.

ADJOURNMENT

6.1 The Chairman thanked Members and adjourned the meeting to Friday 12th February, 2016 at 9:30 a.m.

6.2 The adjournment was taken at 10:59 a.m.

I certify that these Minutes are true and correct.

Chairman

Secretary

January 22, 2016

PARLIAMENT
Republic of Trinidad and Tobago

Levels G - 7, Tower D
The Port-of-Spain International Waterfront Centre
1A Wrightson Road, Port-of-Spain

JOINT SELECT COMMITTEE ON THE PUBLIC PROCUREMENT AND DISPOSAL OF PUBLIC PROPERTY (AMENDMENT) BILL, 2015

MINUTES OF THE 4TH MEETING HELD IN THE ARNOLD THOMASOS ROOM (EAST), LEVEL 6, OFFICE OF THE PARLIAMENT, TOWER D, IWFC, #1A WRIGHTSON ROAD, PORT OF SPAIN ON FEBRUARY 12, 2016 AT 9:30AM

COMMITTEE MEMBERS

Present

Mr. Colm Imbert, MP	-	Chairman
Mr. Adrian Leonce, MP	-	Member
Mrs. Paula Gopee-Scoon	-	Member
Mr. David Small	-	Member
Mr. Franklin Khan	-	Member

Absent/Excused

Mr. Wayne Sturge	-	Member
Mrs. Cherrie-Ann Crichlow–Cockburn, MP	-	Member
Dr. Bhoendradatt Tewarie, MP	-	Member

SECRETARIAT

Mrs. Jacqui Sampson Meiguel	-	Secretary
Ms. Chantal La Roche	-	Assistant Secretary
Ms. Tanya Alexis	-	Legal Officer I

COMMENCEMENT

1.1 The meeting was called to order by the Chairman at 9:42 a.m.

1.2 The Chairman indicated that Mr. Wayne Sturge, Mrs. Cherrie-Ann Crichlow–Cockburn and Dr. Bhoendradatt Tewarie were excused from the day's meeting.

CONFIRMATION OF MINUTES

2.1 The Committee considered the Minutes of the 3rd meeting held on January 22, 2016.

2.2 The Minutes were amended by deleting item 5.2 (ii) on page 3 and replacing it with "the Committee agreed that upon receipt of the submissions, the Committee will consider the submissions and set a date for a meeting if it finds a meeting is required thereafter".

2.3 The motion for the confirmation of the Minutes was moved by Mr. Small and seconded by Mrs. Gopee-Scoon and the Minutes were confirmed by the Committee.

MATTERS ARISING FROM THE MINUTES

Item 4.1

3.1 Members present considered Dr. Tewarie's submissions and, after some discussion, agreed on the inclusion of a Public Procurement Review Board as proposed by Clause 6 of the Bill. It was agreed that the final position of Members would be relayed to Dr. Tewarie at the Committee's next meeting.

DISCUSSIONS WITH REPRENTATIVES OF THE PRIVATE SECTOR/CIVIL SOCIETY GROUP

4.1 The Chairman welcomed the representatives of **the Private Sector/Civil Society Group (PSCSG)** and invited them to introduce themselves.

4.2 Representing PSCSG were:

- Mr. Winston Riley — Chairman, Private Sector/Civil Society Group
- Dr. James Armstrong — President, The Joint Consultative Council for the Construction Industry
- Mr. Robert Trestrail — President, Trinidad and Tobago Chamber of Industry and Commerce
- Mr. Navin Seeterram — Manager, Trinidad and Tobago Chamber of Industry and Commerce
- Mr. Mitchell Da Silva — Director, American Chamber of Commerce of Trinidad and Tobago
- Mr. Lennox Sirjuesingh — President, Trinidad and Tobago Local Content Chamber
- Mr. Deryck Murray — Chair, Trinidad and Tobago Transparency Institute
- Mr. Marc Sandy — Team Lead, Trinidad and Tobago Manufacturers' Association
- Mrs. Desiree Lopez-Arthur — The Joint Consultative Council for the Construction Industry

4.3 Representing the Chief Parliamentary Counsel to provide technical assistance were:

- Ms. Sharmaine Williams — Ag. Assistant Chief Parliamentary Counsel
- Mr. Milton Sorzano — Ag. Assistant Chief Parliamentary Counsel

4.4 The Chairman of PSCSG made a PowerPoint presentation which is attached as **Appendix I** to these Minutes.

4.5 Arising from discussions between the Members of the Committee and representatives of PSCSG, the Committee agreed to consider a number of recommendations and amendments, which are attached as **Appendix II** of these Minutes.

4.6 At the completion of the presentation, the Chairman thanked the representatives of PSCSG for their attendance and presentation and excused them from the meeting.

The Meeting was suspended at 10.56 a.m.
The Meeting resumed at 11.01 a.m.

CONTINUATION OF CLAUSE BY CLAUSE CONSIDERATION OF THE PROCUREMENT AND DISPOSAL OF PUBLIC PROPERTY (AMENDMENT) BILL, 2015

5.1 In relation to Clause 7 of the Bill, the Committee considered an opinion submitted by the Office of the Chief Parliamentary Counsel on the effect of broadening the definition of disposal of state lands to include leases and the jurisdictional responsibilities of all state lands and mining leases. The Committee noted the following:

- Clause 7 of the Bill may affect the disposal of state lands under the Minerals Act and Petroleum Act and as such Regulations when drafted must be made subject to these Act.

- There should be a similar process for the disposal of state lands as the one in place for the procurement process. State entities should submit their rules to the Office of the Procurement Regulator for approval for consistency across the state entities.

5.2 After some discussion the Committee also noted that there would be need to amend the following Sections of the Public Procurement and Disposal of Public Property Bill, 2015 (Act No.1 of 2015):

- **Section 63**

That the Minister should be empowered to make regulations in relation to the disposal of state lands in his own right. Accordingly, the Act would need to be amended to reflect this.

- **Section 11**

Tenure and remuneration of the Regulator
Section 11 (1) should be amended by reducing the tenure of the Regulator to five (5) years with no automatic eligibility for re-appointment.

- That the Regulator and Deputy Regulator should be engaged on a full time basis and be restricted from any other occupation.

5.3 The Chairman also noted that due to the limited mandate of the Committee, further amendments outside of the Committee's remit would be considered via a separate Amendment Bill.

OTHER MATTERS

6.1 In response to a request made by letter dated February 5, 2016, the Committee agreed to grant an extension of time to the Board of Permanent Secretaries and Heads of Departments to submit their written submissions on the Public Procurement and Disposal of Public Property (Amendment) Bill, 2015.The deadline for receipt of submissions from the Board was revised to February 17, 2016.

6.2 The Committee agreed to note the submissions of Mr. Timothy Hamel-Smith and Mr. Afra Raymond.

6.3 The Committee agreed that its next meeting will be held on Friday 19th February, 2016 at 10:00 a.m.

ADJOURNMENT

7.1 There being no other business, the Chairman thanked Members and adjourned the meeting.

7.2 The adjournment was taken at 11:10 a.m.

I certify that these Minutes are true and correct.

Chairman

Secretary

February 12, 2016

Appendix II

a) The Office of the Procurement Regulator (OPR) as a regulatory and monitoring body should not be involved in trade or any transactional elements of procurement;

b) Subsection 13 (o) of the Parent Act be removed;

c) The Office of the Procurement Regulator should not be involved in the transactional aspect of any public procurement function irrespective of Parliament's approval of a budget for its operations which may provide for the acquisition of goods, works or services necessary for its functioning;

d) The Office of the Procurement Regulator should not be involved in the transactional nature of the disposal of its own property;

e) All procurement transactions required for the efficient operation of the OPR should be undertaken by public bodies such as a Ministry and /or a State owned Enterprise;

f) The Regulator is a mere functionary responsible to the Office of the Procurement Regulator. The Regulator does not have the powers or reach of the Contractor General. The substantive powers under Act No. 1 of 2015 reside with the OPR, thus, any removal process should apply to all members of the OPR;

g) The Tribunal charged with the responsibility for removing the Regulator, should have the same powers of a High Court and be appointed by the President Similar to the appointment of High Court Judges;

h) The removal of members of the Board of the OPR should be equivalent to or adopt best HR practices;

i) The Review Board and the Tribunal should be merged into one entity under one name;

j) This one entity should have all the powers of a High Court and should be appointed by the President in his sole discretion;

k) In relation to clause 7 of the Bill, and considering the following:

   i. That the idea of monitoring, auditing, investigating and reporting on the disposal of real property is already in Act No. 1 of 2015;
   ii. That Public Property is already defined in Act No. 1 of 2015;
   iii. That subsection 63 (1) provides that the Minister may on the recommendation of the Office make regulations to give effect to the provisions of this Act; and
   iv. That the Act No. 1 of 2015 specifies that the OPR reports to Parliament through the Minister.

That the amendment 57 A Clause 7 of the Bill should read:

> *"notwithstanding the State Lands Act and other written law to the contrary, the disposal of Public Property shall be subject to regulations made under section 63 (1) which shall specify that each such disposal shall be subject to negative approval of Parliament".*

PARLIAMENT
Republic of Trinidad and Tobago
Levels G - 7, Tower D
The Port-of-Spain International Waterfront Centre
1A Wrightson Road, Port-of-Spain

JOINT SELECT COMMITTEE ON THE PUBLIC PROCUREMENT AND DISPOSAL OF PUBLIC PROPERTY (AMENDMENT) BILL, 2015

MINUTES OF THE 5TH MEETING HELD IN THE ARNOLD THOMASOS ROOM (EAST), LEVEL 6, OFFICE OF THE PARLIAMENT, TOWER D, IWFC, #1A WRIGHTSON ROAD, PORT OF SPAIN ON FEBRUARY 19, 2016 AT 10:00AM

COMMITTEE MEMBERS

Present

Mr. Colm Imbert, MP	-	Chairman
Mr. Adrian Leonce, MP	-	Member
Mrs. Paula Gopee-Scoon	-	Member
Mr. David Small	-	Member
Mr. Franklin Khan	-	Member
Mrs. Cherrie-Ann Crichlow–Cockburn, MP	-	Member
Dr. Bhoendradatt Tewarie, MP	-	Member

Absent/Excused

Mr. Wayne Sturge	-	Member

SECRETARIAT

Mrs. Jacqui Sampson Meiguel	-	Secretary
Ms. Chantal La Roche	-	Assistant Secretary
Ms. Tanya Alexis	-	Legal Officer I

COMMENCEMENT

1.1 The meeting was called to order by the Chairman at 10:18 a.m.

1.2 The Chairman indicated that Mr. Wayne Sturge, was excused from the day's meeting.

CONFIRMATION OF MINUTES

2.1 The Committee considered the Minutes of the 4th meeting held on February 12, 2016.

2.2 The motion for the confirmation of the Minutes was moved by Mr. Small and seconded by Mr. Khan and the Minutes were confirmed by the Committee.

MATTERS ARISING FROM THE MINUTES

Item 4.1

3.1 The Committee invited Dr. Tewarie to present his submissions on the inclusion of a Public Procurement Review Board as proposed by Clause 6 of the Bill.

3.2 Dr. Tewarie noted the following reasons for his objections to the inclusion of the review board as proposed in the Bill, *inter alia*:

- The matters the Review Board would address were already covered by Act No. 1 of 2015.
- The inclusion of the Review Board would not prevent litigation
- The review system established under Act No. 1 of 2015 is faster than that of the Kenyan process (which the proposed Review Board was modeled after)
- Alternative methods of dispute resolution are already available to aggrieved persons under Act No. 1 of 2015.

3.3 After hearing Dr. Tewarie's presentation on Clause 6 of the Bill, the Committee agreed to retain the Review Board as proposed in the Bill. Dr. Tewarie objected to the inclusion of the Review Board in the Bill.

CONTINUATION OF CONSIDERATION OF THE PUBLIC PROCUREMENT AND DISPOSAL OF PUBLIC PROPERTY (AMENDMENT) BILL, 2015 (INCLUDING FINALISATION OF AMENDMENTS).

4.1 The Committee agreed to the amendments attached to these Minutes as Appendix I with the following exceptions:

- The amendment to clause 7 "the Regulations made under this section shall be subject to affirmative resolution of Parliament"; affirmative should be removed and replaced with "negative".
- The proposed amendment to section 11 (1) of Act No. 1 of 2015 was outside the mandate of the Committee. The Committee agreed to recommend in its report to Parliament that another amendment Bill be drafted to capture its recommended amendments which fell outside of the mandate of the Committee.

OTHER MATTERS

5.1 The Committee noted the written submissions from the Board of Permanent Secretaries and Heads of Departments on the Public Procurement and Disposal of Public Property (Amendment) Bill, 2015 and agreed that the submissions fell outside the Committee's mandate.

REPORT TO PARLIAMENT

6.1 The Committee agreed that a draft report would be circulated to Members via email for comment and approval.

6.2 The Committee concurred that this report would be approved by round-robin. The Committee also agreed that should Members have any objections to same, they should email them to the Secretariat.

6.3 The Chairman expressed his gratitude to Members for their commitment and the tremendous work done by the Committee and the Members complimented the Chairman on his performance as Committee Chair.

ADJOURNMENT

7.1 There being no other business, the Chairman thanked Members and adjourned the meeting.

7.2 The adjournment was taken at 11:05 a.m.

I certify that these Minutes are true and correct.

Chairman

Secretary

February 19, 2016

SUBMISSIONS

PRIVATE SECTOR/CIVIL SOCIETY GROUP

Tel: 868-627-2522 Fax: 625-5749 email:pscsgwj©aolicom

29 January, 2016

The Honourable Mr. Colm Imbert, MP
Chairman
Joint Select Committee
The Public Procurement & Disposal of Public Property (Amendment) Bill
Office of the Parliament
Levels G-8, Tower D
The Port of Spain International Waterfront Centre
1A Wrightson Road
Port of Spain



THE PRIVATE SECTOR CIVIL SOCIETY RESPONSE TO THE PUBLIC PROCUREMENT AND DISPOSAL OF PUBLIC PROPERTY (AMENDMENT) BILL, 2015 BEFORE THE JOINT SELECT COMMITTEE

Preamble

The Joint Select Committee (JSC) is reminded here that the Regulator and Deputy Regulator are mere functionaries under Act No. 1 of 2015. The Regulator, and in his absence the Deputy Regulator, administers the day to day operations of the Act and do not have similar powers of the Contractor General under the Jamaican Act or the Director General under the Kenyan Act. The substantive powers under Act No. 1 of 2015 lie exclusively with the Board of the Office of Procurement Regulation (OPR). This is clearly expressed in the Act under sub-section 12 (2) (b) which states "(2) ***in the exercise of its function, the Office shall-***
(b) not be subject to the direction or control of any other person or authority in the performance of its functions, but shall be accountable to Parliament "

The Regulator and Deputy Regulator are limited as such and are not accountable to Parliament but to the Board of the OPR:

1. Powers of the Regulator

The powers of the Regulator are limited to the following:

a. **Chairing meetings of the board of the (OPR) - see sub-section 10 (1) (a) and 15 (2);**
b. **Authenticating with others the official seal of the OPR - see sub-section 10 (4);**
c. ***"The day to day management, administration direction and control of the business of the Office with the authority to act in the conduct of the business of the Office."*** **See sub section 11 (2);**

d. **Receive resignation letters from other members of the OPR - see sub-section 11 (7);**

e. ***Submit reports annually to the Speaker of the House of Representatives, the President of the Senate and the Minister of Finance.*** **See section 24;**

f **Receive complaints** ***"after the entry into force of a procurement contract or conclusion of a framework agreement when an agency does not publish promptly on its web site or any other electronic format notice of award."*** **See sub-section 36 (2);**

g. **Authorises officers to undertake investigations into any alleged or suspected breach of the Act - see sub-section 43 (1).**

It should be noted that the Board receives a full and complete written report of an investigation in writing and informs the affected parties and the Minister. See section 44. If the Office is of the view that a breach has been committed, it shall make a report to the Director of Public Prosecution. See section 45.

All Challenge Proceedings are directed to the OPR by a supplier or Contractor for review of a decision made by a procuring entity - see sections 49, 50 and 51.

2. The proposed amendment under Section 3-Appointment of tribunal by the President

The proposed amendment to section 3 states ***"The Act is amended by inserting after section 12, the following subsection:***

12A. ***(1) "In addition to the provisions of section 12, the Regulator may be removed from office where he trades with the Government without the prior approval, by resolution, of each House of Parliament".***

(2) ***Where a resolution is passed by each House of Parliament that the question of removing the Regulator from office, under subsection (1) or section 12, should be investigated -***

(a) the President shall appoint a tribunal, which shall consist of a chairman and not less than two other members, from among persons who hold or have held the office of a Judge of a Court having unlimited jurisdiction in civil and criminal matters or a Court having jurisdiction in appeals from any such Court; and

(b) the tribunal shall enquire into the matter and report on the facts thereof to the President and recommend to the President whether the Regulator should be removed from office.

The phrase "trade with the Government" can be interpreted in several ways in the context of a Regulator trading with the Government particularly if the Regulator has similar powers to the Contractor General

under the Jamaica Act or the Director General under the Kenyan Act. The phrase trade with Government could mean trading as-:

(1) a person using his position of Regulator to trade with the Government or
(2) the Regulator in his private capacity trading with the Government

A person using his position of Regulator to trade with the Government

Act No. 1 of 2015 deals with acquisition of goods, works and services and the disposal of public property. It is thus conceivable that the OPR may need to acquire goods, works and or services and dispose of public property under its ownership.

The OPR is a public body and sub-section 61 (2) of the Act states ***"For the purposes of this Act, a public body shall have a procurement officer who shall be responsible for the public procurement and the disposal of public property for the body."***

In this context (of the Regulator operating as procurement officer) it is important to note that section 10 states quite clearly that "All expenses incurred by the Office for the purpose of this Act shall be a charge on the Consolidated Fund". Section 21 states that ***"the funds of the Office shall consist of monies appropriated by Parliament for the purposes of the office."*** **It is thus clear that the only funds available for the OPR or the Regulator acting as procurement officer for the OPR are funds approved by Parliament. The approved funds may be for the acquisition of goods, works or services facilitating the operations of the Office.**

On the disposal side however, Act No. 1 of 2015 sub-section 13 (1) (o) gives the OPR the power ***"to act for, in the name and on behalf of the State to dispose of real property owned by the Government in such manner as the Government may consider appropriate and desirable."***

The Private Sector Civil Society Group (PSCSG) Recommendations (1)

The PSCSG is of the view that the OPR as a regulatory and monitoring body should not be involved in trade or any transactional elements of procurement. The PSCSG thus recommends the following:

a) **That sub-section 13 (1) (o) be removed;**
b) **The OPR should not be involved in the transactional aspect of any public procurement function irrespective of Parliament's approval of a budget for its operations which may provide for the acquisition of goods, works or services necessary for its functioning;**
c) **The OPR should not be involved in the transactional nature of the disposal of its own property;**
d) **All procurement transactions required for the efficient operation of the OPR should be undertaken by public body such as a Ministry and/or a State owned Enterprise.**

The Regulator in his private capacity trading with the Government

Taking into account the fact that the amendments may refer to the Regulator acting in his private capacity, reference is here made to the Jamaican Act section (7) which allows for the removal of the Contractor General for trading with the Government of Jamaica without the prior approval, by resolution, of each House of Parliament. The Jamaican act specifies the limits of such trading by stating that the Contractor General *"shall not be so removed except in accordance with the provisions of this section".* **"Part 2 of section 7 states:**

"For the purposes of this section a Contractor-General trades with the Government of Jamaica if, while holding office as such, he becomes party to, or is a partner in a firm or a director or manager of a company which to his knowledge becomes a party to any contract with the Government of Jamaica for or on behalf of the public service."

Sub-sections 3, 4, 5 and 6 of section 7 deal as follows with the issue of removal of the Contractor General:

Sub-section (3) states *"If the question of the removal from office of a Contractor-General has been referred to a tribunal appointed under subsection (4) and the tribunal has recommended to the Governor-General that the Contractor-General ought to be removed from office, the Governor-General shall, by instrument under the Broad Seal, remove the Contractor-General from office."*

Sub-section states (4) *"If each House of Parliament by resolution decides that the question of removing a Contractor-General from office ought to be investigated then -*

a) the Governor-General shall appoint a tribunal, which shall consist of a chairman and not less than two or more than five other members from among persons who hold or have held the office of a Judge of a court having unlimited jurisdiction in civil and criminal matters or a court having jurisdiction in appeals from any such court; and

b) that tribunal shall enquire into the matter and report on the facts thereof to the Governor General and recommend to the Governor-General whether the Contractor-General ought to be removed from office for inability as aforesaid or for misbehavior or for trading as aforesaid."

Sub-section (5) states *"The provisions of sections 8 to 16 (inclusive) of the Commissions of Enquiry Act shall apply mutatis mutandis in like manner in relation to tribunals appointed under subsection (4) or, as the context may require, to the members thereof, as they apply in relation to the Commissions or Commissioners appointed under that Act."*

Sub-section (6) states: *" Where the question of removing a Contractor-General from office has been referred to a tribunal the Governor-General, after consultation with the Prime Minister and the Leader of the Opposition, may suspend the Contractor-General from performing the functions of his office."*

It is clear from the above that the proposed amendments to section 3 of Act No. 1 of 2015 were derived from the Contractor General's Act of Jamaica without taking into account the following:

(1) The Jamaican Act defines and limits the concept of what it means to trade with the Government;

(2) The Contractor General is a Commission of Parliament as stated under sub- section 3 (1)

3 The Contractor General Commission

(1) For purposes of this Act there is hereby constituted a Commission of Parliament to be known as the Contractor General;

(3) The Jamaica Act states under section 5 (1):

5 Independence of Contractor General

(1) In the exercise of the powers conferred upon him by this Act a Contractor General shall not be subject to the direction or control of any other person or authority;

(4) That sub-section 4 (1) of the Jamaica Act states:

4 Functions of the Contractor General

(1) Subject to the provisions of this Act, it shall be the function a Contractor General on behalf of Parliament-

(a) to monitor the award and the implementation of government contracts._

The Regulator is a mere functionary responsible to the OPR. The Regulator does not have the powers or reach of the Contractor General. The substantive powers under Act No. 1 of 2015 reside with the OPR, thus any removal process should apply to all members of the OPR.

The Private Sector Civil Society Group (PSCSG) Recommendations (2)

1) **The Tribunal should have the powers of a High Court and be appointed by the President similar to the appointment of High Court Judges;**
2) **The removal of members of the Board of the OPR should be subject to the same processes;**
3) **The process for removal should be equivalent to or adopt best HR practices;**
4) **The process for removal should start with the Board of the OPR, which should have the power to investigate and make recommendations;**
5) **Following investigation by the Board of the OPR, all recommendations should be passed to the Tribunal for review and decision;**
6) **The decision of the Tribunal is to be forwarded to the President, The Prime Minister and The Leader of the Opposition;**

7) **If removal is the decision of the Tribunal, then the President, after informing the Prime Minister and Leader of the Opposition, should remove the offending member of the OPR from the Office; and**

8) **The Regulator and Deputy Regulator engagement should be full-time and they should not be engaged in any other occupation or be engaged in any other public office while holding such position.**

4, The proposed amendment 4 under **Section 24(4)**

"Section 24(4) of the Act is amended by inserting after the word "respectively", in the second place where it occurs, the words "and the report shall be referred forthwith to the Public Accounts Committee"

The Private Sector Civil Society Group (PSCSG) Recommendations (3)

The proposed amendment under section 24 (4) is accepted by the PSCSG.

5.The proposed amendment **5** under Section 50

Section 50 of the Act is amended by inserting after subsection (12), following subsection:
"(13) ***The suspension of procurement proceedings under subsection (4) (a) shall be lifted immediately upon the issuance of the decision of the Office under subsection (1)."***

The Private Sector Civil Society Group (PSCSG) Recommendations (4)

The proposed amendment under section 50 subsection (13) is accepted by the PSCSG.

6.The proposed amendment 6 under Section **51**

The Act is amended by inserting after section 51, the following new sections:

"Establishment of Public Procurement Review Board Composition of Review Board

51A. The Public Procurement Review Board, herein after referred to as the "Review Board", is hereby established to review decisions made by the Office..

The Private Sector Civil Society Group (PSCSG) Recommendations (5)

(1) The proposed amendment is accepted in principle;

(2) The Review Board and the Tribunal should be merged into one entity under one name;

(3) Under this one entity, time lines for decision making for different proceedings should be stipulated;

(4) This one entity should have all the powers of a High Court and should be appointed by the President in his sole discretion.

7. The proposed amendment 7 inserting after section 57 the following Part:

Part VIA DISPOSAL OF STATE LANDS

"57A Notwithstanding the State Lands Act and other written law to the contrary, the disposal of

a) State Lands;
b) real property owned by the Government;
c) real property owned by State controlled enterprises; and
d) real property owned by a statutory body, responsibility for which is assigned to a Minister of Government shall be subject to Regulations made by the Minister under section **63**

The following should be noted: -

a. **Act No. 1 of 2015 section 4 Part 1 states the following: -**

"Public Property means real or personal property owned by the state."

"Disposal of public property includes the transfer without value, sale, lease, concessions or other alienation of property that is owned by a public body."

"Public Property means real or personal property owned by a public body."

b. **Under section 13 and 14, in the performance of its functions, the Office is to monitor, audit and investigate all activities related to the disposal of public property;**

c. **Under sub-section 24 (1), the Regulator shall submit his reports annually to the Speaker of the House of Representatives, the President of the Senate and the Minister. Sub-section 24 (2) states that a report under subsection (1) shall include: - (d) a summary of transactions in respect of each public body concerning the disposal of public property;**

d. **That Dr. the Honourable Keith Rowley, Prime Minister is reported on the 15th November 2015 in the Newsday, under the caption PM on Secret Distribution of Land, as making a statement at the office of the Prime Minister. The PM recalled that the House of Representatives last Friday approved the Government's recommendations to send the Public Procurement and Disposal of Public Property (Amendment) Bill, 2015 to a JSC which is mandated to complete its work by January 22, and the Prime Minister said that this will involve legislative amendments that will**

prevent any parcel of State land or any State assert from being distributed to any person or Agency without the knowledge of Parliament.

e. **That sub-section 63 (1) states: The Minister may on the recommendation of the Office make regulations to give effect to the provisions of this Act...; and**

f. **That sub-section 63 (3) states that: "Regulations made under this section shall be subject to affirmative resolution of Parliament".**

The Private Sector Civil Society Group (PSCSG) Recommendations (6)

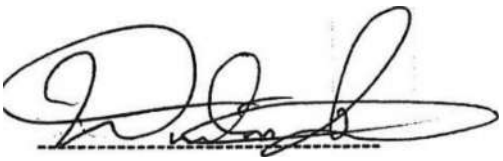
That: -

1. **As the idea of monitoring, auditing, investigating and reporting on the disposal of real property is already in Act No. 1 of 2015;**
2. **As Public Property is already defined in Act No. 1 of 2015;**
3. **As sub-section 63 (1) provides that the Minister may on the recommendation of the Office make regulations to give effect to the provisions of this Act; and**
4. **As Act No. 1 of 2015 specifies that the OPR reports to Parliament through the Minister;**

Then:-
The amendment 57A should read:

"Notwithstanding the State Lands Act and other written law to the contrary, the disposal of Public Property shall be subject to regulations made under section 63 (1) which shall specify that each such disposal shall be subject to negative approval of Parliament."

Yours truly,
PRIVATE SECTOR / CIVIL SOCIETY GROUP



Winston Riley,P.E., FAPETT
Chairman

r. JAMES ARMSTRONG
PRESIDENT
JOINT CONSULTATIVE COUNCIL
FOR THE CONSTRUCTION INDUSTRY

4-ROBERT TRESTRAIL
PRESIDENT
TRINIDAD & TOBAGO CHAMBER OF
INDUSTRY & COMMERCE

RAVI SURYADEVARA
PRESIDENT
AMERICAN CHAMBER OF COMMERCE
OF TRINIDAD & TOBAGO

ERYCK MURRAY
CHAIRMAN
TRINIDAD & TOBAGO TRANSPARENCY INSTITUE

LANGELA LEE LOY
PRESIDENT
TRINIDAD & TOBAGO CO f(TION OF
SERVICES INDUSTRIES

JOSEPH REMY
PRESIDENT
FEDERATED INDEPENDENT TRADE UNIONS
NGO's

LENNOX SIRJ ESINGH
PRESIDENT
TRINIDAD & TOBAGO LOCAL CONTENT CHAMBER

Dr. ROLPH BALGOBIN
PRESIDENT
TRINIDAD & TOBAGO MANUFACTURERS'
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The Secretary
Joint Select Committee - Procurement and Disposal of Public Property (Amendment) Bill, 2015
Parliament of the Republic of Trinidad and Tobago
Level 3 Tower D
Port of Spain International Waterfront Centre
lA Wrightson Road
Port of Spain

Via email: jscprocurementgtparlaimentorg

WRITTEN SUBMISSION

Date: 8th January 2016

I have reviewed the Procurement and Disposal of Public Property (Amendment) Bill, 2015 (the `Amending Bill') which seeks to amend the Procurement and Disposal of Public Property Act, 2015 (the 'Procurement Act'). The Amending Bill has been referred to a Joint Select Committee of Parliament with directions to report to parliament by 22 nd January 2016.

As a consequence I have prepared this submission which is divided into three parts. Part 1 consists of introductory comments, Part 2 is the review and recommendations on the provisions of the Bill and Part 3 includes references in an Appendix to relevant Sections of the Act and Bill which are under consideration.

PART 1— INTRODUCTORY COMMENTS

1. The enactment and implementation of fair and equitable procurement legislation is one of the most significant steps which Trinidad and Tobago can take towards sustainable development.

If done well, the procurement legislation will ensure that (a) the citizens of Trinidad and Tobago receive the best goods and services possible for their tax dollars and (b) that there is an opportunity for all contractors and suppliers to participate on an equal footing in a competitive environment in respect of delivery of works, goods and services required by the State for the benefit of the people of Trinidad and Tobago. It is important that we get this right.

2. **Equal in importance to getting the text of the procurement legislation right, is ensuring that the legislation is implemented efficiently. Without proper implementation the best legislation in the world will be of no practical use. In implementing the legislation there must be a focus on achieving the end result of providing better goods and services for the people of Trinidad and Tobago. While the goals of transparency, accountability and best value for money are vital, it is easy to see these as ends in themselves, as opposed to tools for achieving the ultimate goal of delivering the best goods and services to the people of Trinidad and Tobago.**

3. **With the importance of implementation in mind, and in an effort to assist in the implementation of the Procurement Act, set out below are:**

   3.1. On overview of the remaining steps needed to implement the Procurement Act as well as general comments on the implementation of these steps; and

   3.2. Suggestions as to the most efficient sequencing of these steps.

4. **STEPS REMAINING FOR IMPLEMENTATION**

5. **The implementation of the procurement regime under the Procurement Act contemplates that the following actions must be taken in the following sequential order:**

   5.1. Salary

   5.2. The salary and allowances of the Regulator must be approved by Parliament.

5.3. It would be advisable that this salary be approved prior to the Regulator being appointed as presumably anyone who is considering taking up such an executive role of Regulator will as a prerequisite of acceptance would want to know at least the salary range applicable to the post.

5.4. Given the importance of the role played by the regulator it is essential that the salary be comparable to executive positions in the private sector in order to attract quality personnel.

5.5. Appointment of Regulator and Members of the Board

5.6. The Regulator and members of the Board must be appointed by the President in consultation with the Prime Minister and Leader of the Opposition.

5.7. Procurement Regulations

5.8. Once the appointments have been made, the Office of Procurement Regulation would have to make recommendations to the Minister as to the Regulations to be made under the Procurement Act.

5.9. Such Regulations will have to be brought before Parliament for approval by affirmative resolution.

5.10. Developing Capacity in Public Bodies

5.11. Ministries and Departments formerly had only limited procurement responsibilities as the major projects were handled by the Central Tenders Board the legislation for which is to be repealed. Further each State Enterprise dealt with procurement on an individual basis.

5.12. In order for the Procurement Act to be effectively implemented, considerable resources will need to be invested into public bodies so that they develop the capacity to implement the new procurement system in a way that attains the ultimate goal of delivering goods and services to the people of Trinidad and Tobago.

5.13. Developing such capacity will include:

5.13.1. ***Creation of Standardized Documents***

5.13.2. The Office of the Regulator would have to start on the preparation of (i) Handbooks (incorporating standardized bidding documents, procedural forms and relevant documents for use in public procurement and disposal of public property), (ii) Model Contracts for Procurement, (iii) Standards as to Best Practices in Public Procurement, (iv) a comprehensive Database as required by the Procurement Act.

5.13.3. ***Appointment of a Procurement Officer for each Public Body***

5.13.4. Consideration should be given to combining clusters of 3/4 Ministries or State Enterprises into a single procurement entity in light of staffing constraints.

5.13.5. ***Financial Regulations***

5.13.6. The Minister will need to prepare Financial Regulations under the Exchequer and Audit Act to facilitate spending procedures.

5.13.7. Such financial regulations will ensure timely payments are authorized to effect procurement by Ministries and Departments.

5.13.8. Indeed, the lack of clear Financial Regulations is perhaps the crucial factor which inhibits progress payments on a timely basis being made for projects.

Inevitably this delay in payment, results in State contracts being more expensive and completion dates being extended well beyond targeted completion which in turn runs counter to the key objective of providing goods and services to the public.

5.13.9. ***Training Programs***

5.13.10. An initial and ongoing program should be circulated to all stakeholders as to how the procurement legislation will impact suppliers and contractors and outlining the training programs intended to be implemented in order to upgrade the competencies of the staff of public bodies to implement the procurement procedures required by the Act and as directed by the Regulator.

5.13.11. ***Guiding Principles***

5.13.12. Guiding Principles should be developed to assist public bodies in conducting procurement exercises. A preliminary working draft of such principles is attached.

5.13.13. Of utmost importance is the understanding that the key objective is to ensure the best delivery of goods and services to the people of Trinidad and Tobago. The good governance principles with respect to accountability, transparency and best value for money are tools towards achieving this key objective.

6. EFFICIENT SEQUENCING OF IMPLEMENTATIONS STEPS

7. Given the sequence of implementation actions outlined above I would like to recommend that simultaneously with the Procurement Bill being debated in Parliament that the Minister's proposed salary and allowances of the Regulator be approved by Parliament.

8. **The determination of salary and allowances of the Regulator would allow the President to proceed with the appointment of the Regulator and Members of the Board who could then proceed to make recommendations to the Minister as to the staffing of the Office of the Regulator.**

9. **The Office of the Regulator would then be in a position to make recommendations to the Minister as to Regulations under the Procurement Act which would then have to be presented to parliament for approval by Affirmative Resolution.**

10. **This would then enable the Office of the Regulator to start with preparation of Handbooks and other documents as outlined at 15.13.2 above so that the new procurement regime can commence.**

PART 2 - REVIEW OF PROCUREMENT BILL

11. **I have set out below my comments on the Procurement Bill and Act for consideration by the Joint Select Committee with Appendix dealing with relevant Sections to which reference is made in relation to Offences and Penalties, Salaries/ Allowances of members of the Office of Procurement Regulation (the 'Office'), Regulations, Guidelines/Handbooks, Whistle Blowing, Investigation and Enforcement and Challenge Proceedings.**

12. **The Procurement Bill addresses four critical areas with respect to the procurement process:**
    - **12.1. Removal of the Regulator by a Tribunal;**
    - **12.2. Suspension of Procurement Proceedings;**
    - **12.3. Creation of a Public Procurement Review Board; and**
    - **12.4. Disposal of State Lands.**

1 3. REMOVAL OF THE REGULATOR BY A TRIBUNAL

14. The role of the Regulator is pivotal to the success of the Procurement Act. Consequently the protections afforded to the regulator and the mechanisms for holding him accountable are of the utmost importance.

15. Set out below is an examination of:

15.1. The factors that need to be balanced in removing the Regulator;

1 5.2. The current mechanism under the Procurement Act for removing the regulator;

15.3. The proposed mechanism for removing the regulator under the Procurement Bill;

1 5.4. Alternative mechanisms for removing the Regulator.

16. Factors that need to be balanced in removing the regulator

17. In determining a mechanism for removing the Regulator there are several, somewhat contradictory, factors that must be carefully balanced.

18. Firstly, a substantial part of the Regulator's job is to act as a bulwark against excesses of the Executive in the award of contracts. It is therefore absolutely critical to the success of procurement regulation that the Regulator not be subject to interference by the Executive.

19. Secondly, the Regulator cannot be a law onto itself. There must be mechanisms to hold the Regulator accountable and, if necessary remove the Regulator. If the Regulator cannot be held accountable there will be no way to ensure that the functions of the Office are performed to the standard required.

20. Lastly, natural justice requires that the Regulator be given a fair hearing before being removed. This is not only important in terms of fairness to the Regulator, but it is also ¡mportant if highly qualified individuals are to be attracted to the post of Regulator; no one

will take the post if they believe they can be removed on a whim, especially when such removal will tarnish their reputation.

21. The current mechanism under the Procurement Act for removing the Regulator

22. Section 12 of the Procurement Act provides that the President may remove a member of the Board from office upon being satisfied that the member commits certain actions, including discretionary matters namely:

22.1. being incapable of performing the duties of a member, or

22.2. has neglected his duties or has engaged in conduct that would bring his office into disrepute.

23. The concern raised with this mechanism, and which the Amendment Bill seeks to address, is that as the Cabinet advises the President to remove the Regulator and the President is obliged to follow such advice then really the right to remove is in the hands of the Executive.

24. Such a mechanism is open to abuse by an Executive in that they may remove the Regulator if it was felt that he was preventing the State from using the procurement process for the benefit of the people of Trinidad and Tobago.

25. On the other hand, the reality is that under the existing Procurement Act one would be required to satisfy the rules of natural justice before removing the Regulator which would require that the Regulator be notified of the grounds being relied upon for his removal and to give the Regulator an opportunity to be heard. In addition the Regulator would be entitled to seek judicial review of the decision to have him removed from office, thus affording some protection for the office of the Regulator from the Executive.

26. The proposed mechanism for removing the Regulator under the Procurement Bill

27. The amending Bill provides for the interposition of a Tribunal and requires the President to appoint a Tribunal to investigate the actions of the Regulator and if the Tribunal so recommends the President is required to remove the Regulator.

28. The requirement that the President appoint the Tribunal is based on a resolution of both Houses of Parliament. Under this provision the Government introduces into Parliament a resolution for referral of the conduct of the Regulator to be investigated by the Tribunal. No opportunity is given for the operation of the rules of natural justice which would allow the Regulator an opportunity to be heard by Parliament.

29. Further such a parliamentary process would not allow the Regulator a right to be heard before appointing a Tribunal. Once the Tribunal was appointed it is likely that the reputation of the Regulator would be so lowered in the public estimation by virtue of his public Parliamentary trial that he would not be in a position to perform his duties.

30. The provisions of the Bill which will involve a Parliamentary debate to determine if a Tribunal is appointed are unacceptable. The members of Parliament are entitled to immunity, privilege and freedom of speech. The Government bringing the resolution to Parliament would have already made up its mind to remove the Regulator and could defame him/her with impunity resulting in a public trial without the ability of the Regulator to respond.

31. The reality is that in modem Trinidad and Tobago politics, Parliament does not provide a check on the Executive; unlike larger jurisdiction in which there are significant numbers of back benchers which may revolt against their party leadership. In Trinidad and Tobago the Executive forms a far larger percentage of the governing party's membership in Parliament and such a revolt is extremely unlikely and indeed would be unprecedented.

32. The proposed amendment represents a retrograde step which flouts the rules of natural justice. The existing provision in the Procurement Act at least allows some protection to the

Regulator both in terms of the rules of natural justice and the ability to approach the Court for judicial review. Moreover under the provisions of the Bill, the members of the Tribunal are all hand-picked by the Executive and appointed by the President on the advice of the Cabinet. It creates the façade of independence in the removal of the Regulator while in reality making it even more likely that the Executive can remove the Regulator at its whim.

33. Alternative mechanisms for removing the Regulator

34. A better approach, if the Parliament is to be involved, would be to have a Senatorial Committee sitting in camera and chaired by an Independent Senator and comprising the Senate President, an additional Independent Senator and an Opposition Senator conduct an inquiry in which the Regulator would attend for questioning and to advance his/her own position relative to the allegations made against him. This Senatorial Committee would then make its recommendations on the question of the removal of the Regulator to the President who would be required to act on such recommendations. The advantage of having the President act on the recommendations of the Senatorial Committee would be to preserve the neutral status of the President and avoid any judicial process which may inquire into his conduct.

35. Alternatively the question of the removal of the Regulator could be vested in the President exercising his own discretion or after consultation with the Prime Minister and Leader of the Opposition and/or other persons, subject in either case to the rules of natural justice. The President would still be obligated to observe the rules of natural justice to allow the Regulator an opportunity to be heard and the Regulator would still have the right to resort to the Court by way of judicial review.

36. The Amendment Bill (12A(2)(a)) provides that "The President shall appoint a tribunal". This would mean the Cabinet which decided to bring the resolution to Parliament for removal of the Regulator will now have the power to advise the President as to the members of the Tribunal who will determine if the Regulator should be removed.

37. I recommend that rather than have the President act on the advice of Cabinet that the President should also have the right to appoint the members of the Tribunal in his own discretion or after relevant consultation.

38. SUSPENSION OF PROCUREMENT PROCEEDINGS

39. Section 50(4)(a) of the Procurement Act empowers the Office of the Regulator to suspend procurement proceedings to protect the interests of the Applicant.

40. Section 50(10) of the Procurement Act empowers the Office of the Regulator to take one of a list of actions, including at paragraph (e) "direct that the procurement proceedings be terminated".

41. By Clause 5 the Procurement Bill seeks to introduce into Section 50 an additional sub-section 13 in following terms: "The suspension of procurement proceedings under subsection (4)(a) shall be lifted immediately upon the issuance of the decision of the Office under subsection (11)" without prejudice to the terms of any decision of the Office under subsection (10).

42. The mandatory lifting of the suspension of procurement proceedings intended to be introduced by virtue of Clause 5 gives rise to the possibility that it will contradict elements of the decision made by the Procurement Office under Section 50(10) or at least lead to ambiguities arising from such a suspension. It may be wise to add to Clause 5 of the Bill the wording which I have included at 41 above as shown in bold red.

43. An alternative approach would be to amend Section 50(10)(h) as follows (changes shown in bold red) "take such other action as is appropriate in the circumstances, including if thought fit, the lifting of any suspension of procurement proceedings order made under subsection (4)(a)". This would then give the Office of the Regulator the discretion as to whether the suspension should be lifted in the context of its decision.

44. In deciding to make the lifting of the suspension mandatory the State is signalling that if the Office of the Regulator upholds the procurement process by dismissing the application, the procurement proceedings should not continue to be subject to suspension pending a review or appeal. In other words such a decision should not be a matter for the exercise of discretion by the Office of the Regulator, the Review Tribunal or the High Court or other appellate court. That can be a justifiable position for the State to adopt as such a suspension could cause real harm to ongoing projects of the State and therefore it is arguable that an applicant should only have one bite of the cherry as proposed in the Amending Bill.

45. PUBLIC PROCUREMENT REVIEW BOARD

46. By clause 6 of the Amending Bill a new clause 51A is introduced which establishes a Public Procurement Review Board for purposes of reviewing decisions.

47. The members of the Review Board are appointed to serve for a period of 3 years by the President after consultation with the Prime Minister and the Leader of the Opposition.

48. The proposed Section 5 1 B sets out the composition of the Board. I would recommend that 51B(b) should be amended so as to include either a registered engineer or a quantity surveyor and that the reference to quantity surveyor in 51B(c) be deleted. This would ensure that the Review Board always includes a chartered accountant.

49. The proposed Section 51E provides for the removal of a member of the Review Board by the President upon being satisfied that certain circumstances exist, including discretionary matters — "(b) is incapable of performing the duties of a member: and (c) has neglected his duties or has engaged in conduct that would bring his office into disrepute". This would result in the Cabinet being entitled to simply advise the President as to removal of a member and produces the same concern of the Government as to the removal of the Regulator which the Amending Bill seeks to overcome.

50. I would recommend that removal be made by the President either in his own discretion or after consultation with the Prime Minister and the Leader of the Opposition and in either case in accordance with the rules of natural justice.

51. Alternatively a better approach would be to have a Senatorial Committee established in similar manner to that recommended at paragraph 34 above. That Senatorial Committee would hold an inquiry at which the member of the Review Board would be entitled to attend and be heard. The Senatorial Committee would then present its recommendations to the President who would be obliged to act on such recommendations.

52. The proposed Section 51M provides that "A party to a review may appeal against the decision of the review Board to the High Court within twenty-eight days of the making of the decision".

53. The effect of such an appeal is that there may be further appeals to the Court of Appeal and the Privy Council, resulting in an unnecessary multiplicity of hearings. I would recommend that a single appeal be allowed directly to the Court of Appeal, with no further right of appeal or that such final appeal be made directly to the Caribbean Court of Justice if it is willing and able to accept jurisdiction over the matter under the present arrangements establishing the CCJ.

54. DISPOSAL OF STATE LANDS

55. The proposed Section 57A provides that regulations made by the Minister under Section 63 shall govern the disposal of State Lands and real property owned by the State or State-controlled entities or a statutory body responsible to a Government Minister. This would seem to imply, based on the provisions of Section 63, that the regulations are made, "on the recommendation of the Office", but it worth having this confirmed as the intention of the Amending Bill.

56. Section 13(1) of the Procurement Act sets out the functions of the Office which includes at paragraph (o) "act for, and in the name and on behalf of the State to dispose of real property owned by the Government in such manner as the Government may consider appropriate and desirable".

57. This function is adopted directly from the Central Tenders Board Act. However the Office which has been set up to regulate and monitor procurement and disposal of public property ought not also to have the function of disposing of real property of the State as this would be a conflict of interest, being tantamount to the Office regulating and monitoring itself (see Section 14(1) (a) — monitoring of disposal of public property by public bodies to ensure compliance).

58. I would recommend that paragraph (o) of Section 13(1) of the Procurement Act be deleted and that the proposed Regulations under Section 57A make appropriate provisions for who performs the functions as to disposal.

59. It is to be noted that by Section 13 (1) (c) one of the functions of the Office is to "issue and review guidelines in relation to public procurement and the retention and disposal of public property....". It would therefore be necessary to ensure that the Regulations and any Guidelines issued by the Office with respect to the Disposal of Public Property are synchronised.

Part 3 - APPENDIX

(Sections referred to in Review)

1. Offences and Penalties

a. Section 6(1) of the Procurement Act provides that any procurement that is not done in accordance with the Act shall be void and illegal.

b. Section 14(2) of the Procurement Act provides that a person or public body who fails to comply with a direction under the Act, commits an office and is liable to a fine of $100,000.

c. **Section 17(2) makes it an offence where a member of the Board or committee fails to disclose an interest, the penalty for which is a fine of $500,000 and imprisonment for one year.**

d. **Section 59(10) makes it an offence where a person offers inducement (bribe) to a person in a procuring entity- On conviction this offence is subject to a fine of $1 million and 5 years' imprisonment.**

e. **By Section 60(1) a person involved in bid rigging or offence involving collusion commits an offence liable to a fine of $5 million and 7 years imprisonment.**

f. **By Section 60(2) a person who alters procurement document with intent to influence outcome commits offence and liable to fine of $2 million and 5 years imprisonment.**

g. **By Section 61(1) a person who contravenes sections of Act as listed in Schedule 1 is subject to penalty listed in Schedule 1.**

h. **By Section 63(2) the Regulations may make the breach of any Regulation an office and prescribe penalties therefor not exceeding a fine of $1 million and imprisonment for 5 years.**

i. **However Schedule 1 (Offences and Penalties) — does not include Section 6(1) as an offence and therefore provides no penalty. This needs to be remedied and the other sections referenced above while specifying the offence and fixing the resulting penalty) could also be usefully listed in Schedule 1.**

2. **Salaries and Allowances of the Office of Procurement Regulation (the 'Office')**

(a) Section 11(9) of the Procurement Act provides that "the salaries and allowances of the Regulator and other members shall be determined by the Minister, subject to the approval of Parliament".

3. **Regulations — Parliamentary Approval**

(a) Section 6 (3) — members of Committee to satisfy fit and proper criteria as prescribed by Regulations

(b) By Section 11(9) the salaries and allowances of the Regulator and other members shall be determined by the Minister, subject to the approval of Parliament.

(c) Section 58(4) provides that the Minister may make Regulations with respect to ineligibility list.

(d) Section 63(1) empowers the Minister, on recommendations of the Office, to make Regulations to give effect to the Procurement Act, including Regulations with respect to-

(i) Conduct of challenge proceedings

(ii) The addition to or removal from ineligibility list.

(e) Section 63(3) provides that "Regulations made under this section shall be subject to affirmative resolution of Parliament".

(0 The proposed Section 51F in the Amending Bill provides that "the staffing, remuneration, funding and other operational matters of the Review Board shall be prescribed by the Minister by regulations made under section 63".

(g) The proposed Section 57A provides that regulations made by the Minister under Section 63 shall govern the disposal of State Lands and real property owned by the State or State-controlled entities or a statutory body responsible to a Government Minister.

4. Guidelines, Handbooks

(a) By section 30(1) a procuring entity is required to comply with-

(i) General guidelines issued by the Office

(ii) Special guidelines prepared by procuring entity and approved for a particular procuring entity

(iii) Handbooks prepared by procuring entity and in relation to public procurement approved by the Office

(b) By Section 13 (1) (c) one of the functions of the Office is to "issue and review guidelines in relation to public procurement and the retention and disposal of public property....".

5. Whistle Blowing

(a) Section 40 of the Procurement Act embodies protection for any person who acting in good faith and on the basis of a reasonable belief gives notice of a contravention of the Procurement Act

6. Investigation and Enforcement

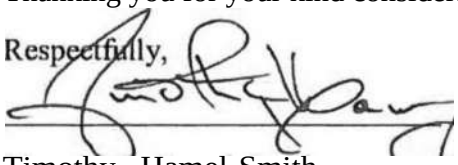
(a) By Section 41 the Office on its own initiative or based on complaint may investigate allegation of bid rigging or irregularity in procurement proceedings.

7. Challenge Proceedings

(a) By Section 49 a supplier or contractor may bring challenge proceedings by applying for review of a decision or action taken by procuring entity

Thanking you for your kind consideration.

Respectfully,



Timothy . Hamel-Smith

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20th January 2016

By email only

Submission to the Joint Select Committee of Parliament
on
The Public Procurement and Disposal of Public Property (Amendment) Bill, 2015

My name is Afra Martin Raymond and I am a Chartered Surveyor, being a Fellow of the Royal Institution of Chartered Surveyors. I am Managing Director of Raymond & Pierre Limited — Chartered Valuation Surveyors, Real Estate Agents and Property Consultants. I am past President of the Institute of Surveyors of Trinidad & Tobago (2009-2010) and the Immediate past-President of the Joint Consultative Council for the Construction Industry (2010-2015).

This submission is bVhg made in my personal capacity and does not represent the position of Raymond & Pierre-Limited, the ISTT or the JCC.

This JSC was established on 13th November 2015 to obtain and consider views on The Public Procurement and Disposal of Public Property (Amendment) Bill, 2015 (The Bill).

The preparation of The Bill and the invitation to submit comments on it is an accelerated process to address the perceived shortcomings of the Public Procurement & Disposal of Public Property Act (The Act). One fully appreciates the motivation for this choice of process, given the urgent need to properly control the high levels of waste and theft of Public Money. These comments are submitted in accordance with the mandate of the JSC, but I have also taken the opportunity to submit for consideration three proposals to increase the effectiveness of this important new law.

The Bill proposes three amendments to The Act with which I wish to treat -

Tribunal for removal of the Regulator

S.12 A (2) (a) should be amended to specify that the Tribunal be appointed by the President after consultation with the Prime Minister and the Leader of the Opposition. That apart, the proposal is acceptable, since would create an independent Tribunal which ought to add confidence to this process.

Public Procurement Review Board

This is proposed to be established as stipulated at Ss.51 (a) through (m) and this is also acceptable as it would provide a further layer of oversight before the Courts can be involved.

Disposal of Public Property

The proposed Part VI A, which sets out S.57 A, treating with 'State Lands' is acceptable, subject to these three points -

- **OPR acting for the Government/State** - **S. 13 (a)** (o), which stipulates one of the functions of the OPR as being to - *"...(o) act for, in the name and on behalf of the State to dispose of real property owned by the Government in such manner as the Government may consider appropriate and desirable,-..."* is an unacceptable anomaly in three respects. Firstly, it proposes the idea that 'Government' could actually own anything, when in fact those properties are held by the State and its Agencies. Secondly, this arrangement is one which would be impossible for the OPR to satisfactorily superintend, since it would be performing the agency functions itself. Thirdly, this sub-section creates an avenue within which the Government could instruct the OPR, which would be in fundamental conflict with the independence of the OPR as stipulated at 5.13 (2) (b) -

  ".. *(2) In the exercise of its functions, the Office shall-*
  (b) not be subject to the direction or control of any other person or authority in the performance of its functions, but shall be accountable to the Parliament..."

  S. 13 (a) (o) should therefore be deleted.

- **Government to Government Agreements** are covered in S. 7 (2), which contains a serious loophole in terms of the disposal of Public Property .

  "7... *(2) To the extent that this Act conflicts with an obligation of the State under or arising out of the following:*
  (a) a treaty or other form of agreement to which Trinidad and Tobago is a party with one or more States or entity within a State;
  (b) an agreement entered into by the Government of Trinidad and Tobago with an international financing institution; or
  (c) an agreement for technical or other cooperation between the Government of Trinidad and Tobago and the Government of a foreign State, the requirements of the treaty or agreement shall prevail ***except that the procurement of goods, works or services shall be governed by this Act*** *and shall promote the socio-economic policies of Trinidad and Tobago and shall adhere to the objects of this Act..."* (emphasis mine)

  This means that The Act would only be effective if the Government to Government Agreement were in relation to the procurement of goods, works or services. As such, this represents an unacceptable gap through which Public Property could be disposed without the complete oversight of The Act as intended and specified in the 'objects clause'.

  The provisions of 5.7 **(2)** should therefore be extended to include 'disposal of Public Property', so as to properly safeguard our country's assets.

- **Acquisition of Property** is an aspect of procurement which is not covered in The Act and that is a significant oversight, given that these processes by which the State acquires property can involve great sums of Public Money. The latest and most egregious example of this is in relation to the HDC's controversial **2012** purchase of 'Eden Gardens', which was the subject of a formal and detailed JCC Report, which can be viewed at http.//www.jcc.org.tt/edengardens.htm . In that case the State used its discretion to bypass the option to compulsorily purchase the property for an estimated $35M and proceeded to pay unknown beneficiaries $175M for a parcel of land which had been transferred for $5M, less than three years previously. The Act is intended to provide an effective framework to govern procurement, yet it excludes the procurement of real property. That is an oversight which should be rectified, in my view.

  Land acquisitions by the State can proceed either via private treaty or compulsorily, under the 1994 Land Acquisition Act. The issue of improper practice arises when the State uses its discretion to opt for a more expensive private treaty solution, when a significantly cheaper and lawful acquisition can be done via the compulsory route. My proposal is that land acquisitions should only proceed if the State pays the lower price between the two options.

I trust that these comments and proposals will receive due consideration. Please note that if requested, I am willing to give oral evidence before the Joint Select Committee (JSC).

I believe all the items in this submission to be true and correct.



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Public Procurement and Disposal of Public Property Act 2015

Comments of the Board of Permanent Secretaries

Introduction and Purpose

The term Public Procurement refers to the acquisition of goods, work, or services involving the use of public money. Public Property is real or personal property owned by a public body. Disposal of Public Property includes the transfer without value, sale, lease, concession, or other alienation of property that is owned by a public body. The Act seeks to reform the procurement laws of Trinidad and Tobago by making provisions which support the principles of good governance, such as accountability, transparency, integrity and value for money.

Definitions

In the Public Procurement and Disposal of Property Act there are several terms that need to be clearly defined to fully interpret the Act and to determine its purpose. These definitions make it easier to understand and determine the purpose of the Act. However the Act is not fully clear or is silent on some definition/areas.

The Board of Permanent Secretary recommends that the under-mentioned areas of the definitions be addressed:

(i) Definition of Accounting Officer/Permanent Secretary:

The Act does not clearly define who is an Accounting Officer and the role of the Accounting Officer/Permanent Secretary as prescribed in the Public Service Regulations. It refers broadly to a ***Public Entity,*** including Ministries and Departments, which are all headed by an Accounting Officer with a specific and clearly defined role of managing public funds. The Act ascribes responsibility to a public entity and a Procurement Officer.

(ii) Definition of 'Standstill period':

This definition refers to the period from the dispatch of a notice as required by section 35 (2). However, section 35 (2) does not specify a period of notice to be given. Section 35 (2) merely states that a procuring entity ***promptly notify.*** This may need to be amended or require further clarification in the regulations to the Act.

Role of the Permanent Secr3tary as Interpreted from the Act

The role of the Permanent Secretary as an Accounting Office is apparently curtailed by the Act or at least in the functioning of the procurement process.

The Exchequer and Audit Act of 1965 defines the Accounting Officer as follows

`accounting officer" means any person appointed by the Treasury and charged with the duty of accounting for any service in respect of which moneys have been appropriated by the Constitution or by Parliament, or any person to whom issues are made from the Exchequer Account'.

The Act describes several responsibilities of the Public Entity in order to support the functions of the Regulator and the procurement process within the Entity, ranging from the establishment of a comprehensive database of information on public procurement to the employment of a Procurement Officer and the establishment of a Disposal Committee. The role of the Accounting Officer as it relates to that of the role identified

for the Procurement Officer in the accomplishment of these responsibilities has to be interpreted in order to properly assign responsibilities, allegations and offences.

Implications of the Act for a Ministry/Department:-

The Board of Permanent Secretaries is of the view that:

(i) The role of the Permanent Secretary as an accounting officer may be in conflict with that of the Procurement Officer. At section 14 (2) the Act refers to 'a public body or person' and can be interpreted as the Accounting Officer or Procurement Officer. The Act states that every public body shall have a procurement officer. With the employment of this person and given the related provisions of the Act, one must then assess and determine the accountability of the Permanent Secretary/Accounting Officer. This must be considered in light of the apparent accounting responsibility assign to the Procurement Officer under the Act and it must be rationalized in view of the role of the Accounting Officer.

(ii) The Act is silent on the qualifications of the Procurement Officer. However, given the responsibilities of the officer; some level of professional experience ought to be statutorily defined in terms of the requirements of the Office. Reference is made to the commission of an offence by a public body and if construed as a reference to an offence committed by the Procurement Officer, this Officer must therefore be someone at the Management Level and not someone below Management without authority to question or stand up to decisions taken by Management. The Act therefore should clearly identify the qualifications required of the office, either in the act or in future regulations to ensure the appropriateness of responsibilities, allegations and convictions under the law.

(iii) Given the responsibility under the Act the Public Entity and by extension Accounting Officer the following institutional arrangement necessary for an enabling environment, must be addressed in the Public Service to ensure the implementation of the Act and the protection of accounting officer and other staff in light of the penalties prescribed by law:

Human Resources

Procurement Officer and staff must be in place at commencement of the implementation of the Act as procurement is an ongoing process. The role of the Central Administrative agencies, namely the Public Management Consulting Division, the Office of the Chief Personnel Officer and the Service Commissions Department are critical players in this regard. It is therefore imperative that these agencies have the appropriate cadre of staff with the requisite skills to meet the human resource needs of the Office at the right time.

Given the responsibility and importance of the function, there is absolute need to have permanent staff assigned to the function. The Procurement process in the public service is carried out by General Administration and Project Management Staff. General Administration is affected by frequent

changes in staff within the clerical and administrative streams. The Project or Programme Management offices are predominantly staffed with contract officers on contract for 3 years. The stability of procurement staff and the continuity of the process must be addressed to ensure that public entities meet the obligations of the law.

- To support an enabling environment additional training must be provided relevant to the implementation of the Act.

- Regulations and Guidelines must also be in place on commencement of implementation.

Legal

- Legal units would have to also be properly staffed as the Act creates a somewhat highly litigious environment
- The Act also includes some phrases which might be construed as unclear. It states for example that potential contractors cannot approach "any member or an associate of a member of a procuring entity ... [or] any person or an associate of any person providing services to a procuring entity." This phrasing is unclear as public officials and contactor interacts with each other regularly. As contractor would have to submit documentations and information to these personnel.

Audit

- The Audit function would also require upgrading and this function can provide oversight and protection for the accounting officer regarding procurement, particularly as it relates to the disposal of public property. This is an area which an Accounting Officer must report on to the Auditor General.

Internal control systems

- The Internal Procurement systems in the public entities must be aligned with the financial systems in operation at the Ministry of Finance (inclusive of Comptroller of Accounts and Budgets Division). This is the only way that internal controls can function effectively and cost efficiently through the entire procurement cycle can be achieved. This must be reflected in either the guidelines or the regulations to the Act.

Specific Role of Office of the Regulator

The Regulator has an investigative and audit role (Section 13 refers). It must be determined whether these roles are limited to interaction with the named Procurement Officer or the Accounting Officer.

Other Areas of Concern

Tenure of the Procurement Regulator

Section II indicates that the Regulator shall be appointed for a term of seven years and is eligible for reappointment for two (2) consecutive terms. This would mean that the Regulator can potentially serve fourteen (14) consecutive years. This poses inherent risks as it relates to entrenched bureaucratic relationships and/or other vested interests.

Appointment and composition of the Board

Section 10 lists the professional qualifications that the Board Members will possess while section 11 **(4)** treats with their appointment. Section 11 (4) (i) — (ii) provides that three members shall be appointed for six years and three members for 5 years. However, there are no guidelines on how these Members will be appointed.

Functions of the Procurement Office

Section 13 (1) (a — s) outlines very expansive functions of the Office. Notably, 13 (o) authorizes the Office to act for and on behalf of the State to dispose of real property owned by Government. It is not clear whether this section is intended to mean that only the Office has the authority to dispose of real property owned by the Government.

Section 13 (2) authorizes the Office to act ***"expeditiously and take such other steps as it thinks fit".*** This is too subjective as it is the Board that will have to decide. This can be abused and or/ used as a loophole.

The expansive functions of the Office requires the Office to develop guidelines, establish systems, procedures and processes, policies and to deal with complaints arising out of transactions performed in accordance with those guidelines. This is a herculean task and in order to effectively perform these functions, the Board must consist of procurement practitioners who are able to understand and maneuver through the intricacies of Public Sector Procurement. There is considerable overlap of functions within Sections 13 and 14.

Information on upcoming procurements

Every procuring entity shall no later than six (6) weeks after the approval of the National Budget publish information regarding planned procurement activities for the financial year. This applies to all procurement proceedings. It time scale may be unworkable given the budgetary processes relating to the allocation and release of funds to the Ministry. The Board of Permanent Secretaries is of the view that there should be a minimum qualifying sum for this requirement.

Power to Obtain Information and documents

As it stands, the Office during an investigation for breaches of the Act, may serve notice on any person requiring them to supply information outlined in the notice. A breach of the Act amounts to a criminal offence. Therefore, the requirement for notice in an investigative process does not accord with the criminal process.

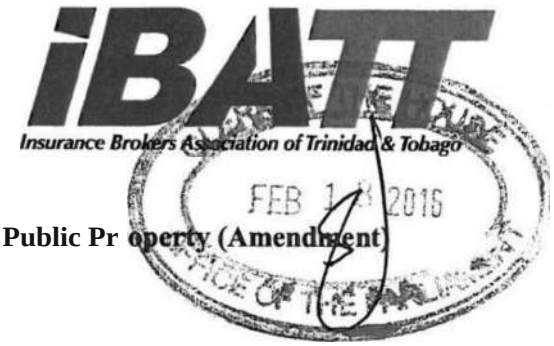
Repeal of the Central Tenders Board

There is no transitional period contemplated to reform the CTB. The Act contemplates that Procurement Office would now perform those tasks. This is fraught with inherent challenges as the performance of several of these functions will require significant human, physical and financial resources if there is to be effective implementation. It will also impact negatively on the procurement of services in the public sector during the period.

Submitted by

The Head of the Public Service
Chairman of the Board of the Permanent Secretaries

February 11, 2016



Ms Jacqui Sampson-Meiguel
Secretary
Joint Select Committee — The Public Procurement and Disposal of Public Property (Amendment) Bill 2015
Office of the Parliament
Levels G-8, Tower D
International Waterfront Centre
l A Wrightson Road
Port of Spain

Dear Madam,

Re: Joint Select Committee - Public Procurement and Disposal of Public Property (Amendment) Bill 2015

The Insurance Brokers Association of Trinidad and Tobago (IBATT) on our review, wishes to make the following comments regarding the Public Procurement and Disposal of Public Property (Amendment) Bill, 2015 now before the Joint Select Committee.

In the interest of meeting the objects of Section 5 (1) (c) of the Public Procurement and Disposal of Public Property Act 2015 - promoting local industry development - we wish to:

1) Firstly, verify that the definition of "services' includes insurance and insurance related services such as broking and loss adjusting.
2) Recommend the following amendments to Sections of the Act that are not yet proclaimed :

Section 13: Functions of the Office — in respect of the contracts placed with overseas suppliers, that the purchaser has complied with the local tax regime applicable had such service been procured locally;

Sections 13 (a): The Functions of the Office should include compiling the value of contracts placed with overseas suppliers by sector;

Section 24 (2)(a), (b) and (c) The Report of The Regulator should inform separately on contracts that are placed with overseas suppliers.

We thank you for your kind consideration.

Yours sincerely,

Prakash Bhaggan
President

25 Agate Drive, Diamond Vale, Diego Martin, Trinidad.
Tel: 868-695 2259 • Fax: 868-695 2260 • www.ibatt.org

VERBATIM NOTES

VERBATIM NOTES OF THE FOURTH MEETING OF THE JOINT SELECT COMMITTEE ON THE PUBLIC PROCUREMENT AND DISPOSAL OF PUBLIC PROPERTY (AMENDMENT) BILL, 2015, IN THE ARNOLD THOMASOS ROOM (EAST), SIXTH FLOOR, TOWER D, INTERNATIONAL WATERFRONT CENTRE, #1A WRIGHTSON ROAD, PORT OF SPAIN, ON FRIDAY, FEBRUARY 12, 2016 AT 9.42 A.M.

PRESENT

Mr. Colm Imbert	Chairman
Mrs. Paula Gopee-Scoon	Member
Mr. Adrian Leonce	Member
Mr. David Small	Member
Mr. Franklin Khan	Member
Mrs. Jacqueline Sampson-Meiguel	Secretary
Miss Chantal La Roche	Assistant Secretary
Miss Tanya Alexis	Legal Officer

ABSENT

Mrs. Cherrie-Ann Crichlow-Cockburn	Member [*Excused*]
Dr. Bhoendradatt Tewarie	Member [*Excused*]
Mr. Wayne Sturge	Member [*Excused*]

CHIEF PARLIAMENTARY COUNSEL

Mr. Milton Sorzano	Assistant Chief Parliamentary Counsel (Ag.)
Miss Sharmaine Williams	Assistant Chief Parliamentary Counsel (Ag.)

PRIVATE SECTOR/CIVIL SOCIETY GROUP

Mr. Winston Riley	Chairman, Private Sector/Civil Society Group
Dr. James Armstrong	President, Joint Consultative Council for the Construction Industry
Mr. Robert Trestrail	President, Trinidad and Tobago Chamber of Industry and Commerce
Mr. Navin Seeterram	Manager, Trinidad and Tobago Chamber of Industry and Commerce
Mr. Mitchell Da Silva	Director, American Chamber of Commerce of Trinidad and Tobago

Mr. Lennox Sirjuesingh	President, Trinidad and Tobago Local Content Chamber
Mr. Deryck Murray	Chair, Trinidad and Tobago Transparency Institute
Mr. Marc Sandy	Team Lead, Trinidad and Tobago Manufacturers' Association
Mrs. Desiree Lopez-Arthur	Joint Consultative Council for the Construction Industry

Mr. Chairman: Okay, good morning ladies and gentlemen. Mr. Riley, am I correct to assume you are the leader of this group?

Mr. Riley: Yes, Sir.

Mr. Chairman: Could you introduce your group, please?

Mr. Riley: I will let them introduce themselves individually.

Mr. Chairman: Sure, sure.

[*Introductions*]

Mr. Chairman: So you have two Chamber reps?

Mr. Riley: Yes.

Mr. Chairman: President and—

Mr. Khan: President, Local Content Chamber.

Mr. Chairman: No, that is different. We have two Chamber reps here.

Visitors: Yes, yes.

Mr. Chairman: Right, okay. Are you expecting anybody else, Mr. Riley?

Mr. Riley: Yes. We are expecting a person from FITUN, but he may be late.

Mr. Chairman: All right, no problem. Okay. Now, the matters before this Committee, the amendment Bill, which is a short Bill with just about seven clauses, and we are also seeking to look at the terms of engagement of the Regulator, but we have to find a procedure to do that, because that is not in this amendment Bill, okay? So, please proceed. We are here to listen to you.

Oh, sorry, let me introduce the members of the Committee that are here: Sen. Small, Independent Senator, or you want to introduce yourself, Sen. Small?

Mr. Small: That is fine. I have no problem being introduced by you, Mr. Chairman.

Mr. Chairman: All right. Independent Sen. Small; Minister of Trade and Industry, Mrs. Paula Gopee-Scoon; myself, Minister of Finance; Mr. Adrian Leonce, Member of Parliament for Laventille East/Morvant. Did I get that right? Mr. Franklin Khan, Minister of Rural Development and Local Government. Missing are: the Minister of Social Development and Family Services; the MP for Caroni Central, Dr. Tewarie and Sen. Sturge, Opposition Senator, okay?

Mr. Riley: We are from the Private Sector Services/Civil Society Group. Mr. Chairman, thank you

for the opportunity to allow us to speak to you on these matters. We have a PowerPoint presentation. I do not know if anybody can see it clearly.

Mr. Chairman: Yes, we can see here and there, so go ahead. [*Points at the monitors to the front and back of the room*] It is behind you as well. I could also look this way.

Mr. Riley: Yes, I will have a problem speaking to you and people looking behind me, anyway, that is only frivolous, of course. [*Laughter*]

Mr. Chairman: Would you have a problem talking to me if I look behind you?

Mr. Riley: No, no, no, somebody else. [*Laughter*]

Okay. Before we actually start the proceedings, what I would like to make a remark on, and this has to do with most people who are in the industry itself did not know it happened, that is the death of Mr. Bynoe. So we wanted to make an announcement on that, and we wanted to make the remark that it appears that the loss of the matter, the $14 million matter in the court has accelerated the process. There is no proof of that, but all we can say, it appears that way, okay? So we are concerned about the question of payment generally, and the question of the use of the Limitation Act to prevent people from being paid, right? Okay.

So let us go—I should probably indicate generally what this document is saying, and then go into the specifics of the document itself. Virtually, our main comment had to do with the issue of the Regulator, as such, and the clauses for amendment of removal of the Regulator. That is our main concern.

The other concern we had of interest had to do with land, but that was not of the same level as the Regulator, and that was how we had dealt with it more or less. In dealing with the Regulator issues, we were of the view not only now, but even prior to now, that there was no specific clause in the Act itself which deals specifically with the removal of the Regulator. It dealt with the removal of members of the board of regulation, okay? And that has to do with the fact that the Regulator was not seen to have the same kind of power as say, the Contractor General in Jamaica, and as such, and that that kind of power was held in the office of regulation. So this is how our presentation begins. I am trying to see if I can shorten it. We said:

> "The Regulator and in his absence the Deputy Regulator, administers the day to day operations of the Act and do not have similar powers of the Contractor General under the Jamaica Act or the Kenyan Act. The substantive powers under Act No. 1 of 2015 lie exclusively with the Board of the Office of Procurement Regulation (OPR). This is clearly expressed in the Act under subsection 12(2)(b) which states '(2) in the exercise of its function, the Office shall-
>
> (b) not be subject to the direction or control of any other person or authority in the

performance of its functions, but shall be accountable to Parliament.'"

That is the Office, not the Regulator, okay?

"The power of the Regulator are limited to the following:"

And we listed these:

"a. Chairing of meetings…

b. Authenticating with others the official seal of the OPR...

c. The day to day management, administration, direction and control of the business of the Office…

d. Receive resignation letters from other members…

e. Submit reports annually to the Speaker of the House of Representatives, the President of the Senate and the Minister of Finance.

f. Receive complaints 'after the entry into force of a procurement contract or conclusion of a framework agreement when an agency does not publish promptly on its web site or any other electronic formation notice of award'.

g. Authorises officers to undertake investigations into any alleged or suspected breach of the Act.

It should be noted that the Board receives a full and complete written report of an investigation in writing and informs the affected parties and the Minister. See section 44."

In other words, that is the responsibility of the Board:

"If the Office is of the view that a breach has been committed, it shall make a report to the Director of Public Prosecution. See section 45."

So, all those powers lie with the Office.

Under "Challenge Proceedings…they are directed to the OPR…"

That is with the Office;

"…by a supplier or Contractor for review of a decision made by a procuring entity, see sections 49, 50 and 51."

—speaks to that of the Act itself.

Now, we come to the proposed amendment:

"The proposed amendment to Section 3-Appointment of a tribunal by the President:

The proposed amendment to section 3 states 'The Act is amended by inserting after section 12, the following subsection:

12A. (1) 'In addition to the provisions of section 12, the Regulator may be removed from office where he trades with the Government without the prior approval, by resolution, of each

House of Parliament."

That is a specific requirement directed totally to the Regulator. All the other requirements under section 12, are directed to members of the board of regulation, right? And then it goes on:

"(2) Where a resolution is passed by each House of Parliament, that the question of removing the Regulator from office, under subsection (1) or section 12, should be investigated -

(a) the President shall appoint a tribunal..."

And then there is listed, the important members of the tribunal. You must have at least three persons with authority of a judge in civil, and as well as criminal proceedings.

"(b) the tribunal shall enquire into the matter and report on the facts thereof to the President and recommend to the President whether the Regulator should be removed from office.

Now, we were looking at this in the more generic sense, first of all. We said that:

"The phrase 'trade with the Government' can be interpreted in several ways, at least two ways in the context of a Regulator trading with the Government particularly if the Regulator has similar powers to the Contractor General under the Jamaica Act or the Director General under the Kenyan Act. The phrase trade with the Government could mean trading as:

(1) a person using his position of Regulator to trade with the Government, or

(2) the Regulator in his private capacity trading with the Government."

Then a person using—this is the first part—his position of Regulator to trade with the Government. Act 1 of 2015 deals with acquisition of goods, works and services and the disposal of public property. It is thus conceivable that the OPR may need to acquire goods, works and/or services and dispose of public property under its ownership.

The OPR is a public body and subsection 61(2) of the Act states:

"For the purposes of this Act, a public body shall have a procurement officer who shall be responsible for the public procurement and the disposal of public property for the body."

In this context of the Regulator operating as procurement officer, it is important to note that section 10 states quite clearly that all expenses incurred by the office for the purpose of this Act shall be a charge on the Consolidated Fund.

Section 21 states that:

"The funds of the Office shall consist of moneys appropriated by Parliament for the purpose of the Office."

It is not thus clear that the only funds available for the OPR or the Regulator acting as procurement officer for the OPR are funds approved by Parliament. The approved funds may be for the acquisition

of goods, works or services facilitating the operations of the office.

On the disposal side, however, Act No. 1 of 2015 subsection 13(1) gives the OPR the power to act for, and in the name and on behalf of the State to dispose of real property owned by the Government in such a manner as the Government may consider appropriate and desirable. So we dealt with the procurement side and that is also the disposal side.

Now, these are our recommendations:

- The Private Sector Civil Society Group is of the view that the OPR as a regulatory and monitoring body should not be involved in trade or any transactional element of procurement.

The Private Sector Civil Society Group thus recommends the following:

- That subsection 13(1)(o) be removed—that is the one that deals specifically with disposal of public property. Under the Act it gives the OPR the ability to dispose of public property. We are saying that is wrong and it should be removed.
- The OPR should not be involved in the transactional aspect of any public procurement function irrespective of Parliament's approval of a budget or charge on the Consolidated Fund for its operations which may provide for the acquisition of goods, works or services necessary for its functioning.

Mr. Chairman: You are not presenting.

Mr. Riley: Or yes, sorry. That is correct. You are very alert, as usual. [*Laughter*]

Mr. Chairman: No, you just caught my attention with what you said, and I wanted to see what page you are on.

Mr. Riley: What is there? No, that last part was a clarification as to why the first part of it was said—all procurement transactions required for the efficient operation—

Mr. Chairman: But which page would that be? Which page is this? I am looking at this, I am looking at the screen and I am not seeing it. So which one is it? You have gone way down. Right. Could you just explain what you were just saying?

Mr. Riley: Okay. What we are saying here is that—and it may probably be good for me to reread the last part of it.

- The OPR should not be involved in the transactional aspect of any procurement function irrespective of Parliament's approval of a budget for its operations which may provide for the acquisition of goods, works or services necessary for its functioning.

Mr. Chairman: So, therefore, Mr. Riley, am I correct to assume that you are not only commenting

on the amendment Bill, you are commenting on the parent Act as well?

Mr. Riley: No, the parent Act does not say that.

Mr. Chairman: We do not have a subsection 13(1).

Mr. Riley: Yes, in that context yes, under subsection 13(1)—

Mr. Chairman: You are proposing—

Mr. Riley: A removal.

Mr. Chairman:—that we look at additional clauses to the clauses that we have in the amendment Bill. This is a proposal that we remove 13(1)(o).

Mr. Riley: Yes.

Mr. Chairman: 13(1)(o) is not mentioned in the amendment Bill.

Mr. Riley: You are correct, yes.

Mr. Chairman: So what you are proposing is outside of the amendment Bill. I am not vexed, let me put it this way. I am just trying to clarify because I am not sure this committee is empowered to look at clauses that are not part of the amendment Bill.

Mr. Riley: Okay, understood.

Mr. Chairman: But that does not mean we are not listening to you, and we will not take action. I just want to be clear in my mind exactly what you are doing. So, you have looked at the whole thing, the parent Act and the amendment Bill and you are now making recommendations.

Mr. Riley: We took it in the context that since you are bringing the issue of procurement and disposal relative to the office of the Regulator, then any issue that deals with the question of procurement and disposal, we took it in that context, in a more generic context.

Mr. Chairman: I am not saying we cannot do that, but normally a joint select committee could only look at what is before it.

Mr. Riley: What Parliament has approved.

Mr. Chairman: What is before it. They can amend, delete, modify what is before it, and this is not before us right now. At least, I do not think so, but I would get the Clerk to clarify that to see whether this flows from what we are doing and therefore we could bring it in.

Perhaps, we should bring the Chief Parliamentary Counsel in at this point in time. Let us do that. I want to do this now because I am not sure whether there are other clauses in the parent Act that you are going to comment on.

Mr. Riley: I do not think so.

Mr. Chairman: This is the only one.

Mr. Riley: That is the only one.

Mr. Chairman: No problem. Well, we will settle this fast then.

[*Staff of Chief Parliamentary Counsel enter the room*]

Is that the leader of the CPC group there? You are in charge. Right? Is it you or Mr. Sorzano?

Mr. Sorzano: Either one of us could respond.

Mr. Chairman: Right. The civil society group has suggested that we delete section 13(1)(o) of the parent Act which says:

> "act for, in the name and on behalf of the State to dispose of real property owned by the Government in such manner as the Government may consider appropriate…"

That flows from the clause in the amendment Bill which refers to the disposal of real property. We are wondering whether this Committee has the authority to look at 13(1)(o).

Miss Williams: It is outside the scope of the intention of the amendment Bill that came before Parliament.

Mr. Chairman: If you look at clause 7 of the amendment Bill, there is a section that says disposal of state lands, and it does refer to the disposal of lands being subject to regulations made by the Minister, and what the group is saying is that 13(1)(o) gives the office of the procurement regulator the authority to dispose of lands. Is there any way we could link this to the amendment Bill?

Miss Williams: We may be able to link it, but I know the intention of (o) was to deal with Government quarters as opposed to lands.

Mr. Chairman: I know how we can deal with this Mr. Riley. When this Bill goes back to the Parliament we could always table an amendment on the floor in addition to this report. You see what would happen is that this Committee would report to the House that we met, we listened to submission, we considered recommendations and we recommend that the amendment Bill be treated in a particular way, but we can then amend that. Not so, Ms. Sampson? [*Crosstalk*] So we can do a further amendment when this matter goes back to the Parliament to cater for the point that you are making. I would like us to pause because I understand the point that is being made. What the civil society group is saying is that the office of the procurement regulator should not have the authority to dispose of property.

Mr. Riley: To be involved in any transaction at all.

Mr. Chairman: In other words, they are a regulatory body, they should not be involved in this sort of transaction. I think it is a good point. From a policy point of view, if you are the Regulator, should you be involved in selling land; the direct process?

So, go ahead, Mr. Riley. I think that you have made a good point. The Committee will consider it and we will see whether we can accommodate the point you have made after we consult with the Parliamentary Counsel and the Members have deliberated. If we are of the view that it is valid we will find a way to get it done.

Mr. Riley: It goes one step further, Mr. Chairman, and that is that since the clause amendment had to do with the question of the Regulator trading with the Government, that is the context, that is the rubric under which we placed it.

Mr. Chairman: I think this is a good time for us to tell you what we have done. I did not want to interrupt you, because you have done all this work, but we have decided to modify the amendment Bill to remove all of the provisions that deal with the appointment of a tribunal where the matter of trading is raised and simply add in clause 12 of the parent Act, which lists the reasons—this is on page 14 of the parent Act, section 12:

> "The President may remove a member from office upon being satisfied that the member—
>
> (a) is declared to be bankrupt;
>
> (b) is incapable of performing the duties…"

We have simply decided to put in there:

> "...has traded with the Government without the prior approval of the Minister."

We just add it in there as a reason why the President would remove a member from office, and then we have defined "the trading" as follows:

> That for the purpose of this section a member trades with the Government if while holding office he becomes a party to or is a partner in a firm or a director or manager of a company which to his knowledge becomes party to any contract with the Government for or on behalf of the public service.

So, we have defined "trading" to be essentially a contractor. You know that if you are associated with a firm and you are a contractor contracting for Government services, you are disqualified from being a member of this office.

Mr. Riley: Okay, that is in keeping to a great extent with our thinking except that the way it was presented to us we had two bases for trading: trading in your own right as Regulator in which you have met the requirements that you are not in conflict with Parliament as such, and then trading in the context of which you have put it. It is in that context that the whole issue of removing all transactional nature aspect—and I think it still holds—should not occur.

Mr. Chairman: You mean all purchases?

Mr. Riley: All purchases.

Mr. Chairman: You mean even buying stationary and so on?

Mr. Riley: Yes, everything.

Mr. Chairman: Well, who would do that then?

Mr. Riley: That is what we said in our recommendation. It should go through a Ministry or a state enterprise.

Mr. Chairman: Okay, well I think we could take your views under consideration. I understand what you are saying. We could perhaps put an exception in the amendment Bill to say except for essential goods and services required for the functioning of the office, or we could go with your proposal. Okay. I hear you. I think this is something that we will consider when we meet after you have finished your presentation. As I said, we have taken out this whole thing with the tribunal and Parliament and so on, and just added that the President may remove a member if the member has traded with the Government without the prior approval of the Minister, and then defined trading to be someone contracting with the Government to provide a service to the Government, and we will consider your point that they should not be involved in anything, not even buying ink is what you are saying, not even buying a coke. You cannot even buy water. [*Laughter*] That is what you are saying.

Mr. Riley: There is one comment and it is that under the parent Act we are talking about removal of a member.

Mr. Chairman: But the Regulator is a member.

Mr. Riley: Yes, the Regulator is a member right and, therefore, if your amendment that you are proposing now does not specified it in the context of the regulator, the regulator as a member of.

Mr. Chairman: It is all members, and if you go to the composition of the office, the regulator is a member of the board of the office. He is a member, so it covers the Regulator.

Mr. Riley: Our concern was not only that the regulator trades but any member.

Mr. Chairman: No, we have done that. We have changed it to member. Okay? So it is anybody on the board including the Regulator.

Mr. Riley: Perfect.

Mr. Chairman: So we will consider your point that they should not even buy water. We would seriously consider it.

Mr. Riley: I could shorten our presentation.

Mr. Chairman: Well, go ahead, yeah.

Mr. Riley: Because if you have removed the whole question of going to Parliament, because we were showing in the presentation how the wording and everything came from the Jamaican Act and under

the Jamaican Act, the Contractor General is a commissioner of Parliament.

Mr. Chairman: He has more powers.

Mr. Riley: He has more powers in that context, and we are talking here now about the office of the Regulator, which means all the members, then we say okay go through a normal HR process.

Mr. Chairman: Follow industrial relations procedure.

Mr. Riley: The question still remains, we still put into that the triggering of a process and that once it comes—it is triggered first by coming to the office of the Regulator, if you want to remove a member. A complaint comes, it goes to the Office of the Regulator, but once the Office of the Regulator comes into operation then an independent body from the office—we said that body has to be named. We could still call it a tribunal—is automatically triggered and the decisions and recommendations to the office goes there. So that in the final analysis there is this independent view that comes in. That is the other approach that we were looking at.

Mr. Chairman: We understand.

Mr. Riley: I do not need to go through all of that again.

Mr. Chairman: Okay, great.

Mr. Riley: All right? So we can go straight to—

Mr. Chairman: And you would scroll for me Mr. Riley, so I could read.

Mr. Riley: Okay. The other issue here is that since you are proposing—let me see if that is the right one. Okay, yes. That is another part of our recommendation which dealt with the whole question of Jamaica and where it came from.

Mr. Chairman: Understood.

Mr. Riley: And then they said the tribunal shall have the power—we are using the term "tribunal", but later on you will see the tribunal with the Review Body, that that should have the power of a High Court and be appointed by the President similar to the appointment of High Court Judges. Now, I would have to give you some aspects of the thinking behind that. The thinking behind that is that it is not only the question of removal of the Regulator or a person or a member of the board of regulation is important, is that any decision that is made by the OPR it is subject to this process there, and I think this is one I think you will agree with fundamentally.

Mr. Chairman: This is what we more or less have in the amendment Bill.

Mr. Riley: But what we were looking at, basically, is that it should go to a body that has the power of the High Court. So the only approach to that after that is appeal. Okay. The thinking behind that had to do with something that came out of the Uff Commission about having something that was parallel to the Construction Court in England, which deals also with the whole question of what is happening

at the EU, and this could be the nexus of something like that. This is the thinking. I am just giving you the thinking.

Mr. Chairman: I am listening to you.

Mr. Riley: This is what we came with, but to get it at the powers of a High Court.

The other issue, let us continue.

- the removal of members of the board of the OPR should be subject to the same process, which I think you have agreed with just now.
- the process for removal should be equivalent to or adopting best HR practices;
- the process for removal should start with the Board of the OPR, which should have the power to investigate and make recommendations;
- following investigation by the board of the OPR, all recommendations should be passed to the tribunal—I am using the term tribunal advisedly—for review and decision.
- the decision of the tribunal is to be forwarded to the President, the Prime Minister and the Leader of the Opposition. This is similar to what you have.
- if the removal is the decision of the tribunal, then the President, after informing the Prime Minister and Leader of the Opposition, should remove the offending member of the OPR from the office.

We want to make two other suggestions with respect to that. That is that if you are dealing now with the question of somebody with HR practices, the tribunal has the power of a High Court, we should still allow the ability to go to the Appeal Court.

Mr. Chairman: That would be a different slide.

Mr. Riley: That is not in our document, but this is a suggestion that we want to make. If it is stopped there and it goes straight to the President, we feel that there should be a period of I think normally we would say 28 days and if the person wants to make an appeal to the High Court he could make it, but that is basically an idea we want to introduce. It is not in the document here, but we feel—

Mr. Chairman: So that is like the Industrial Court then, in a form.

Mr. Riley: In a form. Okay?

M**r. Chairman:** All right.

Mr. Riley: The other part of it is that the Regulator and Deputy Regulator engagement should be full time and they should not be engaged in any other occupation or be engaged in any office.

Mr. Chairman: I agree with that. Is that in the parent Act?

Mr. Riley: No.

Mr. Chairman: Okay.

Mr. Riley: The question is that that is a section that was taken straight from the Kenyan Act.

Mr. Chairman: I agree with that. The Ministers cannot work full time. I mean we cannot work part time, so why the Regulator should be able to work, and there is a reason for that, integrity.

Mr. Riley: Okay. So we are saying there should be a period of time which allows for the time being for the tribunal to come to a decision and an appeal process should take place. We should allow the appeal process to take place. Therefore, if that is happening then there should be different time frames for different types of activity, because one, you do not want to hold up the whole procurement process, because if something goes to the Office of the Regulator or somebody wants to appeal, we should give them the right to appeal, but again a time frame should be set for that situation not to put off the whole process of procurement. So that is it in a nutshell.

Mr. Chairman: Is there anything else?

Mr. Riley: Just to make sure that we are on the same page.

Mr. Chairman: I am hearing you. I want to tell you the procedure that we are probably going to adopt. We will amend the amendment Bill as far as we can to accommodate your proposals that we agree with, and those that we cannot amend by way of the amendment Bill, we will bring another Bill which could probably be debated at the same time that we do the amendment Bill, so there is no delay or while we are putting all of the infrastructure in place, we can bring a Bill and do the amendment because it does take a little while. You have to appoint a Regulator, you have to have an office and that sort of thing, so while that process is going on, we can deal with these issues, because you are really asking for a process of adjudication, similar to what is done in the UK which is then appealable in the Court of Appeal, you skip the High Court. That is really what you are asking for, and I am in total agreement with that. We will take a little while to amend the parent Act to establish this tribunal and give the powers that you have in mind. Okay? There are different ways we could accommodate your proposals. All right, but our objective is really to complete this job, finish the work on this amendment Bill, deal with it in the House and start putting in place the office, but while that is going on we can deal with the issues that you have raised. Okay?

Mr. Riley: In that case, we could go straight to the proposed amendment 4 under section 24(4).

Mr. Chairman: This is the parent Act, right?

Mr. Riley: No, no, this is the amendment. I am saying this is the amendment to the parent Act.

Mr. Chairman: Okay, sorry, go ahead.

Mr. Riley: Section 24(4) of the Act is amended by inserting after the word "respectively", in the

second place where it occurs, the words "and the report shall be referred forthwith to the Public Accounts Committee". We have no problem with that.

Then we go straight to the proposed amendment 5 under section 50. Section 50 of the Act is amended by inserting after subsection (12) the following subsection:

> "The suspension of procurement proceedings under subsection (4)(a) shall be lifted immediately upon the issuance of the decision of the Office under subsection (1)".

We have no problem with that.

Mr. Chairman: Okay, good.

Mr. Riley: Then we go now to the proposed amendment 6 under Section 51.

The Act is amended by inserting after section 51, the following new sections:

"Establishment of Public Procurement Review Board"

And the composition of the Review Board is specified here. Now, I am shifting straight away. The proposed amendment is accepted in principle. The Review Board and the Tribunal should be merged into one entity under one name.

Mr. Chairman: I got that.

Mr. Riley: Under this one entity, time lines for decision making for different procedures should be stipulated. This one entity should have all the powers of a High Court—we said this before—and shall be appointed by the President in his sole discretion.

Mr. Chairman: Now, if you go to 51(h), 51(i), 51(j), 51(k) in this same clause in the amendment Bill, you will see we were giving the Review Board 21 days to do the review and complete it within 21 days upon receiving the request and so on and so on. We already have time lines in there. I understand what you are saying, but we already have time lines in there.

Mr. Riley: We understood that, but if you merge the two and you are dealing with the opportunity to go to what I would call for an individual who you want to fire—if you want to put that term—you may want a different time line for that.

Mr. Chairman: I understand that.

Mr. Riley: We want 28 days.

Mr. Chairman: I understand what you are saying.

Mr. Riley: That is all we are saying.

Mr. Chairman: I just want to let you know that the principle of short time lines is already here and we are trying to get this thing done fast.

Mr. Khan: The issue of merging the two and as you say give them the powers of a High Court, the purpose of the Review Board—if you give them the powers of a High Court there is a way a High

Court has to take evidence and that will slow down the process. This Review Board is not a purely judicial function, and because of that and the nature in which they will take the evidence and view the evidence and make a decision, if the offended party feels that the decision is not in their favour then they still have the option to go to the High Court, but we are hoping that we will filter 90 per cent of those queries. So, in that context, I think to merge the tribunal with the Review Board is inconsistent.

Mr. Riley: I am not clear with you. The tribunal only dealt with the issue of the Regulator.

Mr. Khan: But you are saying giving it the powers of a high court.

Mr. Riley: When you merge it, yes.

Mr. Khan: If you have the powers of a High Court, I am guided by the legal minds here, if you are operating with the powers of a High Court, there is a certain way you have to take evidence and deal with evidence and how you deal with civil proceedings or criminal proceeding practices, and the Review Board would not be subjected to those stringent methods. They would probably take a file and just go through it in one meeting and say, "Hey, this is a valid claim or just reject it."

Mr. Riley: Except there is a process that takes place under the OPR before in which exactly that issue has to be dealt with. It is dealt with first by a complaint that goes to the OPR, the OPR has to take the necessary evidence—everything is in the public domain, by the way when that is happening—and go through that process and it is their recommendation that goes to the High Court. Now, I am not a lawyer, I cannot comment on that.

Mr. Chairman: Mr. Riley, what I would suggest, we understand what you are saying and we are going to consider it very seriously. Mr. Khan is just making a point that this was really an attempt at alternative dispute resolution without the strictures of court procedures in an attempt to get the thing settled fast and to weed out the frivolous matters and then the serious ones would go to the High Court, but we hear what you are saying. It is not that we are not hearing you. So we are going to consider what you are saying.

We just wanted to make the point that this Review Board was not supposed to have the powers of a High Court. It is just supposed to be an adjudicatory body. You know, like a dispute. You know in FIDIC you have the DAB, it is something like that and you know it is an intermediate step. So if a person gets rejected by the Office of the Procurement Regulator, then goes to the Review Board and they reject it too and there are good reasons why these two bodies have rejected it, most people would say: "Well, you see that, I am not bothering to go to the High Court, because that is a waste of time and money." So, it is really to filter out the frivolous ones and the serious ones would go forward to the court. I however, understand what you are proposing and we will consider it. Okay? He just wanted to make that point. I think a very important point.

Mr. Riley: Okay. So we go to the next stage after that, that is:

"The proposed amendment 7 inserting after section 57 the following part:"

That has to do with disposal of state lands.

"…Notwithstanding the State Lands Act and other written law to the contrary, the disposal of:

a) State Lands;

b) real property owned by the Government;

c) real property owned by State controlled enterprises; and

d) real property owned by a statutory body, responsibility for which is assigned to a Minister of Government shall be subject to Regulations made by the Minister under section 63."

That is the proposed amendment.

Then we say here—this is the Private Sector Civil Society Group recommendations.

"The following should be noted:-

a) Act No. 1 of 2015 section 4 Part 1 states the following:-

'Public Property means real or personal property owned by the state.'

'Disposal of public property includes the transfer without value, sale, lease, concessions or other alienation of property that is owned by public body.'

'Public Property means real or personal property owned by a public body.'

That is all in the original Act.

b) Under section 13 and 14, in the performance of its functions, the Office is to monitor, audit and investigate all activities related to the disposal of public property;"

Which is what we mentioned before with the Act.

"c) Under sub-section 24 (1), the Regulator shall submit his reports annually to the Speaker of the House of Representatives, the President of the Senate and the Minister. Sub-section 24 (2) states that a report under subsection (1) shall include:-

a summary of transactions in respect of each public body…"

Then d), I am saying is that there was a statement made by the Prime Minister, and that is:

"Dr The Honourable Keith Rowley, Prime Minister, is reported on the 15th November 2015 in the *Newsday*, under the caption "PM on Secret Distribution of Land", as making a statement at the Office of the Prime Minister.

The PM recalled that the House of Representatives last Friday approved the Government's recommendations to send the Public Procurement and Disposal of Public Property (Amendment) Bill, 2015 to a JSC which is mandated to complete its

work by January 22, and the Prime Minister said that this will involve legislative amendments that will prevent any parcel of State land or any State asset from being distributed to any person or Agency without the knowledge of Parliament."

Now, this is slightly not quite in keeping with what the amendment says, and as such, and then the private sector here is proposing, the Civil Society Group is proposing that:

"e) that sub-section 63(1) states: The Minister may on the recommendation of the Office make regulations to give effect to the provisions of this Act…; and

f) that sub-section 63(3) states that: 'Regulations made under this section shall be subject to affirmative resolution of Parliament'".

So any regulation that is made goes through to Minister and the final decision comes through affirmative resolution of Parliament. Right? Our recommendations is:

"1) As the idea of monitoring, auditing, investigating and reporting on the disposal of real property is already in Act No. 1 of 2015;

2) As Public Property is already defined in Act No. 1 of 2015;

3) As sub-section 63(1) provides that the Minister may on the recommendation of the Office make regulations to give effect to the provisions of this Act; and

4) As Act No. 1 of 2015 specifies that the OPR reports to Parliament through the Minister;"

Then our amendment should read like this:

"'Notwithstanding the State Lands Act and other written law to the contrary, the disposal of Public Property shall be subject to regulations made under section 63(1) which shall specify that each such disposal shall be subject to negative approval of Parliament.'"

Now, the issue here is that there are two issues, the regulation itself goes to Parliament for affirmative resolution but our view is that you cannot have Parliament being bogged down with every disposal of state land looking for affirmative resolution. The transparency aspect of this is that it should be laid before the Parliament so the public knows, the Parliament knows of the disposal in the context of which the Prime Minister was speaking, and the Minister was also speaking. We are saying that, yes, the regulation should go to Parliament for affirmative resolution but every disposal should also go to Parliament but for negative resolution. That is what we are saying.

Mr. Chairman: All right, could you just go back a few slides. Right, section 14 of the parent Act.

Mr. Riley: It is a long section.

Mr. Chairman: I know, I just want to see where you got that from, "to monitor, audit and investigate all activities related to the disposal of public property".

Mr. Riley: Under section 14 it is clear, "monitor the procurement of goods, works and services".

Mr. Chairman: Section 14(1)(a)?

Mr. Riley: Section 14(a), 14(b)—

Mr. Chairman: Okay, fine. We wanted the office to do more than that, more than monitoring, auditing and investigating, and it was specifically the Invader's Bay problem that has motivated the Government to come with this amendment. We wanted a situation where you have this large valuable piece of state land being disposed of, whether it is by lease, sale, or whatever, without following any procedure that we know of. Okay? This is our view, that is what happened, and we wanted, in a case like that, that any Government going forward now—let us say we decide to give away 1,000 acres of land somewhere in south just so to somebody for a dollar, we wanted the procurement office to be able to investigate that and have the power to overturn that. Okay? So we wanted to add that work to the office of the procurement regulator because we saw that as a form of procurement.

Mr. Riley: Okay. So what you are saying is that the OPR will have the power to overturn—

Mr. Chairman: Will have the powers that it has to deal with tendering and the award of contracts. They could deal with that too in the same way. Somebody makes a complaint, "Look, I have discovered that there was an invitation for proposals to acquire state property in Soldado, or wherever, and this fella bid a dollar, that fella bid $10 million; they gave it to de fella for $1 and they did not follow any proper procedure"—I am just speaking very loosely, and that we want the office to be able to deal with that in the way it deals with the award of contracts.

Mr. Riley: Okay. We have no problem with that—

Mr. Chairman: And that is the policy behind this amendment. The reason why we are saying the regulations would be made by the Minister is we are going to make it clear in the regulations what we are talking about, because it would not be agricultural leases and, you know, it would not be routine matters. It will be matters where you have valuable state property that is just being disposed of secretly, and we are now giving a member of the public the ability, or an aggrieved person the ability to make a complaint and then the office steps in and can stop it, and so on. That is what is behind our amendment. Okay?

Mr. Khan: Let me just make one point.

Mr. Chairman: Yeah.

Mr. Khan: You are saying here it is already covered but it is not really, public property means real or personal property owned by the State but if you check in our amendments we included real property owned by state-controlled enterprises, because state-controlled enterprises are registered under the Companies Act. So, Petrotrin lands legally is not state lands, but Petrotrin lands will now fall under this regulation because Caroni lands had been vested with the Commissioner of State Lands. So you

would be broadening the horizon for where the Procurement Regulator has—

Mr. Riley: But the Act deals with all public bodies. The Act covers all public bodies and it is defined.

Mr. Chairman: But, Minister Khan, he already agreed with us you know. You are trying to snatch victory—[*Laughter*] What are you trying to do here? He already agreed so let us keep that. Is there any other point you all want to make?

Mr. Riley: Not so much in terms of what our main purpose would be in here. We are satisfied with the responses that we have gotten so far, in principle. We would like to make a few general comments afterwards, unless you all want to state something specific—

Mr. Chairman: No, I want to make a statement on behalf of the Committee, in my opinion, and members can disagree with me openly if what I am saying is not correct. I am very interested in the points you have made, many of them are very useful, and we will accommodate all of the proposals you have made that are feasible. Okay? We have listened to you, a lot of what you have said makes a lot of sense to me. We will discuss it as a committee and we will take your comments very seriously. But what we want to do is to get this procedure over and done with, tinkering with this Bill, and get moving and start to establish the office. And while we establish that office, or even simultaneously when we are debating this amendment Bill, like that 13(1)(o) that you brought up, the question of disposing, I agree with you. I do not think the office should be doing that at all. That is just my view, the members will discuss it, and that is something that we could bring, a separate amendment Bill to deal with simultaneously when we deal with this, and also try and incorporate some of the other points you have made that we agree with. And, also, take the opportunity, while we are operationalizing the office of the procurement regulator, to make further amendments consistent with the proposals that you have made that are, you know, feasible. Okay? I just want to let you know that is what this Committee would be doing. Is there any member who disagrees with me? No? Well good. All right, so go ahead.

Mr. Riley: We are very heartened by the fact that the time frame is crucial in any of the operations that are happening now. So that is one of the points we want to make, that a lot of amendments can take place while the whole question of putting the OPR into place, even after it is operationalized and proclaimed that can take place. I mean, the Jamaican Act going through five amendments, you know; I cannot remember how much the Kenyan Act went through, but what I am saying is that is an ongoing process.

Mr. Chairman: Okay.

Mr. Riley: The other point we want to make is this, is under last administration we were very concerned about the fact that an organization like this, of all the important stakeholders, were not

involved in the process. The first attempt we wanted is to have—under the Act itself, we are not pushing for that now— is, and we use the term advisably, that a civil society group be involved in the whole question of oversight. Okay? That is what we said, right. They disagreed with that from the point of view of the Act; we do not have a problem with that because oversight is going to come on the ground. We are very good at that. What we did not want is to have a situation where we are on the ground critiquing the Regulator before the Regulator has an opportunity to hear what we have to say, and, as a result of that—and this is not only at the level of the Regulator, it has do with the question of how regulations are being made as such, and that is why we decided to agree with the last administration with the oversight committee. Maybe the composition you may disagree with. We have our disagreement with that too. We did not put it in writing, but what we are saying is that the timely intervention, as we are doing now, is crucial in making sure that the right things are done. To me, to us, the one ingredient that is missing in terms of having civil society operate properly, we have the laws, we have the institutions, but we do not have ways and means of making sure that there is timely intervention by civil society in what is going on. As a result, things become banal in terms of how it is done on the street, more or less, and we do not want to necessarily being involved in that.

Mr. Chairman: So what are you proposing?

Mr. Riley: Excuse me?

Mr. Chairman: What you are proposing?

Mr. Riley: I thought it was clear, Mr. Chairman.

Mr. Chairman: No, it is not.

Mr. Riley: Okay. What I am saying is we would like, even at the stage of getting the OPR operational, we would like to be involved.

Mr. Chairman: Now, we can give you that assurance, but the Government could change 10 years from now and another Government could come in and say, "Well, I am not bothering with all yuh".

Mr. Riley: Disband us.

Mr. Chairman: Yeah. So I am just wondering what you are proposing because this depends on goodwill, what you are proposing.

Mr. Riley: We are worried about proposing anything that will lengthen the process, because it means going back to Parliament.

Mr. Chairman: All right, well, we will give you—this Government—well, I am speaking for the Government, I cannot speak for the Independent Members, and we have no Opposition here today—this Government will ensure that you are involved in the process, okay, but I am speaking on behalf of the Government now and also as the Minister responsible for this portfolio. I will ensure that you are

involved in the process, okay, but I cannot speak for another Minister.

Mr. Riley: No. Understood. There is another way of doing it, partly after the Act is proclaimed. There are four committees that are established under the Act, and to some extent some of it can overflow in these institutions.

Mr. Chairman: I understand.

Mr. Riley: These are the kind of things that we are looking for. We do not want to be fighting on the street on every single issue at time; we would like to be involved in the civil process where things are clear, and, like this, we agree, and we are happy.

Mr. Chairman: Okay, good. All right. Yes, Sen. Small, because I cannot speak for you. [*Laughter*]

Mr. Small: I shall hope not, Mr. Chairman. I am wont to make my own comments. I first want to thank the group for coming this morning. I think that several of the proposals are proposals that I am fully and strongly supportive of. I think that the reason why we are here is because there has been a general failure of oversight in the history of management of all, a lot of state entities in this country. I think that the last point you made there, Mr. Riley, about making sure that members who have a great deal of experience and a lot to add to the governance aspect of how we do things in Trinidad and Tobago, we should be able to try to include them in the fold when we are doing things. So, certainly, as a Member of the Independent Bench, I am on the record many times in this Parliament process of saying that I do not think at any point in time you will get anything 100 per cent correct the first time, and if we ever try to get 100 per cent correct before you start to do it, you will never do it. So, in spite of us trying we will always try to get as much as we can done, we would like to try to move the process forward. So, in that frame, I am aligned with the Chairman's view that we should try to get this done, but it does not preclude us from trying to tweak and improve as we go along, because this procurement process has been—this particular piece of legislation is long overdue for being in force, and I think that we are moving in the right direction. Once again, I want to thank you for the opportunity to hear your comments because I think some of it has been very instructive for me. Thank you.

Mr. Chairman: Okay. Any other members want to say anything? Okay.

Mr. Riley: Just as one minor point, the document that we submitted to you is likely to go up on the website of the different bodies, but we would like you to be informed of such a process.

Mr. Chairman: No problem. Thanks for not ambushing us. Thank you very much for coming, and I hope we could continue in this cordial manner. I really hope so, so we will see. Okay. Thank you very much.

Mr. Riley: Thank you very much.

[*Private Sector/Civil Society Group exits the room*]

LIST OF RECOMMENDED AMENDMENTS TO THE PUBLIC PROCUREMENT AND DISPOSAL OF PUBLIC PROPERTY (AMENDMENT) BILL, 2015

List of Recommended Amendments

CLAUSE	RECOMMENDATION	DECISION
1	None	Agreed
2	None	Agreed
3	Delete Clause 3 and substitute the following new clause: 3. Section 12 of the Act is amended – (a) in paragraph (f), by deleting the word "or"; (b) in paragraph (g), by deleting the full-stop at the end of the paragraph and inserting the words "; or"; (c) by inserting the following new paragraph: "(h) has traded with the Government without the prior approval of the Minister."; (d) by renumbering section 12 as section 12(1); and (e) by inserting after section 12(1), as renumbered, the following new subsection: "(2) For the purposes of this section, a member trades with the Government if, while holding office, he becomes a party to, or is a partner in a firm or a director or manager of a company which to his knowledge becomes a party to any contract with the Government for or on behalf of the public service."	Agreed
4	None	Agreed
5	None	Agreed
6	Delete the proposed section 51F and substitute the following new section: "51F. The Minister may make Regulations, subject to negative resolution of Parliament, with respect to staffing, remuneration, funding and other operation matters of the Review Board	Agreed
7	Delete the proposed section 57A and substitute the following new section: "57A (1) Notwithstanding the State Lands Act and any other written law to the contrary, the Minister may make Regulations in respect of the disposal of a) State Lands; b) real property owned by the Government	

	c) real property owned by State-controlled enterprises; and d) real property owned by a statutory body, responsibility for which is assigned to a Minister of Government. 2) Regulations made this section shall be subject to negative resolution of Parliament."	

CONSOLIDATED VERSION

OF

THE PUBLIC PROCUREMENT AND DISPOSAL OF PUBLIC PROPERTY (AMENDMENT) BILL, 2015

A BILL

An Act to amend the Public Procurement and Disposal of Public Property Act, 2015

Enactment

ENACTED by the Parliament of Trinidad and Tobago as follows:

Short title

1. This Act may be cited as the Public Procurement and Disposal of Public Property (Amendment) Act, 2015.

Interpretation Act No. 1 of 2015

2. In this Act, "the Act" means the Public Procurement and Disposal of Public Property Act, 2015.

~~Section 12A inserted~~

~~**3.**The Act is amended by inserting after section 12, the following section:~~

~~"Appointment of tribunal by President~~

~~12A. (1) In addition to the provisions of section 12, the Regulator may be removed from office where he trades with the Government without the prior approval, by resolution, of each House of Parliament.~~

~~(2) Where a resolution is passed by each House of Parliament that the question of removing the Regulator from office, under subsection (1) or section 12, should be investigated~~

~~(a) the President shall appoint a tribunal, which shall consist of a chairman and not less than two other members, from among persons who hold or have held the office of a Judge of a Court having unlimited jurisdiction in civil and criminal matters or a Court having jurisdiction in appeals from any such Court; and~~

~~(b) the tribunal shall enquire into the matter and report on the facts thereof to the President and recommend to the~~

~~President whether the Regulator should be removed from office.~~

~~(3) The names of each member of the tribunal appointed under subsection (2) as first constituted and every change in the membership of the Board thereafter shall be published in the *Gazette*.~~

~~(4) Where the question of the removal from office of a Regulator has been referred to a tribunal appointed under subsection (2) and the tribunal has recommended to the President that the Regulator should be removed from office, the President shall remove the Regulator from office.~~

~~Chap. 19:01~~

~~(5) The Commissions of Enquiries Act shall apply *mutatis mutandis* to a tribunal appointed under subsection (2) or, as the context may require, to the members thereof, as they apply in relation to a commission or commissioners appointed under that Act.~~

~~(6) Where the question of removing a Regulator from office has been referred to a tribunal, the President, after consultation with the Prime Minister and the leader of the Opposition, may suspend the Regulator from performing the functions of his office and any such suspension may at time be revoked by the President after consultation, as aforesaid, and shall in any case cease to have effect if the tribunal advises the President that the Regulator should not be removed from office.~~

~~(7) For the purposes of this section, the Regulator trades with the Government if, while holding office, he becomes a party to, or is a partner in a firm or a director or manager of a company which to his knowledge becomes a party to any contract with the Government for or on behalf of the public service.".~~

Section 12 amended

3. Section 12 of the Act is amended –

(a) in paragraph (f), by deleting the word "or";

(b) in paragraph (g), by deleting the full-stop at the end of the paragraph and inserting the words "; or";

(c) by inserting the following new paragraph:

" (h) has traded with the Government without the prior approval of the Minister.";

(d) by renumbering section 12 as section 12(1); and

(e) by inserting after section 12(1), as renumbered, the following new subsection:

" (2) For the purposes of this section, a member trades with the Government if, while holding office, he becomes a party to, or is a partner in a firm or a director or manager of a company which to his knowledge becomes a party to any contract with the Government for or on behalf of the public service.".

Section 24 amended

4. Section 24(4) of the Act is amended by inserting after the word "respectively", in the second place where it occurs, the words "and the report shall be referred forthwith to the Public Accounts Committee".

Section 50 amended

5. Section 50 of the Act is amended by inserting after subsection (12), the following subsection:

" (13) The suspension of procurement proceedings under subsection (4)(a) shall be lifted immediately upon the issuance of the decision of the Office under subsection (11).".

Sections 51A to 51M inserted

6. The Act is amended by inserting after section 51, the following new sections:

"Establishment of Public Procurement Review Board

51A. The Public Procurement Review Board, hereinafter referred to as the "Review Board", is hereby established to review decisions made by the Office. .

Composition of Review Board

51B. The Review Board shall comprise –

(a) a retired judge, who shall be the chairman;

(b) a registered engineer with at least ten years' experience in matters relating to procurement; and

(c) a chartered accountant or quantity surveyor with at least ten years' experience in matters relating to procurement.

Appointment of members of Review Board

51C. (1) The members of the Review Board shall be appointed by the President, after consultation with the Prime Minister and the Leader of the Opposition, for a period of three years.

(2) The names of each member of the Review Board as first constituted and every change in the membership of the Board thereafter shall be published in the *Gazette*.

Resignation of member of Review Board

51D. A member of the Review Board may resign his office by letter addressed to the President.

Removal of member of Review Board

51E. The President may remove a member of the Review Board from office upon being satisfied that the member –

(a) is declared to be bankrupt;

(b) is incapable of performing the duties of a member;

(c) has neglected his duties or has engaged in conduct that would bring his office into disrepute;

(d) has been absent, without leave of the Review Board, from three consecutive meetings of the Board;

(e) has been convicted of an offence involving dishonesty;

(f) has been convicted of an offence under the Integrity in Public Life Act;

(g) has been convicted of an offence punishable by imprisonment for at least one year; or

(h) has been convicted of an offence under this Act.

Minister to make Regulations for operation of Review Board

~~51F. The staffing, remuneration, funding and other operational matters of the Review Board shall be prescribed by the Minister by Regulations made under section 63.~~

51F. The Minister may make Regulations, subject to negative resolution of Parliament, with respect to staffing, remuneration, funding and other operational matters of the Review Board.

Request for review

51G. (1) A procuring entity or any other person who is entitled to be given an opportunity to make representations under section 50(1) or 51(1), may request the Review Board to review the order or decision of the Office made under section 50(4) or 50(10).

(2) A request for a review shall be made within twenty-one days of the making of the order or decision.

(3) A request for a review shall be accompanied by the prescribed fee.

(4) The right to request a review under this section is in addition to any other legal remedy available to a person.

Frivolous or vexatious request

51H. The Review Board may dismiss a request for a review if it is of the opinion that the request is frivolous or vexatious.

Time limit for review

51I. The Review Board shall meet to conduct a review within twenty-one days of receiving the request for a review.

Party to a review

51J. The parties to a review shall be –

(a) the person who requests the review;

(b) the relevant procuring entity; and

(c) such other person who has an interest in the order or decision of the Office, as the Review Board may determine.

Time for completion of review

51K. The Review Board shall complete its review within twenty-eight days of receiving the request for the review.

Outcome of review

51L. Upon completing a review the Review Board may –

(a) confirm, vary or overturn the decision of the Office; and

(b) order the payment of costs as between parties to the review.

Appeal from Review Board

51M. A party to a review may appeal against the decision of the Review Board to the High Court within twenty-eight days of the making of the decision.".

Part VIA inserted

7. The Act is amended by inserting after section 57, the following Part:

"PART VIA
DISPOSAL OF STATE LANDS

Disposal of State Land

Chap. 57:01

57A. ~~Notwithstanding the State Lands Act and any other written law to the contrary, the disposal of –~~

~~(a) State Lands;~~

~~(b) real property owned by the Government;~~

~~(c) real property owned by State-controlled enterprises; and~~

~~(d) real property owned by a statutory body, responsibility for which is assigned to a Minister of Government,~~

~~shall be subject to Regulations made by the Minister under section 63.".~~

57A. (1) Notwithstanding the State Lands Act and any other written law to the contrary, the Minister may make Regulations in respect of the disposal of –

(a) State Lands;

(b) real property owned by the Government;

(c) real property owned by State-controlled enterprises; and

(d) real property owned by a statutory body, responsibility for which is assigned to a Minister of Government.

(2) Regulations made under this section shall be subject to negative resolution of Parliament.".

Passed in the House of Representatives this day of , 2015.

Clerk of the House

I confirm the above.

Speaker

Passed in the Senate this day of , 2015.

Clerk of the Senate

I confirm the above.

President of the Senate

COMMENTS OF DR. BHOENDRADATT TEWARIE, MP IN ACCORDANCE WITH STANDING ORDER 114(6)

1. The inclusion of a Review Board appointed in the very same manner by the President as the Procurement Regulator will create a parallel organization, undermining the Office of the Procurement Regulator.

2. The proposal for a Review Board does not seem to have taken into consideration the fact that the Procurement Regulator addresses all disputes in the public glare and therefore under public scrutiny including scrutiny by the media.

3. The transfer of the idea of the Review Board from Kenya does not take into account the difference in philosophical approach between the Kenyan legislation and the Trinidad and Tobago legislation. There are four institutions which manage different phases and aspects of the procurement process in Kenya. Act No. 1 of 2015 is ONE comprehensive law which replaces the Central Tenders Board Act covers all entities involved with the management of public money without exception, decentralizes the procurement execution process to all agencies with the Procurement Regulator and the Procurement entity managing, nurturing and guiding the evolution and development of a modern, responsive transparent procurement system with the Regulator accountable only to Parliament.

4. The Review Board was included in the first draft of the Bill but was removed since it created another layer of bureaucracy in case of disputes and would have no impact on the right of any aggrieved individual to seek redress in a court of law.



PARLIAMENT

REPUBLIC OF TRINIDAD AND TOBAGO

FIRST SESSION OF THE ELEVENTH PARLIAMENT (2015/2016)

FIRST REPORT
OF
THE JOINT SELECT COMMITTEE
APPOINTED TO CONSIDER AND REPORT ON THE PUBLIC PROCUREMENT AND DISPOSAL OF PUBLIC PROPERTY (AMENDMENT) BILL, 2015

Ordered to be printed

TOGETHER WITH THE MINUTES OF PROCEEDINGS

PARL:

HOR PAPER NO: / 2016 SENATE PAPER NO: /2016

MANDATE

1. Pursuant to resolutions of the House of Representatives on Friday November 13, 2015 and of the Senate on Friday November 17, 2015, a Joint Select Committee was established:

   "to consider and report on a Bill entitled the "Public Procurement and Disposal of Public Property (Amendment) Bill, 2015"; and…to report within eight weeks, that is to say, on or before January 22, 2016.".

MEMBERSHIP OF THE COMMITTEE

2. The following persons were appointed to serve on the Committee:

   - Mr. Colm Imbert, MP
   - Mrs. Cherrie-Ann Crichlow-Cockburn, MP
   - Mr. Adrian Leonce, MP
   - Dr. Bhoendradatt Tewarie, MP
   - Mr. Franklin Khan
   - Mrs. Paula Gopee-Scoon
   - Mr. Wayne Sturge
   - Mr. David Small

CHAIRMANSHIP

3. At its first meeting on Friday December 04, 2015, your Committee elected Mr. Colm Imbert to be its Chair, in accordance with House of Representatives Standing Order 97(3) and Senate Standing Order 87(3).

SECRETARIAT AND TECHNICAL SUPPORT

4. During the session Ms. Jacqui Sampson Meiguel, Clerk of the House served as Secretary to the Committee and Ms. Chantal La Roche, Legal Officer II Parliament, served as Secretary of the Committee. Ms. Tanya Alexis, Legal Officer Parliament, also provided assistance to the Committee.

MEETINGS

5. Since its appointment, your Committee held two (2) meetings on the following dates:

   i. Friday December 04, 2015; and
   ii. Friday January 08, 2015

6. The Minutes of the meetings of the Committee are attached at Appendix I.

WORK TO DATE

7. At its First Meeting held on Friday December 04, 2015, your Committee agreed that all Members of the Committee should familiarize themselves with the provisions of the original procurement legislation, as well as the amendment Bill. To this end the Public Procurement and Disposal of Public Property (Amendment) Bill, 2015 and the Public Procurement and Disposal of Property Act 2015, Act No.1 of 2015 (partially proclaimed) were circulated. In addition, reports of the Joint Select Committee appointed during the Tenth Parliament to consider the procurement legislation were also made available to Members.

8. During preliminary discussions your Committee recognized that it would be a challenge to satisfactorily consider and report to Parliament on the Bill within two (2) months. Nevertheless, your Committee identified the need for external assistance during its deliberations and resolved that the Chief Parliamentary Counsel would be invited to assist with a clause by clause analysis on the Bill, and the Permanent Secretary of the Ministry of Finance would also be invited to assist the Committee during its deliberations.

9. At its Second Meeting held on Friday January 08, 2015, your committee heard from Mr. Milton Sorzano, Assistant Chief Parliamentary Counsel (Ag), Ms. Sharmaine Williams, Assistant Chief Parliamentary Counsel (Ag), and Mr. Parvin Sookhai, Parliamentary Counsel II (Ag) who were assigned by Chief Parliamentary Counsel's Department of the Ministry of the Attorney General to assist the Committee in its deliberations. Your Committee was also assisted by the Permanent Secretary of the Ministry of Finance, Mr Maurice Suite who offered his expert views on the Bill.

SUBMISSIONS RECEIVED

10. By letter dated January 04, 2016 the Private Sector/Civil Society Group has requested a meeting with your Committee. Your Committee has also received written submissions on the Bill from Mr Timothy Hamel-Smith dated January 06, 2016.

REPORT

11. The Committee wishes to report that a clause by clause analysis of the Bill is in progress but that additional time is required for the completion of this exercise. As such, the Committee is unable to submit its recommendations by the deadline of January 22, 2016.

RECOMMENDATIONS

12. Your Committee therefore humbly requests a further period of six (6) weeks to complete its work and to submit a final report to the Parliament by February 26, 2015.

13. During the period of extension, the Committee proposes to continue its work in collaboration with the Ministry of Finance and the Chief Parliamentary Counsel's Department of the Ministry of the Attorney General, to meet with stakeholders as required and to assess submissions received.

Respectfully submitted,

Colm Imbert, MP
Chairman

January 20, 2016

APPENDIX I

PARLIAMENT
Republic of Trinidad and Tobago
Levels G - 7, Tower D
The Port-of-Spain International Waterfront Centre
1A Wrightson Road, Port-of-Spain

JOINT SELECT COMMITTEE ON THE PUBLIC PROCUREMENT AND DISPOSAL OF PUBLIC PROPERTY (AMENDMENT) BILL, 2015

MINUTES OF THE FIRST MEETING HELD IN THE ARNOLD THOMASOS ROOM (EAST), LEVEL 6, OFFICE OF THE PARLIAMENT, TOWER D, IWFC, #1A WRIGHTSON ROAD, PORT OF SPAIN ON DECEMBER 04, 2015 at 11:30 a.m.

PRESENT

Mrs. Brigid Annisette-George	-	Speaker of the House

Committee Members

Mr. Colm Imbert, MP	-	Member
Mrs. Cherrie-Ann Crichlow-Cockburn, MP	-	Member
Mr. Adrian Leonce, MP	-	Member
Mr. Franklin Khan	-	Member
Mrs. Paula Gopee-Scoon	-	Member
Mr. David Small	-	Member

Secretariat

Ms. Chantal La Roche	-	Assistant Secretary
Mrs. Jacqui Sampson Meiguel	-	Secretary

ABSENT/EXCUSED

Mr. Wayne Sturge	-	Member
Dr. Bhoendradatt Tewarie, MP	-	Member

COMMENCEMENT

1.1 The meeting was called to order by the Speaker of the House at 11:35 a.m.

ELECTION OF CHAIRMAN

2.1 The Speaker advised that her role was to facilitate the election of a Chair and she invited nominations.

2.2 Mr. Franklin Khan nominated Mr. Colm Imbert for the chairmanship and this nomination was seconded by Mrs. Paula Gopee-Scoon.

2.3 There being no further nominations, Mr. Imbert was declared Chairman.

2.4 The Speaker of the House informed Members that Mrs Jacqui Sampson Meiguel would serve as Secretary to the Committee and Ms Chantal La Roche as Assistant Secretary.

2.5 Mr. Imbert was invited to take the Chair.

2.6 The Chairman took the Chair and thanked Members for their unanimous support for his nomination.

QUORUM

3.1 The Chairman proposed a quorum of 4 persons, inclusive of the Chair, provided that at least one Member from each House was present. The Committee agreed to this proposal.

TERMS OF REFERENCE

4.1 The Chairman reminded Members of the Terms of Reference of the Committee as follows:

i. to consider and report on a Bill entitled "An Act to amend the Public Procurement and Disposal of Public Property Act, 2015";
ii. to discuss the general merits of the Bill along with its details; and
iii. to report by **January 22, 2016.**

DISCUSSIONS ON THE WAY FORWARD

5.1 The Chairman invited discussion on the approach to be taken by the Committee in achieving its mandate.

5.2 The Chairman suggested, and the Committee concurred, that the Committee would first conduct a clause by clause analysis of the Bill.

5.3 The Committee also agreed that a work plan would be settled during its Second meeting, and the Chairman recommended that the Committee should meet on a weekly basis.

5.4 Members also requested that the Secretary circulate the report of the Joint Select Committee appointed during the Tenth Parliament to consider and report to the Parliament on the legislative proposals to provide for public procurement disposal of public property.

External Expert Assistance

5.5 The Committee also identified the need for external assistance during its deliberations and agreed to the following:

i. The Chief Parliamentary Counsel would be invited to assist with a clause by clause analysis on the Bill, as well as to assign an officer to assist the Committee during its deliberations; and
ii. The Permanent Secretary of the Ministry of Finance would also be invited to assist the Committee during its deliberations.

ADJOURNMENT

6.1 There being no other business, the Chairman thanked Members and adjourned the meeting to Friday January 8, 2016 at 10:00 a.m.

6.2 The adjournment was taken at 11:45 a.m.

I certify that these Minutes are true and correct.

Chairman

Secretary

December 4, 2015

PARLIAMENT
Republic of Trinidad and Tobago
Levels G - 7, Tower D
The Port-of-Spain International Waterfront Centre
1A Wrightson Road, Port-of-Spain

JOINT SELECT COMMITTEE ON THE PUBLIC PROCUREMENT AND DISPOSAL OF PUBLIC PROPERTY (AMENDMENT) BILL, 2015

MINUTES OF THE 2ND MEETING HELD IN THE ARNOLD THOMASOS ROOM (EAST), LEVEL 6, OFFICE OF THE PARLIAMENT, TOWER D, IWFC, #1A WRIGHTSON ROAD, PORT OF SPAIN ON JANUARY 8TH 2016 AT 10:00 AM

PRESENT

Committee Members

Mr. Colm Imbert, MP	-	Chairman
Mrs. Cherrie-Ann Crichlow–Cockburn, MP	-	Member
Mr. Adrian Leonce, MP	-	Member
Mrs. Paula Gopee-Scoon	-	Member
Mr. David Small	-	Member
Mr. Bhoendradatt Tewarie, MP	-	Member

Secretariat

Ms. Chantal La Roche	-	Assistant Secretary
Ms. Tanya Alexis	-	Legal Officer I

ABSENT/EXCUSED

Mr. Franklin Khan	–	Member
Mr. Wayne Sturge	-	Member
Mrs. Jacqui Sampson Meiguel	-	Secretary

<u>Office of the Chief Parliamentary Counsel</u>

Mr. Pavin Sookhai	-	Parliamentary Counsel II (Ag.)
Mr. Milton Sorzano	-	Asst. Chief Parliamentary Counsel (Ag.)
Ms. Sharmaine Williams	-	Asst. Chief Parliamentary Counsel (Ag.)

Ministry of Finance

Mr. Maurice Suite - Permanent Secretary

COMMENCEMENT

1.1 The meeting was called to order by the Chairman at 10:20 a.m.

1.2 The Chairman indicated that Mr. Franklin Khan and Mr. Wayne Sturge were excused from the day's meeting.

CONFIRMATION OF MINUTES

2.1 The Minutes were confirmed by Mrs. Crichlow-Cockburn and seconded by Mr. Small.

MATTERS ARISING FROM THE MINUTES

3.1 **Item 5.5**

- The Chairman informed Members that the following persons from the Office of the Chief Parliamentary Counsel will be assisting the Committee during its deliberations,
  - Mr. Milton Sorzano, Assistant Chief Parliamentary Counsel (Ag);
  - Ms. Sharmaine Williams, Assistant Chief Parliamentary Counsel (Ag); and
  - Mr. Parvin Sookhai, Parliamentary Counsel II (Ag).
- The Chairman also advised that the Permanent Secretary of the Ministry of Finance, Mr Maurice Suite had also agreed to assist the Committee with its deliberations on the Bill.

CLAUSE BY CLAUSE ANALYSIS OF THE PUBLIC PROCUREMENT AND DISPOSAL OF PUBLIC PROPERTY (AMENDMENT) BILL, 2015

4.1 The Committee invited Mr. Sorzano, Ms. Williams and Mr. Sookhai to join the meeting to give a brief presentation on the Public Procurement and Disposal of Public Property (Amendment) Bill, 2015.

4.2 The Committee then engaged in a clause by clause discussion on the Bill.

4.3 The Committee approved and adopted Clauses 1 and 2 of the Bill.

4.4 The Committee noted the use of the term "The President" in Clause 3 and its practical effect in relation to authority to remove the Regulator. The Committee agreed to suspend discussions on this clause until a written opinion was provided by the Office of the Chief Parliamentary Counsel.

4.5 The Committee approved and adopted Clause 4 of the Bill.

4.6 In relation to Clause 5, Dr. Tewarie noted that there was a similar provision in the Public Procurement and Disposal of Public Property Act, 2015. The Committee agreed to suspend consideration of this clause until the next meeting to allow for further discussion.

4.7 The Committee agreed to suspend discussions on Clause 6 pending the submission by the Chairman of a paper relating to the creation of a Review Board.

4.8 The Committee approved and adopted Clause 7 of the Bill

OTHER MATTERS

5.1 The Chairman advised the Committee that the following correspondence had been received:

i. Letter dated January 4, 2016 from Private Sector Group/Civil Society, FAPETT requesting a meeting;
ii. Electronic mail dated January, 6 2016 from Mr. Timothy Hamel-Smith inquiring on invitations for written submissions; and
iii. Letter and CV dated November 30, 2015 from Cherryl-Ann Simmons Project Management Consultant, offering assistance to the Committee.

5.2 The Committee agreed as follows:

i. the Committee will meet with the FAPETT on a date to be decided during its next meeting;
ii. written submissions on the Bill would be received from Mr. Hamel-Smith; and
iii. there was no need to engage the services of an external Consultant at this time.

DISCUSSIONS ON THE WAY FORWARD

6.1 Discussion ensued on the effect of the imminent reporting deadline on the work of the Committee.

6.2 As a consequence, the Committee agreed that a report would be tabled to bring to the attention of the Parliament:

i. the decisions of the Committee thus far;
ii. its inability to complete its work in the mandated period; and
iii. its request for an extension to the end of February 2016.

The Committee concurred that this report would be approved by round-robin.

6.3 The Committee agreed that its next meeting will be held on Friday January 22, 2016 at 10:00 a.m., to continue clause by clause analysis of the Bill.

ADJOURNMENT

7.1 The Chairman thanked Members and adjourned the meeting to Friday January 22, 2016 at 10:00 a.m.

7.2 The adjournment was taken at 11:20 a.m.

I certify that these Minutes are true and correct.

Chairman

Secretary

January 8, 2016

PRIVATE SECTOR/CIVIL SOCIETY GROUP
Tel: 868-627-2522 Fax: 625-5749 email:pscsgwj@aol.com

29 January, 2016

The Honourable Mr. Colm Imbert, MP
Chairman
Joint Select Committee
The Public Procurement & Disposal of Public Property (Amendment) Bill
Office of the Parliament
Levels G-8, Tower D
The Port of Spain International Waterfront Centre
1A Wrightson Road
Port of Spain

THE PRIVATE SECTOR CIVIL SOCIETY RESPONSE TO THE PUBLIC PROCUREMENT AND DISPOSAL OF PUBLIC PROPERTY (AMENDMENT) BILL, 2015 BEFORE THE JOINT SELECT COMMITTEE

Preamble

The Joint Select Committee (JSC) is reminded here that the Regulator and Deputy Regulator are mere functionaries under Act No. 1 of 2015. The Regulator, and in his absence the Deputy Regulator, administers the day to day operations of the Act and do not have similar powers of the Contractor General under the Jamaican Act or the Director General under the Kenyan Act. The substantive powers under Act No. 1 of 2015 lie exclusively with the Board of the Office of Procurement Regulation (OPR). This is clearly expressed in the Act under sub-section 12 (2) (b) which states "(2*) in the exercise of its function, the Office shall-*
(b) not be subject to the direction or control of any other person or authority in the performance of its functions, ***but shall be accountable to Parliament."***

The Regulator and Deputy Regulator are limited as such and are not accountable to Parliament but to the Board of the OPR:

1. Powers of the Regulator

The powers of the Regulator are limited to the following:

a. Chairing meetings of the board of the (OPR) - see sub-section 10 (1) (a) and 15 (2);
b. Authenticating with others the official seal of the OPR - see sub-section 10 (4);
c. *"The day to day management, administration direction and control of the business of the Office with the authority to act in the conduct of the business of the Office."* See sub-section 11 (2);

d. Receive resignation letters from other members of the OPR – see sub-section 11 (7);

e. *Submit reports annually to the Speaker of the House of Representatives, the President of the Senate and the Minister of Finance.* See section 24;

f. Receive complaints *"after the entry into force of a procurement contract or conclusion of a framework agreement when an agency does not publish promptly on its web site or any other electronic format notice of award."* See sub-section 36 (2);

g. Authorises officers to undertake investigations into any alleged or suspected breach of the Act – see sub-section 43 (1).

It should be noted that the Board receives a full and complete written report of an investigation in writing and informs the affected parties and the Minister. See section 44. If the Office is of the view that a breach has been committed, it shall make a report to the Director of Public Prosecution. See section 45.

All Challenge Proceedings are directed to the OPR by a supplier or Contractor for review of a decision made by a procuring entity – see sections 49, 50 and 51.

2. The proposed amendment under Section 3–Appointment of tribunal by the President

The proposed amendment to section 3 states *"The Act is amended by inserting after section 12, the following subsection:*

> 12A. (1) *"In addition to the provisions of section 12, the Regulator may be removed from office where he trades with the Government without the prior approval, by resolution, of each House of Parliament".*
>
> (2) *Where a resolution is passed by each House of Parliament, that the question of removing the Regulator from office, under subsection (1) or section 12, should be investigated –*
>
> *(a) the President shall appoint a tribunal, which shall consist of a chairman and not less than two other members, from among persons who hold or have held the office of a Judge of a Court having unlimited jurisdiction in civil and criminal matters or a Court having jurisdiction in appeals from any such Court; and*
> *(b) the tribunal shall enquire into the matter and report on the facts thereof to the President and recommend to the President whether the Regulator should be removed from office.*

The phrase "trade with the Government" can be interpreted in several ways in the context of a Regulator trading with the Government particularly if the Regulator has similar powers to the Contractor General

under the Jamaica Act or the Director General under the Kenyan Act. The phrase trade with Government could mean trading as-:

(1) a person using his position of Regulator to trade with the Government or
(2) the Regulator in his private capacity trading with the Government

A person using his position of Regulator to trade with the Government
Act No. 1 of 2015 deals with acquisition of goods, works and services and the disposal of public property. It is thus conceivable that the OPR may need to acquire goods, works and or services and dispose of public property under its ownership.

The OPR is a public body and sub-section 61 (2) of the Act states *"For the purposes of this Act, a public body shall have a procurement officer who shall be responsible for the public procurement and the disposal of public property for the body."*

In this context (of the Regulator operating as procurement officer) it is important to note that section 10 states quite clearly that "All expenses incurred by the Office for the purpose of this Act shall be a charge on the Consolidated Fund". Section 21 states that *"the funds of the Office shall consist of monies appropriated by Parliament for the purposes of the office."* It is thus clear that the only funds available for the OPR or the Regulator acting as procurement officer for the OPR are funds approved by Parliament. The approved funds may be for the acquisition of goods, works or services facilitating the operations of the Office.

On the disposal side however, Act No. 1 of 2015 sub-section 13 (1) (o) gives the OPR the power *"to act for, in the name and on behalf of the State to dispose of real property owned by the Government in such manner as the Government may consider appropriate and desirable."*

The Private Sector Civil Society Group (PSCSG) Recommendations (1)

The PSCSG is of the view that the OPR as a regulatory and monitoring body should not be involved in trade or any transactional elements of procurement. The PSCSG thus recommends the following:

a) That sub-section 13 (1) (o) be removed;
b) The OPR should not be involved in the transactional aspect of any public procurement function irrespective of Parliament's approval of a budget for its operations which may provide for the acquisition of goods, works or services necessary for its functioning;
c) The OPR should not be involved in the transactional nature of the disposal of its own property;
d) All procurement transactions required for the efficient operation of the OPR should be undertaken by public body such as a Ministry and/or a State owned Enterprise.

The Regulator in his private capacity trading with the Government

Taking into account the fact that the amendments may refer to the Regulator acting in his private capacity, reference is here made to the Jamaican Act section (7) which allows for the removal of the Contractor General for trading with the Government of Jamaica without the prior approval, by resolution, of each House of Parliament. The Jamaican act specifies the limits of such trading by stating that the Contractor General *"shall not be so removed except in accordance with the provisions of this section"*. "Part 2 of section 7 states:

"For the purposes of this section a Contractor-General trades with the Government of Jamaica if, while holding office as such, he becomes party to, or is a partner in a firm or a director or manager of a company which to his knowledge becomes a party to any contract with the Government of Jamaica for or on behalf of the public service."

Sub-sections 3, 4, 5 and 6 of section 7 deal as follows with the issue of removal of the Contractor General:

Sub-section (3) states "*If the question of the removal from office of a Contractor-General has been referred to a tribunal appointed under subsection (4) and the tribunal has recommended to the Governor-General that the Contractor-General ought to be removed from office, the Governor-General shall, by instrument under the Broad Seal, remove the Contractor-General from office.*"

Sub-section states (4) *"If each House of Parliament by resolution decides that the question of removing a Contractor-General from office ought to be investigated then -*

a) *the Governor-General shall appoint a tribunal, which shall consist of a chairman and not less than two or more than five other members from among persons who hold or have held the office of a Judge of a court having unlimited jurisdiction in civil and criminal matters or a court having jurisdiction in appeals from any such court; and*

b) *that tribunal shall enquire into the matter and report on the facts thereof to the Governor General and recommend to the Governor-General whether the Contractor-General ought to be removed from office for inability as aforesaid or for misbehavior or for trading as aforesaid."*

Sub-section (5) states *"The provisions of sections 8 to 16 (inclusive) of the Commissions of Enquiry Act shall apply mutatis mutandis in like manner in relation to tribunals appointed under subsection (4) or, as the context may require, to the members thereof, as they apply in relation to the Commissions or Commissioners appointed under that Act."*

Sub-section (6) states: "*Where the question of removing a Contractor-General from office has been referred to a tribunal the Governor-General, after consultation with the Prime Minister and the Leader of the Opposition, may suspend the Contractor-General from performing the functions of his office."*

It is clear from the above that the proposed amendments to section 3 of Act No. 1 of 2015 were derived from the Contractor General's Act of Jamaica without taking into account the following:

(1) The Jamaican Act defines and limits the concept of what it means to trade with the Government;

(2) The Contractor General is a Commission of Parliament as stated under sub- section 3 (1)

3 The Contractor General Commission

(1) For purposes of this Act there is hereby constituted a Commission of Parliament to be known as the Contractor General;

(3) The Jamaica Act states under section 5 (1):

5 Independence of Contractor General

(1) In the exercise of the powers conferred upon him by this Act, a Contractor General shall not be subject to the direction or control of any other person or authority;

(4) That sub-section 4 (1) of the Jamaica Act states:

4 Functions of the Contractor General

(1) Subject to the provisions of this Act, it shall be the function a Contractor General on behalf of Parliament-

(a) to monitor the award and the implementation of government contracts.....

The Regulator is a mere functionary responsible to the OPR. The Regulator does not have the powers or reach of the Contractor General. The substantive powers under Act No. 1 of 2015 reside with the OPR, thus any removal process should apply to all members of the OPR.

The Private Sector Civil Society Group (PSCSG) Recommendations (2)

1) The Tribunal should have the powers of a High Court and be appointed by the President similar to the appointment of High Court Judges;
2) The removal of members of the Board of the OPR should be subject to the same processes;
3) The process for removal should be equivalent to or adopt best HR practices;
4) The process for removal should start with the Board of the OPR, which should have the power to investigate and make recommendations;
5) Following investigation by the Board of the OPR, all recommendations should be passed to the Tribunal for review and decision;
6) The decision of the Tribunal is to be forwarded to the President, The Prime Minister and The Leader of the Opposition;

7) If removal is the decision of the Tribunal, then the President, after informing the Prime Minister and Leader of the Opposition, should remove the offending member of the OPR from the Office; and

8) The Regulator and Deputy Regulator engagement should be full-time and they should not be engaged in any other occupation or be engaged in any other public office while holding such position.

4. The proposed amendment 4 under Section 24(4)

"Section 24(4) of the Act is amended by inserting after the word "respectively", in the second place where it occurs, the words "and the report shall be referred forthwith to the Public Accounts Committee"

The Private Sector Civil Society Group (PSCSG) Recommendations (3)

The proposed amendment under section 24 (4) is accepted by the PSCSG.

5. The proposed amendment 5 under Section 50

Section 50 of the Act is amended by inserting after subsection (12), following subsection:
"(13) *The suspension of procurement proceedings under subsection (4) (a) shall be lifted immediately upon the issuance of the decision of the Office under subsection (1)."*

The Private Sector Civil Society Group (PSCSG) Recommendations (4)

The proposed amendment under section 50 subsection (13) is accepted by the PSCSG.

6. The proposed amendment 6 under Section 51

The Act is amended by inserting after section 51, the following new sections:

"Establishment of Public Procurement Review Board Composition of Review Board

51A. The Public Procurement Review Board, herein after referred to as the "Review Board", is hereby established to review decisions made by the Office..

The Private Sector Civil Society Group (PSCSG) Recommendations (5)

(1) The proposed amendment is accepted in principle;

(2) The Review Board and the Tribunal should be merged into one entity under one name;

(3) Under this one entity, time lines for decision making for different proceedings should be stipulated;

(4) This one entity should have all the powers of a High Court and should be appointed by the President in his sole discretion.

7. The proposed amendment 7 inserting after section 57 the following Part:

Part VIA DISPOSAL OF STATE LANDS

"57A Notwithstanding the State Lands Act and other written law to the contrary, the disposal of

a) State Lands;

b) real property owned by the Government;

c) real property owned by State controlled enterprises; and

d) real property owned by a statutory body, responsibility for which is assigned to a Minister of Government shall be subject to Regulations made by the Minister under section 63

The following should be noted: -

a. Act No. 1 of 2015 section 4 Part 1 states the following: -

"Public Property means real or personal property owned by the state."

"Disposal of public property includes the transfer without value, sale, lease, concessions or other alienation of property that is owned by a public body."

"Public Property means real or personal property owned by a public body."

b. Under section 13 and 14, in the performance of its functions, the Office is to monitor, audit and investigate all activities related to the disposal of public property;

c. Under sub-section 24 (1), the Regulator shall submit his reports annually to the Speaker of the House of Representatives, the President of the Senate and the Minister. Sub-section 24 (2) states that a report under subsection (1) shall include: - (d) a summary of transactions in respect of each public body concerning the disposal of public property;

d. That Dr. the Honourable Keith Rowley, Prime Minister is reported on the 15th November 2015 in the Newsday, under the caption **PM on Secret Distribution of Land,** as making a statement at the office of the Prime Minister. The PM recalled that the House of Representatives last Friday approved the Government's recommendations to send the Public Procurement and Disposal of Public Property (Amendment) Bill, 2015 to a JSC which is mandated to complete its work by January 22, and the Prime Minister said that this will involve legislative amendments that will

prevent any parcel of State land or any State assert from being distributed to any person or Agency without the knowledge of Parliament.

e. That sub-section 63 (1) states: The Minister may on the recommendation of the Office make regulations to give effect to the provisions of this Act...; and

f. That sub-section 63 (3) states that: "Regulations made under this section shall be subject to affirmative resolution of Parliament".

The Private Sector Civil Society Group (PSCSG) Recommendations (6)

That: -

1. As the idea of monitoring, auditing, investigating and reporting on the disposal of real property is already in Act No. 1 of 2015;
2. As Public Property is already defined in Act No. 1 of 2015;
3. As sub-section 63 (1) provides that the Minister may on the recommendation of the Office make regulations to give effect to the provisions of this Act; and
4. As Act No. 1 of 2015 specifies that the OPR reports to Parliament through the Minister;

Then:-
The amendment 57A should read:

"Notwithstanding the State Lands Act and other written law to the contrary, the disposal of Public Property shall be subject to regulations made under section 63 (1) which shall specify that each such disposal shall be subject to negative approval of Parliament."

Yours truly,
PRIVATE SECTOR / CIVIL SOCIETY GROUP

Winston Riley,P.E., FAPETT
Chairman

Dr. JAMES ARMSTRONG
PRESIDENT
JOINT CONSULTATIVE COUNCIL
FOR THE CONSTRUCTION INDUSTRY

ROBERT TRESTRAIL
PRESIDENT
TRINIDAD & TOBAGO CHAMBER OF
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RAVI SURYADEVARA
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OF TRINIDAD & TOBAGO

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CHAIRMAN
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ASSOCIATION

PRIVATE SECTOR/CIVIL SOCIETY GROUP

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4th January, 2016

Mrs. Jacqui Sampson-Meiguel
Secretary
Joint Select Committee (JSC)
The Public Procurement & Disposal of Public Property
Office of the Parliament
Levels G-8, Tower D
The Port of Spain International Waterfront Centre
1A Wrightson Road
Port of Spain

Dear Mrs. Sampson-Meiguel,

Re: Request to meet with Joint Select Committee on The Public Procurement & Disposal of Public Property

With reference to the captioned subject, the Private Sector / Civil Society Group on Public Procurement Reform (PSCSG) request a meeting with the Joint Select Committee to present our group's position on the proposed amendments to the Public Procurement & Disposal of Public Property Act 2015.

We are cognizant of the fact that the JSC is due to report to Parliament on 22nd January 2016, but would kindly ask that you submit our request to the Chairman of the Committee for his consideration soonest.

We look forward to hearing from you.

Yours sincerely,

Winston Riley P.E., FAPETT
Chairman
Private Sector Civil Society Group (PSCSG)

The Office of the Minister of Planning and Sustainable Development

May 12, 2014

Mr. Winston Riley
Chairman
Private Sector/Civil Society
The Professional Centre Building, Unit 202,
Fitzblackman Drive,
Wrightson Road Extension,
Port of Spain

Dear Mr. Riley,

Thank you for your letter of May 08, 2014.

I note your indication that one member of your group would prefer to have the clause 7 (2) deleted, however, I am grateful that on the basis of two meetings, in the spirit of reaching a mutually acceptable solution, we were able to reach agreement on an amendment to Clause 7 (2).

Attached is a copy of that amendment prepared by the CPC's office.

Thank you for your willingness to work collaboratively to get a good Procurement Bill to be debated and, hopefully passed.

I look forward to your support.

I thank the Civil Society/Private Sector Group and you personally, for making it possible to get to this meaningful point.

Sincerely

Dr. Bhoendradatt Tewarie
Minister

Ministry of Planning and Sustainable Development

Level #14, Eric Williams Finance Building,
Independence Square, Port of Spain,
Republic of Trinidad and Tobago

Tel: (868) 623-3716
Fax: (868) 625-0363
Website: www.planning.gov.tt

PUBLIC PROCURMENT AND DISPOSAL OF PUBLIC PROPERTY BILL

PROPORSED AMENDMENT TO CLAUSE 7

7. (1) This Act applies to public bodies and public private partnership arrangements.

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

(a) a treaty or other form of agreement to which Trinidad and Tobago is a party with one or more States or entity within a State;

(b) an agreement entered into by the Government of Trinidad and Tobago with an international financing institution; or

(c) an agreement for technical or other cooperation between the Government of Trinidad and Tobago and the Government of a foreign State,

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

(3) A procuring entity engaged in procurement proceedings relating to a treaty or agreement referred to in subsection (2)(a) shall comply with section 29 and submit a report on such compliance to the Office.

(4) The Office shall, within twenty-one days of receiving a report under subsection (3), forward a copy of the report to the Speaker who shall cause the report to be laid in Parliament at the earliest opportunity.

25 November, 2013

Senator Dr. the Honourable Bhoendradatt Tewarie
Minster Planning & Sustainable Development
Level 14 Eric Williams Financial Building
Independence Square
Port of Spain

Honourable Minister,

We thank you for your letter of 14th November 2013. In response to your invitation we submit for the consideration of the LRC, the following ***comments on the Government's Public Procurement Bill*** ('the Government Bill').

The Private Sector/Civil Society Group (PSCSG) is of the opinion that *any Bill on procurement reform must be based on five indispensable elements which we consider crucial to a modern, well-managed, fully accountable and flexible procurement regime in a democratic State.* These elements express the principles of good governance—transparency, accountability and value for money—which should inform the function and structure of the legislation. *These are at the heart of the Draft Bill that we are proposing* and have been made publicly available on www.jcc.org.

The five elements are as follows:

1. use of *Public Money* as the cornerstone of any public procurement process;
2. definition of *Procuring Agency* encapsulating any organisations responsible for transactions in the use of public money;
3. effective independence of mechanisms of *regulation and grievance resolution*;
4. *Value for Money* linked to performance/efficient use of public money; and
5. imbedded *participation of Civil Society* in the maintenance of the integrity of the procurement system.

In what follows we explain in greater detail our understanding of these elements, highlight what appear to be some of the loopholes in the Government Bill and note some important provisions in it that do not appear to have been considered by the Joint Select Committee of Parliament (JSC).

Public Money

The main objective of public procurement legislation is to ensure the efficient and transparent use of public money in the procurement cycle. The underlying assumption is that the use of public money necessarily entails some level of public accountability regardless of the source of funds or the status or type of the body/agency responsible for its use. *The use of Public Money is therefore the cornerstone of any public procurement process* and as such must inform every aspect of any legislation pertinent to public procurement. The definition of public money will determine the boundaries of accountability as well as identify the accountable agency and accountable person within the accountable agency

The litmus test to be incorporated in any definition of public money is the liability of the taxpayer. In this regard *the definition of public money and its operation is dealt with thoroughly in the PSCSG Bill* and should form the cornerstone of any Bill under discussion.

The definition of public money utilized in the Government Bill is similar to the one used in the PSCSG Draft Bill. However, in the Government Bill the definition hangs on its own. It is not used in the definition of public procurement or in identifying responsible agencies. Instead, the Government Bill defines "procurement" or "public procurement" as the acquisition of goods, works or services by a public body.

In the PSCSG Draft Bill "public procurement" means procurement involving the use of public money. This definition is designed, *inter alia*, to encompass BOLT (Build, Own, Lease, Transfer), BOOT (Build, Own, Operate, Transfer) and DFC (Design, Finance, Construct) schemes or other funding schemes for the provision of capital works which may be found to be ultimately to the benefit of the public.

Procuring Agency

'Agency' refers to the category of organisations where persons are required to provide explanations about their stewardship of public money – in other words the **'who'** of accountability, transparency and value for money—*sine qua non* in any law relating to public procurement.

The system of accountability for public money in Trinidad and Tobago is currently rooted in the *Exchequer and Audit Act* (Act #20 of 1959) a replica of an Act of the same name introduced by William Gladstone and passed in the United Kingdom in 1866. The Act focuses on ministerial responsibility to Parliament for the quality of public expenditure, with the Permanent Secretary as the accounting officer.

It is to be noted that the environment in respect of public expenditure in which the Exchequer and Audit Act was conceived was considerably less complex than what prevails today.

In the PSCSG Draft Bill '"agency" means a body incorporated or otherwise that uses public money and includes:

a) a ministry or department of government;
b) a statutory body and any corporate body in which that statutory body has a controlling interest or is in a position to directly or indirectly exercise control over affairs of that corporate body;
c) a state controlled enterprise and its subsidiary;
d) a person prescribed in the Guidelines for the purposes of this definition
e) a corporate body that is established for a public purpose;
f) any other body that is involved in public procurement; and
g) a person as prescribed for the purposes of this definition

This definition should be incorporated in any Bill to go to Parliament to enable a comprehensive accountability system for public expenditure for the acquisition of property and services. It is the link of these bodies to the use of public money which triggers the requirement for accountability, transparency and value for money.

Item (f) above —"any other body that is involved in public procurement"—is missing from the Government Bill. This omission denies oversight of the use of delivery systems such as Build Operate Lease Transfer (BOLT), of Public Private Partnerships (PPPs) where a private special purpose organisation not controlled or owned by the State is in control of the project. It also denies oversight of Government to Government arrangements.

In the Government Bill the use of the term "procuring entity" is restricted to public bodies, being defined as '... a public body that engages in public procurement'. Yet "Procurement" or 'Public Procurement' have previously been defined in the same Government Bill as '… the acquisition of goods, works or services by a public body".

The PSCSG Draft Bill states that 'procurement' means "the process of acquiring property or services commencing with the identification of the need of the property or services and ending with the performance of the related contracts." 'Public procurement' is defined as "procurement involving the use of public money".

Mechanisms of Regulation and Grievance Resolution

The functional and financial independence of the Procurement Regulator from the government of the day is a prerequisite for the integrity of any procurement system. In accordance with sound accountability criteria neither a Minister nor a Regulator is to be directly involved in the award of contracts.

The PSCSG Bill derived this third element from the history of public procurement in Trinidad and Tobago—a history in which changes in the institutional framework arose out of corruption issues.

The Central Tenders Board (CTB) was established by the CTB Act of 1961 and came into operation in 1965. This Act took away the power to award tenders from the elected representatives of local government bodies and gave the CTB "sole and exclusive authority … save as is provided in section 35 …" (thereby creating loopholes) " … to Act on behalf of the Government and the statutory bodies". In addition "In the exercise of its powers and in its performance of its duties the board shall conform to any general or special directives given to it by the Minister" meaning the "the Minister to whom responsibility for the Central Tenders Board is assigned". This was the Minister of Finance. *The CTB Act not only centralised control of public procurement but placed the CTB and thus the award of contracts under the direct control of a Minister.*

According to Section 75 (1) of the Constitution, *Cabinet's responsibility is for the "general direction and control of the Government of Trinidad and Tobago and shall be collectively responsible therefor to Parliament".*

The evidence emanating out of the *Commission of Enquiry into the Piarco Airport Project* revealed, not just *general* direction and control but direct interference in the procurement process by Ministers, to the extent that some of those Ministers are before the courts.

During the proceedings of the *Uff Commission of Enquiry*, particularly with respect to the operations of UDeCOTT, the question of ministerial involvement in the procurement process came under intense scrutiny.

It is clear that, *in regard to ministerial involvement in the procurement process, reformed procurement legislation must be true to the letter and spirit of Section 75 (1) of our country's Constitution.*

The issue of cabinet accountability to Parliament may require that there be *a permanent Joint Select Committee* responsible for public procurement. This could ensure that matters that fall within the purview of a Regulator are in the public domain as well as under Parliamentary oversight.

The role of Civil Society is critical in this context and should be reflected in any policy and legislation with respect to procurement.

The role of a regulatory authority in the Government Bill is no different from that which exists in the CTB Act of 1966. There is however some merit in what is proposed in it for grievance resolution.

Value for Money

Value for Money is the cornerstone of modern procurement systems. A procurement governance structure utilising the principle of value for money emphasises performance management approaches rather than regulatory procedures managed at clerical levels.

In this context, procurement is perceived as a management function based on:

(a) methodologies for optimising Value for Money to achieve stated economic and social-outputs on a whole-of-life basis.

(b) best practice accountability and transparency principles.

Methodologies

As far as methodologies are concerned we note that the PSCSG Draft Bill requires that Guidelines, Agency Handbooks and Agency Instructions apply value for money methodologies that take into account:-

(a) identification of needs and of economic and social outputs and outcomes (that must be explicitly promoted by the procurement contract) so that specification in these terms will facilitate cost benefit analysis and the proper identification, assessment and comparison of the costs and benefits at each phase of the procurement cycle; and
(b) planning that includes the selection of an appropriate delivery method and evaluation criteria and takes into account:

i Government and agency policies;
ii. market maturity;
iii the need to implement a competitive process of a scale commensurate with the size and risk profile of the particular procurement;
iv admission requirements for tenderers;
v the performance history of each tenderer

Civil Society

A body comprising civil society and others should assist in reinforcing independently the integrity of the system and report accordingly in the public domain. The role of the National Procurement Advisory Council as envisaged in the PSCSG Draft Bill is to consider the effectiveness and efficiency of the procurement system and to make recommendations to Parliament. Good governance can only be permanently established if political participation functions effectively through Civil Society. It is thus incumbent on Parliament to act objectively in forming and nurturing active and responsible civil society participation in the policy formulation process.

Loopholes

We also take this opportunity to draw to your attention to some of the legislative loopholes in the Government Bill that need to be addressed.

Avoiding the CTB

By Act No. 36 of 1979 the Government amended the CTB Act and qualified the CTB's sole and exclusive authority in the procurement process by giving itself *the right to contract directly if "it enters into a contract with a company which is wholly owned by the State"*. This amendment effectively bypassed the philosophy of centralising procurement and led to a proliferation of State Owned Enterprises (SOEs) with independent tendering processes.

SOE's effectively spent public money for property and services outside the purview of the CTB.

We understand there are over seventy such SOEs which are responsible to the Minister of Finance as Corporation Sole. These SOEs are under the purview of Cabinet and the perception of the public is that they serve as vehicles for the distribution of patronage. It is thus imperative that a procurement regulator report directly and only to Parliament and be

supported by a statutory body the expenses of which should be a charge on the Consolidated Fund. This approach will reinforce Parliamentary sovereignty in accordance with the intent of the Constitution.

Avoiding Judicial Review

Clear legislative expression will also inform future jurisprudence on the operation of the principles of good governance. Currently the jurisprudence of Trinidad and Tobago indicates confusion as to the meaning of public procurement which in turn informs the jurisprudence on the meaning of good governance. *In NH International CvA. No. 95 of 2005 procurement processes were classified as essentially commercial thereby excluding the outcome of those processes from judicial review* notwithstanding the public nature of the agencies involved and the use of public money. The minority judgement of the then Chief Justice Sharma, focusing as it did on the significance of the use of public money, was prescient and to be preferred.

Avoiding the Integrity in Public Life Act (IPLA)

On June 27th, 2013 the Court of Appeal ruled that *Telecommunications Services of Trinidad and Tobago* (TSTT) was not a State Enterprise and as a result, was not subject to the provisions of the IPLA since, the government terminated its *de jure* control of TSTT when it transferred its majority shares in the company to National Enterprises Limited. This Court of Appeal decision overturned a 2007 decision which held that TSTT was a public authority as it was supported by Government funds over which Government was in a position to exercise control. Consequently this may affect SOE's in general and may determine whether or not *they now fall outside the purview of the Integrity Commission*. This decision affects the jurisprudence of the '**who**' of accountability.

Significance

These loopholes are significant as they are being tackled in other jurisdictions in the Commonwealth in respect of public sector arrangements where Government agencies attempt

to acquire information on projects when public money is involved. The current definitions in the PSCSG Draft Bill will remove these anomalies by ensuring, very simply, that once there is public money involved the principles/rules pertaining to good governance should apply, regardless of the status of these agencies.

The critical issue is not the constitution of the agency but rather its involvement with public money for a public purpose.

Provisions of the Government Bill not addressed by the JSC Recommendations

It appears that the documents originally laid in Parliament as 'Legislative Proposals' that were then referred to successive JSCs and drawn upon to some extent in the second JSC's report to Parliament, have been largely side-lined in the production of the Government Bill.

At the same time, issues that apparently were not addressed by both JSCs have found their way into the Government Bill. Prominent among these are:

- the *exclusion of Government to Government arrangements*; and
- the *introduction of Framework Agreements* using text that appears to have been copied word for word from the 2011 *UNCITRAL Model Law on Public Procurement* which has been determined by the World Bank as not being efficient in supporting developing countries' policies.

For further discussion of the first of these issues, please see the attached paper entitled '*Local Content, Government to Government and Procurement which demonstrates how g2g arrangements should be brought under our procurement legislation without being in conflict with international agreements.*

Conclusion

In the light of the above, the PSCSG is constrained to conclude that, ***without radical and extensive redrafting that would place the elements that we consider indispensable at its core and would address the loopholes as well as the other concerns that we have identified, the Government Bill could never be considered legislation that was "modern, progressive and transparent".***

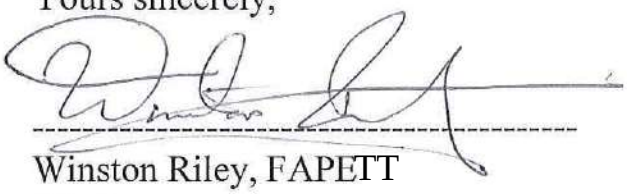
In contrast, the PSCSG Bill qualifies eminently for such a description. Not only does it address adequately the issues that we have identified above, it is also a thoroughly updated version dated 29th October 2010 of the second of the two legislative proposals that were laid

in Parliament and placed before the LRC It is in fact the result of eleven years of public sector/private sector/civil society collaboration.

It would greatly advance the reform process along sound and efficient lines if, rather than a re-draft of the current Government Bill, the document eventually laid in Parliament and sent to the LRC were substantially the PSCSG Draft.

Please rest assured that the PSCSG remains committed to continue collaborating with Government and all other stakeholders in seeking genuine public procurement reform.

Yours sincerely,



Winston Riley, FAPETT
Chairman

CC: Mr. Moonilal Lalchan, Chairman, Trinidad and Tobago Chamber of Industry and Commerce
Mr. Hugh Howard, President, American Chamber of Commerce of Trinidad and Tobago
Mr. Nicholas Lok Jack, President, Trinidad and Tobago Manufacturers Association
Dr. Thackwray Driver, Chief Executive Officer, The Energy Chamber of Trinidad and Tobago
Mr. Nirad Tewarie, Chief Executive Officer, Trinidad and Tobago Coalition Services Industry
Mr. Afra Raymond, B.Sc., FRICS, President, The Joint Consultative Council for the Construction Industry
Mr. Deryck Murray, Chairman, Trinidad and Tobago Transparency Institute
Mr. Christopher Garcia, President, Trinidad and Tobago Contractors Association
Mr Joseph Yearwood, Chairman, Board of Architecture of Trinidad and Tobago
Ms. Margarita Leonard, President, The Association of Professional Engineers
Mr. Lennox Austin, President, Trinidad and Tobago Society of Planners
Mr. Lennox Sirjuesingh, President, Trinidad and Tobago local Content Chamber
Mr. Joseph Remy, President, Federated independent Trade Unions and NOO's
Mr. Ganga-Persad Kissoon, President, Institute of Surveyors of Trinidad and Tobago
Mr. Keith Spencer, President, Trinidad and Tobago Chapter International Facility Management Association
The Honourable Prakash Ramadhar, Chairman of Legislative Review Committee
The Honourable Roodal Moonilai, Leader of Government Business, House of Representatives
The Honourable Ganga Singh, Leader of Government Business, Senate
The Honourable Prime Minister, Mrs. Kamla Persad Bissesar
Ms. Jennifer Smith, President, Trinidad and Tobago Institute of Architects

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ASSOCIATION

CHRISTOPHER GARCIA
PRESIDENT
TRINIDAD & TOBAGO CONTRACTORS'
ASSOCIATION

Local Content, Government to Government and Procurement

Winston Riley (FAPETT)

The Joint Consultative Council (JCC) and the Trinidad and Tobago Local Content Chamber (TTLCC) met on July 16th 2013 to discuss issues of Local Content, Government to Government (G2G) arrangements and Public Procurement. The primary concern of Local Content, Government to Government and Procurement Paper was the impact of G2G arrangements on local content, procurement regulations and the development of local institutions and organisations.

G2G arrangements were initially analysed in the context of the existing legislation on procurement– i.e., The Central Tenders Board (CTB) Act 1961 amended in 1979, section 20A which allows Government to act on its own behalf where:-

i. *'...as a result of an agreement for technical or other co-operation between it and the Government of a foreign State, the latter designates a company to supply the articles or to undertake the works or any services in connection therewith;*
ii. *the articles or works or any services in connection therewith are to be supplied or undertaken by a company which is wholly owned or controlled by a foreign State;*
iii. *it enters into a contract with the National Insurance Property Development Company Limited or a company which is wholly owned by the State, for the supply of articles or for the undertaking of works or services in connection therewith'*

Subsequently, the Private Sector/Civil Society Group (PS/CSG) became aware of a Draft Public Procurement Act to be placed before the Legislative Review Committee (LRC) by the office of the Chief Parliamentary Council (CPC). The document states:-

"This Act does not apply to the procurement of goods and services arising out of –

(a) a treaty or other form of agreement to which Trinidad and Tobago is a party with one or more other States;

(b) an agreement entered into by Trinidad and Tobago with an I intergovernmental international financing institution; (IFI)

(c) an agreement with CARICOM; or

(d) an agreement for technical or other cooperation between the Government and the Government of a foreign State,

Where the treaty or agreement provides for rules or regulations regarding the procurement of goods or services."

The government bill follows the UNCITRAL 2011 draft model which states

Article 3

International obligations of this State relating to procurement [and intergovernmental agreements within [this State]

To the extent that this Law conflicts with an obligation of this State under or arising out of any:

(a) Treaty or other form of agreement to which it is a party with one or more other States; [or]

(b) Agreement entered into by this State with an intergovernmental international financing institution, [; or]

[(c) Agreement between the federal Government of [name of federal State] and any subdivision or subdivisions of [name of federal State] or between any two or more such subdivisions,]

the requirements of the treaty or agreement shall prevail, but in all other respects the procurement shall be governed by this Law.

We should use our ingenuity to insure that when public money is involved the procurement laws of our country prevail.

A review of G2G arrangements reveals the following:

i. G2G arrangements in Trinidad and Tobago were initiated in 1979 when 'money was not a problem'. At present, G2G arrangements are continuing

when the local banks are flush with funds and bonds could be raised at 2.5%. There is no resource deficiency in T&T.

ii. G2G arrangements are not only instruments for procurement of goods and services from foreign countries but also provide for the outsourcing of the procurement process. As a result, human and institutional systems/structures are placed entirely in the hands of the foreign country thus making any procurement legislation irrelevant.

iii. All capital projects can be initiated under G2G arrangements

iv. Public monies utilised for the procurement of goods and services leave generations of T&T citizens responsible for the public debt incurred.

PS/CSG hereby advocates that:

i. Procurement legislation should state that "*whenever and wherever public money is involved, all procurement of goods and services are subject to the procurement regulations of the country*."

ii. Our procurement rules should be in keeping with international best practice.

iii. The local implementing agencies should establish and express the measurable development objectives of each project before implementation.

Other provisions should include for:-

a) The optimising of local value added along supply chains.
b) The enforcing of laws and regulations related to labour, health and safety
c) The linking and optimising of Value for Money to stated measurable development objectives as the prescribed approach in decision making along the value chain.
d) The tabling of all G2G arrangements in Parliament upon signing, for public consideration.
e) The immediate tabling in Parliament of all G2G arrangements already signed. These should include, inter alia-:
    - The Declaration of POS with the People's Republic of China
    - The 2012 Canadian agreements,

- The agreement with the Austrian Government (San Fernando Hospital).

Trinidad and Tobago's history and experience in oil and gas has allowed this country, a former British colony, a strategic advantage over developed countries in becoming a provider of goods and services to other former colonial countries with potential in extractive industries.

Thus G2G arrangements can be used by Trinidad and Tobago to develop:

i. Business through the supply of goods and services from home companies;
ii. The banking sector through the provision and or organisation of private or State funded loans to developing countries;
iii. Learning institutions through the provision of training to foreign students.

Canadian Commercial Corporation (CCC) , SNC Lavalin and the Penal Hospital Project

The Government of Trinidad and Tobago signed a G2G arrangement with the Government of Canada for the development of health-care facilities. The Canadian Government named the Canadian Commercial Corporation (CCC) as the implementing agency under the agreement and the Trinidad and Tobago Government named the Urban Development Corporation as its counterpart. SNC Lavalin through CCC undertook preliminary designs for a Hospital at Penal.

Recently, a ten year ban was imposed by the World Bank and the Canadian International Development Agency on SNC Lavalin Inc. and its affiliates for corruption. A series of newspaper articles both in Trinidad and Tobago and abroad called for clarification of the role of CCC with respect to SNC Lavalin on the Penal Hospital project. CCC has stated that they are at present undertaking a due diligence exercise on the Hospital project.

Trinidad and Tobago's sovereignty is in question here. Due diligence being undertaken by the CCC at this stage with respect to SNC Lavalin Inc. is an insult to the Government of Trinidad and Tobago.

The following should now be undertaken, as public money is involved:

i. Abandon any existing or future contractual agreement with SNC Lavalin Inc. in Trinidad and Tobago, for the next ten years;
ii. Implement UDECOTT's procurement rules for the procurement of consultants and contractors;
iii. Conduct a value engineering exercise at the preliminary design stage to optimise value for money and local content;
iv. Allow the CCC, after undertaking due diligence, to recommend a firm or firms to UDECOTT for the construction of the Penal Hospital;
v. UDECOTT should manage its own due diligence procedures on the firms recommended by CCC;
vi. Encourage Canadian firms to enter into an agreement with local firms for submission of tenders;
vii. Permit local firms to tender provided that the import component from Canada for goods and services are in keeping with Trinidad and Tobago's national interest;
viii. Implement UDECOTT's tendering procedure with amendments to facilitate evaluation and verification of local content by setting up technical specifications with requirements and procedures that define, measure and allow for the declaration and verification of the local content of goods, services and works.

Local Content should be expressed as a percentage of the Tender price, and shall be calculated as follows:

LC = (1 - x/y) x 100 where (x) = imported component in T&T Dollars and (y) = tender price in Trinidad and Tobago Dollars.

It is to be noted that The Chinese Exim Bank stipulates... ***"The portion of the Chinese content of exported goods should be no less than 50% of the total value"*** of project financing from China. Statements made in the local media about 40% local content are not at all palatable.

October 28, 2013

Mr. Winston Riley
Chairman
Private Sector/Civil Society group
The Professional Centre Building
1st Floor Unit B202
11-13 Fitzblackman Drive
Wrightson Road South
Port of Spain

Dear Mr. Riley,

I am following up on our telephone conversation last week on the matter of Procurement legislation and this letter is to update you on what is transpiring with regard to the Procurement Legislation and to suggest a methodology for getting a good Bill to the point of debate and passage in the Parliament of Trinidad and Tobago. I would sincerely appreciate the collaboration of your good self and the Private Sector/Civil Society Group members in managing the process successfully.

The clear objective of our Government from the very beginning has been– to pass Procurement Legislation that would establish a modern, progressive, transparent procurement regime, support the development of business and encourage sustainable development of our country.

As an enlightened and interested party, following progress on this matter, you would be aware that the process has not been easy getting the Bill to this point. After all is said and done, however, we did achieve a Joint Select Committee consensus on what should be included in the Bill. All submissions, written and oral, from interested parties would have been taken into account by the Joint Select Committee in arriving at its consensus and this includes submissions by the Private Sector/ Civil Society Group. The recommendations of that Joint Select Committee were unanimously accepted by Parliament after full debate.

It is on the basis of these recommendations that the preparation of the legislation has been pursued by the Chief Parliamentary Council. To have done otherwise would be to risk withdrawal of support for the Bill in Parliament; and the Bill requires a special majority. As I indicated earlier the objective of Government is to establish a modern, transparent progressive procurement regime. However, to do that we must have the required Parliamentary support. A

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minimum requirement in this regard would be alignment of the Bill with the recommendations agreed by parliament.

My best information is that a pre-legislative draft should be ready by November 6, 2013, and that a Legislative Review Committee meeting is scheduled for November 18, 2013. I shall be happy to have that draft forwarded to you for any amendments you may wish to suggest. If you can do so in time for Legislative Review Committee to consider that would facilitate the work of the committee as well as progress on the Bill. We are doing our utmost to get the Bill to Parliament and to have your input along the way. We will ensure that the draft bill gets to you as soon as the pre-legislative process is completed. What we are seeking is your cooperation and collaboration to make things work.

Following the Legislative Review Committee process I am certain that the Chair of the Legislative Review Committee would be willing to have the Committee engage you to clarify which of your suggested amendments have been accepted and which have not and why.

Following that meeting the Bill will be considered by Cabinet and laid in Parliament. The leader of Government Business can arrange for a period of three weeks to elapse before debate on the Bill begins.

This letter is written to you in the spirit of goodwill and in good faith and it is my hope that you and the reasonable voices in your complex organization will predominate and that on this basis you will be able to reciprocate.

Please appreciate, that, given the acceptance of the recommendations of the Joint Select Committee of Parliament (made up of Government, Opposition and Independent members of both Houses) by Parliament as a whole, this Parliamentary decision must inform preparation of the legislation.

Bear in mind that Parliament in making its decision would have taken into account that all submissions to the Joint Select Committee would have been duly taken into account by its Joint Select Committee including submissions of the Private Sector/Civil Society Group.

Please appreciate that our Government is seeking to meet its commitment to pass Procurement Legislation taking in to account the consensus position on matters for inclusion taken by Parliament.

Please take into account that at the stage when a draft bill will have been completed following a JSC consultation process, the most meaningful contributions can be made by way of amendments which will be considered by the LRC once you submit them.

Please appreciate that the openness to dialogue, after the LRC would have considered your suggested amendments, is to impress upon you that we wish to proceed to Parliament with an enlightened Procurement Bill that will receive both Parliamentary as well as public support.

The three week period between the laying of the Bill in Parliament and the beginning of debate is to allow for public scrutiny and public comment which can be taken into account during the debate on the Bill including at the committee stage.

Our Government is making a diligent effort to pass good legislation on Procurement and it would be in the interest of all to work together to achieve this. It is my view that with reasonableness and mutual respect and consideration we can pass good legislation and do something worthwhile for our country.

I shall be most grateful if we can achieve this with your encouragement, support and participation.

Sincerely,

Dr. Bhoendradatt Tewarie
Minister

cc: Mr. Moonilal Lalchan, Trinidad and Tobago Chamber of Industry and Commerce
Mr. Hugh Howard, President, American Chamber of Commerce of Trinidad and Tobago
Mr. Nicholas Lok Jack, President, Trinidad and Tobago Manufacturers Association
Dr. Thackwray Driver, Chief Executive Officer, The Energy Chamber of Trinidad and Tobago
Mr. Nirad Tewarie, Chief Executive Officer, Trinidad and Tobago Coalition Services Industry
Mr. Afra Raymond, B.Sc., FRICS, President, The Joint Consultative Council for the Construction Industry
Mr. Deryck Murray, Chairman, Trinidad and Tobago Transparency Institute
Mr. Christopher Garcia, President, Trinidad and Tobago Contractors Association
Mr Joseph Yearwood, Chairman, Board of Architecture of Trinidad and Tobago
Ms Margarita Leonard, President, The Association of Professional Engineers
Mr Lennox Austin, President, Trinidad and Tobago Society of Planners
Mr. Lennox Sirjuesingh, President, Trinidad and Tobago local Content Chamber
Mr. JosephRemy, President, Federated Independent Trade Unions and NGO's
Mr. Ganga-Persad Kissoon, President, Institute of Surveyors of Trinidad and Tobago
Mr. Keith Spencer, President, Trinidad and Tobago Chapter International Facility Management Association
The Honourable Prakash Ramadhar, Chairman of Legislative Review Committee
The Honourable Roodal Moonilal, Leader of Government Business, House of Representatives
The Honourable Ganga Singh, Leader of Government Business, Senate
Honourable Prime Minister, Mrs Kamla Persad Bissesar

Private Sector/ Civil Society Group
Tel:868-623-9396 Fax: 868- 625-5749 Email: jcctt1@gmail.com

11th September, 2013

Senator Dr. the Honourable **Bhoendradatt Tewarie**
Minister of Planning and Sustainable Development
Level 14 Eric Williams Financial Complex
Independence Square,
Port-of-Spain

Honourable Minister:

Re: Public Procurement Legislation

On behalf of the Private Sector/ Civil Society Group (PS/CS Group) I acknowledge receipt of your letter dated 14th August 2013.

Please be advised that the PS/CS Group operates on the basis of consensus decision-making with unanimity as the decision rule. Further, since the Group's area of concern is public procurement, the public interest is paramount in all its decision-making.

Members of the PS/CS Group are unanimous in their view that it would be regrettable if any meeting with a technical team representing the Government were to take place only "... *following the laying of the Procurement Bill in Parliament*".

Members of the PS/CS Group are also in unanimous agreement on the following:

i. Out of respect for the work undertaken by our Group and its predecessors over the last ten years, there should be, as a first measure and *before* the laying of a Bill in Parliament, a discussion of or a statement on the Legislative Review Committee's concerns with the PS/CS Group's draft bill to which the Prime Minister referred in Parliament on the 10th of October, 2012.

//2... On that occasion

On that occasion she stated: *"Mr. Speaker, we propose to send before the Legislative Review Committee the report of the Joint Select Committee and, in addition, this document. This document has been prepared by the Joint Consultative Council for the Construction industry; the Trinidad and Tobago Transparency Institute; the Trinidad and Tobago Chamber of Industry and Commerce, and the Trinidad and Tobago Manufacturers Association. This document is a draft Bill, 2012—"Draft Public Procurement and Disposal of Public Property Bill, 2012", which will be sent to the LRC for consideration for the laying of a Bill in Parliament for procurement".*

ii. There should also be, *before* the laying in Parliament of any Bill, a discussion of the extent to which the Bill proposed by the LRC ('the Government Bill') is in conformity with the policy proposals of the Joint Select Committee's report to Parliament.

iii. As the *Medium-Term Policy Framework 2011-2014* (on page 18) states that "measures are to be undertaken to give effect to the recommendations contained in the **White Paper on Reforming the Public Sector Procurement Regime"**, there must, in addition, be discussion on the extent to which the Government Bill meets this requirement and how it compares in this regard with the PS/CS Group's Bill.

iv. As the issue of procurement reform is of national importance, any Bill should, for an adequate period, be the subject of public debate before it is debated in Parliament.

It should be noted that the provisions of the PS/CS Group's Bill have been the subject of public consultation for over ten years, beginning during the period of development of policy documented in the Green and White papers, continuing during the period of drafting and of subsequent enhancement by the Group of the original draft and concluding with discussions with stakeholders held over the last few years.

In light of the foregoing and with a view to ensuring legislation and implementation structures which are transparent and in the best interest of the country, we propose a meeting between our Group and your Team be held during the second half of September 2013 or any other date mutually convenient, prior to laying same in Parliament.

//3....As a matter of courtesy

As a matter of courtesy and in keeping with our unwavering stance in our communications with the JSC that discussions on any proposed procurement legislation should, at all stages, be in the public domain, we will, as a matter of public interest, be releasing this letter to the media.

Yours sincerely,
PRIVATE SECTOR/CIVIL SOCIETY
GROUP ON PUBLIC PROCUREMENT REFORM

Winston Riley, P.E., FAPE
Chairman

Copy: Honourable Senator Larry Howai, Minister of Finance
Honourable Minister Prakash Ramadhar (MP), Head Legislative Review Committee and Minister of Legal Affairs

AFRA RAYMOND
PRESIDENT
JOINT CONSULTATIVE COUNCIL
FOR THE CONSTRUCTION INDUSTRY

MOONILAL LALCHAN
PRESIDENT
TRINIDAD & TOBAGO CHAMBER OF
INDUSTRY & COMMERCE

NICHOLAS LOK JACK
PRESIDENT
TRINIDAD & TOBAGO MANUFACTURERS'
ASSOCIATION

DERYCK MURRAY
CHAIRMAN
TRINIDAD & TOBAGO TRANSPARENCY INSTITUE

LENNOX SIRJUESINGH
PRESIDENT
TRINIDAD & TOBAGO LOCAL CONTENT
CHAMBER

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for GANGA-PERSAD KISSOON
PRESIDENT
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11 September, 2012

JCC PRESS RELEASE

The Joint Consultative Council for the Construction Industry - JCC – is completely opposed to the recently-proclaimed provisions of the Trinidad and Tobago Administration of Justice (Indictable Proceedings) Act 2011 which have the effect of creating a loophole to allow the high-profile persons accused in the Piarco Airport scandal to escape trial. The Bernard Commission was an expensive and critical Enquiry into the Piarco Airport scandal which revealed evidence of massive corruption, bid-rigging, bribe-paying, back-fitting and other practices which amounted to a series of criminal assaults on our nation's Treasury. The JCC played a leading role in calling for and submitting evidence to the Bernard Commission which exposed abuse of power and corrupt practices in some of the highest offices in our country. There have been high-level convictions and imprisonments arising directly from the Bernard Commission, yet there has been no action on effectively prosecuting the accused parties in our own Courts.

"The effect of the new laws which were proclaimed would have been to create a legal means for those accused persons to escape a trial and oblige the Court to have made a verdict of not guilty. The JCC deplores such an intended result in this matter as being contrary to good order and seemingly intended to promote the notion that white-collar crime pays."

The JCC is calling for ***immediate*** corrective action by the Attorney General and the Minister of Justice, including repealing the recently-proclaimed sections of this Act, to ensure that the trials of the Piarco Airport scandal accused can proceed as promised on several occasions to the public. ***Justice must not only be done, it must be seen to be done.*** Even after the necessary immediate corrective action, the JCC is calling on the Prime Minister to make a formal, full statement to the Parliament to give an accounting for the manner in which this most important matter has been handled, including why it was thought advisable to have those particular clauses of this new law proclaimed at the particular moment of celebrating our country's 50th anniversary of Independence.

Given the specific assurances given to the Parliament as to the pre-conditions to the government's intended proclamation of this new law, the role of the President in assenting to these particular clauses at that particular moment of national celebration and maximum distraction is a matter for serious concern.

Publish the Bernard Report now

The JCC is repeating its call for the immediate publication of the full Report of the Bernard Commission into the Piarco Airport scandal.

Implement the Uff Report recommendations now

The JCC is calling on this administration to implement the Uff Report recommendations now as promised in the 2010 election campaign. The JCC completely rejects the position of the Minister of Justice that the Joint Select Committee on Public Procurement and Disposal of Public Property is handling that implementation process. Only one of the 91 recommendations of the Uff Report has any relation to the work of that Joint Select Committee, so those need to be implemented now.

If this administration is serious about attacking the wave of white-collar crime which is drowning our country, the Uff Report recommendations will be implemented now.

Public Procurement reform now

The JCC is renewing its call for the immediate implementation of a new Public Procurement system to eliminate the waste and theft of Public Money. This administration campaigned on a promise to implement the new Public Procurement system within one year of the May 2010 election, so we are way overdue for those new laws.

The JCC and its colleagues in the Private Sector/Civil Society group have submitted a complete DRAFT BILL to the Joint Select Committee, so that needs to become law now.

If this administration is serious about attacking the wave of white-collar crime which is drowning our country, the DRAFT BILL on Public Procurement and disposal of Public Property as prepared by the Private Sector/Civil Society group will be immediately tabled in Parliament for debate and enactment

In this, our nation's 50th year of independence, our Parliament re-convened during its vacation to approve Financial laws on the request of a foreign government.

The JCC is calling for Parliament to be reconvened for the immediate correction of this gross error in proclaiming this new law.

The JCC is also calling on this administration to make the passing of new Public Procurement laws an urgent priority.

Thank you for your support on these important issues of national development.

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PRESS RELEASE: For Immediate Release
Contact: Desiree Arthur-Lopez jcctt1@gmail.com ***(868) 623-9396***

November 17, 2011 – Port of Spain, TT—
JCC Press Briefing on PUBLIC PROCUREMENT

Welcome to Members of the Media attending this important briefing.

Let me introduce our colleagues –
The Peoples' Partnership's manifesto, at page 18, commits to –
Procurement

- *Prioritise the passing of procurement legislation and appropriate rules and regulations*
- *Establish equitable arrangements for an efficient procurement system ensuring transparency and accountability by all government departments and state enterprises…*

The Public Procurement legislative process has paused, with the work of the original Joint Select Committee of Parliament having been preserved for a new JSC to take over in this session.

We were advised that the new JSC is to be appointed shortly to complete the work of the original Committee and we would like to note for the record that our Private Sector/Civil Society group stands ready to resume work on this.

Our group comprises

- The JCC
- Trinidad & Tobago Chamber of Industry & Commerce
- Trinidad & Tobago Manufacturers' Association
- Trinidad & Tobago Transparency Institute

As such, we are the leading Private Sector/Civil Society stakeholders with the intention of our proposals being to promote Transparency, Accountability and Value-for-Money in the expenditure of Public Money.

The new Public Procurement systems we are proposing will enhance competition, reduce political interference in the award of contracts and act as an effective anti-corruption measure. All of those objectives will be of great benefit to our nation, particularly the silent majority, by which we are referring to the unborn citizens of the future.

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Our position on the legislative process is that, given the far-reaching consequences of these proposals, the government must publish the draft legislation for public comment before the matter is debated in Parliament. One of our greatest concerns on this Public Procurement matter is with respect to the Uff Report. The Minister of Justice is responsible for the implementation of the 91 recommendations in the Uff Report and JCC has written to Minister Volney on three occasions to offer our assistance in any working group that Ministry might have established. We have never had a reply, but we will continue to insist that the Uff Enquiry has to have a meaning for the progress of our nation and that has to mean that its recommendations are implemented.

As an active part of the drive for new, effective Public Procurement systems, we also have serious, shared concerns on the Invader's Bay situation and those are highlighted at http://www.jcc.org.tt/invadersbay.htm. We have all written to the Minster of Planning & the Economy to state our objections and all attended a meeting with Minister Dr. Bhoe Tewarie and Minister Stephen Cadiz on 26th September. We note that our concerns have not been addressed and that the said Minister is reported to have said that "*...The winning proposal for the Invaders Bay development project will be revealed within two weeks...*"

The lack of a proper Needs Assessment is a glaring omission in this Invader's Bay matter, as a result of which there were no clear rules for project evaluation at the time the RFP was published. When we asked the Ministers during our meeting, we were told that those evaluation rules would be finalised after the submissions were received. We regard that as completely unacceptable in terms of transparency and proper process in tendering.

Related to that is the fact that the RFP issued by MPE is itself silent as to the existing three strategic plans for the Port-of-Spain area, such that this would appear to be taking place without proper context. There needs to be wide public consultation on this proposed development if proper levels of transparency and participation are to be achieved.

There is also the issue of the urgent need to diversify our economy, so that we can develop non-energy sources of foreign exchange earnings. This proposed development is an excellent opportunity to address that issue of foreign exchange leakage during the construction and operation phases.

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We offered MPE to revise the RFP, so as to conform with their 12-month deadline for start-on-site, but they refused this.

The approach being taken on Invader's Bay to date represents a continuation of the old, which makes it effectively a breach of trust and promise to the national community.

We once again urge the MPE to take the opportunity to withdraw this RFP and revise the process.

Thank you, we will take questions now...



H.O.R. PAPER NO. 13 of 2012 MP PARL: NO. 14/3/31

REPORT

OF

THE JOINT SELECT COMMITTEE APPOINTED TO CONSIDER AND REPORT TO PARLIAMENT ON THE LEGISLATIVE PROPOSALS TO PROVIDE FOR PUBLIC PROCUREMENT AND DISPOSAL OF PUBLIC PROPERTY AND THE REPEAL AND REPLACEMENT OF THE CENTRAL TENDERS BOARD ACT

Second Session (2011/2012) Tenth Parliament

[Ordered to be printed]

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BACKGROUND

APPOINTMENT AND TERMS OF REFERENCE

1.1 Pursuant to resolutions passed in the House of Representatives on **Wednesday November 09, 2011** and on **Friday November 18, 2011** and in the Senate on **Tuesday November 15, 2011 and on Tuesday November 22, 2011**, a Joint Select Committee was appointed to consider and report on the Legislative Proposal to provide for public procurement and disposal of public property together with the Legislative Proposal to repeal and replace the Central Tenders Board Act.

1.2. This is the second such Committee to have been established during this Tenth Parliament. The Committee appointed in the First Session (2010/2011) was unable to complete its mandate before prorogation on June 17, 2011, and as such requested that all its work be saved and referred to any subsequent committee.

1.3. In consonance with this request, this Committee was appointed to consider and report *on the Legislative Proposal to provide for public procurement and disposal of public property together with the Legislative Proposal to repeal and replace the Central Tenders Board Act which were laid in the House of Representatives on Friday June 25, 2010* ***along with the work of the previous Committee appointed in the First Session of the Tenth Parliament:***

The Committee was also required *to:*

(a) consult with stakeholders, experts and interested persons;
(b) send for persons, papers, records and other documents;
(c) recommend amendments to the proposals with a view to improving the drafts; and
(d) submit a report to Parliament within three (3) months from the date of appointment.

1.4. Based on the above stated reporting period, the deadline for the Committee to report to Parliament was set as **February 23, 2012.**

MEMBERSHIP

2.1 The following Members were appointed to the Joint Select Committee:

- Dr. Bhoendradatt Tewarie- **Chairman**
- Dr. Tim Gopeesingh, MP
- Mr. Prakash Ramadhar, MP
- Mr. Herbert Volney, MP
- Dr. Keith Rowley, MP
- Mr. Anand Ramlogan, SC
- Mr. Collin Partap, MP
- Mr. Colm Imbert, MP
- Mr. David Abdulah
- Mr. Faris Al-Rawi
- Mrs. Helen Drayton
- Dr. James Armstrong

2.2 With the exception of, Mr. Kevin Ramnarine and Dr. Rolph Balgobin, the composition of the Committee remained the same as the one that was appointed in the First Session (2010/2011). These two Members were replaced by Dr. Bhoendradatt Tewarie and Dr. James Armstrong respectively.

SECRETARIAL SUPPORT

3.1 The following persons provided secretarial assistance:

- Ms. Lily Broomes- Secretary
- Mr. Julien Ogilvie-Assistant Secretary
- Ms. Sheranne Samuel- Parliamentary Intern

EXPERT ASSISTANCE

4.1 The following persons provided expert advice:

- Mrs. Claire Blake, S.C.- Senior Legal Consultant
- Ms. Anne Hussein- Legal Officer I

ELECTION OF CHAIRMAN AND QUORUM

5.1 At its First Meeting held on December 02, 2011, the Committee unanimously appointed Dr. Bhoendradatt Tewarie as Chairman.

5.2 At that meeting, the Committee also resolved that its quorum will be as follows:

- ***Four(4) Members***
  Comprising two (2) Members of the Government, one (1) Member of the Opposition and one (1) Independent Member.

MEETINGS

6.1 Since its appointment, your Committee held five (5) meetings on:

1. December 02, 2011;
2. January 06, 2012;
3. January 16, 2012.
4. April 17, 2012; and
5. May 28, 2012

Challenges with convening meetings- Lack of a quorum

7.1 Following its Third Meeting held on January 16, 2012, your Committee experienced challenges in convening meetings due to lack of a quorum. Its Fourth Meeting was postponed on two occasions (Monday January 30, 2012 and Wednesday February 29, 2012).

7.2 The initial quorum requirements stated at item 5.2 above proved to be impractical. The specification that certain groups must be represented within the quorum resulted in a situation where meetings could not be convened in the absence of any particular grouping. As a result, the work of the Committee was interrupted for approximately one month.

7.3 Given the imminent expiration of the time frame for the completion of its mandate, your Committee submitted an interim report seeking an extension of time and the intervention of Parliament to resolve the quorum issue. The Interim report was presented in the Senate on March 06, 2012 and in the House of Representatives on March 09, 2012.

The issue of quorum resolved

7.4 However, at its Fourth meeting held on Tuesday April 17 2012, your Committee in accordance with the provisions of the standing orders[1] resolved, by a division of 5 to 2, to alter its quorum as follows[2]:

- **Any four Members of the Committee with at least one Member from the House of Representatives and one Member from the Senate, including the Chairman.**

DELIBERATIONS

GOVERNMENT'S POLICY POSITION ON PUBLIC PROCUREMENT

8.1 Initial discussions on the subject matter focused on the need for a policy position from the government with regard to the design for a national procurement system. It was agreed that this was essential in guiding your Committee in its deliberations and decision making.

8.2 Your Committee determined that the result of its deliberations ought to be a recommended framework on procurement that would inform the drafting of legislation

[1] Standing Orders 79(2) and 71(2) of the House of Representatives and the Senate respectively
[2] Refer to items 4.1 to 4.10 of the Minutes of the Fourth Meeting at Appendix III

MAJOR ISSUES TO BE RESOLVED

9.1 Your Committee identified the following issues as critical for the advancement of its deliberations:

(a) Whether a Procurement Regulator or an equivalent to a Contractor General is necessary for Trinidad and Tobago and reasons for this;
(b) The role of the Minister and the Executive. The issue of parliamentary oversight;
(c) The registration and application process for contractors;
(d) The question of appeals and the allowance for due process while not hindering the business of production;
(e) Balancing value for money, transparency and accountability against the need to facilitate development;
(f) Being current not only with good practice, but with the latest thinking on good practice.

9.2 The policy proposals at **Appendix I** as agreed by your Committee addresses all of the issues that your Committee sought to resolve.

9.3 In seeking to determine what was the most suitable legislative solution to be adopted, your Committee examined the procurement systems of countries that have made notable advancements in this area such as Finland, Canada, United Kingdom, the Philippines, Latin America and Jamaica, among others.

SUBMISSIONS RECEIVED BY THE COMMITTEE

10.1 In accordance with its mandate outlined at item 3.2, your Committee received written and oral submissions from organizations and persons as follows:

Table 1.

No.	Person or organization	Nature of the submission (Oral or written)	Dated made or submitted
i.	**Inter-American Development Bank**	**Written** Re: Program to support the Public Procurement Reform in Trinidad and Tobago	August 30, 2011
ii.	**Mr. Greg Christie, Contractor General of Jamaica**	**Oral and written submissions** Re: An overview of the operations of the Office of the Contractor General	January 16 2012 *(Third meeting)*
iii.	**Ministry of Labour and Small and Micro-Enterprise Development**	**Written submission** Re: The incorporation of the tenets of the *FairShare programme* into the legislative framework for public procurement reform	March 21, 2012
iv.	**Chairman, Procurement Committee, Private Sector Civil Society Group**	**Written** Re: Revised Draft Public Procurement Bill dated April 11, 2011 and Revised Draft framework for procurement guidelines	April 16, 2012
v.	**Mr. Joao Veiga Malta, Senior Procurement Specialist from the World Bank**	**Oral and written submissions** Re: options for Public Procurement Reform for Trinidad and Tobago	April 17 2012 *(Fourth Meeting)*
vi.	**Chairman of the Committee**	**Written** Re: Policy position for informing the Legislative Reform of Public Procurement and Disposal of Public Property by the Government of Trinidad and Tobago-	May 21, 2012 *(Fifth Meeting)*

CONSIDERATION OF PROPOSAL FOR ASSISTANCE FROM THE IDB

11.1 During the process of deliberation, your Committee was approached by representatives of the Inter-American Development Bank with an offer of technical assistance in the areas of public procurement reform. The Proposal sought to provide technical and financial Assistance to the Government of the Republic of Trinidad and Tobago in the sum of US$300, 000.

11.2 Your Committee agreed to consult with the IDB to ascertain the feasibility of their offer of assistance and the possibility of execution, within a January 2012 timeframe. Discussions also ensued on the pre-legislation and post-legislation process. To date, the IDB agreed in principle that funding would be made available to support the implementation of the legislation, although a work plan between the Committee and the IDB had not been formulated.

DISCUSSIONS WITH THE CONTRACTOR GENERAL OF JAMAICA

12.1 During its Second Meeting held on January 06, 2012, your Committee decided that it would be useful to hold discussions with the Contractor General of Jamaica to acquire a more in-depth insight into the operations of this office. The Office of the Contractor General is a similar office to the "Procurement Regulator" that was proposed to the Committee as a possible option. This Office has extensive powers and privileges to oversee the award and termination of public sector contracts.

12.2 To this end, Mr. Greg Christie, Contractor General of Jamaica was invited to Trinidad to meet with the Committee. Mr. Christie was accompanied by two other officials from his department, namely:

- **Mr. Craig Beresford** , Senior Director of Monitoring Operations, Corporate Communications & Special Projects; and

- **Ms. Sashein Wright,** Special Projects Assistant to the Contractor General, Communications Officer and Special Investigator.

12.3 At its Third Meeting, your Committee met with the Contractor General and engaged in in-depth discussion on the various aspects of his department's operations. Due to the sensitive and confidential nature of the information that was anticipated to be shared, the Contractor General requested that discussions with the Committee be conducted in private. Thus, the Minutes of the Third Meeting held on January 16, 2012 at **Appendix III** do not reflect the full details of the discussions held between your Committee and the Contractor General.

12.4 This meeting proceeded as follows:

A. The Contractor General made his presentation without any interjections by the Committee;
B. Following his presentation, Members of the Committee posed questions and made comments;

C. The Committee then engaged the officials openly on issues of interest.

12.5 The following are the major subject areas and issues that were raised during the discussions:

i. The jurisdiction of the Contractor General (CG) to oversee and scrutinize all contracts awarded and terminated by Government departments, agencies or bodies to ensure that contracts are awarded impartially and based on merit;

ii. The wide and far reaching powers of investigation and inquiry vested in the Office of the Contractor General, including the ability to conduct investigations on current contracts and those awarded in the past;

iii. The objectives of the CG's department as it relates to fostering transparency, impartiality and propriety in the public procurement system of Jamaica;

iv. The high degree of independence and discretion granted to the CG;

v. The different types and values of contracts over which the CG has jurisdiction;

vi. The requirement for the CG to report the findings of investigations to the Executive and Parliament;

vii. The requirement for strong political will to achieve Public Procurement reform.

viii. Limitations and shortcomings of the Office of the Contractor General;

ix. The existence of multiple anti-corruption bodies in Jamaica similar to Trinidad and Tobago (i.e. The Contractor General, the Integrity Commission and the Corruption Prevention Commission) and the need for them to be merged into a single Anti-corruption body.

12.6 Your Committee was very thankful for the knowledge, expertise and experience shared by the Contractor General and his team who traveled to Trinidad to meet with the Committee at short notice. Your Committee would have acquired invaluable insight into the operation of a 'regulator' in a Public Procurement Regime.

DISCUSSIONS WITH OFFICIALS FROM THE WORLD BANK

13.1 By letter dated March 20, 2012, the World Bank requested of your Committee to have **Mr. Joao Veiga Malta, Senior Procurement Specialist from the World Bank** make an oral presentation to the Committee on the contents of the World Bank's procurement reform proposals for Trinidad and Tobago. The World Bank has assisted numerous countries in the area of Public Procurement Reform. As part of the Performance-Informed Budgeting and

Procurement Reform component under its Fee-Based Services, the World Bank prepared a guidance paper with options for procurement reform in Trinidad and Tobago.

13.2 Your Committee agreed to this request and met with Mr. Malta during its Fourth meeting. Your Committee heard Mr. Malta's presentation, following which a question and answer period ensued. (**See items 7.1 to 9.5 of the Minutes of the Fourth Meeting).**

CONSIDERATION OF GOVERNMENT'S POLICY POSITION FOR INFORMING THE LEGISLATIVE REFORM OF PUBLIC PROCUREMENT AND DISPOSAL OF PUBLIC PROPERTY

14.1 In fulfillment of a commitment made to Members, the Chairman circulated, a document outlining government's policy position on procurement in advance of the Fifth Meeting of your Committee.

14.2 At the Fifth Meeting, your Committee considered the policy document **at Appendix II** provided by the Chairman. Your Committee considered the document page by page and made amendments where it deemed necessary. Amendments were made to allow for the inclusion of the following:

i. **Adherence to national labour laws and standards;**

ii. **The broadening of the mandate of the PAC to scrutinize the reports of the Procurement Regulator;**

iii. **The requirement for the Procurement regulator to make recommendations to the Minister of Finance for action on any matter where issues of transparency, probity or good governance may be compromised. And that reports on such instances also be submitted for the consideration of the PAC;**

iv. **Defined deadlines for the submission of reports to Parliament;**

v. **A mechanism for expeditious treatment of objections to procurement decisions and/or dispute resolution be included in the legislation;**

vi. **An approved list of adjudicators will be compiled to support the function of resolution of disputes;**

vii. **A timeline of thirty (30) days for the resolution of disputes from the date of referral.**

14.3 Having recommended the foregoing for inclusion in the policy document to guide the reform of Public Procurement legislation in Trinidad and Tobago, your Committee unanimously agreed that:

1. The amended policy document at **Appendix I** should be included in the Committee's report to Parliament.
2. Your Committee's report would inform the drafting of legislation for the reform of the Public Procurement system of Trinidad and Tobago.

CONCLUSION

15.1 The Joint Select Committee on Public Procurement was established on November 02, 2010. The work of this Committee has now spanned almost two sessions of Parliament. Over the period of work of this Committee, a fair range of proposals for consideration have been put forward by interested parties and stakeholders, both locally and abroad listed in Table 1. In addition, your Committee has reviewed a large volume of literature related to public procurement, including a number of models. The Uff Report on the Commission of Inquiry into the Construction Sector and its recommendations have been given due consideration.

15.2 The Legislative Proposals referred to the Committee in the First session (2010/2011) for its review and amendment were deemed to be mutually exclusive. The Committee at that time agreed that the two drafts required extensive and detailed redrafting to bring them in line with the requirements for a modern procurement system relevant to the culture of Trinidad and Tobago.

15.3 Following the reappointment of the Committee in the Second Session (2011/2012), the mandate of your Committee remained the same except that the work of the Committee established in the first session was brought forward. Nonetheless, the new Committee also agreed that the product of its deliberations ought to be a legislative framework of policy that would inform the drafting of legislation for the reform rather than a revised draft Bill or

prescriptive legislation. It was agreed that the policy framework emanating from the Committee must promote among other things:

- Transparency;
- Accountability;
- Fairness;
- Equity; and
- Value for money.

15.4 To this end, your Committee has reviewed and amended the Government's policy proposals to encapsulate the requirements/prerequisites listed at 15.3 above. Your Committee is satisfied that the policy proposals outlined in **Appendix I**, represent a relevant and appropriate guide/framework for the drafting of legislation for the reform of the Public Procurement Regime in Trinidad and Tobago.

RECOMMENDATIONS

16.1 Given the foregoing, your Committee respectfully submits its final report and recommends that the report, together with **Appendix I and II** be used as a guide for the drafting of legislation and the implementation of policy initiatives for the reform of the public procurement system in Trinidad and Tobago;

Respectfully submitted,

Dr. Bhoendradatt Tewarie

Chairman

June 04th, 2012

APPENDIX I

Revised policy proposals for informing the Legislative Reform of Public Procurement and Disposal of Public Property including amendments made by the Committee on May 28, 2012 (in bold)

i. That the procurement regime to be established must deliver goods and services more efficiently, effectively and at higher performance levels than currently exists. The system should take into account clear lines of accountability, ensure transparency and promote ethical conduct;

ii. That Framework legislation rather than prescriptive legislation is recommended;

iii. That such Framework legislation should come to Parliament together with general regulations, and the net of coverage of State institutions should be wide, in keeping with the policy pledge to ensure transparency and accountability by all government departments and state enterprises;

iv. That a hybrid model involving a system with centralized as well as decentralized elements would be more practical and would be desirable;

v. That this hybrid model should result in greater efficiency in public procurement by permitting Government Agencies to engage in their own procurement processes - that is within the context of law, rules and regulations - but still be subject to scrutiny through the oversight of the Procurement Regulator.

vi. That transparency, accountability**, fairness, equity** and value for money be regarded as essential to enlightened policy and practice and must inform the legislation;

vii. That efficiency, effectiveness, ethics and fair dealing should be an important outcome of the legislation;

viii. That a new procurement regime should promote local industry, ensure that "local content" considerations are adequately addressed and that international trade is facilitated;

ix. That the procurement regime also promote enlightened and progressive environmental practices, **adherence to national labour laws and standards,** provide opportunities for innovation and for human capital development and skills building;

x. That the position of Regulator for Procurement and the Office of the Regulator for Procurement be established;

xi. That the Office of the Regulator for Procurement be constituted as a statutory body, independent of any Ministry;

xii. That to oversee the reporting of the Procurement Regulator to Parliament, the Public Accounts Committee be made to perform the oversight function, and that the Procurement Regulator be accountable to the Public Accounts Committee;

xiii. Item (xii) above will require the institutionalization of an independent audit process. It will also require an expansion of the remit of the Public Accounts Committee which may also require a possible amendment to the law governing the Public Accounts Committee. These matters need to be taken into account in the drafting of the legislation;

xiv. That this Regulator be responsible for **establishing** centralized rules and regulations that will generally guide procurement matters at all levels, including e-procurement, within the context of Public Procurement Laws and Regulations;

xv. That this Regulator be responsible for investigating complaints from any party involved in public procurement:

a. To ensure that the procurement process at all levels be above reproach at all times

b. To address complaints in an expeditious manner

c. To identify matters which may require investigation

d. To make recommendations **to the Minister of Finance** for action on any matter where issues of transparency, probity or good governance may be compromised;

e. That such matters as may relate to (c) and (d) above, also be submitted to the Public Accounts Committee

xvi. That this Regulator report to Parliament on an annual basis not later than ninety (90) days following the end of the reporting year and that the regulator submit special investigation reports within thirty (30) days of the initiation of an investigation to the Minister of Finance as well as to Parliament;

xvii. that the Regulator should be appointed by the President following consultation with the Prime Minister and the Leader of the Opposition;

xviii. That the Procurement Regulator be able to select and appoint the staff of the Office of the Procurement Regulator on a merit basis;

xix. That the Procurement Regulator be able to employ alternative dispute resolution and mediation, in the settling of complaints;

xx. **That a mechanism for expeditious treatment of objections to procurement decisions and/or dispute resolution be established as part of the legislation. An approved list of adjudicators will be compiled to support the function of resolution of disputes. Adjudicators will be responsible for proposing a solution to disputes within 30 days from the date of referral.**

Joint Select Committee
Legislative Proposals on Public Procurement and
on the Repealing and Replacing of the Central Tenders Board Act

Dated Monday May 28, 2012

APPENDIX II

Policy position for informing the Legislative Reform of Public Procurement and Disposal of Public Property by the Government of Trinidad and Tobago- May 21, 2012

1. The current system of public procurement was established in 1961 under the Central Tenders Board Act, which established the Central Tenders Board (CTB) for the Government of Trinidad and Tobago and certain Statutory Bodies. The centralized procurement established in 1961 is still applicable to Government Ministries, departments and only a few statutory authorities, as through a series of amendments to the 1961 legislation, other agencies have been empowered to act independently of the CTB, these include:

- The armed forces and the protective services which since 1991 are not required to revert to the CTB
- NIPDEC which since 1993 as Agent of the State can conduct its own procurement

Additionally a 1987 amendment grants power to Government to undertake procurement during a period of emergency.

2. However, in all cases the regulatory framework which governs the CTB applies. In other words an overarching framework of rules governs all procurement but the CTB is not the Sole Agency authorized to award and execute contracts.

3. In 2005, the Investment Division of the Ministry of Finance produced a body of rules to guide State Enterprises/Statutory Authorities which include rules for appointment of tender committees, registration of contractors, the application and award process, appeals regarding unfair treatment and for the disposal of unserviceable items, so that State Enterprises not governed by the CTB are covered under these standard procurement procedure, and rules.

4. There have been previous attempts at Procurement Reform which were considered by Cabinet. The draft National Tenders Board Bill 1997 was considered by Cabinet but not introduced in Parliament. "The Reform of the Public Procurement Regime – A White Paper" produced by the Ministry of Finance was presented to Parliament in 2005 followed by the "Public Procurement and Disposal of Public Property Bill 2006" based on the White Paper. But the Bill was never debated.

5. The last amendment of the Central Tenders Board Act was done in 1993; so between 1993 and February 2012, although Cabinet has reviewed and considered the issue of procurement reform and has presented a White Paper as well as draft legislation to Parliament, Parliament itself sitting as House of Representatives and Senate have not considered or debated any amended or new procurement legislation since 1993.

6. In spite of all of this, procurement practices have often been suspect, and evidence within recent times has demonstrated possible instances of corruption and there have been calls as well as recommendations for Reform of the Procurement system. The 2010 People's Partnership Manifesto which formally and officially informs Government policy, makes the following commitment to Procurement Reform:

"*Our policy on infrastructure will be based on ensuring quality, reliability and maintenance of existing infrastructure while adopting transparent and fair procurement practices*." (p. 61)

"*Prioritize the passing of procurement legislation and appropriate rules and regulations. Establish equitable arrangements for an efficient procurement system ensuring transparency and accountability by all government departments and state enterprises*." (p. 18)

7. The Medium Term Policy Framework 2011-14 reinforces this position:

"*Priority will also be given to reforming the public procurement process and measures are to be undertaken to give effect to the recommendations contained in the White Paper on Reforming the Public Sector Procurement Regime*" (Page 18).

"Government's policy is to ensure that the quality, reliability and maintenance of existing infrastructure is of the highest standard, while adopting transparent and fair procurement practice" (Page 74).

8. Over the period of the work of this Joint Select Committee meeting since 2010, a fair range of proposals for consideration have been put forward by interested parties and stakeholders including from the Joint Consultative Council, Chambers of Commerce and Environmental organisations. The World Bank has also made a presentation to the Committee. In addition, a number of models have been examined and the Uff Report and its recommendations have been given due consideration.

9. Since 2010, the Government of Trinidad and Tobago has made a clear commitment to reform the system but has not so far articulated a clear policy. The approach so far has been to wait on the completed report of the Joint Select Committee so that Cabinet could review the Committee's work, as a consensus position which would then inform the legislative drafting stage. At this point, given the recent unfolding of events with regard to the functioning of the Joint Select Committee it is doubtful whether the level of cooperation required to achieve a consensus policy position from the Committee can be

achieved. Accordingly, the Government of Trinidad and Tobago considers it prudent to present its policy position formally to the Committee.

10. In outlining its policy position the Government of Trinidad and Tobago has taken into account features identified in the relevant literature to support a good and modern public procurement system appropriate to a country such as ours. These include:

(i) Demand Identification- which takes into account that we need in Trinidad and Tobago a platform of government spending which would address:

a. Government agencies now subject to the Central Tenders Board as well as State Enterprises and State Agencies which may not now be so subject;
b. The achievement of best value for each unit of government spending.

(ii) Needs Based Assessment- in the case of Trinidad and Tobago refers to the collective assessment of what might have gone wrong in the current system and what needs to be done differently to improve the system and facilitate enlightened practice.

(iii) Best Identifiable Remedy- which in the case of Trinidad and Tobago would mean a universal system encompassing all arms of government. Such a system will allow for:

a. Government savings, while spending in procuring goods at good value;
b. the use of government special purpose companies as an incubator for sound principles in contracting;
c. the use of government spending to grow skills in local industry;
d. the use of government spending to encourage small business, green practices and innovation;
e. the use of government spending presented to the public in a clear easily identifiable manner;
f. good quantification (accounting) of government spending;
g. easy identification of goods for the short and long term value and their position within government strategy;
h. an identifiable link between government macroeconomic strategy, macroeconomic spending and microeconomic initiatives.

(iv) Implementation of the Best Identifiable Remedy- which will require adherence to the following principles:

a. best value for money;
b. open and effective competition;
c. transparency;

d. enhancing opportunities for local businesses within the framework of (iii) identified above.

(v) A Monitoring and Evaluation System- which will allow for independent scrutiny of the execution of policy in matters related to procurement.

(vi) Ensuring that objections in procurement matters are expeditiously handled-this will allow a distinction to be made between genuine well substantiated objections and frivolous and obstructionist ones. The idea is that government strategy for progress and development should not be undermined by irresponsible actions but that legitimate objections grounded in evidence will be taken into account.

11. Against this background the following recommendations are made by the Government of Trinidad and Tobago for the establishment of a modern procurement system:

    i. That the procurement regime to be established must deliver goods and services more efficiently, effectively and at higher performance levels than currently exists. The system should take into account clear lines of accountability, ensure transparency and promote ethical conduct;
    ii. That Framework legislation rather than prescriptive legislation is recommended;
    iii. That such Framework legislation should come to Parliament together with general regulations, and the net of coverage of State institutions should be wide, in keeping with the policy pledge to ensure transparency and accountability by all government departments and state enterprises;
    iv. That a hybrid model involving a system with centralized as well as decentralized elements would be more practical and would be desirable;
    v. That this hybrid model should result in greater efficiency in public procurement by permitting Government Agencies to engage in their own procurement processes - that is within the context of law, rules and regulations - but still be subject to scrutiny through the oversight of the Procurement Regulator.
    vi. That transparency, accountability and value for money be regarded as essential to enlightened policy and practice and must inform the legislation;
    vii. That efficiency, effectiveness, ethics and fair dealing should be an important outcome of the legislation;
    viii. That a new procurement regime should promote local industry, ensure that "local content" considerations are adequately addressed and that international trade is facilitated;

ix. That the procurement regime also promote enlightened and progressive environmental practices and provide opportunities for innovation and for human capital development and skills building;

x. That the position of Regulator for Procurement and the Office of the Regulator for Procurement be established;

xi. That the Office of the Regulator for Procurement be constituted as a statutory body, independent of any Ministry;

xii. That this Regulator report to Parliament on an annual basis;

xiii. That to oversee the reporting of the Procurement Regulator to Parliament, the Public Accounts Committee be made to perform the oversight function, and that the Procurement Regulator be accountable to the Public Accounts Committee;

xiv. That this Regulator be responsible for establishing centralized rules and regulations that will generally guide procurement matters at all levels, including e-procurement, within the context of Public Procurement Laws and Regulations;

xv. That this Regulator be responsible for investigating and resolving complaints from any party involved in public procurement:

a. To ensure that the procurement process at all levels be above reproach at all times

b. To address complaints in an expeditious manner

c. To identify matters which may require investigation

d. To make recommendations for action on any matter where issues of transparency, probity or good governance may be compromised to the Minister of Finance

xvi. That the Procurement Regulator be appointed by the President

xvii. That the Procurement Regulator be able to select and appoint the staff of the Office of the Procurement Regulator on a merit basis;

xviii. That the Procurement Regulator be able to employ alternative dispute resolution and mediation, in the settling of complaints;

xix. That a mechanism for expeditious treatment of objections to procurement decisions and/or dispute resolution be established as part of the legislation.

The Government's policy position on procurement, in keeping with its commitment in the Manifesto of 2010 and the Medium-Term Policy Framework of 2011 is hereby made available for scrutiny, comment and engagement.

Senator, Dr. the Honourable Bhoendradatt Tewarie
Chairman, Joint Select Committee-
Legislative Proposals on Public Procurement and
on the Repealing and Replacing of the Central Tenders Board Act

Date May 21, 2012

APPENDIX III

MINUTES OF THE PROCEEDINGS OF MEETINGS

MINUTES OF THE <u>FIRST MEETING</u> OF THE JOINT SELECT COMMITTEE ESTABLISHED TO CONSIDER AND REPORT ON THE LEGISLATIVE PROPOSALS FOR PUBLIC PROCUREMENT AND DISPOSAL OF PUBLIC PROPERTY AND THE REPEAL AND REPLACEMENT OF THE CENTRAL TENDERS BOARD ACT HELD IN LEVEL 2 MEETING ROOM, OFFICE OF THE PARLIAMENT, TOWER D, THE PORT OF SPAIN INTERNATIONAL WATERFRONT CENTRE,

1A WRIGHTSON ROAD, PORT OF SPAIN

ON FRIDAY DECEMBER 2, 2011 AT 11:18 A.M.

PRESENT

Hon. Wade Mark, MP	Speaker of the House
Dr. Tim Gopeesingh, MP	Member
Mr. Herbert Volney, MP	Member
Mr. Collin Partap, MP	Member
Dr. Keith Rowley, MP	Member
Mr. Anand Ramlogan	Member
Dr. Bhoendradatt Tewarie	Member
Mr. David Abdulah	Member
Mrs. Helen Drayton	Member
Dr. James Armstrong	Member

ABSENT

Mr. Colm Imbert, MP	Member (Excused)
Mr. Prakash Ramadhar, MP	Member (Excused)
Mr. Faris Al-Rawi	Member (Excused)

SECRETARIAT

Mrs. Lily Broomes	Secretary
Ms. Candice Williams	Graduate Research Assistant

<u>INTRODUCTION</u>

1.1 The Speaker of the House called the meeting to order at 11.18 a.m. and welcomed Members present. He explained that his role at the meeting was to facilitate the election of a Chairman.

ELECTION OF CHAIRMAN

2.1 The Speaker invited nominations for the post of Chairman.

2.2 Dr. Bhoendradatt Tewarie was nominated by Dr. Tim Gopeesingh. This was seconded by
Mr. Anand Ramlogan.

2.3 The Speaker inquired whether there were any other nominations. There being no other nominations, Dr. Bhoendradatt Tewarie was declared the duly elected Chairman of the Committee.

2.4 The Speaker of the House congratulated the Chairman and wished the entire Committee success in its deliberations. He further emphasized the importance of the Committee and its undertaking and expressed the hope that its business would be managed effectively.

2.5 The Speaker then invited Dr. Tewarie to take the chair and excused himself from the Meeting.

DETERMINATION OF QUORUM

3.1 The Chairman invited suggestions for a quorum.

3.2 After some discussion, the Committee agreed to the composition of the quorum as follows:

- ***Four(4) Members , comprising two (2) Members of the Government, one (1) Member of the Opposition and one (1) Independent Member.***

APOLOGIES

4.1 The Chairman extended apologies on behalf of the following members who indicated their inability to attend the meeting:-

- Mr. Prakash Ramadhar;
- Mr. Colm Imbert; and
- Mr. Faris Al-Rawi.

SECRETARIAL SUPPORT

5.1 The Chairman informed Members that in accordance with Standing Order 6(7), Mrs. Lily Broomes has been assigned as Secretary to the Committee with Mr. Julien Ogilvie as Assistant Secretary.

5.2 The Chairman thanked the Committee and the former chairman for the significant work that was completed.

5.3 The Chairman requested the cooperation of the Leader of the Opposition and the Independent Members in assisting the Committee to fulfill its mandate with integrity, excellence and in an expeditious manner.

MANDATE

6.1 The Chairman reiterated the Committee's mandate and also sought clarification on item (C) of the mandate "Send for papers, records and other documents" to which the Secretary gave an explanation.

6.2 The Committee ascertained that the deadline for reporting to Parliament was **February 23, 2012**.

6.3 Much discussion ensued on whether there was need to have a policy position from the government to guide the way forward for the Committee. Issues of decentralized or hybrid models, regulatory framework and adjudication formed part of the discussion. The Committee would continue its work and hope to arrive at a consensus position.

6.4 The Chairman indicated that in the interest of transparency, Members needed to have a discussion on the issue of **"declaration of interest"** considering the fact that we are a small society with unknown connections.

6.5 The Committee agreed that it would be useful to hold discussions with the Contractor General of Jamaica and in this regard, it was also agreed to invite the Contractor General to meet with the Committee to share their experience.

Requested information

7.1 The Secretary was directed to provide the Committee with the following:

i. **Completed legislation on public procurement recently passed in Finland;**

ii. **Documentation on E- procurement systems and how they work;**

iii. **Examples of small societies where procurement legislation and E-procurement systems are in use in addition to countries such as the United States and Canada.**

Inter-American Development Bank (IDB) Offer

8.1 The Committee was informed that an offer of assistance from the Inter-American Development Bank (IDB) will be placed on the Agenda for discussion at the next meeting. The IDB offer is to be circulated to Members in advance of the next meeting.

NEXT MEETING

9.1 After some discussion, the Committee established that meetings will be held every Friday at 11.00 a.m. but the next meeting will however be held on **Monday December 12, 2011 at 1.30 p.m.**

ADJOURNMENT

10.1 The Chairman thanked Members for their participation. The meeting was adjourned to **Monday December 12, 2011 at 1.30 p.m.**

10.2 The adjournment was taken at 12.03 p.m.

I certify that the Minutes are true and correct.

Dr. Bhoendradatt Tewarie
Chairman

Mrs. Lily Broomes
Secretary

December 05, 2011

MINUTES OF THE SECOND MEETING OF THE JOINT SELECT COMMITTEE ESTABLISHED TO CONSIDER AND REPORT ON THE LEGISLATIVE PROPOSALS FOR PUBLIC PROCUREMENT AND DISPOSAL OF PUBLIC PROPERTY AND THE REPEAL AND REPLACEMENT OF THE CENTRAL TENDERS BOARD ACT HELD IN THE ARNOLD THOMASOS ROOM (WEST), LEVEL6, OFFICE OF THE PARLIAMENT, TOWER D, THE PORT OF SPAIN, IWFC, 1A WRIGHTSON ROAD, PORT OF SPAIN

ON FRIDAY JANUARY 06, 2012 AT 10:20 A.M.

PRESENT

COMMITTEE MEMBERS

Dr. Bhoendradatt Tewarie	Chairman
Dr. Tim Gopeesingh, MP	Member
Mr. Prakash Ramadhar, MP	Member
Mr. Colm Imbert, MP	Member
Mr. Anand Ramlogan, SC	Member
Mr. David Abdulah	Member
Mrs. Helen Drayton	Member
Dr. James Armstrong	Member

ABSENT

Mr. Herbert Volney, MP	Member (Excused)
Mr. Collin Partap, MP	Member (Excused)
Dr. Keith Rowley, MP	Member (Excused)
Mr. Faris Al-Rawi	Member (Excused)

SECRETARIAT

Mrs. Lily Broomes	Secretary
Mr. Julien Ogilvie	Assistant Secretary
Ms. Sheranne Samuel	Parliamentary Intern

MINISTRY OF THE ATTORNEY GENERAL

Ms. Claire Blake, SC	Senior Legal Consultant
Ms. Joan Furlonge	Legal Adviser to the Honourable Attorney General
Ms. Anne Hussein	Legal Officer

INTRODUCTION

1.1 The Chairman called the meeting to order at 10.20a.m, welcomed Members and extended New Year greetings.

1.2 The Chairman invited the officers from the Office of the Attorney General, the Parliament Secretariat and Hansard Unit to introduce themselves to the Committee.

1.3 The Chairman informed members that the following persons indicated their inability to attend the meeting:

- Mr. Herbert Volney, MP
- Mr. Collin Partap, MP
- Dr. Keith Rowley, MP
- Mr. Faris Al-Rawi

Consideration of Minutes of the First Meeting

2.1 The Chairman directed the attention of Members to the Minutes of the First meeting held on December 02, 2012 and inquired whether Members wished to highlight any errors or omissions.

2.2 Dr. Armstrong objected to the wording of item 6.3 and thought it did not sufficiently represent the course of discussions that transpired. He referred to pages 15 and 16 of the verbatim notes from the First meeting and proposed that the item be appropriately reworded.

2.3 Lengthy decision ensued with various members articulating their position on the matter

2.4 In the end, the committee agreed that the item should be amended by inserting the following:

"...Members expressed the hope that the consensus position arrived at by the committee would be favourably considered by the government in the adoption of its policy"

2.5 The motion for the confirmation of the minutes was moved by Dr. Gopeesingh and was seconded by Mr. Abdulah.

MATTERS ARISING OUT OF THE MINUTES

3.1 Mr. Imbert reverted to the discussions on item 6.3 and reiterated that a Parliamentary Committee cannot dictate or bind the actions of Cabinet or the Executive.

CONSIDERATION OF PROPOSAL FOR ASSISTANCE FROM THE IDB

4.1 The Chairman referred members to a letter dated August 30, 2011 from the Inter-American Development Bank (IDB) offering financial and technical assistance to the Government of the Republic of Trinidad and Tobago in the area of Public Procurement Reform.

4.2 The assistance will come in two phases: pre-legislation and post-legislation.

4.3 The Committee decided that they would consult with the IDB to determine whether their offer of assistance can be carried out expeditiously i.e. within a January 2012 timeframe and also to discuss the pre-legislation and post-legislation process.

CONSIDERATION OF REQUESTED RESEARCH INFORMATION

5.1 Mrs. Blake emphasized the need for the Committee to decide on the model of legislation, be it the prescriptive model or the framework model. There was consensus among Members that the Committee will go the way of framework legislation.

5.2 Mrs. Drayton reiterated the importance of regulations and stated that it would be inappropriate to table a piece of legislation without the regulations.

5.3 Debate ensued on whether the proposed legislation will deal solely with central government or whether it will govern state enterprises as well.

5.4 There was a general consensus that there should be rules and regulations to govern state enterprises and special purpose companies. It was felt that a hybrid model will address this.

5.5 Mr. Imbert stated that standard tender rules should be legislated and questioned the need for a regulator.

5.6 Members expressed an appreciation for the Finnish model.

OTHER BUSINESS

6.1 Dr. Gopeesingh suggested that the Committee examine the Draft Public Procurement and Disposal of Public Property Bill, 2011 prepared by the Ms. Blake and a legal team from the Joint Consultative Council for the Construction Industry (JCC). Mr. Imbert reminded members that the Committee agreed to come up with a legislative framework and not a Bill.

6.2 Mrs. Drayton suggested having a two (2) day workshop to deal with matters of the Committee. Members acknowledged that this may be feasible after the Committee meets with the Contractor General of Jamaica.

6.3 The Committee decided that they will meet with the Contractor General at their next meeting on Monday January 16, 2012, the timeframe of which will be extended to facilitate this.

NEXT MEETING

7.1 After some discussion, the Committee established that the next meeting will be held on **Monday January 16, 2012 at 10.00 a.m.**

ADJOURNMENT

8.1 The Chairman thanked Members for their participation. The meeting was adjourned to **Monday January 16, 2012 at 10.00 a.m.**

8.2 The adjournment was taken at 11.57 a.m.

I certify that the Minutes are true and correct.

Dr. Bhoendradatt Tewarie
Chairman

Mrs. Lily Broomes
Secretary

January 11, 2012

MINUTES OF THE THIRD MEETING OF THE JOINT SELECT COMMITTEE ESTABLISHED TO CONSIDER AND REPORT ON THE LEGISLATIVE PROPOSALS FOR PUBLIC PROCUREMENT AND DISPOSAL OF PUBLIC PROPERTY AND THE REPEAL AND REPLACEMENT OF THE CENTRAL TENDERS BOARD ACT HELD IN THE ARNOLD THOMASOS ROOM (WEST), LEVEL6, OFFICE OF THE PARLIAMENT, TOWER D, THE PORT OF SPAIN, IWFC, 1A WRIGHTSON ROAD, PORT OF SPAIN

ON MONDAY JANUARY 16, 2012 AT 10:00 A.M.

PRESENT

COMMITTEE MEMBERS

Dr. Bhoendradatt Tewarie	Chairman
Dr. Tim Gopeesingh, MP	Member
Mr. Prakash Ramadhar, MP	Member
Mr. Herbert Volney, MP	Member
Mr. Collin Partap, MP	Member
Dr. Keith Rowley, MP	Member
Mr. Colm Imbert, MP	Member
Mr. Anand Ramlogan, SC	Member
Mr. David Abdulah	Member
Mr. Faris Al-Rawi	Member
Mrs. Helen Drayton	Member
Dr. James Armstrong	Member

SECRETARIAT

Mrs. Jacqui Sampson- Meiguel	Clerk of the House
Mrs. Lily Broomes	Secretary
Mr. Julien Ogilvie	Assistant Secretary
Ms. Sheranne Samuel	Parliamentary Intern

MINISTRY OF THE ATTORNEY GENERAL

Ms. Claire Blake, SC	Senior Legal Consultant
Ms. Joan Furlonge	Legal Adviser to the Honourable Attorney General
Ms. Anne Hussein	Legal Officer I

OFFICE OF THE CONTRACTOR GENERAL OF JAMAICA

Mr. Greg Christie	Contractor General of Jamaica
Mr. Craig Beresford	Senior Director of Monitoring Operations, Corporate Communications & Special Projects
Ms. Sashein Wright	The Special Projects Assistant to the Contractor General, Communications Officer and Special Investigator.

INTRODUCTION

1.1 The Chairman called the meeting to order at 10.04 a.m. He suggested that the meeting proceed since the Members in attendance constituted a quorum and other members will join as the morning progressed.

Consideration of Minutes of the Second Meeting

2.1 The Chairman directed the attention of Members to the Minutes of the Second meeting held on December 02, 2012. The Committee examined the minutes page by page and found no errors or omissions.

2.2 The Chairman therefore requested that a member move the adoption of the Minutes.

2.3 Mrs. Drayton moved and Senator Abdulah seconded.

MATTERS ARISING OUT OF THE MINUTES

Inter-American Development Bank (IDB)

3.1 Mr. Abdulah inquired whether any feedback from the IDB was received.

3.2 In response, the Chairman advised the Committee that he consulted with the IDB and they agreed in principle that most of the funding would be made available to support the implementation of the legislation.

3.3 In addition, the Chairman indicated that the IDB was willing to provide a technical expert to assist in the preparation of Committee documents for submission to Parliament. He further advised that the funding available for the implementation of the legislation was free and did not have to be repaid.

3.4 Mr. Al-Rawi sought clarification on a concern expressed in the minutes with regards to the timeliness of the assistance from the IDB. The Chairman indicated that the Committee will proceed with its business with or without the input of the IDB.

Frame work or prescriptive legislation

3.5 Mr. Al-Rawi also queried whether at the last meeting, the Committee determined the type of legislative solution its deliberations will aim to produce, that is, a draft Bill or framework legislation etc.

3.6 The Chairman indicated that at the last meeting, the Committee did not agree on the preparation of a draft Bill, rather there was agreement that the Committee's report must contain a solid policy position and a recommended course of action in the form of a Legislative Framework, which will adopt elements of a Hybrid Model.

3.7 The Chairman held that if each member would examine the Public Procurement Bill dated April 09, 2011, which was revised by the Joint Consultative Council for the Construction Industry (JCC) in collaboration with Ms. Claire Blake, SC, the Committee will be in a better position.

CONSIDERATION OF APPROACH FOR DISCUSSION WITH THE CONTRACTOR GENERAL

4.1 The Chairman advised members that the Contractor General and two of his support officers were available and waiting to meet with the Committee. He further advised that the Contractor General had forwarded some documents for the consideration of the Committee in advance of the meeting.

4.2 The Chairman reiterated the approach for the meeting that was discussed on the last occasion the Committee met, which he mentioned as follows:

A. The Contractor General will make his presentation without any interjections by the Committee;
B. Following his presentation, members of the Committee may ask questions and make comments;
C. The Committee would engage the officials openly on issues of interest.

4.3 Members proferred the following suggestions:

i. Inquire about the models Jamaica would have examined to arrive at their existing Public Procurement arrangements. Also state the shortcomings of the current legislation;

ii. The extent to which litigation has impacted the operations of the Office of the Contractor General, in terms of delays, particularly with regards to implementation;

iii. Whether Jamaica has conducted a review or assessment of its existing procurement legislation and if so, what models were considered;

iv. Inquire about the operations of the National Contracts Commission (NCC);

v. Engage on the question of E-procurement;

vi. Clarification needed on Sector Committees;

vii. Ascertain whether there are opportunities for abuse of power within the system;

viii. Clarification needed on the relationship between the Contractor General, the National Contracts Commission and subsector bodies.

4.4 Mr. Imbert drew Members' attention to the Public Sector Procurement Policy of Jamaica (Item 35.1), included in the documents supplied by the Office of the Contractor General of Jamaica:

"It is issued under the authority of the Minister of Finance pursuant to Section 19 B of the Financial Administration and Audit Act and the National Contracts Commission in accordance with the Contractor-General Act 1993".

4.5 He requested a copy of the Financial Administration and Audit Act of Jamaica to which the item refers. He also suggested that the Committee adopts the measure whereby tender rules become legally binding by order of the Minister of Finance.

CONSIDERATION OF MATTERS TO BE DISCUSSED AT THE NEXT MEETING

5.1 The Chairman asked that members avail themselves of the following documents:

i. Draft Public Procurement and Disposal of Public Property Bill, 2011 (dated April 09, 2011) revised by the JCC and Ms. Claire Blake, SC;
ii. Legislative Framework on Public Procurement (Inclusive of Explanatory Notes);
iii. Auditor General's comments on the Legislative Proposals;
iv. Reservations/ concerns expressed by the last Committee (to be forwarded by Mrs. Blake);
v. World Bank Proposals – (Chairman indicated that he will make these available).

5.2 Some concern was raised about the reservations of the last Committee in relation to the Procurement and Disposal of Public Property Bill, 2006. Mrs. Blake indicated that they were not recorded in the framework and that she would like to do so in order to produce a revised document. The Chairman requested that the reservations be detailed separately from the existing Legislative Framework.

5.3 The Chairman highlighted the following issues to be considered:

(a) Whether a regulator or an equivalent to a Contractor General is necessary or not in the case of Trinidad and Tobago and reasons for this;
(b) The role of the Minister and the Executive. The issue of parliamentary oversight;
(c) The registration and application process for contractors;
(d) The question of appeals and the allowance for due process while not hindering the business of production;

5.4 Mrs. Drayton raised the issue of the National Procurement Advisory Council.

5.5 Both Mr. Al-Rawi and Mr. Gopeesingh raised the point of a need for an independent anti-corruption state agency which was an issue coming out of the media releases of the Contractor General of Jamaica. It was noted that the proposed procurement legislation would have implications for this.

REPORT TO PARLIAMENT

6.1 The Chairman suggested that the reality of the procurement process in Trinidad and Tobago as it stands today and the changing global realities and benchmarks that demand an enlightened procurement process be included in the Committee's Report to Parliament.

SUSPENSION

7.1 The Meeting was suspended at 11:22 a.m.

MEETING WITH OFFICIALS FROM THE OFFICE OF THE CONTRACTOR GENERAL OF JAMAICA

Proceedings Off the record

Further to a request from the Contractor General of Jamaica there was no Audio Recording or Hansard reporting during the period of discussions with the Committee

Discussions following meeting with the Contractor General

8.1 Following the discussions with the Contractor General Members engaged each other on the way forward.

8.2 It was suggested that the next course of action for the Committee is to take a serious and detailed look at the legislative models available and determine what elements of those models should be incorporated in our legislative solution.

8.3 The Chairman suggested that for the committee to achieve meaningful progress each and every member must conduct a detailed examination of the following documents:

a. Revised Legislative Framework (inclusive of explanatory Note) on Public Procurement prepared by Ms. Claire Blake, SC, Legal Consultant;

b. Revised Draft Public Procurement and Disposal of Public Property Bill, 2011 (dated April 09, 2011) amended by the JCC and Ms. Claire Blake, SC;

c. The Auditor General's comments on the Legislative Proposals;

d. World Bank Proposals *(Chairman indicated that he will make these available)*

NEXT MEETING

9.1 After some discussion, the Committee established that the next meeting will be held on **Monday January 30, 2012 at 9.00 a.m.**

ADJOURNMENT

10.1 The Chairman thanked Members for their participation. The meeting was adjourned to **Monday January 30, 2012 at 9.00 a.m.**

10.2 The adjournment was taken at 3: 33 p.m.

I certify that the Minutes are true and correct.

Dr. Bhoendradatt Tewarie
Chairman

Mrs. Lily Broomes
Secretary

January 23, 2012

MINUTES OF THE FOURTH MEETING OF THE JOINT SELECT COMMITTEE ESTABLISHED TO CONSIDER AND REPORT ON THE LEGISLATIVE PROPOSALS FOR PUBLIC PROCUREMENT AND DISPOSAL OF PUBLIC PROPERTY AND THE REPEAL AND REPLACEMENT OF THE CENTRAL TENDERS BOARD ACT HELD IN THE ARNOLD THOMASOS ROOM (WEST), LEVEL6, OFFICE OF THE PARLIAMENT, TOWER D, THE PORT OF SPAIN, IWFC, 1A WRIGHTSON ROAD, PORT OF SPAIN

ON TUESDAY APRIL 17, 2012 AT 9:20 A.M.

PRESENT

COMMITTEE MEMBERS

Dr. Bhoendradatt Tewarie	Chairman
Dr. Tim Gopeesingh, MP	Member
Mr. Herbert Volney, MP	Member
Mr. Collin Partap, MP	Member
Dr. Keith Rowley, MP	Member
Mr. Colm Imbert, MP	Member
Mr. David Abdulah	Member
Mr. Faris Al-Rawi	Member
Mrs. Helen Drayton	Member
Dr. James Armstrong	Member

ABSENT

Mr. Anand Ramlogan, SC	Member
Mr. Prakash Ramadhar, MP	Member

SECRETARIAT

Mrs. Lily Broomes	Secretary
Mr. Julien Ogilvie	Assistant Secretary
Ms. Sheranne Samuel	Parliamentary Intern

MINISTRY OF THE ATTORNEY GENERAL

Ms. Claire Blake, SC	Senior Legal Consultant
Ms. Anne Hussein	Legal Officer I

OBSERVERS

Mr. Michael Mendez	Deputy Permanent Secretary Ministry of Finance
Ms. Joan Furlonge	Legal Adviser to the Honourable Attorney General

THE WORLD BANK

Mr. Joao Veiga Malta	Senior Procurement Specialist
Ms. Fanny Weiner	Public Sector Group, Latin America and the Caribbean Region

INTRODUCTION

1.1 The Chairman called the meeting to order at 9:20 a.m. and thanked those present for their attendance.

Consideration of Minutes of the Third Meeting

2.1 The Chairman directed the attention of Members to the Minutes of the Third meeting held on January 16, 2012. The Committee examined the minutes page by page and found no errors or omissions.

2.2 The Chairman therefore requested that a member move the confirmation of the Minutes.

2.3 Mr. Abdulah moved and Mr. Partap seconded.

MATTERS ARISING OUT OF THE MINUTES

3.1 No matters were raised.

REVISITING THE QUORUM

4.1 The Chairman directed members' attention to the issue of revising the quorum of the Committee. He referred members to the Standing Order that gave a Joint Select Committee the discretion to determine its quorum.

4.2 The Chairman proposed that the quorum be as follows:

- Any four (4) members of the Committee with at least one member from the House and one Member from the Senate.

4.3 The proposal was seconded by Mr. Partap.

4.4 Mr. Imbert stated his objection to the Chairman's proposal. He contended that the perception he had was that the Committee would seek to arrive at consensus based on its deliberations. He also expressed concern about the tendency for meetings to be convened early in the morning, which he held would inconvenience members who serve on a part-time basis.

4.5 In response, the Chairman reiterated that the rationale for instituting the new requirements for a quorum is to prevent the work of the committee from being stymied by the non-participation of a particular sector of members. He committed to ensure that subsequent meetings are scheduled for dates that are convenient to opposition and independent members.

4.6 Mrs. Drayton inquired of the Chairman, whether the traditional composition of the a Joint Select Committee will remain, that is, a committee with representation from the Government, Opposition and Independent bench.

4.7 The Chairman explained that the initial approach that would have been adopted to resolve the quorum issue was to have the Interim Report of the Committee debated. However, he advised that the debate was preempted when the opposition gave a commitment to continue participating in the committee.

4.8 Mr. Al-Rawi concurred with the observations made by Mr. Imbert.

4.9 At the end of the discussions, the Chairman again proposed that the quorum of the Committee be constituted as follows:

- **Any four members of the Committee with at least one member from the House of Representatives and one Member from the Senate, including the Chairman.**

4.10 The Members present voted as follows:-

i. five of the seven Members present (excluding the Chairman) voted in favour of the motion: Mr. Volney, Mr. Partap, Mr. Abdulah, Mrs. Drayton and Dr. Armstrong;

ii. two of the seven Members present (Excluding the Chairman) voted against: Mr. Imbert and Mr. Al-Rawi.

4. 11 In light of the results of the vote, the quorum of the Committee was duly amended as stated at 4.8 above.

ABSENT/EXCUSED

5.1 The Chairman advised that Mr. Anand Ramlogan, SC and Mr. Prakash Ramadhar, were both out of the country and were excused from the meeting.

PRELIMINARY DISCUSSIONS ON PRESENTATION FROM THE WORLD BANK

6.1 The Chairman advised Members that the World Bank had requested a meeting with the Committee to present its position on a modern procurement system. He indicated that as Chairman he believed that in the spirit of openness, the committee should accede to the World Bank's request.

6.2 The Chairman indicated that the officials from the World Bank had agreed to make a 20 minute presentation to be followed by a 30 minute question and answer period.

6.3 Mr. Al-Rawi sought to ascertain the genesis of the input or assistance from the World Bank and also sought clarification about the meaning of '*Fee-based services*.'

6.4 In response, the Chairman indicated as follows:

i. the Ministry of Finance and to a lesser extent, the Ministry of Planning and the Economy have engaged the IDB and the World Bank. The Minister of Finance wrote to the Chairman of the Committee advising that the World Bank was desirous of meeting with the 'Procurement Committee' to share the organisation's views on modern best practice in procurement and on matters leading up to procurement legislation;

ii. It may be possible to acquire the assistance of the World Bank in drafting procurement legislation. However, the Government has already committed to the IDB's offer of a US$300, 000 assistance grant;

iii. The IDB's assistance will be used mainly during the implementation and operationalization of the provisions of the new procurement legislation;

6.5 Mr. Imbert and Mrs. Drayton expressed their dissatisfaction with the contents of the draft submission from the World Bank (circulated prior to the meeting).

6.6 In response, the Chairman suggested that the Committee proceed to meet with the World Bank officials and members can state their positions then.

MEETING WITH OFFICIALS FROM THE WORLD BANK

[Officials from the World Bank enter the meeting room]

Introductory remarks

7.1 The Chairman welcomed **Mr. Joao Veiga Malta, Senior Procurement Specialist** and **Ms. Fanny Weiner, Public Sector Group, Latin America and the Caribbean Region** and thank them for attending.

7.2 The Chairman also took the opportunity to indicate that Mr. Michael Mendez, Deputy Permanent Secretary in the Ministry of Finance and Ms. Joan Furlonge, Legal Adviser to the Honourable Attorney General, were present as observers.

Presentation by Mr. Joao Veiga Malta, Senior Procurement Specialist, World Bank

8.1 Before the commencement of his presentation Mr. Malta expressed appreciation to the committee for acceding to the World Bank's request to meet with the Committee.

8.2 **See attached as Appendix I**, the Presentation of Mr. Joao Veiga Malta, Senior Procurement Specialist, World Bank.

QUESTION AND ANSWER PERIOD

9.1 The following is a synopsis of the questions posed by members and the responses provided by Mr. Malta:

a. How can the Trinidadian Model be improved in the short to medium term vis-à-vis framework arrangements or complex transactions with Government?

- A detailed plan for reforming the system has to be created.
- Standardization of the activities of Government.
- The removal or reductions in the amount of discretion public officials have in the purchasing process and the introduction of policies that standardize what government buys.
- The training and development of a cadre of accredited staff to deal with procurement procedures i.e. Building a competency-based System.
- Overriding all of this is the requirement for a National Policy on procurement and a legislative framework that addresses this national policy.

b. Whether a Risk-based Framework should be integrated into the governing authority and also into the body of primary legislation?

- The risk approach needs to be applied throughout agencies, so that the agencies will be assigned with the right competencies.

c. How must principles and standards be applied in the context of individual procurement agreements?

- The Rules and Principles must be applied simultaneously to produce the most cost-efficient and beneficial outcome.

d. Where/when should the principles and rules be applied in relation to the regulations that govern the procurement legislation?

- One ought to ensure that the underpinning principles are instituted first, followed by rules and regulations. The basic principles that must be included in any system/model are; value for money, efficiency and transparency.

- The World Bank reviewed the procurement systems of several countries and found that those countries with a highly regulated system were ranked as more corrupt than those with fewer regulations by Transparency International.

- A holistic and flexible system must be adopted. The World Bank has found that in this region on average, 50% of public expenditure procurement is done outside the legal framework for procurement.

e. Based on your knowledge of procurement models and statutory frameworks found in different countries, can you identify three models that can be the foundation for a statutory framework for Trinidad and Tobago?

- There are many models but the ones which work are jurisdiction specific. However, what most of them have in common is that they include the pillars which form a modern system i.e. transparency, technology, professionalism and a governance framework.

- Singapore, New Zealand, UK, Denmark and Finland are interesting examples to examine.

- Every country has specific conditions and circumstances that require them to modify their procurement system as these conditions change.

f. How do you avoid a few large and well-resourced suppliers from dominating the market?

- By establishing a tier system where suppliers are ranked according to their capacity/ volume or size. This is required to avoid the monopolization of the system by large entities and also avoid smaller suppliers from bidding for contracts they may be unable to fulfill.

- Mechanisms must be implemented to prevent market distortion.

- Market analysis must be conducted before introducing a framework agreement.

g. How does a government balance the drive to attain more output with ensuring that processes are done in accordance with the rules and regulations?

- Regardless of the organizational models government chooses to adopt in the implementation of it policies (e.g. Special purpose companies), all involved in the system must be accountable and bound by common rules.

h. When does government policy on procurement apply in the system/market?

- First the objectives and guiding rules of the system must be established.

- A policy may target a specific group of suppliers based on a particular requirement e.g. geographic location or size.

i. How do you sustain what already exist and create opportunities for new growth, expansion and diversity in the system?

- A Government must consider whether its policy promotes and facilitates capital development, innovation etc.

- It comes down to having a procurement policy that incorporates the requirements for National Development.

- Innovation is a prerequisite for competitiveness. Therefore, those in the system who are inefficient will need to reinvent themselves in order to compete in the market.

9.2 After issues emanating from Mr. Malta's presentation were addressed, inquiries were made about the scope of the World Bank's assistance.

9.3 In response, Mr. Malta informed the Committee as follows:

i. The scope of the requirement was initially to do a review of the existing procurement arrangements and to make recommendations for a new procurement system. Since this arrangement for assistance is fee-based, the scope is therefore flexible and based on the demands of the Government.

ii. This assistance programme began in May, 2011. During the initial phase, the Bank held discussions with Government officials and members of the private sector.

9.4 The Chairman indicated that as far as his Chairmanship of the meeting was concern, the meeting in question was his first involvement with the World Bank.

9.5 He reiterated that the World Bank was primarily engaged with the Ministry of Finance under whose remit Public Procurement falls. The Chairman explained that the Minister of Finance wanted the Committee to benefit from whatever his Ministry was pursuing in the area of public procurement, so as to avoid the Ministry impinging on the work of the committee.

[The Officials from the World Bank exited the room]

FORMULATING A POLICY POSITION

10.1 Following the discussions with the officials from the World Bank, the Chairman directed members' attention to the issue of the formulation of a policy position.

10.2 The Chairman committed to provide members with a document stating the Government's policy position on Public Procurement, at least five clear days before the next meeting.

NEXT MEETING

11.1 After some discussion, the Committee established that the next meeting will be held on **Wednesday May 09, 2012 at 9.00 a.m.** The Committee acknowledged that its next meeting may endure for the entire day.

ADJOURNMENT

12.1 The Chairman thanked Members for their participation. The meeting was adjourned to **Wednesday May 09, 2012 at 9.00 a.m.**

12.2 The adjournment was taken at 12: 01 p.m.

I certify that the Minutes are true and correct.

Dr. Bhoendradatt Tewarie
Chairman

Mrs. Lily Broomes
Secretary

April 24, 2012

UNCONFIRMED

MINUTES OF THE FIFTH MEETING OF THE JOINT SELECT COMMITTEE ESTABLISHED TO CONSIDER AND REPORT ON THE LEGISLATIVE PROPOSALS FOR PUBLIC PROCUREMENT AND DISPOSAL OF PUBLIC PROPERTY AND THE REPEAL AND REPLACEMENT OF THE CENTRAL TENDERS BOARD ACT
HELD IN THE ARNOLD THOMASOS ROOM (EAST), LEVEL6, OFFICE OF THE PARLIAMENT, TOWER D, THE PORT OF SPAIN, IWFC, 1A WRIGHTSON ROAD, PORT OF SPAIN

ON MONDAY MAY, 28 2012 AT 9:00 A.M.

PRESENT

COMMITTEE MEMBERS

Dr. Bhoendradatt Tewarie	Chairman
Mr. Anand Ramlogan, SC	Member
Dr. Tim Gopeesingh, MP	Member
Mr. Prakash Ramadhar, MP	Member
Mr. Herbert Volney, MP	Member
Mr. Colm Imbert, MP	Member
Mr. David Abdulah	Member
Mr. Faris Al-Rawi	Member
Mrs. Helen Drayton	Member

ABSENT/EXCUSED

Mr. Collin Partap, MP	Member
Dr. Keith Rowley, MP	Member
Dr. James Armstrong	Member

SECRETARIAT

Mrs. Lily Broomes	Secretary
Mr. Julien Ogilvie	Assistant Secretary

MINISTRY OF THE ATTORNEY GENERAL

Ms. Claire Blake, SC	Senior Legal Consultant
Ms. Anne Hussein	Legal Officer I

Ms. Joan Furlonge	Legal Adviser to the Honourable Attorney General

INTRODUCTION

1.1 The Chairman called the meeting to order at 9:28 a.m. and thanked those present for their attendance.

Consideration of Minutes of the Fourth Meeting

2.1 The Chairman directed the attention of Members to the Minutes of the Fourth Meeting held on April17, 2012. The Committee examined the Minutes page by page. The following amendments were made:

i. **Page 3- in line 3 of item 4.5**, insert the words **", notwithstanding the change in quorum requirements"** after the word **"that";**

ii. **Page 5- item 6.5** was amended to read as follows:

Mr. Imbert expressed his dissatisfaction with the contents of the draft submission from the World Bank (circulated prior to the meeting). Mrs. Drayton expressed concern about the World Bank making a presentation at this late stage.

2.2 There being no further amendments to the Minutes, the Chairman requested that a Member move the confirmation of the Minutes.

2.3 Mrs. Drayton moved and the Chairman seconded.

MATTERS ARISING OUT OF THE MINUTES

3.1 No matters were raised.

CONSIDERATION OF GOVERNMENT'S POLICY POSITION FOR INFORMING THE LEGISLATIVE REFORM OF PUBLIC PROCUREMENT AND DISPOSAL OF PUBLIC PROPERTY

4.1 The Chairman directed Members' attention to the Government's policy document on Public Procurement Reform that he committed to provide at the conclusion of the fourth meeting. He highlighted the fact that the document was forwarded to Members approximately seven days before the actual meeting day, which was in keeping with his commitment.

4.2 The Chairman indicated that the document outlined Government's policies on procurement and the principles that would inform them.

4.3 The Chairman drew Members' attention specifically to items 5, 6, 7, 8 and 11 of the document. It was agreed that it will be a more beneficial if the Committee considered the document page by page and make amendment where necessary.

4.4 Clarification was sought on whether the purpose of the meeting was to achieve consensus on the Government's policy proposals or on the work the Committee has done for the past 14 months.

4.5 In response, the Chairman stated that it would be difficult to achieve consensus on what the Committee did in the past, since the Members of the Opposition have vehemently rejected the previous approach and requested that the government produce its policy position on public procurement. He further advised that the policy document before the Committee took into account the five or six points on which consensus was reached by the Committee.

4.6 Lengthy discussions ensued as the Committee paid particular attention to item 11 of the document. The following are the key points and suggested amendments that emanated from the deliberations:

i. The inclusion of the words **"fairness and equity"** in sub item **(vi)**;

ii. The inclusion of the word **"adherence to local labour laws and standards"** in sub item **(ix)**;

iii. That the Procurement regulator should report to Parliament more frequently than once per year;

iv. There was some discussion as to whether reports on matters which the Procurement Regulator judged to be requiring further investigation should be referred to the Minister of Finance and it was subsequently agreed that referral should be made to the Minister of Finance and the Public Accounts Committee of Parliament simultaneously;

v. **New sub item (xvi)-** that the deadline for the submission of Annuals Reports of the Procurement Regulator to Parliament will be ninety (90) days following the end of the reporting year. The audited financial statements of the Office of the Procurement Regulator to be submitted within that same timeframe. Special investigation reports are to be submitted within thirty (30) days of the initiation of an investigation to the Minister of Finance as well as to the Public Accounts Committee;

vi. The possibility that a separate committee with the responsibility of scrutinizing reports of the Procurement Regulator and to exercise general oversight of the public procurement system being established was discussed;

vii. Despite the foregoing suggestion for a separate committee, it was proposed that the remit of the Public Accounts Committee be modified via a possible amendment to the law governing the Public Accounts Committee, to facilitate its expanded scope to consider reports of the Regulator. The enhancement of the construct and resources available to the PAC were considered as essential requirements for the Committee to effectively achieve its expanded mandate;

viii. That standards and requirements should be established for reports that are to be submitted to Parliament. It was posited that this will ensure that the committee scrutinizing the reports will have adequate information to make informed determinations and conclusions;

ix. The Committee was assured by the Attorney General that in drafting procurement legislation he would ensure that the remit and the jurisdiction of the Committee with respect to this particular function is widely drafted so as to capture, not just the accounts or the report, but to allow for a panoramic overview that would allow the Parliamentary Committee to look at the management and the operations itself;

x. **Sub item (xvii)-** that the Regulator should be appointed by the President following consultation with the Prime Minister and the Leader of the Opposition;

xi. **New sub item (xx)-** a mechanism for expeditious treatment of objections to procurement decisions and/or dispute resolution. In addition, an approved list of adjudicators will be compiled to support the function of resolution of disputes. Disputes are to be resolved within a 30 day timeline from the date of referral;

4.7 After considering and amending the policy document, the Chairman sought the concurrence of Members on the way forward.

4.8 It was agreed that the Chairman should circulate to members a revised policy document highlighting the amendments made by the Committee for their scrutiny and comfort. The Chairman would then prepare a Draft Report for submission to Parliament based on the consensus achieved.

NB: The amendments made to Item 11 of the policy document are reflected fully at Appendix I.

OTHER BUSINESS

5.1 The Chairman sought and received the agreement of Members not to proceed with the other items on the Agenda.

5.2 In response to whether the Committee had considered any submissions from the private sector. The Chairman advised that recent submissions from the Private Sector/Civil Society Group as well was the Ministry of Labour, were considered in the process of drafting the policy document.

ADJOURNMENT

6.1 The Chairman thanked Members for their participation and for their contribution to arriving at a consensus document. The meeting was adjourned to **a date to be fixed.**

6.2 The adjournment was taken at 12: 11 p.m.

I certify that the Minutes are true and correct.

Dr. Bhoendradatt Tewarie
Chairman

Mrs. Lily Broomes
Secretary

June 01, 2012

APPENDIX IV

ATTENDANCE RECORD OF MEMBERS OF THE COMMITTEE

Attendance Record
Joint Select Committee on Legislative Proposals for Public Procurement
Second Session (2011/2012)

	MEMBERS	1st Meeting 02.12.2011	2nd Meeting 06.01.2012	3rd Meeting 17.01.2012	4th Meeting 17.04.2012	5th Meeting 28.05.2012
1.	Dr. Bhoendradatt Tewarie	√	√	√	√	√
2.	Dr. Tim Gopeesingh	√	√	√	√	√
3.	Mr. Prakash Ramadhar	Abs/exc	√	√	Abs/exc	√
4.	Mr. Herbert Volney	√	Abs/exc	√	√	√
5.	Mr. Collin Partap	√	Abs/exc	√	√	Abs/exc
6.	Dr. Keith Rowley	√	Abs/exc	√	√	Abs/exc
7.	Mr. Colm Imbert	Abs/exc	√	√	√	√
8.	Mr. Anand Ramlogan, SC	√	√	√	Abs/exc	√
9.	Mr. David Abdulah	√	√	√	√	√
10.	Mr. Faris Al-Rawi	Abs/exc	Abs/exc	√	√	√
11.	Mrs. Helen Drayton	√	√	√	√	√
12.	Dr. James Armstrong	√	√	√	√	Abs/exc

SUBMISSION

on

LEGISLATIVE PROPOSALS ON PUBLIC PROCUREMENT REFORM

laid in Parliament on 29 October, 2010

Submitted to
THE JOINT SELECT COMMITTEE
APPOINTED TO CONSIDER AND REPORT TO PARLIAMENT
ON
THE LEGISLATIVE PROPOSALS TO PROVIDE FOR PUBLIC PROCUREMENT AND DISPOSAL OF PUBLIC PROPERTY AND THE REPEAL AND REPLACEMENT OF THE CENTRAL on 22 December, 2010 by the

PRIVATE SECTOR/ CIVIL SOCIETY Group
And further amended following discussions with the Legal Advisor to the Joint Select Committee and re-submitted on April 16th 2012.

Private Sector/ Civil Society Group Members:

JOINT CONSULTATIVE COUNCIL FOR
THE CONSTRUCTION INDUSTRY

TRINIDAD AND TOBAGO TRANSPARENCY INSTITUTE

TRINIDAD & TOBAGO CHAMBER OF INDUSTRY AND COMMERCE

TRINIDAD AND TOBAGO MANUFACTURERS ASSOCIATION

INTRODUCTORY NOTE

1) A *Joint Select Committee of Parliament (JSC)* was appointed on the 29 October, 2010 to consider:

   a) A *Legislative Proposal to provide for Public Procurement and the Disposal of Public Property*

      This is in effect the text of a draft Procurement and Disposal of Public Property Bill 2006 that was produced as part of the procurement reform process initiated by Government following the laying in Parliament in September 2005 of the *White Paper on the Reform of the Public Sector Procurement Regime*[1]. The signatories to the White paper were also responsible for the preparation of this draft bill as part of a Cabinet Appointed Committee chaired by the then Permanent Secretary in the Ministry of Finance, Kamal Mankee.

   b) *A Legislative Proposal to repeal and replace the Central Tenders Board Act.*

This document, which *was prepared in 1997 by the then Attorney General, Ramesh Lawrence Maharaj,* is the text of ***The National Tenders Board Bill, 1997*** which sought to repeal and replace the Central Tenders Board Act and establish a National Tenders Board for the Government and certain statutory bodies and a Parliamentary Commission to monitor its activities.

The JSC is charged with reporting to Parliament with recommendations for new procurement legislation on the basis of these proposals.

2) This submission is intended to assist the JSC by providing stakeholder *inputs.*

It takes the form of suggested amendments/additions ([2] Amendments suggested by the Private Sector/ Civil Society Group are shown italicized in bold red) **to the text of the 2006 draft Bill taking into account elements of the 1997 Tenders Board Bill, developments since the policy statement of the White Paper from which the 2006 draft Bill evolved *and discussions with the legal adviser to the JSC held on April 11th, 2011 in accordance with the direction of the JSC (*** [3] Those suggested by the Legal Advisor to the JSC are shown italicized in bold blue)**. The amended text is submitted as a** *Draft Public Procurement and Disposal of Public Property Bill,* **2012.**

3) This submission reflect**s** our *endorsement of the White Paper* with two (2) material *differences*, which are:-

   (a) *The separation of investigatory powers from regulatory powers* which, in the 2006 Bill, are functions of the proposed Procurement Regulator who reports only to Parliament.

   In the 2012 draft Bill it is proposed that the investigatory powers reside with the *Public Procurement Commission*, a Standing Commission of Enquiry established to monitor the procurement process and deal with grievances arising out of the procurement process. This body too reports only to Parliament.

[1] Available at: http://www.finance.gov.tt/content/pub50.pdf

[2] Amendments suggested by the Private Sector/ Civil Society Group are shown italicized in bold red.

[3] Those suggested by the Legal Advisor to the JSC are shown italicized in bold blue.

This accords with best practice and addresses concerns expressed in the *Uff Commission of Enquiry*. In addition, the 2012 Bill follows a similar separation of the investigatory from the regulatory function that was proposed in the *1997 National Tenders Board Bill*.

It also reflects a feature of the relevant *Jamaican legislation* in which The Contractor General Act 1985 was amended in 1999 so as to provide the Contractor General with the power to investigate any Government contract or grant, or issue any prescribed licence, while leaving to the National Contracts Commission the largely regulatory role of the granting and implementation of Government contracts.

(b) In comparison with the White Paper and the 2006 draft Bill, this document provides for greater support for the proposed Procurement Regulator by *amplifying the role and composition of the National* Procurement *Advisory Council* and *establishing the organizational support of his Office* as a direct charge on the Consolidated Fund.

4) The text of our proposed draft Bill follows.

BILL FOR

AN ACT

PUBLIC **PROCUREMENT AND DISPOSAL OF PUBLIC PROPERTY BILL,** *2012*

EXPLANATORY NOTE

(These notes form no part of the Bill, but are intended only to indicate its general purport).

Background

The purpose of this Bill is to provide the legal and regulatory framework to implement the Policy on Procurement Reform as contained in the White Paper entitled "Reform of the Public Sector Procurement Regime" (the White Paper), tabled in Parliament on 26 September 2005.

The intent is to maximize economy and efficiency in public expenditure in the area of procurement in accordance with the principle of accountability, transparency and value for money thereby increasing public confidence in the quality of governance. It does so by prescribing the legal and regulatory framework recommended in the White Paper entitled "The Reform of the Public Sector Procurement Regime" which was tabled in Parliament on 26 September 2005 by the Government.

The Bill reflects the assumption that expenditure involving public money triggers a prime responsibility of the purchaser who uses public funds for a transaction to ensure that the people get value. The Bill does not inhibit the common law doctrines in relation to contract nor specify a rigid process. Rather, it establishes the overarching legal framework founded on principles of public law in which contractual rights will operate. It enables customizing and responsibility of the procurement process to reside with agencies while identifying key points in the procurement system to which all agencies must adhere. The relevant design and monitoring of the procurement system within the specified parameters of the principles of accountability, transparency and value for money is the function of an independent Procurement Regulator.

This Bill therefore heralds the Government's stated intention to strengthen the quality of governance by promoting these principles of good governance by systemic re-engineering of the public financial

management system. This Bill is thus one of a raft of relevant Bills for the re-engineering of the public financial management system.

Critical to the proposed new procurement regime is a clear understanding of the concept of 'public money'. This encompasses –

- ***all money received or receivable by an agency regardless of source;***
- ***all money received by a non-public body from an agency.***

The legal framework will embrace expenditure by an agency which is essentially organisation using public money for a public purpose –

- ***a public organization even if for a private purpose;***
- ***a private organization for a public purpose regardless of the source or type of funding if it can be identified that the State is ultimately liable.***

The test therefore is not the mode of the incorporation of the body but the ultimate financial responsibility of the State.

The Bill also addresses the recommendations of the report of the Commission of Enquiry into the Construction Sector chaired by Professor John Uff, published in March 2010 that, inter alia, specified the need for a clear dispute resolution system which, in this Bill, is the function of the Public Procurement Commission.

Brief Description of Bill

The crux of the ***Bill*** is the mandatory compliance with ***the Operating Principles, Objectives and*** Guidelines ***by all parties to transactions related to the procurement of property, services involving public money and the disposal of public property. The details of the procurement process will in general terms be dealt with in the Guidelines whilst the customized details in respect of an agency will be found in Agency Handbooks. All documents are to be publicly available.***

The responsibility for the effective operation of the overarching system will reside in an independent Procurement Regulator who directly accounts to Parliament while the accountability for the actual acquisition of property and services and the disposal of property acquired with public money will reside with the agencies.

The Bill requires that all parties to a transaction involving public money for the acquisition of property and services or the disposal of public property will need to ensure that their conduct, processes and documentation conform to;–

- ***Economy, efficiency and competition;***
- Ethics and fair dealing according to the highest standards of **probity** and professionalism;
- Promotion of national industry in a manner that conforms to the international obligations of Trinidad and Tobago; and
- ***Sustainable development taking into account the Social return on investment.***

The Operating Principles and the Objectives will inform the National Procurement Guidelines which, in turn, will inform the content of Handbooks for various categories of transaction which are to be prepared by the agency.

The Guidelines will be developed by the Procurement Regulator in consultation with the National Procurement Advisory Council. The Council will comprise a total of fourteen (14) persons including representatives of private sector organizations, of those organizations appointed by the President to represent civil society, and representatives from the public sector including the Ministry of Finance and the Tobago House of Assembly.

The Bill also provides for a Public Procurement Commission to treat with irregularities and complaints of non-compliance with the Operating Principles, Objectives and Guidelines. The members of the Commission are to be appointed by the President and are answerable to Parliament.

Apart from the accountability framework the Bill also prescribes penalties for non-compliance with the Operating Principles, Objectives and Guidelines: a fine of $500,000 and imprisonment for seven (7) years where no other sanction is prescribed. As these penalties indicate an indictable offence, the Bill ensures the applicability of the Proceeds of Crimes Act, 2000. This may be used by the State for the tracing of assets to reclaim public money in the event that there is a breach of the Act.

Where a transaction is found either by a court or by the Public Procurement Commission to be in breach of the Act it is prescribed to be illegal – the common law result of a contract in breach of public policy.

For the purpose of operational flexibility for the local conditions and to take into account the culture of an agency, the Bill enables the Chief Executives of agencies (which include ministries and departments, statutory bodies and their subsidiaries, state controlled enterprises and their subsidiaries) to issue

instructions to treat with the procuring procedures of their respective agencies. These Agency Instructions are to be complied with by all parties to a transaction so long as they do not breach the Operating Principles, Objectives and Guidelines and will include details of the authorized purchasing officers and purchasing responsibilities, including the quanta of their purchasing limits.

Apart from the Guidelines and the Agency Instructions of the Chief Executive, the relevant procedures in respect of the transaction to aid purchasers using public money will be provided in support documents as Handbooks. These may be developed by the Procurement Regulator as model Handbooks which can be customized by the agency. The Bill thus enables the internal procuring rules of a state owned enterprise to be incorporated into the Handbook for the respective agency. The Bill thus enables the incorporation of existing procedures into the proposed legal and regulatory framework. The Bill enables model Handbooks to be designed for different types of categories of transactions such as those pertaining to construction, consultancy services and Information Technology.

In addition to developing the mandatory Guidelines in consultation with the National Procurement Advisory Council, the Procurement Regulator will also have the function of –

- enabling agencies to explore alternative service delivery options;
- promoting flexible and accountable ***systems for procurement;***
- encouraging a streamlined Government purchasing framework;
- ***implementing a procurement system to foster*** small to medium enterprises;
- providing best practice advice on the conduct of procurement ***including promoting electronic transactions; and***
- ***auditing and reviewing the procurement system to ensure compliance with the Operating Principles and Objectives which will require generally the monitoring of award and implementation of transactions.***

The ***Procurement*** Regulator will also be required to prepare an Annual Report ***to be submitted*** directly to Parliament identifying ***inter alia:***

- the strengths and weaknesses of the procurement system and steps taken to rectify any weaknesses;
- the total value of contracts awarded by agencies so that Parliament can get an idea of the amount of

public money involved in procurement; and

- ***outcomes of investigations, and lessons learnt which are to be or have been fed back into the procurement system through amendment of the Guidelines.***

The Procurement Regulator will be supported by a statutory body to be known as the Office of the Procurement Regulator. The expenses of both offices are to be a charge on the Consolidated Fund.

The Public Procurement Commission has, with a direct reporting accountability to Parliament, the function of investigating breaches of the procurement system by parties to a transaction involving the expenditure of public money.

In so doing, it will have the powers of a Commission of Enquiry as if it were a Commission properly constituted under the Commissions of Enquiry Act, Chapter 19:01. The sanctions it may employ are, inter alia, to order a suspension of the contract pending the hearing in a court of law or to find the transaction to be in breach of the Operating Principles and Guidelines resulting in it being deemed illegal. It is noted that any decision it makes is subject to the Judicial Review Act, 2000.

However, persons bringing frivolous complaints to this body will be penalized.

Where parties comply with the Operating Principles, Objectives and Guidelines it is highly unlikely there will be much recourse to the Public Procurement Commission.

The Bill is in ***6*** Parts as follows:

PART I – PRELIMINARY

This Part deals with operational matters pertaining to the Bill.

The Bill is to commence on a date to be proclaimed. However, as the National Policy on procurement in the form of the White Paper was tabled in Parliament on 26 September 2005, this means that all agencies would have had to conform to the Operating Principles and Objectives in all their transactions from that date.

Clause 1

Therefore validates the duty by ensuring that the application of the Operating Principles and Objectives are deemed to apply from the date of the tabling of that Policy. This general duty is retrospective to 26 September 2005 – the date the Policy was tabled in Parliament. The provision entrenches the duty required of agencies

even prior to the passage of the Bill to conform to Government Policy.

Clause 2

Contains the definitions pertaining to the Bill.

Key definitions to note are –

"*agency*" – ***means a body incorporated or otherwise that uses public money.***

"*property*" – ***means real or personal property, or other tangible or intangible property including a right, interest, title, claim, chose in action, monetary or financial instrument, present or future, vested or contingent. This definition would encompass those matters that are the traditional focus of procurement such as goods works and services as well as intellectual property rights;***

"*public property*" means property that is acquired or is to be acquired by an agency, or is in the care, control or custody of an agency;

"*public money*" ***all money received by a public body, regardless of source;***
all money received by a non-public body from a public body.
The legal framework will embrace expenditure by a –

- ***public organization even if for a private purpose; a private organization for a public purpose regardless of the source or type of funding if it can be identified that the State is ultimately liable.***
- ***The test therefore is not the mode of the incorporation of the body but the ultimate financial responsibility of the State.***

"*procurement*" ***means the process of acquiring property and services commencing with the identification of the need for the acquisition and ending with the performance of the related contract. This definition conforms to current best practice;***

"public procurement" means procurement involving the use of public money; (this definition is designed to encompass BOLT (Build, Own, Lease, Transfer), BOOT (Build, Own, Operate, Transfer) and DFC (Design, Finance, Construct) schemes or other funding schemes for the provision of capital works which can be found to be ultimately to the benefit of the public);

"services" ***includes consultancy services, professional services, and any other activity which can be classified as services. This would encompass the provision of legal services, architectural services and maintenance services;***

"transaction" ***means any contract, agreement or arrangement for, or in relation to, public procurement or disposal of public property. This definition would encompass related negotiations.***

The nature of these definitions illustrates the ambit of the Act. ***The critical element in the triggering of the application of the law is the use of public money in a transaction, not the institutional corpus of the spender nor the purpose nor the classification of the process that can be classified as commercial or private in the context of that transaction.***

Clause 3

Provides that this Act will bind the State.

PART II – PROCUREMENT FRAMEWORK

This Part establishes the ***legal and*** regulatory framework which will apply to all parties to a procurement transaction to ensure that it conforms to the Operating Principles defined as ***Accountability, Transparency and Value for Money together with the Objectives of economy, being inter-alia efficiency, effectiveness, competition, ethics, and fair dealing. The promotion of national policy is also required to be addressed in any transaction. These requirements also apply to those involved in the disposal of public property.***

This Part also identifies the consequence of entering a transaction with an unauthorized purchaser.

Clause 4

States that the Operating Principles and Objectives apply to every transaction and requires that a person who is a party to a transaction conform to the Operating Principles of Accountability, Transparency and Value for Money. A person who is acting on behalf of an agency shall ensure the transaction reflects Value for Money. All parties to the transaction will also address the Objectives of economy, efficiency and competition, ethics and fair dealing according to the highest standards of probity and the provision of proceeds for national development such as the Fair Share Programme. All parties as of law are to ensure that the transaction conforms to the Guidelines.

Where there are no Guidelines in place, the operation of the Operating Principles and Objectives will be determined by current best practice.

Clause 5

Provides for the development of National Procurement Guidelines ('the Guidelines') by the Procurement Regulator in consultation with the National Procurement Advisory Council. These Guidelines are to be tabled in Parliament and are to be consistent with the Act, and essentially ensure the operation of best current procurement practice. It is expected that the Guidelines will, inter alia, address issues ranging from the format and content of Requests for Proposal to mechanisms of review of the whole procurement cycle, the publication of details in respect of the operation of best current practice in procurement which would encompass e-procurement, issues of conflict of interest, and emergency measures, to mention a few.

The Guidelines may also include direction of a tender process to apply to a specific transaction. The clause also requires the Procurement Regulator to consult with the private sector and civil society represented on the National Advisory Council which also has representatives of the public sector, when developing the Guidelines. The Guidelines are to be published in the Gazette and are a statutory instrument for the purposes of the Statutes Act.

Sample Procurement Guidelines are provided in the White Paper (Annex 1).

Clause 6

Enables the Procurement Regulator to develop generic Handbooks for categories of transactions as guidance material for agencies. These may supplement those developed by agencies. However, the prime responsibility for the development of handbooks lies with the Chief Executive. All Handbooks must conform to the Operating Principles, Objectives and Guidelines and must be published for public comment for a period of 30 days prior to implementation.

Clause 7

Enables the Chief Executive to issue Agency Instructions for the purpose of expediting transactions. Such Instructions must conform to the Act, Regulations and Guidelines and identify the authorized purchasers for the conduct of a transaction for or on behalf of an agency. An Agency Instruction that does not conform is void.

Clause 8

Provides that where there is a divergence from an Agency Instruction the Procurement Regulator needs to be accordingly advised, in writing with reasons.

Clause 9

Identifies the Chief Executive and any person in an agency so authorized by an Agency Instruction to have the lawful authority to enter a transaction. Where a person wrongly enters or represents himself as having authority to enter a transaction, he commits an offence. The clause also treats with the personal liability for damages of an authorized person where the transaction breaches the Act. A transaction that is entered into by a person without lawful authority is voidable at the instance of the agency.

The clause also provides that an authorized person is subject to the Integrity in Public Life Act, 2000. The clause requires publication of authorized persons and their spending limits.

The clause also provides that neither Cabinet nor a Minister shall be an authorized person.

Clause 10

Places the onus on suppliers to ensure that they are treating with persons who have the appropriate authority to enter a transaction. This is possible because of the requirement on agencies to publish details of authorized persons in clause 9.

The duty on suppliers to conform to the Operating Principles, Objectives and Guidelines is already provided for in clause 4. However, where in the course of an investigation, the Public Procurement Commission or, in the course of an action, a Court, finds that a supplier is recklessly dealing or has recklessly dealt with a non-authorized person, that supplier shall be prohibited, as of law, from entering into any future transaction with an agency for five years either personally or as an officeholder of a company. This means that if a supplier is dealing with a purchaser believing in good faith that the purchaser is an authorized purchaser and after exercising due diligence the purchaser is found to be an unauthorized purchaser the supplier will not be penalized. The same logic applies to transactions involving disposal of property particularly as it affects the would be beneficiary of that disposal.

PART III – PUBLIC PROCUREMENT COMMISSION

This Part enables an aggrieved person to complain, in the manner prescribed, to the Public Procurement Commission, to be appointed by the President and directly accountable to Parliament, that a transaction breaches the Operating Principles, Objectives and Guidelines. The Public Procurement Commission may, either on its own initiative or on the basis of a complaint, investigate any transaction so as to ensure conformity to the Operating Principles, Objectives and Guidelines. The Commission may, pending the

outcome of the investigation, suspend the process and employ mediation techniques in the course of the investigation. At the end of the investigation the Commission must advise all parties to the transaction of the outcome of the investigation and report accordingly to Parliament.

After investigating the complaint the Commission may confirm a decision as a consequence of mediation, direct a continuation of the suspension pending an appeal, find the transaction has been conducted by an unauthorized person, find that the transaction is contrary to public policy in that it breaches the Operating Principles, Objectives or Guidelines or find that the complaint is frivolous and vexatious.

The Part also enables the Commission to refer the matter to an appropriate authority for further dealing. All details of investigations will be reported to Parliament in the annual report. This does not preclude the Commission from submitting a special report with respect to a particular investigation.

Certain procedural issues are specified in the Act. In the event there is a gap in the powers of a Commission in respect of process, the Commissions of Enquiry Act can be availed of to fill the gaps.

Clause 11

Establishes a Public Procurement Commission for the purpose of investigating complaints. This clause provides for the appointment of members of a Public Procurement Commission to be appointed by the President in the exercise of his discretion after consultation with the Prime Minister and the Leader of the Opposition. The persons to be appointed as members of the Commission are to have qualifications in law, finance or engineering.

Clause 12

Adumbrates the functions and powers of the Public Procurement Commission to investigate transactions and resolve complaints. The Commission is to have the powers of a Commission of Enquiry as if it were constituted under the Commissions of Enquiry Act (Chap. 19:01) and also operates as a mediator in respect of resolving a complaint as if appointed as such under the Mediation Act (Chapter 5:32).

The Act specifically mandates the Commission to expedite issues before it in a timely fashion so as to minimize negative economic impact.

Clause 13

Details some operational matters of the Commission viz that it is not to be subject to the direction or control of any person for its functions but is directly accountable to Parliament. Where a transaction under enquiry exceeds TT50 Million, no less than three members of the commission shall hear the matter.

Clause 14

Enables a person who has a complaint that a transaction does not comply with the Act to complain to the Commission. The Commission may also on its own initiative institute the process as regards complaints.

Clause 15

Specifies the procedure of the Commission when investigating a complaint.

Clause 16

Treats with the powers of obtaining of material pertinent to the investigation by the Commission.

The Commission or a person authorized by it in writing will be able to access documents or property in the course of an investigation. An entry on private property (i.e. not belonging to an agency) can only be effected with the consent of the owner or occupier. Where that consent is not forthcoming, the Commission or person authorized by it to do the investigation shall obtain a warrant to do so. Copies of books, records or documents including those in digital format are also to be made available to the Commission.

Clause 17

Provides for the Commission to summon certain persons to give evidence as a witness.

Clause 18

Enables the Commission at the expiry of an enquiry to confirm a decision as a consequence of mediation, direct a continuation of a suspension pending an appeal to the Court or find that the transaction is contrary to Operating Principles, Objectives and Guidelines. The Commission may also refer the matter to an appropriate authority for further action.

This clause also provides for a mandatory report to Parliament on the outcome of any investigation.

Clause 19

Statutorily declares a transaction to be illegal once it is found as a fact to be in breach of the Operating Principles, Objectives and Guidelines by the Commission. This clause also protects the rights of innocent third parties to a transaction so declared.

Clause 20

Enables the Commission to surcharge a complainant for costs if the complaint is frivolous or vexatious.

Clause 21

Enables the Commission to make a special report to Parliament in the event that it finds that an officer of an agency is in breach of his duty, commits misconduct or a criminal offence, which report it further refers to the appropriate agency for further action.

Clause 22

Protects proceedings from being voided for want of form.

PART *IV* – THE *PROCUREMENT* REGULATOR

This Part treats with the appointment of a Procurement Regulator. The functions and powers together with operational and institutional matters pertinent to the Procurement Regulator such as the provision of staff and other resources by way of the establishment of the Office of the Procurement Regulator are treated with as well. The Part also provides for an audit of this agency by the Auditor General.

Clause 23

Provides for the establishment of the office of the Procurement Regulator who is to be appointed by the President in the exercise of his own discretion for a contract of five (5) years or more but not exceeding seven (7) years.

The President chooses from the recommendations made by Parliament which considers the list of names submitted to Parliament by a Joint Select Committee specifically established to recruit the Procurement Regulator.

This clause also provides for the removal of the officeholder in the event that he is infirm of mind or body, or misbehaves. The President may also appoint a person to act and such person has the power to finish what the Procurement Regulator commenced before he went on leave or other temporary absence. The provisions of the Integrity in Public Life Act, 2000 apply to the office holder.

Clause 24

Establishes the Office of the Procurement Regulator to comprise the staff and support for the Procurement Regulator. The costs incurred for the performance of that Office shall be a direct charge on the Consolidated Fund.

Clause 25

Prescribes the functions of the ***Procurement*** Regulator. ***The prime function is to ensure an effective, efficient and relevant procurement system that conforms to the Operating Principles, Objectives and Guidelines. The Procurement Regulator is required therefore to develop, implement and review Guidelines in consultation with the National Procurement Advisory Council for the implementation of the Operating Principles and Objectives. This provides for inputs from industry and service providers. The functions of the Procurement Regulator also include, inter alia, establishing a comprehensive database with information on procurement opportunities, processes, contract awards and prices, the promotion of public understanding of procurement, the fostering of improvements with the use of technology including e-commerce, the receipt of complaints and reporting to Parliament.***

This clause states that in the exercise of his functions the Procurement Regulator is not subject to the direction or control of any person. In this regard his independence of office is analogous to that of the Auditor General.

Clause 26

Provides that the cost and related expenses of the Procurement Regulator is a direct charge on the Consolidated Fund.

Clause 27

Provides for the Auditor General to audit the Procurement Regulator and the Office of the Procurement Regulator annually.

Clause 28

Requires the ***Procurement*** Regulator similar to the Auditor General, to report at least annually to Parliament ***but no later than forty (40) days after the expiry of the financial year.*** The Report is required to inform Parliament of the total figure of contracts awarded ***involving public money and cost overruns by agencies, details of transactions involved in a project including the beneficiaries of the transaction and the value of those transactions to the State,*** outcomes of investigation including lessons learnt, ***details of changes to the Guidelines to implement best practice and recommendations including those of the National Procurement Advisory Council.***

The Report does not need to include details of contracts of value less than $50,000 or contracts for the settlement of a legal liability. The Speaker is to table the Report within 28 days of receipt.

PART *V* – NATIONAL PROCUREMENT ADVISORY COUNCIL

This Part identifies the membership and functions of the National Procurement Advisory Council which essentially, as a consultative body, provides inputs into the design and content of the Guidelines so as to ensure relevance.

Clause 29

Establishes the National Procurement Advisory Council in a manner so as to avoid allegations of executive manipulation of the membership. The membership of the National Procurement Advisory Council, in conformity with the Policy, will comprise ***fourteen (14) persons being the*** nominees of three civil society organizations which are publicly acknowledged as having a concern for good governance, five organizations representing the construction, manufacturing and retail sectors of Trinidad and Tobago, two representing labour and professional organisations, ***a nominee representing the State Owned Enterprises, a nominee of*** the Tobago House of Assembly, an *ex officio* member from the Ministry of Finance ***and the Chief State Solicitor***.

The nominating organizations are to be selected by the President in his own discretion after taking into account the record of those organizations in serving the public interest. ***The Procurement Regulator is to advise the public of the successful nominees by notice in the Gazette and a major circulating daily newspaper. Nominees will hold their positions for a term of 3 years***

Operational matters for the Council are specified in the Second Schedule.

The Council is to present an annual report to the Procurement Regulator who includes that report in his own report to Parliament.

Clause 30

Provides that the function of the Council is to consider the effectiveness and efficiency of the procurement system and to make recommendation to the ***Procurement*** Regulator in the development of the Guidelines and Handbooks so as to ensure conformity with the Operating Principles, ***Objectives and Guidelines***. The Council, ***when so doing,*** is to canvass the views of the national community as widely as possible. ***The Council may also co-opt representatives of agencies to assist in its function but such persons will not have a vote.***

Clause 31

Requires the Procurement Regulator to provide secretariat services to the Council.

PART *VI* – MISCELLANEOUS

This Part deals with matters that enhance effective implementation of the Act including protection from liability, statutory obligations of reporting by agencies, offences, repeal of the Central Tenders Board Ordinance, 1961 and transitional arrangements. To ensure there is consistency in the definition in respect of expenditure of public money, the Exchequer and Audit Act has been consequently amended.

Clause 32

Protects a member of the Commission, from liability.

Clause 33

Provides for privilege of information, in the course of investigation as if in a court of law and protection from defamation proceedings.

Clause 34

Provides that a request made under this clause is to be treated as if, it were made under the Freedom of Information Act 1999. It is to be noted that, as some agencies affected are currently outside the jurisdiction of the Freedom of Information Act, 1999, there is need for this provision. The section also provides that the failure to disclose on the grounds of confidentiality cannot encompass mere embarrassment that such disclosure would afford. The section is to apply notwithstanding any other law.

Clause 35

Requires that the person authorized to enter a transaction, publish specified details of the award of a contract, or any variation and other relevant details contemporaneously with the making of the award. This provision not only conforms to current best practice but also ensures transparency.

Clause 36

Guarantees legal remedies under the Judicial Review Act, 2000 to be available to any decision made in the course of procurement.

Clause 37

Requires ***a person who has a reasonable belief that, collusion between all or any of the parties, or any breach of the Act has occurred, as a matter of law, to report accordingly to the Procurement Regulator or the Public***

Procurement Commission. The Procurement Regulator will be required to refer that report to the Public Procurement Commission and report accordingly to Parliament. This promotes transparency.

Clause 38

Treats with offences: It provides that a person who fails to comply with the Act commits an offence.

This clause also makes it an offence to hold assets that are prima-facie disproportionate to emoluments one can be expected to receive as an officer, without justification. The word "disproportionate" in subsection (3) conveys the idea that the acquisition of the total value of the assets under the control of a person who was an officer of the agency could not reasonably have been afforded by the person at that date given total emoluments provided.

Clause 39

Provides a general penalty for an offence under the Act to be a fine of $500,000 and 7 years imprisonment. In addition an offence under this Act is deemed a "specified offence" for the purpose of the Proceeds of Crime Act, 2000 thereby attracting the capacity of the State to trace public funds.

Clause 40

This clause protects a 'whistleblower' from being demoted, harassed or otherwise discriminated against because of his report made under Clause 39.

It will also be an offence to discharge, suspend, demote or otherwise negatively treat a person simply because they have reported a breach of the Act to the Procurement Regulator.

Clause 41

Prescribes a Parliamentary majority of 2/3 in the event of future amendment of sections 4 to 10 of the Act. This entrenches the framework and acknowledges that the flexibility of process to ensure competitiveness will be through the subordinate instruments such as the Guidelines and Handbooks. Parliament, by this provision, is entrenching the provisions of this Act particularly in the future event that a disaffected executive with a simple Parliamentary majority would want to change the framework.

Clause 42

Prescribes the regulation making power to reside with the President.

Clause 43

Validates, to the extent of their validity, transactions entered into by those agencies that fall outside the ambit of the Central Tenders Board where those transactions conform to the agency's internal tendering rules and the Operating Principles, Objectives and Guidelines as of 26 September, 2005, the date of the tabling of the Policy in Parliament.

Clause 44

Repeals the Central Tenders Board Ordinance, 1961 and validates any transaction entered into or in force under the authority of the Central Tenders Board on behalf of an agency at the commencement of this Act as validly conducted by an agency under this Act.

The section also provides that a reference to the Central Tenders Board Ordinance 1961 or the Director of Contracts in any legislation shall be construed as reference to this Act or the Procurement Regulator as the context demands.

The section also provides for the continuation of the Central Tenders Board Regulations, 1965 Regulations and the Central Tenders Board (Defence Force and Protective Services (No. 2) Order 1992), pending the formulation of in-house tender procedures by an agency, and the Guidelines, notwithstanding the repeal of the principal legislation pending the implementation of the Guidelines.

Clause 45

Provides for, the consequential amendments to the Exchequer and Audit Act which include revised definitions of "public money", "revenue" and "statutory body" so as to harmonize public expenditure on the acquisition of property and services with provision in the Exchequer and Audit Act.

First Schedule

Specifies the framework for the establishment of Procurement Guidelines.

Second Schedule

Provides for the administration and terms and conditions of members of the Public Procurement Commission.

Third Schedule

Provides for the operation of the National Procurement Advisory Council including the quorum requirement resignation of an officer, termination of appointment and remuneration of members.

PUBLIC PROCUREMENT AND DISPOSAL OF PUBLIC PROPERTY BILL, *2010*

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BILL

AN ACT to promote the public interest by prescribing the principles of ***good governance, namely*** accountability, transparency and value for money ***in public procurement according to the objectives of economy, efficiency and competition; these principles and objectives are also to apply to the disposal of public property; the establishment of the Public Procurement Commission, to be directly accountable to Parliament, to investigate irregularities and resolve complaints arising out of the procurement system;*** the establishment of the Procurement Regulator, to be directly accountable to Parliament for the effective monitoring of the system of public procurement ***and to be supported by a statutory body called the Office of the Procurement Regulator, and to be supported by the national community through the National Procurement Advisory Council,*** and related matters.

Enactment

Enacted by the Parliament of Trinidad and Tobago as follows:

PART I – PRELIMINARY

Short title and commencement

1. (1) This Act may be cited as the Public Procurement and Disposal of Public Property Act, 2012.

(2) Subject to subsection (3), this Act shall come into effect on a date to be fixed by the President, by Proclamation.

(3) Section 4 (1), 4(2) (a) and (b) and 4(3) shall be deemed to have come into operation on 26 September, 2005.

Interpretation

2. In this Act -

"agency" means -

(a) a ministry or department of government;

(b) a corporate body ***that is established for a public purpose;***

(c) ***any other body that is involved in public procurement***;

(d) a person as prescribed for the purposes of this definition;

"Agency Instruction" means an instruction issued in accordance with section ***7***;

"appropriate authority" means -

(a) the Auditor General;

(b) the relevant Service Commission;

(c) the Commissioner of Police;

(d) the Director of Public Prosecutions;

(e) an authority as prescribed;

"authorized person" means a person referred to in section 9;

"Chief Executive" means a person who **is the accounting officer of an agency;**

"Commission" means the Public Procurement Commission established by section 11 and a 'member of the Commission' has the corresponding meaning;

"Constitution" means the Constitution of the Republic of Trinidad and Tobago;

"Council" means the National Procurement Advisory Council established in accordance with section ***29***;

"disposal of public property" includes the transfer without ***consideration by way of sale or lease, a concession, a licence, or other alienation, of public property;***

"Guidelines" means the National Procurement Guidelines referred to in section 5;

" Handbook" means the handbooks referred to in clause 6

"**Intellectual Property**" ***as reflected in the Copyright Act of 1997***

"Objectives" means the objectives specified in section 4(2) (b);

"Office of the Procurement Regulator" means the body established by section 24;

"Operating Principles" means the principles of accountability, transparency and value for money;

"procurement" means the process of acquiring property or services commencing with the identification of the need of the property or services and ending with the performance of the related contract***s***;

"Procurement Regulator: means the person performing the duties of, or occupying, the office of the Procurement Regulator as established by section ***23***;

"property" means real or personal property or other tangible or intangible property including a right, interest, intellectual property, title, claim, chose in action, monetary or financial instrument, whether present or future or vested or contingent;

"public money" means money that is:-

(a) received or receivable by ***the State, a statutory body or a state controlled enterprise***;

(b) raised by an instrument from which it can be reasonably inferred that the State accepts ultimate liability in the case of default;

(c) spent or committed for future expenditure, by the State, a statutory body or a state controlled enterprise***;***

(d) distributed by the State, a statutory body or a state controlled enterprise ***to a person; or***

(e) raised by a private body in accordance with a statutory instrument, for a public purpose;

"public procurement" means procurement involving the use of public money;

"public property" means property acquired, or in the process of being acquired, by an agency or in the care, control or custody of an agency whether as a trustee or not;

"services" ***includes*** consultancies, professional services***, management services*** and ***related*** activities;

"State controlled enterprise" means a company that is registered under the Companies Act - Chapter 81:01

(a) for a public purpose; or

(b) where the government or any person controlled by the government is entitled to exercise control directly or indirectly over the affairs of the company;

"statutory body" means -

(a) the Tobago House of Assembly as established by section 141A of the Constitution;

(b) a board, commission, body **or body corporate established by an act other than that regulating the conduct of professional occupations;** or

"supplier" includes ***a contractor or a consultant*****;**

"transaction" means any contract, agreement, licence or arrangement for or in relation to -

(a) public procurement;

(b) the use of public property by an agency; or

(c) the disposal of public property.

"value analysis" means an analysis of the functions of a programme, project, system, product, items of equipment, building, facility, service or supply by a person, directed at improving performance, reliability, quality, safety and life-cycle.

(2) For the purpose of this act "procurement "does not include:-

- ***a) Grants (with in the form of a contract or conditional gift)***
- ***b) Investment or divestment***
- ***c) Sales by tender***
- ***d) Loans***
- ***e) Purchases of property or services used in the production of goods for resale***

f) Any property right not acquired through the expenditure of Public money- for example, a right to pursue a legal claim for negligence;
g) Statutory appointments;
h) appointments made by a Minister using the executive power) – for example, the appointment of a person to an advisory board: or
i) (engagement of employees in the public service) on contract or the appointment of public officers in the public service".

Act to bind the State

3. This Act binds the State.

PART II - PROCUREMENT FRAMEWORK

Application of ***Principles and Objectives***

4. ***(1) The Operating Principles of Accountability, Transparency and Value Value for Money, together with the Objectives of Public Procurement which are:***

(a) economy, efficiency and competition;

(b) ethics and fair dealing according to the highest standards of probity and professionalism;

(c) the promotion of national industry effecting sustainable development, poverty alleviation and environmental management;

(d) a social return on investment shall apply to every transaction.

(2) A person who is a party or seeks to be a party to a transaction shall ensure that the transaction-

(a) conforms to the Operating Principles specified in sub-section 1;

(b) addresses the Objectives specified in sub-section 1; and

(c) conforms to the Guidelines and where no Guidelines are in place, to current best practice.

(3) A person who fails to comply with subsection (2) and (3) commits an offence.

Guidelines

5. (1) The Procurement Regulator shall develop ***the National Procurement*** Guidelines **taking into account the First Schedule -**

(a) for the implementation and monitoring of the Operating Principles and Objectives in their application to a transaction ***and the system of public procurement;***

(b) ***for*** the publication of details in respect of a transaction;

(c) to treat with matters for, ***and*** in relation to a transaction;

(d) to ensure ***best practices in public procurement in every matter in relation to-***

(i) identification of needs;
(ii) feasibility study;
(iii) value analysis.

(e) ***handling of complaints by Agencies in respect of*** **a transaction** ***estimated below the thresholds specified in the Guidelines.***

(2) The Guidelines may address the following:

(a) general rules relating to procurement including those with respect to -

(i) the format and content of requests for proposals;

(ii) the means of improving the process of competitive tendering and contracting;

(iii) the system of using bonded ***or preferred*** suppliers;

(iv) the preference, according to Government policy, for local suppliers and small business in procurement;

(v) ***the principle of*** open and effective competition including public notification of opportunities and evaluation criteria to be used in the bid process;

(vi) advertising rules and time limits;

(vii) participation and qualification ***of interested parties to a transaction;***

(viii) the tender documentation and technical specifications;

(ix) the tender evaluation and award criteria;

(x) the reporting ***and monitoring*** requirements;

(xi) conflict of interest;

(xii) measures in times of emergency;

(xiii) whole of government procurement contracts;

(xiv) select tendering or direct sourcing as a means of procurement;

(xv) dealing with complaints at the agency level

(b) ***the procurement indispensable for national security or national defence purposes;***

(c) public consultation on major contracts;

(d) the use of a joint undertaking by all parties to a transaction to comply with an agreed code of ethics with sanctions;

(e) the consideration of government policies in public procurement;

(f) an independent review process ***to include civil society at critical points of the system of public procurement;***

(g) reporting requirements of agencies;

(h) monitoring of the performance of the contract;

(i) the relationship of the Handbooks to the Guidelines;

(j) general rules on disposal of public property including those with respect to disposal of unserviceable, surplus or obsolete public property and sale or lease of real property in the care, control or custody, of an agency;

(k) ***Parliamentary approval of Government to Government contracts involving the use of public money; and***

(l) ***any other matters as are prescribed***.

(3) The Procurement Regulator, when developing the Guidelines, shall consult with the Council.

(4) The Guidelines –

(a) shall be consistent with this Act;

(b) may adopt or adapt any published **international** standard **in accordance with best procurement practice;**

(c) shall specify exemptions in certain restricted circumstances ***that are not inconsistent with the public interest;***

(d) ***shall be public and easily available***.

(5) The Procurement Regulator shall submit the Guidelines ***directly to Parliament to be tabled no later than ten (10) sitting days of receipt by Parliament.***

(6) ***The Guidelines*** shall be subject to negative resolution of Parliament.

(7) The Procurement Regulator shall publish the Guidelines in the Gazette.

Chapter 3:20

8) The Guidelines, once published, are a statutory instrument for the purpose of the statutes Act.

9) A party to a transaction who fails to comply with the Guidelines commits an offence.

Handbook as guidance material to supplement Guidelines

6. (1) The Procurement Regulator may develop Handbooks ***or other material*** to serve as detailed guides ***for the process to be followed in respect of specified categories*** of transactions.

(2) The Chief Executive shall cause a Handbook to be published in respect of the procedures to be followed by his agency in respect of procurement and disposal of public property.

(3) A Handbook, whether produced by the Procurement Regulator or an agency shall conform to the Operating Principles, Objectives and Guidelines.

(4) A Handbook shall be published for public comment for 30 days before it becomes operational.

Chief Executive to issue Agency Instructions to supplement Guidelines

7. (1) The Chief Executive may issue, in writing, an internal administrative direction for the purpose of expediting a transaction ***to be known as an Agency Instruction***.

(2) The Chief Executive shall forward a copy of the Agency Instruction to the Procurement Regulator before its date of operation.

(3) An Agency Instruction shall-

(a) conform to the Act, Regulations and Guidelines and take into account any guidance material such as Handbooks issued by the Procurement Regulator so that the practices of the agency relating to procurement and disposal of public property conform to the Operating Principles, Objectives and Guideline; and

(b) authorize a person to enter into a transaction for, or on behalf of, the agency.

(4) An Agency Instruction that fails to conform ***to*** the Act, Regulations or Guidelines is void.

Report of ***actions*** inconsistent with Agency Instruction

8. A person being an officer or employee of an agency who is a party to a transaction and makes a decision that is inconsistent with an Agency Instruction shall make a written record for the Procurement Regulator of the reasons of the decision for so acting.

Authorized person for the purpose of

9. (1) A Chief Executive, ***or a person authorized in accordance with an Agency Instruction,*** has the authority to ***execute*** a transaction or enter a ***related negotiation*** for or on behalf of the agency which he serves.

transaction

(2) The Chief Executive may authorize, by an Agency Instruction, a person to enter a transaction or related negotiation for or on behalf of an agency.

(3) The Chief Executive shall cause the names and positions of the persons authorized under subsection (2) and the extent of their capacity to treat, to be published.

(4) A ***transaction*** that is entered into by a ***person*** without lawful authority is void***able*** at the instance of the agency.

(5) A person authorized to act for or on behalf of an agency may be personally liable for the damages incurred by the agency as a consequence of entering a transaction in breach of the Operating Principles, Objectives and Guidelines.

(6) An authorized person under subsections (1) and (2) is deemed to be "a person in public life" for the purposes of the Integrity in Public Life Act, 2000.

(7) A person who wrongly represents himself as a person authorized to enter a transaction commits an offence.

(8) Neither Cabinet, a Minister of Government nor a person directly instructed by either, is authorized to enter a transaction.

Supplier not to enter transaction unless with a authorized purchaser

10. (1) A person who is, or intends to be, a supplier ***shall ensure that the person with whom he is entering into a transaction or related negotiations is an authorized person.***

(2) A ***supplier*** who is found either by the Procurement Regulator, ***the Public Procurement Commission*** or the Court to have ***recklessly*** entered, or be entering, a transaction with ***an unauthorized person*** shall be prohibited from entering any future transaction with any agency for a period ***of*** five years either in

a personal capacity or in respect of any corporate body ***of which that person is a corporate office holder***, in addition to any other penalty.

PART III - PUBLIC PROCUREMENT COMMISSION

Establishment of the Public Procurement Commission

11. (11) For the purposes of this Act there is hereby constituted as a standing commission of enquiry a body to be known as the Public Procurement Commission which shall be directly accountable to Parliament.

(2) The membership of the Commission shall comprise a full time Chairman, 4 full time Commissioners and 4 part-time Commissioners being persons with a minimum of experience of 10 years in the disciplines of law, accounting and engineering and such other disciplines as the President sees fit, to be appointed by the President in the exercise of his discretion after consultation with the Prime Minister and the Leader of the Opposition;

(3) The Chairman of the Commission shall be a retired judge;

(4) The terms and conditions of the members of the Commission and other matters pertaining to the operation of the Commission are prescribed in the Second Schedule.

(5) The costs incurred for, and in relation to, the performance of the functions of the Commission shall be a direct charge on the Consolidated Fund.

Functions and powers of the Commission

12. (1) The function of the Commission is to investigate and resolve a complaint arising out of public procurement that cannot be resolved by the by the agency in accordance with the Guidelines, whether the complaint is submitted by an aggrieved party or the Commission is acting on its own initiative.

(2) In the exercise of its functions the Commission shall expedite issues before it in a timely fashion and take such other steps so as to minimize negative economic impact arising out of the performance of its functions.

(3) Subject to the Act, the Commission is deemed to be a commission

Chapter 19:01 ***for the purposes of the Commissions of Enquiry Act and a member of the Commission shall have all the powers of a Commissioner appointed under that Act.***

Chap. 5:32 ***(4) The Commission may conduct a mediation in accordance with the Mediation Act.***

Matters pertaining To the performance of the Commission

***13. (1) Where a transaction arises out of a development project, social or* otherwise, valued in excess of $50 million which is the *subject of investigation by the Commission, no less than three (3) of the members of the* Commission shall hear the matter**

(2) The Commission shall not be subject to the direction or control of any other person or authority in the performance of its functions but is directly accountable to Parliament.

(3) Nothing in subsection (2) shall be construed as preventing the Minister with the responsibility for such aspects of the administration of this Act to make such arrangements as are necessary or desirable to facilitate liaison between Parliament and ***the Commission.***

(4) The Commission upon hearing the parties to a transaction may direct the suspension of the procurement process pertaining to a transaction pending the outcome of an investigation and in so doing shall provide reasons.

(5) The Commission may employ alternative dispute resolution and other mediation techniques in the course of investigating and resolving a complaint.

(6) Subject to sections ***14, 15, 16 and 17, the Commission*** may regulate its own procedure and confer powers and impose duties on any officer of an agency.

(7) ***The Commission*** shall, no later than 10 working days following the expiry of the investigation, advise the parties to the transaction of the outcome of the investigation and report accordingly to Parliament.

Instituting process to treat with a complaint

14. (1) ***Subject to the Guidelines a*** person who has a complaint that a transaction to which this Act applies is in breach of the Operating Principles and Objectives or the Guidelines, may complain to ***the Commission*** in writing.

(2) The Commission may on its own initiative, or shall as a result of a complaint made under subsection (1), investigate a matter relating to a transaction so as to ensure the integrity of the process applied in the transaction and the application of the Operating Principles, Objectives and Guidelines.

(3) The Commission may offer mediation to the parties to a complaint in the first instance.

Procedure of Commission

15. (1) For the purposes of an investigation under this Act, the Commission shall inform itself in such manner as it sees fit.

(2) For the purpose of an investigation under this Act, the Commission may-

(a) by notice in writing, require an agency or any officer or employee of that agency to furnish information that may assist the investigation into a transaction in such manner and at such times as may be specified by the ***Commission***;

(b**)** by notice in writing require any person to provide information, data or reports for or in relation to, a transaction as may be in the possession or under the control of that person.

(3) The Commission may summon before it and examine on oath -

(a) ***any person who has made representations to it; or***

(b) ***any officer, member or employee of a public body or any other person who, in the opinion of the Commission is able to furnish information relating to the investigation.***

(4) No person shall, for the purpose of an investigation, be compelled to give any evidence or produce any document or thing which he could not be compelled to give or produce in proceedings in any court of law.

Access to property of an agency

16. (1) For the purpose of an investigation under this Act the ***Commission or a*** person authorized by it in writing for that purpose shall have the power to –

(a) access books, records, documents, stores or other property belonging to an agency whether in the possession of an official or any other person, and make copies accordingly;

(b) enter premises or a location under the care, control or custody of an agency where the Commission has reason to believe that the books, records, documents or other property pertinent to the investigation may be found;

(c) enter premises occupied by any person in order to make such enquiries or to inspect a document, record or property that he considers necessary to any matter being investigated by him.

(2) The Commission or a person authorized by it in writing for that purpose shall only enter premises, other than those belonging to an agency with the consent of the occupier or owner, and where that consent is not forthcoming, may enter after having obtained a warrant to so do.

(3) A person, where so directed by the Commission or a person authorized in writing, shall make available copies of books, records or documents including those in digital format as required.

Witness on oath

17. The Commission may summon before it and examine on oath -

(a) any person who has made representations to it; or

(b) any officer, member or employee of an agency or any other person who, in the opinion of the Commissioner is able to furnish information relating to the investigation.

Outcome of Investigation

18. (1) Upon the completion of the investigation the Commission may –

(a) confirm a decision that is satisfactory to all and in compliance with this Act as a result of mediation or arbitration;

(b) direct a continuation of the suspension made under section 13(5) pending an appeal to the Court by the parties;

(c) find that a transaction has been conducted by an unauthorized purchaser;

(d) find the transaction is contrary to the Operating Principles, Objectives or Guidelines;

(e) find the complaint to be frivolous and vexatious.

(2) The Commission in addition to the powers in subsection (1) may refer the matter to an appropriate authority for further action.

(3) The Commission shall present a report to Parliament on the outcome of any investigation on any matter pertaining to public procurement or disposal of public property.

(4) After conducting an investigation under this Act, a Commission shall, in writing, inform the Chief Executive of the agency concerned and the Minister having responsibility of that agency the result of that investigation and make such recommendations as he considers necessary in respect of the matter which was investigated.

(5) Where a report of the Commission reflects adversely upon any person the Commission shall, so far as practicable, inform that person of the substance of the report.

Illegal transaction

19. (1) Where, as a consequence of an investigation by ***the Commission,*** the party to a transaction is found by the ***Commission to be*** in breach of an Operating Principle, Objective***s*** or Guideline***s***, the transaction shall be deemed to be ***void.***

(2) The deeming of a transaction to be void shall not preclude the enforcement of remedies by an innocent third party against a party to that transaction.

Surcharge for frivolous complaint

20. The Commission may surcharge a person instituting a complainant for costs where the complaint is found by the Commission to be frivolous or vexatious.

Special Report

21. If a Commission finds, during the course of its investigations or on the conclusion of a hearing that there is evidence of a breach of duty, misconduct or a criminal offence on the part of an officer or member of an agency, it shall refer the matter to the person competent to take disciplinary or other proceedings as may be appropriate against that officer or member, and in all such cases shall submit a special report to Parliament.

Proceedings not to be voided for want of form

22. The proceedings of a Commission shall not be rendered void for want of form.

PART *IV* – THE PROCUREMENT REGULATOR

Appointment of the Procurement Regulator ***by the President***

23. (1) Subject to sub-section 2, 3 and 4 the President acting in his own deliberate discretion shall appoint a person to the office of Procurement Regulator after taking into consideration the advice of Parliament.

(2) A person who is an eligible candidate according to the qualifications as advertised by Parliament for the office of Procurement Regulator shall submit his application to a Joint Select Committee appointed by Parliament for the purpose of recruiting the Procurement Regulator.

(3) The Joint Select Committee shall conduct public hearings to consider eligible candidates for appointment to the office of Procurement Regulator and submit a list of names to Parliament.

(4) Parliament shall consider the list of the names submitted by the Joint Select Committee and together with its recommendations submit a list of names to the President.

(5) The terms and conditions in respect of the office of the Procurement Regulator including remuneration, gratuity and pension benefits shall be as determined by the President on the advice of the Joint Select Committee.

(6) The Procurement Regulator is deemed to be "a person in public life" for the purpose of the Integrity in Public Life Act 2000 and is directly accountable to Parliament for the performance of his functions and powers.

(7) The Procurement Regulator shall be appointed on a contract for a term of not less than five (5) years but no more than seven (7) years on terms as determined by the President in the exercise of his own discretion and is eligible for re-appointment for one more consecutive term only.

(8) The President may terminate the appointment of the Procurement Regulator where that person -

(a) becomes of unsound mind or is incapable of carrying out the duties of the Procurement Regulator;

(b) has been declared bankrupt;

(c) is convicted of an offence which brings the office into disrepute;

(d) is guilty of misconduct in relation to the functions, powers and duties of the Procurement Regulator;

(e) is absent from three consecutive meetings of the Council except on leave granted by the President;

(h) fails materially or wilfully to carry out of the duties or functions as required of the Procurement Regulator under this Act.

(9) Where the Procurement Regulator is unable to act by reason of illness or other cause, the President may appoint a person to act in his stead and the person so appointed may complete any unfinished business commenced by the Procurement Regulator.

Establishment of the Office of Procurement

24. (1) There shall be established by this Act a statutory authority, headed by the Procurement Regulator, to be ***known as the Office of the Procurement Regulator, to provide support to the Procurement Regulator in the performance of his functions and powers.***

(2) The Parliament shall provide the Office of the Procurement Regulator with adequate human, financial and capital resources, for and in relation to the efficient and effective operation of the functions and powers of the Procurement Regulator, including staffing, training and technical support.

(3) The parliament shall provide for the costs and expenses to be incurred in the operations of the Office of the Procurement Regulator to be a direct charge on the Consolidated Fund.

Functions and Powers of the Procurement Regulator

25. (1) The Procurement Regulator shall have the power to do anything necessary or convenient for performing his functions under this Act, including the power to enter ***into*** contracts, hire consultants or purchase or lease real ***property***.

(1) Without limiting the generality of sub-section (1) the Procurement Regulator shall have the power to engage such staff on contract according to terms and conditions as he sees fit and enter such contracts as he deems necessary for the purpose of his functions.

(3) The Procurement Regulator has the function of –

(a) promoting a flexible and responsible system for procurement;

(b) developing a streamlined public procurement framework;

(c) enabling agencies to explore alternative service delivery options ***within the context of the Operating Principles, Objectives and Guidelines;***

(d) providing 'best practice' advice in the conduct of procurement including the promotion of electronic transactions;

(e) implementing a procurement system to foster small and medium enterprises;

(f) auditing and reviewing the systems of procurement to ensure compliance with the Operating Principles and Objectives.

(g) monitoring the award and implementation of transactions to ensure compliance with the Operating Principles, Objectives and Guidelines;

(h) liaising with the Public Procurement Commission with respect to its powers so as to advise and guide parties to a transaction and the public of current best practice.

(4) Without limiting the generality of the foregoing, the Procurement Regulator may-

(a) harmonize policies, systems and practices of agencies **taking into account costs reduction strategies** in relation to public procurement and disposal of public property;

(b) ***review*** procurement ***practices and delivery systems annually to identify best practices***;

(c) establish a comprehensive database with information on procurement processes, contract awards and prices and any other information of public interest as the Procurement Regulator determines:

(d) determine, develop, introduce, maintain and update related system-wide data-bases and technology;

(e) maintain a Register of Suppliers ***in respect of classes of transactions;***

(f) adopt, adapt and update common specifications, standards and other whole-of-government arrangements for mandatory compliance;

(g) promote public understanding of procurement and related processes;

(h) in consultation with competent authorities set training standards, competence levels, and certification requirements to promote best practices in procurement;

(i) prepare, update and issue authorized versions of Handbooks incorporating standardized bidding documents, procedural forms and attendant documents for use by agencies in public procurement and disposal of public property;

(j) ensure that any deviation by agency from the use of the Handbooks, standardized bidding documents, procedural forms, any other attendant documents and standardized contracts, accord with the Operating Principles, Objectives, and Guidelines:

(k) foster improvements with the use of technology in public procurement including electronic trading;

(l) conduct periodic inspections of the records and proceedings of the procuring and disposing practices of agencies to ensure the application of the operating Principles, Objectives and Guidelines;

(m) refer complaints concerning a transaction to the Public Procurement Commission;

(n) institute audits for or in relation to –

(i) public procurement or disposal of public property;

(ii) the content and conduct of a contract; and

(iii) the conduct of a transaction;

(o) heighten the awareness of agencies and members of the public to issues of public procurement;

(p) establish and maintain institutional linkages with professional entities and other bodies with interest in public procurement and disposal of public property, ***particularly the Public Procurement Commission;***

(q) undertake research and surveys with respect to public procurement and disposal of public property; and

(r) under take any other activity that may be necessary for the implementation of the Operating Principles, Objectives and Guidelines.

(5) In the exercise of his functions the Procurement Regulator shall not be subject to the direction or control of any person or authority.

(6) In the exercise of his functions, the Procurement Regulator may request an agency for details in respect of a transaction, and the agency shall comply with that request within the time specified in the request.

(7) Where a person fails to comply with such request within the time specified in that request, that person is guilty of an offence.

Expenses of the ***Procurement*** Regulator

26. (1) The Parliament shall provide for the cost and expenses of the Procurement Regulator to be a direct charge on the Consolidated Fund.

Audit of the Procurement Regulator

27. The Auditor General shall audit the Procurement Regulator annually and submit the report to Parliament.

Report**ing by** the Procurement Regulator to Parliament

28. (1) The Procurement Regulator shall present an annual report to Parliament no later than forty (40) days after the expiry of the financial year to which that report relates.

(2) The report shall include-

(a) a figure representing the total value of contracts as awarded by agencies, ***and another figure representing*** the cost of the total value of contract overruns;

(b) the number of unfulfilled contracts awarded by agencies in respect of procurement;

(c) the means of financing the contracts;

(d) the number of variations to a contract and related costs;

(e) a summary of transactions on an agency by agency basis specifying in respect of public procurement-

(i) the number of contracts awarded;

(ii) the means of funding the contracts together with quantum;

(iii) the number of contracts varied;

(iv) the number of contracts with cost overruns;

(v) the quantum of those overruns;

(vi) the number of unfulfilled contracts and the quantum of cost incurred;

(vii) with respect to the procurement for a project, the expected deliverables of that project, the number and value of the contracts involved and a list of the successful awardees with respect to contracts issued in relation to the project together with a brief description of each contract;

(viii) lessons learnt as a consequence of the management contract***s***;

(f) a summary of transactions concerning the disposal of public property on an agency by agency basis -

(i) in respect of real property – the address and other identifying details of the property disposed of including value, to whom it was disposed, date of disposal, means of disposal, and consideration;

(ii) in respect of property other than real property, details of the property disposed of including value, to whom it was disposed, means of disposal, and consideration;

(g) details of changes implemented to ensure current best practice for procurement, and disposal of public property;

(h) the contents of the report of the Council;

(i) recommendations.

(3) The report does not need to include details of contracts less than $50,000 or contracts for the settlement of legal liability other than the total number and quantum.

(4) The Speaker shall cause a copy of that report to be laid before Parliament within twenty-eight (28) days of its receipt by him, or if Parliament is not then in session, within twenty-eight (28) days of the commencement of its next session.

PART V - NATIONAL PROCUREMENT ADVISORY COUNCIL

National Procurement Advisory Council

29. (1) There shall be established a National Procurement Advisory Council comprising fourteen (14) persons being -

(a) a nominee of the Trinidad and Tobago Transparency Institute and one nominee from each of two (2) other civil society organizations established under law having an interest in good governance;

(b) two nominees of the Joint Consultative Council for the Construction Industry and one each from the Trinidad and Tobago Manufacturers' Association, the Trinidad and Tobago Chamber of Industry and Commerce and the Energy Chamber;

(c) a nominee ***from an organization representing labour and one representing a professional organization;***

(d) a nominee of the Tobago House of Assembly;

(e) a nominee of a body that represents the State enterprises other than the Corporation Sole;

(f) the Chief State Solicitor; and

(g) an *ex-officio* member from the Ministry of Finance.

(2**)** A nominating organization referred to in sub-section (1) ***other than that which is specified,*** shall be appointed for a period of three years by the President

exercising his own discretion after taking into account the effectiveness of that organization in serving the public interest, which organization shall nominate its representative to serve on the Council.

(3) Should a nominating organization cease to exist, the President may identify an alternative organization for the balance of the term of the organization being replaced, and the nominee's term on the Council shall be affected accordingly.

(4) An organization within five (5) working days of being appointed by the President shall advise the Procurement Regulator in writing of its nominee to the Council being selected by the President.

(5) The Procurement Regulator shall advise the public of the nominees by a notice in the Gazette and in a major circulating daily newspaper.

(6) Matters pertaining to the operation of the Council are prescribed in the **Third** Schedule.

(7) The Council shall present an annual report to the Procurement Regulator and include in that report its observations and recommendations on the operation of the systems pertaining to public procurement, and disposal of public property.

Functions and powers of the National Procurement Advisory Council

30. (1) The Council shall meet –

(a) to consider the implementation of the Operating Principles and Objectives, and to advise the Procurement Regulator accordingly;

(b) to make recommendations to the Procurement Regulator for the development of the Guidelines so as to ensure that the Guidelines and other matters in relation to public procurement, and disposal of public property, conform to the Operating Principles and Objectives.

(2) In performing its functions under subsection (1), the Council shall take all reasonable steps to obtain the views of the national community on the operation of the public procurement system ***and take into account Government procurement policy for local suppliers and small businesses.***

(3) The Council may invite a representative of an agency to assist in the performance of its functions but the representative shall have no vote.

Secretariat services to be provided by the Procurement Regulator

31. The Procurement Regulator shall provide the necessary secretariat services to the Council and bear the cost for the operation of the Council.

PART VI – MISCELLANEOUS

Protection from liability

32. Subject to section 37, no proceedings whatsoever shall lie against a Commission or any person concerned with the administration of this Act for anything that he may do or report or say in the performance of its functions and powers under this Act.

Privileged information and protection from defamation

33. (1) Anything said or information supplied or any document or thing produced by any person in proceedings before a Commission or in the course of any investigation by the Commission shall be absolutely privileged in the same manner as if the proceedings or investigations were in a court of law.

(2) For the purposes of defamation proceedings any report made by a Commission or the Procurement Regulator under this Act and any fair and accurate comment concerning that report shall be deemed to be privileged.

Procurement records to be public

34. (1) A person may make a request of an agency to supply information and documents relating to a transaction.

(2) The Freedom of Information Act, 1999 applies to a request under subsection (1) as if that request had been made under the Freedom of Information Act, 1999.

(*3*) An agency shall not withhold disclosure on the grounds of confidentiality because that disclosure may prove embarrassing to the agency.

Agencies to publish award of contracts

35. Where an agency awards a contract, the authorized officer of that agency shall cause the public to be advised of that award, the names of the parties, the property or services to be acquired or disposed of, the price, and the performance date of the contract contemporaneously with the making of the award, and the requirements shall apply in respect of any variation of that contract or award.

Application of Judicial Review Act, 2000

36. Notwithstanding any other law, the Judicial Review Act, 2000 applies to a decision which arises in the process of procurement in respect of a transaction by an agency.

Reporting on Collusion

37. (1) Notwithstanding any other written law, where a person has a reasonable belief that collusion between all or any of the interested parties to a transaction, or reasonably believes that an irregularity or a breach of this Act, has occurred, that person shall report accordingly to the Procurement Regulator, or the Public Procurement Commission.

(2) The Procurement Regulator shall refer any report of a breach of this Act to the relevant authorities and to the Public Procurement Commission for prompt attention, and advise accordingly in his report to Parliament.

Offences

38. ***(1)*** A person who exercises undue influence which results in a transaction being in breach of the Operating Principles, Objectives or Guidelines commits an offence.

(2) A person who being or having been an officer of an agency -

(a) maintains a standard of living above that which is commensurate with his present or past official emoluments; or

(b) is in control of financial resources or property disproportionate to his present or past official emoluments, ***and,*** unless he gives a satisfactory explanation to the Court as to how he was able to maintain such a standard of living or how such pecuniary resources or property came under his control; commits an offence.

(3) Where a Court is satisfied in proceedings incurring subsection (2) that, having regard to the closeness of his relationship to the accused and to other circumstances, there is reason to believe that any person was holding pecuniary resources or property in trust for, or otherwise on behalf of, the accused or acquired such resources or property as a gift from the accused, those resources or property shall, until the contrary is proved, be presumed to have been in the control of the accused.

General penalty

39. (1) A person who commits an offence under this Act for which no penalty is prescribed shall be liable to a fine of five hundred thousand dollars and imprisonment for seven (7) years.

(2) An offence attracting a penalty under subsection (1) is a "specified offence" for the purpose and application of the Proceeds of Crime Act, 2000.

Protection for whistleblowers

40. (1) Notwithstanding any other law, a person shall not be discharged, demoted, suspended, threatened, harassed, or financially prejudiced or otherwise discriminated against for making a report under section 38.

(2) A person who is discharged, demoted, suspended, threatened, harassed or financially prejudice or otherwise discriminated against for making a report under section 38 shall be reinstated in his original office with no loss of benefit and provided with a public apology by the agency without prejudice to other

legal recourse available to him.

(3) A person who acting on behalf of an agency discharges, demotes, suspends, threatens, harasses or in any manner discriminates against a person or acts so as to prejudicially impact upon a person's livelihood as a consequence of his making a report under section 38 commits an offence and is liable on summary conviction to a fine of one hundred and fifty thousand dollars ($150,000) and imprisonment for six (6) months.

Amendment to Act

41. A law altering sections 4, 5, 6, 7, 8, 9, and 10 of this Act shall not be passed by Parliament unless the final vote is supported by the votes of not less than two-thirds of the members of each House.

Regulations

42. The President may make regulations for the giving effect of this Act, and for prescribing anything required or authorized by this Act to be prescribed.

Validation of transactions by agencies outside the jurisdiction of Central Tenders Board Ordinance 1961

43. A transaction that is a transaction to which the Central Tenders Board Ordinance, 1961 does not apply and which is entered into or in force in accordance with an agency's tendering rules and procedures at the commencement of this Act, shall be deemed to be performed in accordance with this Act, and to the extent that the transaction is valid at the commencement of the Act, it shall be deemed to be so valid for the purposes of this Act so long as it conforms to section 4 of this Act.

Repeal and savings of transaction within the jurisdiction of the Central Tenders Board Ordinance 1961

44. (1) The Central Tenders Board Ordinance, 1961 is repealed.

(2) At the commencement of this Act a transaction that is entered into by the Director of Contracts, the Central Tenders Board or by any person in accordance with the Central Tenders Board Ordinance, 1961, for or on behalf of an agency shall be deemed to have been entered in accordance with this Act with respect to that agency ***and a reference to the Director of Contracts, the Central***

Tenders Board as the Central Tenders Board Ordinance 1961, as the case may be, shall be construed as a reference to the Procurement Regulator or this Act as the context demands.

(3) Notwithstanding the repeal of the Central Tenders Board Ordinance, 1961, the Central Tenders Board Regulations 1965 and the Central Tenders Board (Defence Force and Protective Services) (No 2) Order 1992 shall continue to be in effect and shall apply, as appropriate to a transaction to which the Central Tenders Board Ordinance, 1961 applied prior to the commencement of this Act, until such time as the Guidelines are in force.

Consequential Amendments to the Exchequer and Audit Act

45. The Exchequer and Audit Act is amended in section 2 by -

(a) adding at the end of the definition of "public money"

"(c) spent or committed for expenditure by or on behalf of an accounting officer or a statutory body; Chap. 69:01

(d) distributed or administered by or on behalf of an accounting officer to a person."

(b) by adding at the end of the definition of "revenue" the following ***words:***

"received or receivable by an accounting officer or raised by an instrument that is issued by or on behalf of the State from which it can be inferred that the State accepts liability in the case of default";

(c) by deleting from the definition of "statutory body" ***the following words:***

"or similar body corporate established and incorporated by an act" and substituting the words "established by an act or body corporate that is established by under an act including the Companies Act where the Government or any person controlled by the Government is entitled to exercise control directly or indirectly over the affairs of that body". Section 11(3)

FIRST SCHEDULE

(Section 5)

Framework for the Establishment of Procurement Guidelines

1. The Objectives of Public Procurement include the promotion of economy, efficiency and competition in public procurement and in the disposal of public property in accordance with the Operating Principles of Accountability, Transparency and Value for Money. These objectives are more readily achievable when procurement is-

(a) perceived as a knowledge-based management activity geared to enhancing good governance by linking the financial system to economic and social outputs and outcomes;

(b) managed in such a manner that inputs, outputs and related methods adhere to best practice.

2. Guidelines, Agency Handbooks and Agency Instructions must apply-

a) standards for public contracting as recommended by Transparency International (see Appendix 1);

b) Methodologies for optimising Value for Money and apply on a whole of life basis to achieve stated economic and social outputs reflecting the principles of Transparency and Accountability.

3. Value for Money methodologies require:-

(a) ***Identification of needs and of economic and social outputs and outcomes; specification in these terms facilitates cost benefit analysis: the proper identification, assessment and comparison of the costs and benefits at each phase of the procurement cycle.***

(b) ***Planning, including the selection of an appropriate procurement method and of evaluation criteria, taking into account:***

i. government and agency policies;

ii. market maturity;

iii. the need to implement a competitive process of a scale commensurate with the size and risk profile of the particular procurement;

iv. admission requirements for tenderers;

v. the performance history of each tenderer;

vi. the requirement that the procurement contract promote stated social and economic outputs and outcomes.

(c) ***Disposal of assets in accordance with best practice, accountability and transparency principles.***

4. Guidelines, Agency Handbooks and Agency Instructions shall apply accountability and transparency criteria to all stages of the procurement cycle.

The application of these criteria should identify performance indicators that include:

(a) ***the extent to which the procurement process to be undertaken-***

i. optimizes value for money in accordance with the economic and social outputs and outcomes of the agency;

ii. protects the agency's integrity in the use of public money.

(b) ***What social and economic outputs and outcomes to be achieved through the procurement process using the value for money methodologies.***

5) Agencies through their Chief Executives are accountable for their procurement processes. Accountability and transparency are best achieved by ensuring that an agency's procurement procedures are clear, well understood, open applied equitably and adhere to best practice in accordance with the agency's policies and objectives. The procedures must be documented and published thereby enabling third party verification.

6) ***Guidelines, Agency Handbooks and Agency Instructions shall foster the achievement of economic and social outputs and outcomes in accordance with Government policy decisions, particularly those relating to national industry, promotion of small and medium-sized enterprises and of local content, sustainable development, poverty alleviation and environmental management.***

7) ***An agency's performance in meeting accountability and transparency criteria should form part of the Procurement Regulator's report to Parliament and be published on the agency's website.***

SECOND SCHEDULE

(Section 11)

Matters pertaining to the operation, and terms and conditions of the members, of the Public Procurement Commission.

Period of Appointment

1. (1) Subject to this Act, a person appointed as a member of the Commission shall hold office for a period of seven (7) years and may be re-appointed for period not exceeding five (5) years but shall not be appointed for more than two (2) consecutive terms.

(2) A member of the Commission is deemed to be a person in public life for the purpose of the Integrity in Public Life Act, 2000 and is directly accountable to Parliament for the performance of his functions and powers.

Remuneration of members of the Commission

2. (1) Subject to subsection (2), a member of the Commission shall receive such emoluments and be subject to such other terms and conditions of service as the President may from time to time determine.

(2) The emoluments and terms of conditions of a member of the Commission shall not be less than the emoluments which may, from time to time, be payable to a Puisne Judge.

(3) The emoluments and terms and conditions of service of a member of the Commission, other than allowances that are not taken into account in computing pensions, shall not be altered to his disadvantage during the period of his appointment or reappointment, as the case may be.

Voluntary departure from office

3. A person appointed as a member of the Commission may at his own request be relieved of office by the President and shall in any case, subject to Clause 4, vacate office on attaining the age of seventy (70) years.

Extension of in limited circumstances

4. (1) The President may, after consultation with the Prime Minister and the Leader of the Opposition, permit a member of the Commission to continue in office until he has attained a later age, but not exceeding seventy-five (75) years.

(2) Not withstanding that he has attained the age at which he is required to vacate his office, a member of the Commission may continue in office for such period after attaining that age as the President after consultation with the Prime Minister and the Leader of the Opposition, may specify, so that the member can give his decision or conclude any investigation he was conducting before he attained that age.

Validation of action of member

5. Nothing done by a member of the Commission shall be invalid by reason only that he has attained the age at which he required to vacate his office.

Removal of member of the Commission

6. (1) A member of the Commission may be removed from office for –

(a) inability to discharge the functions of his office (whether arising from infirmity of body or mind or any other cause);

(b) trading with the Government of Trinidad and Tobago without the prior approval by resolution of each House of Parliament;

(c) bringing the office into disrepute;

and shall not be so removed except in accordance with this provision.

(2) For the purposes of this clause a Commissioner trades with "the Government of Trinidad and Tobago" if, while holding office as such, he becomes a party to, or is a partner in a firm or a director or manager of a company which to his knowledge becomes a party to, any transaction with the Government of Trinidad and Tobago.

(3) If each House of Parliament by resolution decides that the question of removing a person from the Commission ought to be investigated, then the President shall appoint a disciplinary tribunal, which shall comprise a Chairman and not less than two or more than five other members from among persons who hold or have held the office of Judge of a superior court having jurisdiction in civil and criminal matters or a court having jurisdiction in appeals from any such court.

(4) The disciplinary tribunal shall enquire into the matter and report on the facts to the President and recommend whether the member of the Commission the subject of the enquiry, ought to be removed from office for the grounds specified in this clause, within three (3) months of being appointed under sub clause (3).

(5) If the question of the removal from office of a member of the Commission has been referred to a tribunal appointed under sub clause (3) and the tribunal has recommended to the President that the person appointed as a member of the Commission should be removed from office, the President shall, remove that person from office.

(3) The appointment of a member of the Commission and the termination of his appointment whether by death, resignation or otherwise shall be published in the Gazette.

Suspension of member

7. Where the question of removing a member of the Commission from office has been referred to a tribunal the President, after consulting with the Prime

Minister and the Leader of the Opposition, may suspend him from performing the functions of his office and any such suspension may at any time be revoked by the President after consultation with the Prime Minister and the Leader of the Opposition and shall in any case cease to have effect if the tribunal advises the President that the person ought not be removed from office.

Disqualification of member of Commission

8. (1) No person shall be appointed as a member of the Commission if he is-

(a) a member of the Senate or of the House of Representatives,

(b) an undischarged bankrupt;

(c) has been convicted of any offence involving dishonesty or moral turpitude; or

(d) a partner in a firm, or a director or manager of a company which to his knowledge is a party to any transaction with the Government of Trinidad and Tobago, unless, prior to his appointment, he has disclosed the nature of that transaction and interest of such firm or company.

Member to be full time

9. A person appointed as a full time member of the Commission shall devote his time to the appointment and shall not accept paid employment in any other capacity during any period in which he holds office and a person appointed as a part-time member of the Commission shall devote his full time to the performance of his duties when acting as a Commissioner.

Vacancy to be filled

10. (1) Where a vacancy arises in the membership of the Commission the President, after consultation with the Prime Minister and the Leader of the Opposition, may designate one of the part-time members of the Commission to act in that office during that vacancy, until an appointment is made by the President.

(2) Where, by reason of illness, absence from the jurisdiction or other sufficient cause a person appointed as a member of the Commission is unable

to perform the functions of his office, the President after consultation with the Prime Minister and the Leader of the Opposition, may appoint a part-time Commissioner as he thinks fit, being a person qualified under this Act, to perform those functions as a replacement.

Staff of Commission

11. (1) The Commission may appoint and employ persons as are necessary to assist it in the proper performance of its function, at such remuneration, terms and conditions as may be approved by the Commission.

THIRD SCHEDULE

Section 29 (1) (6)

Matters pertaining to the operation of the National Procurement Advisory Council

Tenure of office

1. (1) An organization that is represented on the Council may through its nominee hold an office for a period of three (3) years and the organization is eligible for re-appointment for no more than two (2) consecutive terms

(2) The organization may change its nominee after giving notice to the President and the Procurement Regulator.

Council vacancy

2. (1) The office of a member of the Council shall become vacant –

(a) if he resigns in writing;

(b) if his appointment is terminated in accordance with this Schedule.

(2) If any vacancy occurs in the membership of the Council, that vacancy shall be filled by another nominee of the relevant organization who shall, subject to this Schedule, hold office for the remainder of the period for which the previous member was appointed, and the consequent appointment shall be made in the manner and from the same category of persons as the appointment of the previous member.

Gazetting of appointments

3. The names of all the members of the Council as first constituted and every change of membership following shall be published in the *Gazette*.

Resignation from office

4. A member of the Council may at any time resign his office by instrument in writing addressed to the President and transmitted through the Chairman, and from the date of the receipt by the President of that instrument, the member shall cease to hold office.

Termination of appointment

5. The membership of a person to the Council shall cease if –

i. the nominating organization withdraws support from the person who is its nominee on the Council;
ii. the nominating organization becomes bankrupt or compounds with or suspends payment to a creditor;
iii. the President revokes the organization as a nominating body, which the person represents.
iv. that person becomes of unsound mind or becomes permanently unable to perform his functions by reason of ill health;
v. that person is convicted of an offence and sentenced to a term of imprisonment;
vi. that person dies.

Procedure of meetings

6. (1) The Council shall meet not less than once a month or as often as may be necessary or expedient for the performance of its functions under this Act and these meetings may be held at such places and times and on such days as the Council determines.

1. The Council shall appoint one of its members as Chairman.
2. The Chairman shall preside at all meetings of the Council and if the Chairman is absent from a meeting the members present shall elect another member to preside at that meeting.
3. Five members shall constitute a quorum of the Council.
4. The decisions of the Council shall be by a majority of votes and in addition to an original Vote, the Chairman or other member presiding

at the meeting shall have a casting vote in any case in which the voting is equal.

5. Subject to the provision of this Act the Council may regulate its own proceedings
6. The validity of any proceedings of the Council shall not be affected by any vacancy among the members or by any defect in the appointment of a member.

Remuneration of members

7. There shall be paid to the members of the Council such remuneration, whether by way of salary, honorarium, travelling or other allowances as the Cabinet determines.

Passed in the House of Representative this …….day of ……2012

Clerk of the House

I confirm the above

Speaker of the House of Representative

Passed in the Senate this ……. ....day of …….2012

Clerk of the House

I confirm the above

President of the Senate

July 05 2012 – Public Procurement and Disposal of Public Property Act, 2012

This document is a draft only and thus may contain typographical errors. Should you locate such an error please forward same to us via email – jcctt1@gmail.com. Other comments are also welcome.

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PRESS RELEASE: For Immediate Release
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November 17, 2011 – Port of Spain, TT—
JCC Press Briefing on PUBLIC PROCUREMENT

Welcome to Members of the Media attending this important briefing.

Let me introduce our colleagues –
The Peoples' Partnership's manifesto, at page 18, commits to –
Procurement

- *Prioritise the passing of procurement legislation and appropriate rules and regulations*
- *Establish equitable arrangements for an efficient procurement system ensuring transparency and accountability by all government departments and state enterprises…*

The Public Procurement legislative process has paused, with the work of the original Joint Select Committee of Parliament having been preserved for a new JSC to take over in this session.

We were advised that the new JSC is to be appointed shortly to complete the work of the original Committee and we would like to note for the record that our Private Sector/Civil Society group stands ready to resume work on this.

Our group comprises

- The JCC
- Trinidad & Tobago Chamber of Industry & Commerce
- Trinidad & Tobago Manufacturers' Association
- Trinidad & Tobago Transparency Institute

As such, we are the leading Private Sector/Civil Society stakeholders with the intention of our proposals being to promote Transparency, Accountability and Value-for-Money in the expenditure of Public Money.

The new Public Procurement systems we are proposing will enhance competition, reduce political interference in the award of contracts and act as an effective anti-corruption measure. All of those objectives will be of great benefit to our nation, particularly the silent majority, by which we are referring to the unborn citizens of the future.

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Our position on the legislative process is that, given the far-reaching consequences of these proposals, the government must publish the draft legislation for public comment before the matter is debated in Parliament. One of our greatest concerns on this Public Procurement matter is with respect to the Uff Report. The Minister of Justice is responsible for the implementation of the 91 recommendations in the Uff Report and JCC has written to Minister Volney on three occasions to offer our assistance in any working group that Ministry might have established. We have never had a reply, but we will continue to insist that the Uff Enquiry has to have a meaning for the progress of our nation and that has to mean that its recommendations are implemented.

As an active part of the drive for new, effective Public Procurement systems, we also have serious, shared concerns on the Invader's Bay situation and those are highlighted at http://www.jcc.org.tt/invadersbay.htm. We have all written to the Minster of Planning & the Economy to state our objections and all attended a meeting with Minister Dr. Bhoe Tewarie and Minister Stephen Cadiz on 26th September. We note that our concerns have not been addressed and that the said Minister is reported to have said that "*...The winning proposal for the Invaders Bay development project will be revealed within two weeks...*"

The lack of a proper Needs Assessment is a glaring omission in this Invader's Bay matter, as a result of which there were no clear rules for project evaluation at the time the RFP was published. When we asked the Ministers during our meeting, we were told that those evaluation rules would be finalised after the submissions were received. We regard that as completely unacceptable in terms of transparency and proper process in tendering.

Related to that is the fact that the RFP issued by MPE is itself silent as to the existing three strategic plans for the Port-of-Spain area, such that this would appear to be taking place without proper context. There needs to be wide public consultation on this proposed development if proper levels of transparency and participation are to be achieved.

There is also the issue of the urgent need to diversify our economy, so that we can develop non-energy sources of foreign exchange earnings. This proposed development is an excellent opportunity to address that issue of foreign exchange leakage during the construction and operation phases.

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We offered MPE to revise the RFP, so as to conform with their 12-month deadline for start-on-site, but they refused this.

The approach being taken on Invader's Bay to date represents a continuation of the old, which makes it effectively a breach of trust and promise to the national community.

We once again urge the MPE to take the opportunity to withdraw this RFP and revise the process.

Thank you, we will take questions now...

22 Dec 2010

SUBMISSION

on

LEGISLATIVE PROPOSALS ON PUBLIC PROCUREMENT REFORM

laid in Parliament on 29 October, 2010

Submitted to a Joint Select Committee of Parliament

by the

JOINT CONSULTATIVE COUNCIL FOR THE CONSTRUCTION INDUSTRY

TRINIDAD AND TOBAGO TRANSPARENCY INSTITUTE

TRINIDAD & TOBAGO CHAMBER OF INDUSTRY AND COMMERCE

TRINIDAD AND TOBAGO MANUFACTURERS ASSOCIATION

22ND DECEMBER, 2010

INTRODUCTORY NOTE

1) A *Joint Select Committee of Parliament (JSC)* was appointed on the 29 October, 2010 to consider:

a)* A *Legislative Proposal to provide for Public Procurement and the Disposal of Public Property

This is in effect the text of a draft Procurement and Disposal of Public Property Bill 2006 that was produced as part of the procurement reform process initiated by Government following the laying in Parliament in September 2005 of the *White Paper on the Reform of the Public Sector Procurement Regime*[1]. The signatories to the White paper were also responsible for the preparation of this draft bill as part of a Cabinet Appointed Committee chaired by the then Permanent Secretary in the Ministry of Finance, Kamal Mankee.

b)* *A Legislative Proposal to repeal and replace the Central Tenders Board Act.

***c)* This document, which *was prepared in 1997 by the then Attorney General, Ramesh Lawrence Maharaj,* is the text of *The National Tenders Board Bill, 1997* which sought to repeal and replace the Central Tenders Board Act and establish a National Tenders Board for the Government and certain statutory bodies and a Parliamentary Commission to monitor its activities.**

The JSC is charged with reporting to Parliament with recommendations for new procurement legislation on the basis of these proposals.

2) *This submission is intended to assist the JSC* by providing stakeholder *inputs.*

It takes the form of suggested amendments/additions to the text of the 2006 draft Bill taking into account elements of the 1997 Tenders Board Bill as well as developments since the policy statement of the White Paper from which the 2006 draft Bill evolved.

The amended text is submitted as a *Draft Public Procurement and Disposal of Public Property Bill,* 2011.

3) This submission reflects our *endorsement of the White Paper* with two (2) material *differences*, which are:-

(a) *The separation of investigatory powers from regulatory powers* which, in the 2006 Bill, are functions of the proposed Procurement Regulator who reports only to Parliament.

1 Available at: http://www.google.tt/url?sa=t&source=web&cd=1&ved=0CBUQFjAA&url=http%3A%2F%2Fwww.finance.gov.tt%2Fcontent%2Fpub50.pdf&ei=wbL6TPnjOIGC8gai9rH7Cg&usg=AFQjCNFgFkhkWkKheA8rPlZAcClrhfJ6vw

In the 2011 draft Bill it is proposed that the investigatory powers reside with the *Public Procurement Commission*, a Standing Commission of Enquiry established to monitor the procurement process and deal with grievances arising out of the procurement process. This body too reports only to Parliament.

This accords with best practice and addresses concerns expressed in the *Uff Commission of Enquiry*. In addition, the 2011 Bill follows a similar separation of the investigatory from the regulatory function that was proposed in the *1997 National Tenders Board Bill*.

It also reflects a feature of the relevant *Jamaican legislation* in which The Contractor General Act 1985 was amended in 1999 so as to provide the Contractor General with the power to investigate any Government contract or grant, or issue any prescribed licence, while leaving to the National Contracts Commission the largely regulatory role of the granting and implementation of Government contracts.

(b) In comparison with the White Paper and the 2006 draft Bill, this document provides for greater support for the proposed Procurement Regulator by *amplifying the role and composition of the National* Procurement *Advisory Council* and *establishing the organizational support of his Office* as a direct charge on the Consolidated Fund.

4) The text of our proposed draft Bill follows.

BILL FOR

AN ACT

PUBLIC **PROCUREMENT AND DISPOSAL OF PUBLIC PROPERTY BILL,** *2011*

EXPLANATORY NOTE

(These notes form no part of the Bill, but are intended only to indicate its general purport).

Background

The purpose of this Bill is to provide the legal and regulatory framework to implement the Policy on Procurement Reform as contained in the White Paper entitled "Reform of the Public Sector Procurement Regime" (the White Paper), tabled in Parliament on 26 September 2005. This White Paper.

The intent is to maximize economy and efficiency in public expenditure in the area of procurement in accordance with the principle of accountability, transparency and value for money thereby increasing public confidence in the quality of governance. It does so by prescribing the legal and regulatory framework recommended in the White Paper entitled "The Reform of the Public Sector Procurement Regime" which was tabled in Parliament on 26 September 2005 by the Government.

The Bill reflects the assumption that expenditure involving public money triggers a prime responsibility of the purchaser who uses public funds for a transaction to ensure that the people get value. The Bill does not inhibit the common law doctrines in relation to contract nor specify a rigid process. Rather, it establishes the overarching legal framework founded on principles of public law in which contractual rights will operate. It enables customizing and responsibility of the procurement process to reside with agencies while identifying key points in the procurement system to which all agencies must adhere. The relevant design and

monitoring of the procurement system within the specified parameters of the principles of accountability, transparency and value for money is the function of an independent Procurement Regulator.

This Bill therefore heralds the Government's stated intention to strengthen the quality of governance by promoting these principles of good governance by systemic re-engineering of the public financial management system. This Bill is thus one of a raft of relevant Bills for the re-engineering of the public financial management system.

This Bill, although it stands alone, should form part of a total legislative financial management reform package comprising:

(a) a National Audit Office of Trinidad and Tobago Bill***;***

(b) a Financial Management and Accountability Bill which should be presented to the Parliament pending the acquisition of an Integrated Financial Management Information System and the implementation of output based budgeting as signalled by the Government in the Social Economic Policy Frameworks, 2004 – 2006 and 2006 – 2008.

Critical to the proposed new procurement regime is a clear understanding of the concept of 'public money'. This encompasses –

- ***all money received or receivable by an agency regardless of source;***
- ***all money received by a non-public body from an agency.***

The legal framework will embrace expenditure by an agency which is essentially an organisation using public money for a public purpose –

- ***a public organization even if for a private purpose;***
- ***a private organization for a public purpose regardless of the source or type of funding if it can be identified that the State is ultimately liable.***

The test therefore is not the mode of the incorporation of the body but the ultimate financial responsibility of the State.

The Bill also addresses the recommendations of the report of the Commission of Enquiry into the Construction Sector chaired by Professor John Uff, published in March 2010 that, inter alia, specified the need for a clear dispute resolution system which, in this Bill, is the function of the Public Procurement Commission.

Brief Description of Bill

The crux of the ***Bill*** is the mandatory compliance with ***the Operating Principles, Objectives and*** Guidelines ***by all parties to transactions related to the procurement of property, services involving public money and the disposal of public property. The details of the procurement process will in general terms be dealt with in the Guidelines whilst the customized details in respect of an agency will be found in Agency Handbooks. All documents are to be publicly available.***

The responsibility for the effective operation of the overarching system will reside in an independent Procurement Regulator who directly accounts to Parliament while the accountability for the actual acquisition of property and services and the disposal of property acquired with public money will reside with the agencies.

The Bill requires that all parties to a transaction involving public money for the acquisition of property and services or the disposal of public property will need to ensure that their conduct, processes and documentation conform to;–

- ***Economy, efficiency and competition;***
- Ethics and fair dealing according to the highest standards of probity and professionalism;
- Promotion of national industry in a manner that conforms to the international obligations of Trinidad and Tobago; and
- ***Sustainable development taking into account the Social return on investment.***

The Operating Principles and the Objectives will inform the National Procurement Guidelines which, in turn, will inform the content of Handbooks for various categories of transaction which are to be prepared by the agency.

The Guidelines will be developed by the Procurement Regulator in consultation with the National Procurement Advisory Council. The Council will comprise a total of fourteen (14) persons including representatives of private sector organizations, of those organizations appointed by the President to represent civil society, and representatives from the public sector including the Ministry of Finance and the Tobago House of Assembly.

The Bill also provides for a Public Procurement Commission to treat with irregularities and complaints of non-compliance with the Operating Principles, Objectives and Guidelines. The members of the Commission are to be appointed by the President and are answerable to Parliament.

Apart from the accountability framework the Bill also prescribes penalties for non-compliance with the Operating Principles, Objectives and Guidelines: a fine of $500,000 and imprisonment for seven (7) years where no other sanction is prescribed. As these penalties indicate an indictable offence, the Bill ensures the applicability of the Proceeds of Crimes Act, 2000. This may be used by the State for the tracing of assets to reclaim public money in the event that there is a breach of the Act.

Where a transaction is found either by a court or by the Public Procurement Commission to be in breach of the Act it is prescribed to be illegal – the common law result of a contract in breach of public policy.

For the purpose of operational flexibility for the local conditions and to take into account the culture of an agency, the Bill enables the Chief Executives of agencies (which include ministries and departments, statutory bodies and their subsidiaries, state controlled enterprises and their subsidiaries) to issue instructions to treat with the procuring procedures of their respective agencies. These Agency Instructions are to be complied with by all parties to a transaction so long as they do not breach the Operating Principles, Objectives and Guidelines and will include details of the authorized purchasing officers and purchasing responsibilities, including the quanta of their purchasing limits.

Apart from the Guidelines and the Agency Instructions of the Chief Executive, the relevant procedures in respect of the transaction to aid purchasers using public money will be provided in support documents as Handbooks. These may be developed by the Procurement Regulator as model Handbooks which can be customized by the agency. The Bill thus enables the internal procuring rules of a state owned enterprise to be incorporated into the Handbook for the respective agency. The Bill thus enables the incorporation of existing procedures into the proposed legal and regulatory framework. The Bill enables model Handbooks to be designed for different types of categories of transactions such as those pertaining to construction, consultancy services and Information Technology.

In addition to developing the mandatory Guidelines in consultation with the National Procurement Advisory Council, the Procurement Regulator will also have the function of –

- enabling agencies to explore alternative service delivery options;
- promoting flexible and accountable ***systems for procurement;***
- encouraging a streamlined Government purchasing framework;
- ***implementing a procurement system to foster*** small to medium enterprises;
- providing best practice advice on the conduct of procurement ***including promoting electronic transactions; and***
- ***auditing and reviewing the procurement system to ensure compliance with the Operating Principles and Objectives which will require generally the monitoring of award and implementation of transactions.***

The ***Procurement*** Regulator will also be required to prepare an Annual Report ***to be submitted*** directly to Parliament identifying ***inter alia:***

- the strengths and weaknesses of the procurement system and steps taken to rectify any weaknesses;
- the total value of contracts awarded by agencies so that Parliament can get an idea of the amount of public money involved in procurement; and

- ***outcomes of investigations, and lessons learnt which are to be or have been fed back into the procurement system through amendment of the Guidelines.***

The Procurement Regulator will be supported by a statutory body to be known as the Office of the Procurement Regulator. The expenses of both offices are to be a charge on the Consolidated Fund.

The Public Procurement Commission has, with a direct reporting accountability to Parliament, the function of investigating breaches of the procurement system by parties to a transaction involving the expenditure of public money.

In so doing, it will have the powers of a Commission of Enquiry as if it were a Commission properly constituted under the Commissions of Enquiry Act, Chapter 19:01. The sanctions it may employ are, inter alia, to order a suspension of the contract pending the hearing in a court of law or to find the transaction to be in breach of the Operating Principles and Guidelines resulting in it being deemed illegal. It is noted that any decision it makes is subject to the Judicial Review Act, 2000.

However, persons bringing frivolous complaints to this body will be penalized.

Where parties comply with the Operating Principles, Objectives and Guidelines it is highly unlikely there will be much recourse to the Public Procurement Commission.

The Bill is in ***6*** Parts as follows:

PART I – PRELIMINARY

This Part deals with operational matters pertaining to the Bill.

The Bill is to commence on a date to be proclaimed. However, as the National Policy on procurement in the form of the White Paper was tabled in Parliament on 26 September 2005, this means that all agencies would have had to conform to the Operating Principles and Objectives in all their transactions from that date.

Clause 1

Therefore validates the duty by ensuring that the application of the Operating Principles and Objectives are deemed to apply from the date of the tabling of that Policy. This general duty is retrospective to 26 September 2005 – the date the Policy was tabled in Parliament. The provision entrenches the duty required of agencies even prior to the passage of the Bill to conform to Government Policy.

Clause 2

Contains the definitions pertaining to the Bill.

Key definitions to note are –

"agency" – ***means a body incorporated or otherwise that uses public money.***

"property" – ***means real or personal property, or other tangible or intangible property including a right, interest, title, claim, chose in action, monetary or financial instrument, present or future, vested or contingent. This definition would encompass those matters that are the traditional focus of procurement such as goods works and services as well as intellectual property rights;***

"public property" means property that is acquired or is to be acquired by an agency, or is in the care, control or custody of an agency;

"public money" ***all money received by a public body, regardless of source;***
all money received by a non-public body from a public body.
The legal framework will embrace expenditure by a –

- ***public organization even if for a private purpose; a private organization for a public purpose regardless of the source or type of funding if it can be identified that the State is ultimately liable.***
- ***The test therefore is not the mode of the incorporation of the body but the ultimate financial responsibility of the State.***

"procurement" ***means the process of acquiring property and services commencing with the identification of the need for the acquisition and ending with***

the performance of the related contract. This definition conforms to current best practice;

"public procurement" means procurement involving the use of public money; (this definition is designed to encompass BOLT (Build, Own, Lease, Transfer), BOOT (Build, Own, Operate, Transfer) and DFC (Design, Finance, Construct) schemes or other funding schemes for the provision of capital works which can be found to be ultimately to the benefit of the public);

"services" ***includes consultancy services, professional services, and any other activity which can be classified as services. This would encompass the provision of legal services, architectural services and maintenance services;***

"transaction" ***means any contract, agreement or arrangement for, or in relation to, public procurement or disposal of public property. This definition would encompass related negotiations.***

The nature of these definitions illustrates the ambit of the Act. ***The critical element in the triggering of the application of the law is the use of public money in a transaction, not the institutional corpus of the spender nor the purpose nor the classification of the process that can be classified as commercial or private in the context of that transaction.***

Clause 3

Provides that this Act will bind the State.

PART II – PROCUREMENT FRAMEWORK

This Part establishes the ***legal and*** regulatory framework which will apply to all parties to a procurement transaction to ensure that it conforms to the Operating Principles defined as ***Accountability, Transparency and Value for Money together with the Objectives of economy, being inter-alia efficiency, effectiveness, competition, ethics, and fair dealing. The promotion***

of national policy is also required to be addressed in any transaction. These requirements also apply to those involved in the disposal of public property.

This Part also identifies the consequence of entering a transaction with an unauthorized purchaser.

Clause 4

States that the Operating Principles and Objectives apply to every transaction and requires that a person who is a party to a transaction conform to the Operating Principles of Accountability, Transparency and Value for Money. A person who is acting on behalf of an agency shall ensure the transaction reflects Value for Money. All parties to the transaction will also address the Objectives of economy, efficiency and competition, ethics and fair dealing according to the highest standards of probity and the provision of proceeds for national development such as the Fair Share Programme. All parties as of law are to ensure that the transaction conforms to the Guidelines.

Where there are no Guidelines in place, the operation of the Operating Principles and Objectives will be determined by current best practice.

Clause 5

Provides for the development of National Procurement Guidelines ('the Guidelines') by the Procurement Regulator in consultation with the National Procurement Advisory Council. These Guidelines are to be tabled in Parliament and are to be consistent with the Act, and essentially ensure the operation of best current procurement practice. It is expected that the Guidelines will, inter alia, address issues ranging from the format and content of Requests for Proposal to mechanisms of review of the whole procurement cycle, the publication of details in respect of the operation of best current practice in procurement which would encompass e-procurement, issues of conflict of interest, and emergency measures, to mention a few.

The Guidelines may also include direction of a tender process to apply to a specific transaction. The clause also requires the Procurement Regulator to consult with the private sector and civil society represented on the National Advisory Council which also has representatives of the public sector, when developing the Guidelines. The Guidelines are to be published in the Gazette and are a statutory instrument for the purposes of the Statutes Act.

Sample Procurement Guidelines are provided in the White Paper (Annex 1).

Clause 6

Enables the Procurement Regulator to develop generic Handbooks for categories of transactions as guidance material for agencies. These may supplement those developed by agencies. However, the prime responsibility for the development of handbooks lies with the Chief Executive. All Handbooks must conform to the Operating Principles, Objectives and Guidelines and must be published for public comment for a period of 30 days prior to implementation.

Clause 7

Enables the Chief Executive to issue Agency Instructions for the purpose of expediting transactions. Such Instructions must conform to the Act, Regulations and Guidelines and identify the authorized purchasers for the conduct of a transaction for or on behalf of an agency. An Agency Instruction that does not conform is void.

Clause 8

Provides that where there is a divergence from an Agency Instruction the Procurement Regulator needs to be accordingly advised, in writing with reasons.

Clause 9

Identifies the Chief Executive and any person in an agency so authorized by an Agency Instruction to have the lawful authority to enter a transaction. Where a person wrongly enters or represents himself as having authority to enter a transaction, he commits an offence. The clause also treats with the personal liability for damages of an authorized person where the transaction breaches the Act. A transaction that is entered into by a person without lawful authority is voidable at the instance of the agency.

The clause also provides that an authorized person is subject to the Integrity in Public Life Act, 2000. The clause requires publication of authorized persons and their spending limits.

The clause also provides that neither Cabinet nor a Minister shall be an authorized person.

Clause 10

Places the onus on suppliers to ensure that they are treating with persons who have the appropriate authority to enter a transaction. This is possible because of the requirement on agencies to publish details of authorized persons in clause 9.

The duty on suppliers to conform to the Operating Principles, Objectives and Guidelines is already provided for in clause 4. However, where in the course of an investigation, the Public Procurement Commission or, in the course of an action, a Court, finds that a supplier is recklessly dealing or has recklessly dealt with a non-authorized person, that supplier shall be prohibited, as of law, from entering into any future transaction with an agency for five years either personally or as an officeholder of a company. This means that if a supplier is dealing with a purchaser believing in good faith that the purchaser is an authorized purchaser and after exercising due diligence the purchaser is found to be an unauthorized purchaser the supplier will not be penalized. The same logic applies to transactions involving disposal of property particularly as it affects the would be beneficiary of that disposal.

PART III – PUBLIC PROCUREMENT COMMISSION

This Part enables an aggrieved person to complain, in the manner prescribed, to the Public Procurement Commission, to be appointed by the President and directly accountable to Parliament, that a transaction breaches the Operating Principles, Objectives and Guidelines. The Public Procurement Commission may, either on its own initiative or on the basis of a complaint, investigate any transaction so as to ensure conformity to the Operating Principles, Objectives and Guidelines. The Commission may, pending the outcome of the investigation, suspend the process and employ mediation techniques in the course of the investigation. At the end of the investigation the Commission must advise all parties to the transaction of the outcome of the investigation and report accordingly to Parliament.

After investigating the complaint the Commission may confirm a decision as a consequence of mediation, direct a continuation of the suspension pending an appeal, find the transaction has been conducted by an unauthorized person, find that the transaction is contrary to public policy in that it breaches the Operating Principles, Objectives or Guidelines or find that the complaint is frivolous and vexatious.

The Part also enables the Commission to refer the matter to an appropriate authority for further dealing. All details of investigations will be reported to Parliament in the annual report. This does not preclude the Commission from submitting a special report with respect to a particular investigation.

Certain procedural issues are specified in the Act. In the event there is a gap in the powers of a Commission in respect of process, the Commissions of Enquiry Act can be availed of to fill the gaps.

Clause 11

Establishes a Public Procurement Commission for the purpose of investigating complaints. The Commission is to have the powers of a Commission of Enquiry as if it were constituted under the Commissions of Enquiry Act (Chap. 19:01) and also operates as a mediator in respect of resolving a complaint as if appointed as such under the Mediation Act (Chapter 5:32).

This clause provides for the appointment of members of a Public Procurement Commission to be appointed by the President in the exercise of his discretion after consultation with the Prime Minister and the Leader of the Opposition. The persons to be appointed as members of the Commission are to have qualifications in law, finance or engineering.

Clause 12

Details some operational matters of the Commission viz that it is not to be subject to the direction or control of any person for its functions but is directly accountable to Parliament.

Clause 13

Adumbrates the functions and powers of the Public Procurement Commission to investigate transactions and resolve complaints. It is to have the powers of a commission of enquiry appointed under the Commissions of Enquiry Act, Chapter 19:01. The Act specifically mandates the Commission to expedite issues before it in a timely fashion so as to minimize negative economic impact.

Clause 14

Enables a person who has a complaint that a transaction does not comply with the Act to complain to the Commission. The Commission may also on its own initiative institute the process as regards complaints.

Clause 15

Specifies the procedure of the Commission when investigating a complaint.

Clause 16

Treats with the powers of obtaining of material pertinent to the investigation by the Commission.

The Commission or a person authorized by it in writing will be able to access documents or property in the course of an investigation. An entry on private property (i.e. not belonging to an agency) can only be effected with the consent of the owner or occupier. Where that consent is not forthcoming, the Commission or person authorized by it to do the investigation shall obtain a warrant to do so. Copies of books, records or documents including those in digital format are also to be made available to the Commission.

Clause 17

Provides for the Commission to summon certain persons to give evidence as a witness.

Clause 18

Enables the Commission at the expiry of an enquiry to confirm a decision as a consequence of mediation, direct a continuation of a suspension pending an appeal to the Court or find that the transaction is contrary to Operating Principles, Objectives and Guidelines. The Commission may also refer the matter to an appropriate authority for further action.

This clause also provides for a mandatory report to Parliament on the outcome of any investigation.

Clause 19

Statutorily declares a transaction to be illegal once it is found as a fact to be in breach of the Operating Principles, Objectives and Guidelines by the Commission. This clause also protects the rights of innocent third parties to a transaction so declared.

Clause 20

Enables the Commission to surcharge a complainant for costs if the complaint is frivolous or vexatious.

Clause 21

Enables the Commission to make a special report to Parliament in the event that it finds that an officer of an agency is in breach of his duty, commits misconduct or a criminal offence, which report it further refers to the appropriate agency for further action.

Clause 22

Protects proceedings from being voided for want of form.

PART *IV* – THE *PROCUREMENT* REGULATOR

This Part treats with the appointment of a Procurement Regulator. The functions and powers together with operational and institutional matters pertinent to the Procurement Regulator such as the provision of staff and other resources by way of the establishment of the Office of the Procurement Regulator are treated with as well. The Part also provides for an audit of this agency by the Auditor General.

Clause 23

Provides for the establishment of the office of the Procurement Regulator who is to be appointed by the President in the exercise of his own discretion for a contract of five (5) years or more but not exceeding seven (7) years.

The Procurement Regulator is eligible for re-appointment. The total period of his appointment is not to exceed 2 consecutive terms.

This clause also provides for the removal of the officeholder in the event that he is infirm of mind or body, or misbehaves. The President may also appoint a person to act and such person has the power to finish what the Procurement Regulator commenced before he went on leave or other temporary absence.

The provisions of the Integrity in Public Life Act, 2000 apply to the office holder.

Clause 24

Establishes the Office of the Procurement Regulator to comprise the staff and support for the Procurement Regulator. The costs incurred for the performance of the functions and powers of the Procurement Regulator and the maintenance of the Office shall be a direct charge on the Consolidated Fund. The accountability of these bodies to Parliament reaffirms the constitutional principle of Parliamentary supremacy for fiscal management.

Clause 25

Prescribes the functions of the ***Procurement*** Regulator. ***The prime function is to ensure an effective, efficient and relevant procurement system that conforms to the Operating Principles, Objectives and Guidelines. The Procurement Regulator is required therefore to develop, implement and review Guidelines in consultation with the National Procurement Advisory Council for the implementation of the Operating Principles and Objectives. This provides for inputs from industry and service providers. The functions of the Procurement Regulator also include, inter alia, establishing a comprehensive database with information on procurement opportunities, processes, contract awards and prices, the promotion of public understanding of procurement, the fostering of improvements with the use of technology including e-commerce, the receipt of complaints and reporting to Parliament.***

This clause states that in the exercise of his functions the Procurement Regulator is not subject to the direction or control of any person. In this regard his independence of office is analogous to that of the Auditor General.

Clause 26

Specifies that in the performance of his functions, the Procurement Regulator shall have the power to do anything necessary or convenient for the performance of his functions under the Act including entering contracts and hiring consultants and acquiring property. This would enable the Procurement Regulator to obtain the necessary staff and consultancy services, and purchase or lease property.

Clause 27

Provides for the Auditor General to audit the Procurement Regulator and the Office of the Procurement Regulator annually.

Clause 28

Requires the ***Procurement*** Regulator, similar to the Auditor General, to report at least annually to Parliament ***but no later than forty (40) days after the expiry of the financial year.*** The Report is required to inform Parliament of the total figure of contracts awarded ***involving public money and cost overruns by agencies, details of transactions involved in a project including the beneficiaries of the transaction and the value of those transactions to the State,*** outcomes of investigation including lessons learnt, ***details of changes to the Guidelines to implement best practice and recommendations including those of the National Procurement Advisory Council.***

The Report does not need to include details of contracts of value less than $50,000 or contracts for the settlement of a legal liability. The Speaker is to table the Report within 28 days of receipt.

PART *V* – NATIONAL PROCUREMENT ADVISORY COUNCIL

This Part identifies the membership and functions of the National Procurement Advisory Council which essentially, as a consultative body, provides inputs into the design and content of the Guidelines so as to ensure relevance.

Clause 29

Establishes the National Procurement Advisory Council in a manner so as to avoid allegations of executive manipulation of the membership. The membership of the National Procurement Advisory Council, in conformity with the Policy, will comprise ***fourteen (14) persons being the*** nominees of three civil society organizations which are publicly acknowledged as having a concern for good governance, five organizations representing the construction, manufacturing and retail sectors of Trinidad and Tobago, two representing labour and professional organisations, ***a nominee representing the State Owned Enterprises, a nominee of*** the Tobago House of Assembly, an *ex officio* member from the Ministry of Finance ***and the Chief State Solicitor***.

The nominating organizations are to be selected by the President in his own discretion after taking into account the record of those organizations in serving the public interest. ***The Procurement Regulator is to advise the public of the successful nominees by notice in the***

Gazette and a major circulating daily newspaper. Nominees will hold their positions for a term of 3 years

Operational matters for the Council are specified in the Second Schedule.

The Council is to present an annual report to the Procurement Regulator who includes that report in his own report to Parliament.

Clause 30

Provides that the function of the Council is to consider the effectiveness and efficiency of the procurement system and to make recommendation to the ***Procurement*** Regulator in the development of the Guidelines and Handbooks so as to ensure conformity with the Operating Principles, ***Objectives and Guidelines***. The Council, ***when so doing,*** is to canvass the views of the national community as widely as possible. ***The Council may also co-opt representatives of agencies to assist in its function but such persons will not have a vote.***

Clause 31

Requires the Procurement Regulator to provide secretariat services to the Council.

Clause 32

Requires the ***Procurement*** Regulator to attend meetings of the Council but in so doing the Procurement Regulator has no vote.

PART *VI* – MISCELLANEOUS

This Part deals with matters that enhance effective implementation of the Act including protection from liability, statutory obligations of reporting by agencies, offences, repeal of the Central Tenders Board Ordinance, 1961 and transitional arrangements. To ensure there is consistency in the definition in respect of expenditure of public money, the Exchequer and Audit Act has been consequently amended.

Clause 33

Protects a member of the Commission from liability.

Clause 34

Provides for privilege of information in the course of investigation as if in a court of law and protection from defamation proceedings.

Clause 35

Provides that a request made under this clause is to be treated as if it were made under the Freedom of Information Act, 1999. It is to be noted that, as some agencies affected are currently outside the jurisdiction of the Freedom of Information Act, 1999, there is need for this provision. The section also provides that the failure to disclose on the grounds of confidentiality cannot encompass mere embarrassment that such disclosure would afford. The section is to apply notwithstanding any other law.

Clause 36

Requires that the person authorized to enter a transaction publish specified details of the award of a contract, or any variation and other relevant details contemporaneously with the making of the award. This provision not only conforms to current best practice but also ensures transparency.

Clause 37

Guarantees legal remedies under the Judicial Review Act, 2000 to be available to any decision made in the course of procurement.

Clause 38

Requires ***a person who has a reasonable belief that collusion between all or any of the parties, or any breach of the Act has occurred, as a matter of law, to report accordingly to the Procurement Regulator or the Public Procurement Commission. The Procurement Regulator will be required to refer that report to the Public Procurement Commission and report accordingly to Parliament. This promotes transparency.***

Clause 39

Treats with offences. It provides that a person who fails to comply with the Act commits an offence.

This clause also makes it an offence to hold assets that are prima-facie disproportionate to emoluments one can be expected to receive as an officer, without justification. The word "disproportionate" in subsection (3) conveys the idea that the acquisition of the total value of the assets under the control of a person who was an officer of the agency could not reasonably have been afforded by the person at that date given total emoluments provided.

Clause 40

Provides a general penalty for an offence under the Act to be a fine of $500,000 and 7 years imprisonment. In addition an offence under this Act is deemed a "specified offence" for the purpose of the Proceeds of Crime Act, 2000 thereby attracting the capacity of the State to trace public funds.

Clause 41

This clause protects a 'whistleblower' from being demoted, harassed or otherwise discriminated against because of his report made under Clause 39.

It will also be an offence to discharge, suspend, demote or otherwise negatively treat a person simply because they have reported a breach of the Act to the Procurement Regulator.

Clause 42

Prescribes a Parliamentary majority of 2/3 in the event of future amendment of sections 4 to 10 of the Act. This entrenches the framework and acknowledges that the flexibility of process to ensure competitiveness will be through the subordinate instruments such as the Guidelines and Handbooks. Parliament, by this provision, is entrenching the provisions of this Act particularly in the future event that a disaffected executive with a simple Parliamentary majority would want to change the framework.

Clause 43

Prescribes the regulation making power to reside with the President.

Clause 44

Validates, to the extent of their validity, transactions entered into by those agencies that fall outside the ambit of the Central Tenders Board where those transactions conform to the agency's internal tendering rules and the Operating Principles, Objectives and Guidelines as of 26 September, 2005, the date of the tabling of the Policy in Parliament.

Clause 45

Repeals the Central Tenders Board Ordinance, 1961 and validates any transaction entered into or in force under the authority of the Central Tenders Board on behalf of an agency at the commencement of this Act as validly conducted by an agency under this Act.

The section also provides that a reference to the Central Tenders Board Ordinance 1961 or the Director of Contracts in any legislation shall be construed as reference to this Act or the Procurement Regulator as the context demands.

The section also provides for the continuation of the Central Tenders Board Regulations, 1965 Regulations and the Central Tenders Board (Defence Force and Protective Services (No. 2) Order 1992), pending the formulation of in-house tender procedures by an agency, and the Guidelines, notwithstanding the repeal of the principal legislation pending the implementation of the Guidelines.

Clause 46

Provides for the consequential amendments to the Exchequer and Audit Act which include revised definitions of "public money", "revenue" and "statutory body" so as to harmonize public expenditure on the acquisition of property and services with provision in the Exchequer and Audit Act.

First Schedule

Provides for the administration and terms and conditions of members of the Public Procurement Commission.

Second Schedule

Provides for the operation of the National Procurement Advisory Council including the quorum requirements, resignation of an officer, termination of appointment and remuneration of members.

PUBLIC PROCUREMENT AND DISPOSAL OF PUBLIC PROPERTY BILL, *2010*

Arrangement of Clauses

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BILL

AN ACT to promote the public interest by prescribing the principles of ***good governance, namely*** accountability, transparency and value for money ***in public procurement according to the objectives of economy, efficiency and competition; these principles and objectives are also to apply to the disposal of public property; the establishment of the Public Procurement Commission, to be directly accountable to Parliament, to investigate irregularities and resolve complaints arising out of the procurement system;*** the establishment of the Procurement Regulator, to be directly accountable to Parliament for the effective monitoring of the system of public procurement ***and to be supported by a statutory body called the Office of the Procurement Regulator, and to be supported by the national community through the National Procurement Advisory Council,*** and related matters.

Enactment

Enacted by the Parliament of Trinidad and Tobago as follows:

PART I – PRELIMINARY

Short title and commencement

1. (1) This Act may be cited as the Public Procurement and Disposal of Public Property Act, 2010.

(2) Subject to subsection (3), this Act shall come into effect on a date to be fixed by the President, by Proclamation.

(3) Section 4 (1), 4(2)(a) and (b) and 4(3) shall be deemed to have come into operation on 26 September, 2005.

Interpretation

2. In this Act -

"agency" means -

(a) a ministry or department of government;

(b) a corporate body ***that is established for a public purpose;***

(c) ***any other body that is involved in public procurement***;

(d) a person as prescribed for the purposes of this definition;

"Agency Instruction" means an instruction issued in accordance with section *7*;

"appropriate authority" means -

(a) the Auditor General;

(b) the relevant Service Commission;

(c) the Commissioner of Police;

(d) the Director of Public Prosecutions;

(e) an authority as prescribed;

"authorized person" means a person referred to in section 9;

"Chief Executive" means a Permanent Secretary, a Head of Department or a person who is the chief ***executive*** officer of an agency;

"Commission" means the Public Procurement Commission established by section 11 and a 'member of the Commission' has the corresponding meaning;

"Constitution" means the Constitution of the Republic of Trinidad and Tobago;

"Council" means the National Procurement Advisory Council established in accordance with section ***29***;

"disposal of public property" includes the transfer without ***consideration by way of sale or lease, a concession, a licence, or other alienation, of public property;***

"Guidelines" means the National Procurement Guidelines referred to in section 5;

"Objectives" means the objectives specified in section 4(2) (b);

"Office of the Procurement Regulator" means the body established by section 24;

"Operating Principles" means the principles of accountability, transparency and value for money;

"procurement" means the process of acquiring property or services commencing with the identification of the need of the property or services and ending with the performance of the related contract***s***;

"Procurement Regulator: means the person performing the duties of, or occupying, the office of the Procurement Regulator as established by section ***23***;

"property" means real or personal property or other tangible or intangible property including a right, interest, title, claim, chose in action, monetary or financial instrument, whether present or future or vested or contingent;

"public money" means money that is-

(a) received or receivable by ***the State, a statutory body or a state controlled enterprise***;

(b) raised by an instrument from which it can be reasonably inferred that the State accepts ultimate liability in the case of default;

(c) ***spent or committed for future expenditure, by*** the State, a statutory body or a state controlled enterprise***;***

(d) ***distributed by*** the State, a statutory body or a state controlled enterprise ***to a person; or***

(e) ***raised by a private body in accordance with a statutory instrument, for a public purpose;***

"public procurement" means procurement involving the use of public money;

"public property" means property acquired, or in the process of being acquired, by an agency or in the care, control or custody of an agency whether as a trustee or not;

"services" ***includes*** consultancies, professional services***, management services*** and ***related*** activities;

"State controlled enterprise" means a company that is registered under

Chapter 81:01 the Companies Act -

(a) ***for a public purpose; or***

(b) ***where the government or any person controlled by the government is entitled to exercise control directly or indirectly over the affairs of the company;***

"statutory body" means -

(a) the Tobago House of Assembly as established by section 141A of the Constitution;

(b) a board, commission, body or body corporate established by an act other than that regulating the conduct of professional occupations; or

"supplier" includes ***a contractor or a consultant*****;**

"transaction" means any contract, agreement, licence or arrangement for or in relation to -

(a) ***public procurement;***

(b) ***the use of public property by an agency; or***

(c) ***the disposal of public property.***

Act to bind the State

3. This Act binds the State.

PART II - PROCUREMENT FRAMEWORK

Application of the Act

4. ***(1) The Operating Principles of Accountability, Transparency and Value for Money, together with the Objectives and Guidelines shall apply to a transaction.***

(2) A person who is a party or seeks to be a party to a transaction shall ensure that the transaction-

(a) ***conforms to the Operating Principles;***

(b) ***addresses the Objectives of -***

(i) ***economy, efficiency and competition;***

(ii) ***ethics and fair dealing according to the highest standards of probity and professionalism;***

(iii) ***the promotion of national industry and production that conforms to government policy effecting sustainable development, poverty alleviation and environmental management;***

(iv) Social return on investment; and

(c) ***conforms to the Guidelines and where no Guidelines are in place, to current best practice.***

(3) A person who is a party to a transaction for or on behalf of an agency shall ensure that the transaction conforms to the Operating Principle of Value for Money.

Mandatory Guidelines

5. (1) The Procurement Regulator shall develop ***the National Procurement*** Guidelines -

(a) for the implementation and monitoring of the Operating Principles and Objectives in their application to a transaction ***and the system of public procurement;***

(b) ***for*** the publication of details in respect of a transaction;

(c) to treat with matters for, ***and*** in relation to a transaction;

(d) to ensure ***best practices in public procurement*****.**

(2) The Guidelines may address the following:

(a) general rules relating to procurement including those with respect to -

(i) the format and content of requests for proposals;

(ii) the means of improving the process of competitive tendering and contracting;

(iii) the system of using bonded ***or preferred*** suppliers;

(iv) the preference, according to Government policy, for local suppliers and small business in procurement;

(v) ***the principle of*** open and effective competition including public notification of opportunities and evaluation criteria to be used in the bid process;

(vi) advertising rules and time limits;

(vii) participation and qualification ***of interested parties to a transaction;***

(viii) the tender documentation and technical specifications;

(ix) the tender evaluation and award criteria;

(x) the reporting ***and monitoring*** requirements;

(xi) ***conflict of interest;***

(xii) ***measures in times of emergency;***

(b) ***the procurement indispensable for national security or national defence purposes***

(c) public consultation on major contracts;

(d) the use of a joint undertaking by all parties to a transaction to comply with an agreed code of ethics with sanctions;

(e) the consideration of government policies in public procurement;

(f) an independent review process ***to include civil society at critical points of the system of public procurement;***

(g) ***reporting requirements of agencies;***

(h) ***monitoring of the performance of the contract;***

(i) the relationship of the Handbooks to the Guidelines;

(j) ***general rules on disposal of public property including those with respect to disposal of unserviceable, surplus or obsolete public property and sale or lease of real property in the care, control or custody, of an agency;***

(k) ***Parliamentary approval of Government to Government contracts involving the use of public money; and***

(l) ***any other matters as are prescribed***.

(3) The Procurement Regulator, when developing the Guidelines, shall consult with the Council.

(4) The Guidelines –

(a) shall be consistent with this Act;

(b) may adopt or adapt any published international standard in accordance with best procurement pracitce;

(c) shall specify exemptions in certain restricted circumstances ***that are not inconsistent with the public interest;***

(d) ***shall be public and easily available***.

(5) The Procurement Regulator shall submit the Guidelines ***directly to Parliament to be tabled no later than ten (10) sitting days of receipt by Parliament.***

(6) ***The Guidelines*** shall be subject to negative resolution of Parliament.

(7) The Guidelines shall be published in the *Gazette* and are a

Chapter 3:02 statutory instrument for the purpose of the Statutes Act.

Handbook as guidance material to supplement Guidelines

6. (1) The Procurement Regulator may develop Handbooks ***or other material*** to serve as detailed guides for the process to be followed in respect of ***specified categories*** of transactions.

(2) The Chief Executive shall cause a Handbook to be published in respect of the procedures to be followed by his agency in respect of procurement and disposal of public property.

(3) A Handbook, whether produced by the Procurement Regulator or an agency shall conform to the Operating Principles, Objectives and Guidelines.

(4) A Handbook shall be published for public comment for 30 days before it becomes operational.

Chief Executive to issue Agency Instructions to supplement Guidelines

7. (1) The Chief Executive may issue, in writing, an internal administrative direction for the purpose of expediting a transaction ***to be known as an Agency Instruction***.

(2) The Chief Executive shall forward a copy of the Agency Instruction to the Procurement Regulator before its date of operation.

(3) An Agency Instruction shall-

(a) conform to the Act, Regulations and Guidelines and take into account any guidance material such as Handbooks issued by the Procurement Regulator so that the practices of the agency relating to procurement and disposal of public property conform to the Operating Principles, Objectives and Guideline; and

(b) authorize a person to enter into a transaction for, or on behalf of, the agency.

(4) An Agency Instruction that fails to conform ***to*** the Act, Regulations or Guidelines is void.

Report of inconsistent action with ***the*** Agency Instruction

8. A person who is an officer or employed by an agency and being a party to a transaction makes a decision that is inconsistent with an Agency Instruction shall make a written record for the Procurement Regulator of reasons of the decision for so acting.

Authorized person for the purpose of transaction

9. (1) A Chief Executive, ***or a person authorized in accordance with an Agency Instruction*****,** has the authority to ***execute*** a transaction or enter a ***related negotiation*** for or on behalf of the agency which he serves.

(2) The Chief Executive may authorize, by an Agency Instruction, a person to enter a transaction or related negotiation for or on behalf of an agency.

(3) The Chief Executive shall cause the names and positions of the persons authorized under subsection (2) and the extent of their capacity to treat, to be published.

(4) A ***transaction*** that is entered into by a ***person*** without lawful authority is voidable at the instance of the agency.

(5) A person authorized to act for or on behalf of an agency shall be personally liable for the damages incurred by the agency as a consequence of entering a transaction in breach of the Operating Principles, Objectives and Guidelines.

(6) An authorized person under subsections (1) and (2) is deemed to be "a person in public life" for the purposes of the Integrity in Public Life Act, 2000.

(7) A person who wrongly represents himself as a person authorized to enter a transaction commits an offence.

(8) Neither Cabinet, a Minister of Government nor a person directly instructed by either, is authorized to enter a transaction.

Supplier not to enter transaction unless with an authorized purchaser

10. (1) A person who is, or intends to be, a supplier ***shall ensure that the person with whom he is entering into a transaction or related negotiations is an authorized person.***

(2) A ***supplier*** who is found either by the Procurement Regulator, ***the Public Procurement Commission*** or the Court to have ***recklessly*** entered, or be entering, a transaction with ***an unauthorized person*** shall be prohibited from entering any future transaction with any agency for a period ***of*** five years either in a personal capacity or in respect of any corporate body ***of which that person is a corporate office holder***, in addition to any other penalty.

PART III - PUBLIC PROCUREMENT COMMISSION

Establishment of ***standing*** the Public Procurement Commission

11. (11) For the purposes of this Act there is hereby constituted as a commission of enquiry a body to be known as the Public Procurement Commission which shall be directly accountable to Parliament.

(2) The membership of the Commission shall comprise a full time Chairman, 4 full time Commissioners and 4 part-time Commissioners being persons with a minimum of experience of 10 years in the disciplines of law, accounting and engineering and such other disciplines as the President sees

fit, to be appointed by the President in the exercise of his discretion after consultation with the Prime Minister and the Leader of the Opposition;

(3) The Chairman of the Commission shall be a retired judge;

(4) The terms and conditions of the members of the Commission and other matters pertaining to the operation of the Commission are prescribed in the First Schedule.

(5) The costs incurred for, and in relation to, the performance of the functions of the Commission shall be a direct charge on the Consolidated Fund.

Functions and powers of the Commission

12. (1) The function of the Commission is to investigate and resolve complaints arising out of public procurement, whether by the submission or a complaint by an aggrieved party or by acting on its own initiative.

(2) In the exercise of its functions the Commission shall expedite issues before it in a timely fashion and take such other steps so as to minimize negative economic impact arising out of the performance of its functions.

(3) Subject to the Act, the Commission is deemed to be a commission

Chapter 19:01 *for the purposes of the Commissions of Enquiry Act and a member of the Commission shall have all the powers of a Commissioner appointed under that Act.*

Chap. 5:32 *(4) The Commission may conduct a mediation in accordance with the Mediation Act.*

Matters pertaining to the performance *the* Commission

13. (1) Where a transaction that is the subject of investigation by the Commission is in excess in value of $100 million, no less than three (3) of members of the Commission shall hear the matter.

(2) The Commission shall not be subject to the direction or control of any other person or authority in the performance of its functions but is directly accountable to Parliament.

(3) Nothing in subsection (2) shall be construed as preventing the Minister with the responsibility for such aspects of the administration of this Act to make such arrangements as are necessary or desirable to facilitate liaison between Parliament and ***the Commission.***

(4) The Commission upon hearing the parties to a transaction may direct the suspension of the procurement process pertaining to a transaction pending the outcome of an investigation and in so doing shall provide reasons.

(5) The Commission may employ alternative dispute resolution and other mediation techniques in the course of investigating and resolving a complaint.

(6) Subject to sections ***14, 15, 16 and 17, the Commission*** may regulate its own procedure and confer powers and impose duties on any officer of an agency.

(7) ***The Commission*** shall as soon as possible at the expiry of the investigation advise the parties to the transaction of the outcome of the investigation, and report accordingly to Parliament.

Instituting process to treat with a complaint

14. (1) A person who has a complaint that a transaction to which this Act applies is in breach of the Operating Principles and Objectives or the Guidelines, may complain to ***the Commission*** in writing in the manner as publicly specified by ***the Commission***.

(2) The Commission may on its own initiative, or shall as a result of a complaint made under subsection (1), investigate a matter relating to a transaction so as to ensure the integrity of the process applied in the transaction and the application of the Operating Principles, Objectives and Guidelines.

(3) The Commission may offer mediation to the parties to a complaint in the first instance.

Procedure of ***Commission*** Commission

15. (1) For the purposes of an investigation under this Act, the shall inform itself in such manner as it sees fit.

(2) For the purpose of an investigation under this Act, the Commission may-

(a) by notice in writing, require an agency or any officer or employee of that agency to furnish information that may assist the investigation into a transaction in such manner and at such times as may be specified by the ***Commission***;

(b) by notice in writing require any person to provide information, data or reports for or in relation to, a transaction as may be in the possession or under the control of that person.

(3) The Commission may summon before it and examine on oath -

(a) ***any person who has made representations to him; or***

(b) ***any officer, member or employee of a public body or any other person who, in the opinion of the Commissioner is able to furnish information relating to the investigation.***

(4) No person shall, for the purpose of an investigation, be compelled to give any evidence or produce any document or thing which he could not be compelled to give or produce in proceedings in any court of law.

Access to property of an agency property

16. (1) For the purpose of an investigation under this Act the ***Commission or a*** person authorized by it in writing for that purpose shall have the power to –

(a) access books, records, documents, stores or other belonging to an agency in respect whether in the possession of an official or any other person, and make copies accordingly;

(b) enter premises or a location under the care, control or custody of an agency where the Commission has reason to believe that the books, records, documents or other property pertinent to the investigation may be found;

(c) enter premises occupied by any person in order to make such enquiries or to inspect a document, record or property that he considers necessary to any matter being investigated by him.

(2) The Commission or a person authorized by it in writing for that purpose shall only enter premises, other than those belonging to an agency with the consent of the occupier or owner, and where that consent is not forthcoming, may enter after having obtained a warrant to so do.

(3) A person, where so directed by the Commission or a person authorized in writing, shall make available copies of books, records or documents including those in digital format as required.

Witness on oath

17. The Commission may summon before it and examine on oath -

(a) any person who has made representations to it; or

(b) any officer, member or employee of a public body or any other person who, in the opinion of the Commissioner is able to furnish information relating to the investigation.

Outcome of Commission

18. (1) Upon the completion of the investigation the Commission may –

(a) confirm a decision that is satisfactory to all and in compliance with this Act as a result of mediation or arbitration;

(b) direct a continuation of the suspension made under section 13(5) pending an appeal to the Court by the parties;

(c) find that a transaction has been conducted by an unauthorized purchaser;

(d) find the transaction is contrary to the Operating Principles, Objectives or Guidelines;

(e) find the complaint to be frivolous and vexatious.

(2) The Commission in addition to the powers in subsection (1) may refer the matter to an appropriate authority for further action.

(3) The Commission shall present a report to Parliament on the outcome of any investigation on any matter pertaining to public procurement or disposal of public property.

Illegal transaction

19. (1) Where, as a consequence of an investigation by ***the Commission,*** the party to a transaction is found by the ***Commission to be*** in breach of an Operating Principle, Objective or Guideline, the transaction shall be deemed to be ***illegal***.

(2) The deeming of a transaction to be illegal shall not preclude the enforcement of remedies by an innocent third party against a party to that transaction.

(3) After conducting an investigation under this Act, a Commission shall, in writing, inform the Chief Executive of the agency concerned and the Minister having responsibility of that agency the result of that investigation and make such recommendations as he considers necessary in respect of the matter which was investigated.

(4) Where a report of the Commission reflects adversely upon any person the Commission shall, so far as practicable, inform that person of the substance of the report.

Surcharge for frivolous complaint

20. The Commission may surcharge a person instituting a complainant for costs where the complaint is found by the Commission to be frivolous or vexatious.

Special Report

21. If a Commission finds, during the course of its investigations or on the conclusion of a hearing that there is evidence of a breach of duty, misconduct or a criminal offence on the part of an officer or member of an agency, it shall refer the matter to the person competent to take disciplinary or other proceeding as may be appropriate against that officer or member, and in all such cases shall submit a special report to Parliament.

Proceedings not *of* to be voided for want of form

22. The proceedings of a Commission shall not be rendered void for want form.

PART *IV* – THE PROCUREMENT REGULATOR

Appointment of the Procurement *the* Regulator

23. (1) The Procurement Regulator shall be appointed by the President in the exercise of his own discretion on terms and conditions to be approved by President.

(2) The Procurement Regulator is deemed to be "a person in public life" for the purpose of the Integrity in Public Life Act 2000 and is directly accountable to Parliament for the performance of his functions and powers..

(3) The Procurement Regulator shall be appointed on a contract for a term of not less than five (5) years but no more than seven (7) years on terms as determined by the President in the exercise of his own discretion and is eligible for re-appointment for one more consecutive term only.

(4) The President may terminate the appointment of the Procurement Regulator where that person -

(a) becomes of unsound mind or is incapable of carrying out the duties of the Procurement Regulator;

(b) has been declared bankrupt;

(c) is convicted of an offence which brings the office into disrepute;

(d) is guilty of misconduct in relation to the functions, powers and duties of the Procurement Regulator;

(e) is absent from three consecutive meetings of the Council except on leave granted by the President;

(h) fails materially or wilfully to carry out of the duties or functions as required of the Procurement Regulator under this Act.

(5) Where the Procurement Regulator is unable to act by reason of illness or other cause, the President may appoint a person to act in his stead and the person so appointed may complete any unfinished business commenced by the Procurement Regulator.

Establishment of the Office of Procurement Regulator

24. (1) There shall be established by this Act a statutory authority to be known as the Office of the Procurement Regulator, to provide support to the Regulator in the performance of his functions and powers.

(2) The Parliament shall provide the Procurement Regulator and the Office of the Procurement Regulator with adequate resources including funds for the efficient discharge of the functions of that office.

(3) The costs incurred for the performance of the functions of the Procurement Regulator and the Office of the Procurement Regulator shall be a direct charge on the Consolidated Fund.

Functions of the an Procurement conforms to Regulator

25. (1) The prime function of the Procurement Regulator is to ensure effective, efficient and relevant procurement system that the Operating Principles, Objectives and Guidelines.

(2) The Procurement Regulator shall, in relation to public procurement and disposal of public property, develop and review the Guidelines in consultation with the National Procurement Advisory Council for the implementation of the Operating Principles and Objectives.

(3) The Procurement Regulator has the function of –

(a) promoting a flexible and responsible system for procurement;

(b) developing a streamlined public procurement framework;

(c) enabling agencies to explore alternative service delivery options ***within the context of the Operating Principles, Objectives and Guidelines;***

(d) providing 'best practice' advice in the conduct of procurement including the promotion of electronic transactions;

(e) implementing a procurement system to foster small and medium enterprises;

(f) auditing and reviewing the systems of procurement to ensure compliance with the Operating Principles and Objectives.

(g) ***monitoring the award and implementation of transactions to ensure compliance with the Operating Principles, Objectives and Guidelines;***

(h) ***liaising with the Public Procurement Commission with respect to its powers so as to advise and guide parties to a transaction and the public of current best practice.***

(4) Without limiting the generality of the foregoing, the Procurement Regulator may-

(a) harmonize policies, systems and practices of agencies in relation to public procurement and disposal of public property;

(b) ***review*** procurement ***practices and delivery systems annually to identify best practices***;

(c) establish a comprehensive database with information on procurement processes, contract awards and prices and any other information of public interest as the Procurement Regulator determines:

(d) determine, develop, introduce, maintain and update related system-wide data-bases and technology;

(e) maintain a Register of Suppliers ***in respect of classes of transactions;***

(f) adopt, adapt and update common specifications, standards and other whole-of-government arrangements for mandatory compliance;

(g) promote public understanding of procurement and related processes;

(h) in consultation with competent authorities set training standards, competence levels, and certification requirements to promote best practices in procurement;

(i) prepare, update and issue authorized versions of Handbooks incorporating standardized bidding documents, procedural forms and attendant documents for use by agencies in public procurement and disposal of public property;

(j) ensure that any deviation by agency from the use of the Handbooks, standardized bidding documents, procedural forms, any other attendant documents and standardized contracts, accord with the Operating Principles, Objectives, and Guidelines:

(k) foster improvements with the use of technology in public procurement including electronic trading;

(l) conduct periodic inspections of the records and proceedings of the procuring and disposing practices of agencies to ensure the application of the operating Principles, Objectives and Guidelines;

(m) ***refer complaints concerning a transaction to the Public Procurement Commission;***

(n) institute audits for or in relation to –

(i) public procurement or disposal of public property;

(ii) the content and conduct of a contract; and

(iii) the conduct of a transaction;

(o) ***heighten the awareness of agencies and members of the public to issues of public procurement;***

(p) establish and maintain institutional linkages with professional entities and other bodies with interest in public

procurement and disposal of public property, ***particularly the Public Procurement Commission;***

(q) undertake research and surveys with respect to public procurement and disposal of public property; and

(r) under take any other activity that may be necessary for the implementation of the Operating Principles, Objectives and Guidelines.

(5) In the exercise of his functions the Procurement Regulator shall not be subject to the direction or control of any person or authority.

(6) In the exercise of his functions, the Procurement Regulator may request an agency for details in respect of a transaction, and the agency shall comply with that request within the time specified in the request.

Powers of the Procurement Regulator necessary

26. The Procurement Regulator shall have the power to do anything or convenient for performing his functions under this Act, including the power to enter ***into*** contracts, hire consultants purchase or lease real property ***and offer financial incentives for reports of breaches of this Act.***

Audit of the Procurement Regulator

27. The Auditor General shall audit the Procurement Regulator and the Office of the Procurement Regulator annually and submit the report to Parliament.

Report of the Procurement Regulator to Parliament

28. (1) The Procurement Regulator shall present an annual report to Parliament no later than forty (40) days after the expiry of the financial year to which that report relates.

(2) The report shall include-

(a) a figure representing the total value of contracts as awarded by agencies, ***and another figure representing*** the cost of the total value of contract overruns;

(b) the number of unfulfilled contracts awarded by agencies in respect of procurement;

(c) the means of financing the contracts;

(d) the number of variations to a contract and related costs;

(e) a summary of transactions on an agency by agency basis specifying in respect of public procurement-

(i) the number of contracts awarded;

(ii) the means of funding the contracts together with quantum;

(iii) the number of contracts varied;

(iv) the number of contracts with cost overruns;

(v) the quantum of those overruns;

(vi) the number of unfulfilled contracts and the quantum of cost incurred;

(vii) with respect to the procurement for a project, the expected deliverables of that project, the number and value of the contracts involved and a list of the successful awardees with respect to contracts issued in relation to the project together with a brief description of each contract;

(viii) lessons learnt as a consequence of the management contract***s***;

(f) a summary of transactions concerning the disposal of public

property on an agency by agency basis -

(i) in respect of real property – the address and other identifying details of the property disposed of including value, to whom it was disposed, date of disposal, means of disposal, and consideration;

(ii) ***in respect of property other than real property, details of the property disposed of including value, to whom it was disposed, means of disposal, and consideration;***

(g) details of changes implemented to ensure current best

practice for procurement, and disposal of public property;

(h) the contents of the report of the Council;

(i) recommendations.

(3) The report does not need to include details of contracts less than $50,000 or contracts for the settlement of legal liability other than the total number and quantum.

(4) The Speaker shall cause a copy of that report to be laid before Parliament within twenty-eight (28) days of its receipt by him, or if Parliament is not then in session, within twenty-eight (28) days of the commencement of its next session.

PART V - NATIONAL PROCUREMENT ADVISORY COUNCIL

National Procurement

29. (1) There shall be established a National Procurement Advisory Council comprising fourteen (14) persons being -

Advisory Council

(a) ***a nominee of the Trinidad and Tobago Transparency Institute and one nominee from each of two (2) other civil society organizations established under law having an interest in good governance;***

(b) ***two nominees of the Joint Consultative Council for the Construction Industry and one each from the Trinidad and Tobago Manufacturers' Association, the Trinidad and Tobago Chamber of Industry and Commerce and the Energy Chamber;***

(c) a nominee ***from an organization representing labour and one representing a professional organization;***

(d) ***a nominee of the Tobago House of Assembly;***

(e) a nominee of a body that represents the State enterprises other than the Corporation Sole;

(f) the Chief State Solicitor; and

(g) an *ex-officio* member from the Ministry of Finance.

(2) A nominating organization referred to in sub-section (1) ***other than that which is specified,*** shall be appointed for a period of three years by the President exercising his own discretion after taking into account the effectiveness of that organization in serving the public interest, which organization shall nominate its representative to serve on the Council.

(3) Should a nominating organization cease to exist, the President may identify an alternative organization for the balance of the term of the organization being replaced, and the nominee's term on the Council shall be affected accordingly.

(4) An organization within five (5) working days of being appointed by the President shall advise the Procurement Regulator in writing of its nominee to the Council being selected by the President.

(5) The Procurement Regulator shall advise the public of the nominees by a notice in the Gazette and in a major circulating daily newspaper.

(6) Matters pertaining to the operation of the Council are prescribed in the Second Schedule.

(7) The Council shall present an annual report to the Procurement Regulator and include in that report its observations and recommendations on the operation of the systems pertaining to public procurement, and disposal of public property.

Functions and powers of the National Procurement Advisory Council

30. (1) The Council shall meet –

(a) to consider the implementation of the Operating Principles and Objectives, and to advise the Procurement Regulator accordingly;

(b) to make recommendations to the Procurement Regulator for the development of the Guidelines so as to ensure that the Guidelines and other matters in relation to public procurement, and disposal of public property, conform to the Operating Principles and Objectives.

(2) In performing its functions under subsection (1), the Council shall take all reasonable steps to obtain the views of the national community on the operation of the public procurement system.

(3) The Council may invite a representative of an agency to assist in the performance of its functions but the representative shall have no vote.

Secretariat services to be provided by the Procurement Regulator

31. The Procurement Regulator shall provide the necessary secretariat services to the Council and bear the cost for the operation of the Council.

Procurement Regulator to attend Council

32. The Procurement Regulator shall attend the meetings of the Council, but shall have no vote.

PART VI – MISCELLANEOUS

Protection from liability

33. Subject to section 38, no proceedings whatsoever shall lie against a Commission or any person concerned with the administration of this Act for anything that he may do or report or say in the performance of its functions and powers under this Act.

Privileged information and protection from defamation

34. (1) Anything said or information supplied or any document or thing produced by any person in proceedings before a Commission or in the course of any investigation by the Commission shall be absolutely privileged in the same manner as if the proceedings or investigations were in a court of law.

(2) For the purposes of defamation proceedings any report made by a Commission or the Procurement Regulator under this Act and any fair and accurate comment concerning that report shall be deemed to be privileged.

Procurement records to be available to public

35. (1) A person may make a request of an agency to supply information and documents relating to a transaction.

(2) The Freedom of Information Act, 1999 applies to a request under subsection (1) as if that request had been made under the Freedom of Information Act, 1999.

(***3***) An agency shall not withhold disclosure on the grounds of confidentiality because that disclosure may prove embarrassing to the agency.

Agencies to publish award of contracts

36. Where an agency awards a contract, the authorized officer of that agency shall cause the public to be advised of that award, the names of the parties, the property or services to be acquired or disposed of, the price, and the performance date of the contract contemporaneously with the making of the award, and the requirements shall apply in respect of any variation of that contract or award.

Application of Judicial Review Act, 2000

37. Notwithstanding any other law, the Judicial Review Act, 2000 applies to a decision which arises in the process of procurement in respect of a transaction by an agency.

Reporting to

38. (1) Notwithstanding any other written law, where a person has a

Procurement Regulator or Public Procurement Commission of Collusion

reasonable belief that collusion between all or any of the interested parties to a transaction, or reasonably believes that an irregularity or a breach of this Act, has occurred, that person shall report accordingly to the Procurement Regulator, or the Public Procurement Commission.

(2) The Procurement Regulator shall refer any report of a breach of this Act to the relevant authorities and to the Public Procurement Commission for prompt attention, and advise accordingly in his report to Parliament.

Offences

39. ***(1)*** A person who exercises undue influence which results in a transaction being in breach of the Operating Principles, Objectives or Guidelines commits an offence.

(2) A person who being or having been an officer of an agency -

(a) maintains a standard of living above that which is commensurate with his present or past official emoluments; or

(b) is in control of financial resources or property disproportionate to his present or past official emoluments, ***and,*** unless he gives a satisfactory explanation to the Court as to how he was able to maintain such a standard of living or how such pecuniary resources or property came under his control; commits an offence.

(3) Where a Court is satisfied in proceedings incurring subsection (2) that, having regard to the closeness of his relationship to the accused and to other circumstances, there is reason to believe that any person was holding pecuniary resources or property in trust for, or otherwise on behalf of, the accused or acquired such resources or property as a gift from the accused, those resources or property shall, until the contrary is proved, be presumed to have been in the control of the accused.

General penalty ***40.*** (1) A person who commits an offence under this Act for which no penalty is prescribed shall be liable to a fine of five hundred thousand dollars and imprisonment for seven (7) years.

(2) An offence attracting a penalty under subsection (1) is a "specified offence" for the purpose and application of the Proceeds of Crime Act, 2000.

Protection for whistleblowers ***41. (1) Notwithstanding any other law, a person shall not be discharged, demoted, suspended, threatened, harassed, or financially prejudiced or otherwise discriminated against for making a report under section 38.***

(2) A person who is discharged, demoted, suspended, threatened, harassed or financially prejudice or otherwise discriminated against for making a report under section 38 shall be reinstated in his original office with no loss of benefit and provided with a public apology by the agency without prejudice to other legal recourse available to him.

(3) A person who acting on behalf of an agency discharges, demotes, suspends, threatens, harasses or in any manner discriminates against a person or acts so as to prejudicially impact upon a person's livelihood as a consequence of his making a report under section 38 commits an offence and is liable on summary conviction to a fine of one hundred and fifty thousand dollars ($150,000) and imprisonment for six (6) months.

Amendment to Act

42. A law altering sections 4, 5, 6, 7, 8, 9, and 10 of this Act shall not be passed by Parliament unless the final vote is supported by the votes of not less than two-thirds of the members of each House.

Regulations

43. The President may make regulations for the giving effect of this Act, and for prescribing anything required or authorized by this Act to be prescribed.

Validation of transactions by agencies outside the jurisdiction of Central Tenders Board Ordinance 1961

44. A transaction that is a transaction to which the Central Tenders Board Ordinance, 1961 does not apply and which is entered into or in force in accordance with an agency's tendering rules and procedures at the commencement of this Act, shall be deemed to be performed in accordance with this Act, and to the extent that the transaction is valid at the commencement of the Act, it shall be deemed to be so valid for the purposes of this Act so long as it conforms to section 4 of this Act.

Repeal and savings of transaction within the jurisdiction of the Central Tenders Board Ordinance 1961

45. (1) The Central Tenders Board Ordinance, 1961 is repealed.

(2) At the commencement of this Act a transaction that is entered into by the Director of Contracts, the Central Tenders Board or by any person in accordance with the Central Tenders Board Ordinance, 1961, for or on behalf of an agency shall be deemed to have been entered in accordance with this Act with respect to that agency ***and a reference to the Director of Contracts, the Central Tenders Board as the Central Tenders Board Ordinance 1961, as the case may be, shall be construed as a reference to the Procurement Regulator or this Act as the context demands.***

(3) Notwithstanding the repeal of the Central Tenders Board Ordinance, 1961, the Central Tenders Board Regulations 1965 and the Central Tenders Board (Defence Force and Protective Services) (No 2) Order 1992 shall continue to be in effect and shall apply, as appropriate to a transaction to which the Central Tenders Board Ordinance, 1961 applied prior to the commencement of this Act, until such time as the Guidelines are in force.

Consequential Amendments to the Exchequer and Audit Act Chap. 69:01

46. The Exchequer and Audit Act is amended in section 2 by -

(a) adding at the end of the definition of "public money" the following words:

"(c) spent or committed for expenditure by or on behalf of an accounting officer or a statutory body;

(d) distributed or administered by or on behalf of an accounting officer to a person.";

(b) by adding at the end of the definition of "revenue" the following ***words:***

"received or receivable by an accounting officer or raised by an instrument that is issued by or on behalf of the State from which it can be inferred that the State accepts liability in the case of default";

(c) by deleting from the definition of "statutory body" ***the following words:***

"or similar body corporate established and incorporated by an act" and substituting the words "established by an act or body corporate that is established by under an act including the Companies Act where the Government or any person controlled by the Government is entitled to exercise control directly or indirectly over the affairs of that body".

FIRST SCHEDULE

Matters pertaining to the operation, and terms and conditions of the members, of the Public Procurement Commission.

Period of Appointment

1. (1) Subject to this Act, a person appointed as a member of the Commission shall hold office for a period of seven (7) years and may be re-appointed for period not exceeding five (5) years but shall not be appointed for more than two (2) consecutive terms.

(2) A member of the Commission is deemed to be a person in public life for the purpose of the Integrity in Public Life Act, 2000 and is directly accountable to Parliament for the performance of his functions and powers.

Remuneration of members of the Commission

2. (1) Subject to subsection (2), a member of the Commission shall receive such emoluments and be subject to such other terms and conditions of service as the President may from time to time determines.

(2) The emoluments and terms of conditions of a member of the Commission shall not be less than the emoluments which may, from time to time, be payable to a Puisne Judge.

(3) The emoluments and terms and conditions of service of a member of the Commission, other than allowances that are not taken into account in computing pensions, shall not be altered to his disadvantage during the period of his appointment or reappointment, as the case may be.

Voluntary departure from office

3. A person appointed as a member of the Commission may at his own request be relieved of office by the President and shall in any case, subject to Clause 4, vacate office on attaining the age of seventy (70) years.

Extension of in limited circumstances

4. (1) The President may, after consultation with the Prime Minister and the Leader of the Opposition, permit a member of the Commission to continue in office until he has attained a later age, but not exceeding seventy-five (75) years.

(2) Not withstanding that he has attained the age at which he is required to vacate his office, a member of the Commission may continue in office for such period after attaining that age as the President after consultation with the Prime Minister and the Leader of the Opposition, may specify, so that the member can give his decision or conclude any investigation he was conducting before he attained that age.

Validation of action of member

5. Nothing done by a member of the Commission shall be invalid by reason only that he has attained the age at which he required to vacate his office.

Removal of member of the Commission

6. (1) A member of the Commission may be removed from office for –

(a) *inability to discharge the functions of his office (whether arising from infirmity of body or mind or any other cause);*

(b) trading with the Government of Trinidad and Tobago without the prior approval by resolution of each House of Parliament;

(c) bringing the office into disrepute;

and shall not be so removed except in accordance with this provision.

(2) For the purposes of this clause a Commissioner trades with "the Government of Trinidad and Tobago" if, while holding office as such, he becomes a party to, or is a partner in a firm or a director or manager of a company which to his knowledge becomes a party to, any transaction with the Government of Trinidad and Tobago.

(3) If each House of Parliament by resolution decides that the question of removing a person from the Commission ought to be investigated, then the President shall appoint a disciplinary tribunal, which shall comprise a Chairman and not less than two or more than five other members from among persons who hold or have held the office of Judge of a superior court having jurisdiction in civil and criminal matters or a court having jurisdiction in appeals from any such court.

(4) The disciplinary tribunal shall enquire into the matter and report on the facts to the President and recommend whether the member of the Commission the subject of the enquiry, ought to be removed from office for the grounds specified in this clause, within three (3) months of being appointed under sub clause (3).

(5) If the question of the removal from office of a member of the Commission has been referred to a tribunal appointed under sub clause (3) and the tribunal has recommended to the President that the person appointed as a member of the Commission should be removed from office, the President shall, remove that person from office.

(3) The appointment of a member of the Commission and the termination of his appointment whether by death, resignation or otherwise shall be published in the Gazette.

Suspension of member

7. Where the question of removing a member of the Commission from office has been referred to a tribunal the President, after consulting with the Prime Minister and the Leader of the Opposition, may suspend him from performing the functions of his office and any such suspension may at any time be revoked by the President after consultation with the Prime Minister and the Leader of the Opposition and shall in any case cease to have effect if the tribunal advises the President that the person ought not be removed from office.

Disqualification of member of Commission

8. (1) No person shall be appointed as a member of the Commission if he is –

(a) a member of the Senate or of the House of Representatives,

(b) an undischarged bankrupt;

(c) has been convicted of any offence involving dishonesty or moral turpitude; or

(d) a partner in a firm, or a director or manager of a company which to his knowledge is a party to any transaction with the Government of Trinidad and Tobago, unless, prior to his appointment, he has disclosed the nature of that transaction and interest of such firm or company.

Member to be devote

9. A person appointed as a full time member of the Commission shall

full time

his time to the appointment and shall not accept paid employment in any other

capacity during any period in which he holds office and a person appointed as a part-time member of the Commission shall devote his full time to the performance of his duties when acting as a Commissioner.

Vacancy to be filled

10. (1) Where a vacancy arises in the membership of the Commission the President, after consultation with the Prime Minister and the Leader of the Opposition, may designate one of the part-time members of the Commission to act in that office during that vacancy,

until an appointment is made by the President.

(2) Where, by reason of illness, absence from the jurisdiction or other sufficient cause a person appointed as a member of the Commission is unable to perform the functions of his office, the President after consultation with the Prime Minister and the Leader of the Opposition, may appoint a part-time Commissioner as he thinks fit, being a person qualified under this Act, to perform those functions as a replacement.

Staff of Commission

11. (1) The Commission may appoint and employ persons as are necessary to assist it in the proper performance of its function, at such remuneration, terms and conditions as may be approved by the Commission.

SECOND SCHEDULE

Section 31(b)

Matters pertaining to the operation of the

National Procurement Advisory Council

Tenure of office

1. (1) An organization that is represented on the Council may through its nominee hold an office for a period of three (3) years and the organization is eligible for re-appointment for no more than two (2) consecutive terms

(2) The organization may change its nominee after giving notice to the President and the Procurement Regulator.

Council vacancy

2. (1) The office of a member of the Council shall become vacant –

(a) if he resigns in writing;

(b) if his appointment is terminated in accordance with this Schedule.

(2) If any vacancy occurs in the membership of the Council, that vacancy shall be filled by another nominee of the relevant organization who shall, subject to this Schedule, hold office for the remainder of the period for which the previous member was appointed, and the consequent appointment shall be made in the manner and from the same category of persons as the appointment of the previous member.

Gazetting of every appointments

3. The names of all the members of the Council as first constituted and change of membership following shall be published in the *Gazette*.

Resignation from

4. A member of the Council may at any time resign his office by

office instrument in writing addressed to the President and transmitted through the Chairman, and from the date of the receipt by the President of that instrument, the member shall cease to hold office.

Termination of appointment

5. The membership of a person to the Council shall cease if –

(a) the nominating organization withdraws support from the person who is its nominee on the Council;

(b) the nominating organization becomes bankrupt or compounds with or suspends payment to a creditor;

(c) the President revokes the organization as a nominating body, which the person represents.

(d) that person becomes of unsound mind or becomes permanently unable to perform his functions by reason of ill health;

(e) that person is convicted of an offence and sentenced to a term of imprisonment;

(f) that person dies.

Procedure of meetings

6. (1) The Council shall meet not less than once a month or as often as may be necessary or expedient for the performance of its functions under this Act, and these meetings may be held at such places and times and on such days as the Council determines.

(2) The Council shall appoint one of its members as Chairman.

(3) The Chairman shall preside at all meetings of the Council and if the Chairman is absent from a meeting the members present shall elect another member to preside at that meeting.

(4) Five members shall constitute a quorum of the Council.

(5) The decisions of the Council shall be by a majority of votes and in addition to an original Vote, the Chairman or other member presiding at the meeting shall have a casting vote in any case in which the voting is equal.

(6) Subject to the provision of this Act the Council may regulate its own proceedings

(7) The validity of any proceedings of the Council shall not be affected by any vacancy among the members or by any defect in the appointment of a member.

Remuneration of members

7. There shall be paid to the members of the Council such remuneration, whether by way of salary, honorarium, travelling or other allowances as the Cabinet determines.

Passed in the House of Representative this …….day of ……2010

Clerk of the House

I confirm the above

Speaker of the House of Representative

Passed in the Senate this ……. ....day of …….2010

Clerk of the House

I confirm the above

President of the Senate

July 05 2010 – Public Procurement and Disposal of Public Property Act, 2010

JOINT CONSULTATIVE COUNCIL
FOR THE CONSTRUCTION INDUSTRY
The Professional Centre Bldg.
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11-13 Fitzblackman Drive, Wrightson Rd. Ext.
Port of Spain
Tel: (868) 623-9396 Fax: (868) 625-5749 E-mail: jcctt1@gmail.com Website: jcc.org.tt

11 September, 2012

JCC PRESS RELEASE

The Joint Consultative Council for the Construction Industry - JCC – is completely opposed to the recently-proclaimed provisions of the Trinidad and Tobago Administration of Justice (Indictable Proceedings) Act 2011 which have the effect of creating a loophole to allow the high-profile persons accused in the Piarco Airport scandal to escape trial. The Bernard Commission was an expensive and critical Enquiry into the Piarco Airport scandal which revealed evidence of massive corruption, bid-rigging, bribe-paying, back-fitting and other practices which amounted to a series of criminal assaults on our nation's Treasury. The JCC played a leading role in calling for and submitting evidence to the Bernard Commission which exposed abuse of power and corrupt practices in some of the highest offices in our country. There have been high-level convictions and imprisonments arising directly from the Bernard Commission, yet there has been no action on effectively prosecuting the accused parties in our own Courts.

"The effect of the new laws which were proclaimed would have been to create a legal means for those accused persons to escape a trial and oblige the Court to have made a verdict of not guilty. The JCC deplores such an intended result in this matter as being contrary to good order and seemingly intended to promote the notion that white-collar crime pays."

The JCC is calling for ***immediate*** corrective action by the Attorney General and the Minister of Justice, including repealing the recently-proclaimed sections of this Act, to ensure that the trials of the Piarco Airport scandal accused can proceed as promised on several occasions to the public. ***Justice must not only be done, it must be seen to be done.*** Even after the necessary immediate corrective action, the JCC is calling on the Prime Minister to make a formal, full statement to the Parliament to give an accounting for the manner in which this most important matter has been handled, including why it was thought advisable to have those particular clauses of this new law proclaimed at the particular moment of celebrating our country's 50th anniversary of Independence.

Given the specific assurances given to the Parliament as to the pre-conditions to the government's intended proclamation of this new law, the role of the President in assenting to these particular clauses at that particular moment of national celebration and maximum distraction is a matter for serious concern.

Publish the Bernard Report now

The JCC is repeating its call for the immediate publication of the full Report of the Bernard Commission into the Piarco Airport scandal.

Implement the Uff Report recommendations now

The JCC is calling on this administration to implement the Uff Report recommendations now as promised in the 2010 election campaign. The JCC completely rejects the position of the Minister of Justice that the Joint Select Committee on Public Procurement and Disposal of Public Property is handling that implementation process. Only one of the 91 recommendations of the Uff Report has any relation to the work of that Joint Select Committee, so those need to be implemented now.

If this administration is serious about attacking the wave of white-collar crime which is drowning our country, the Uff Report recommendations will be implemented now.

Public Procurement reform now

The JCC is renewing its call for the immediate implementation of a new Public Procurement system to eliminate the waste and theft of Public Money. This administration campaigned on a promise to implement the new Public Procurement system within one year of the May 2010 election, so we are way overdue for those new laws.

The JCC and its colleagues in the Private Sector/Civil Society group have submitted a complete DRAFT BILL to the Joint Select Committee, so that needs to become law now.

If this administration is serious about attacking the wave of white-collar crime which is drowning our country, the DRAFT BILL on Public Procurement and disposal of Public Property as prepared by the Private Sector/Civil Society group will be immediately tabled in Parliament for debate and enactment

In this, our nation's 50th year of independence, our Parliament re-convened during its vacation to approve Financial laws on the request of a foreign government.

The JCC is calling for Parliament to be reconvened for the immediate correction of this gross error in proclaiming this new law.

The JCC is also calling on this administration to make the passing of new Public Procurement laws an urgent priority.

Thank you for your support on these important issues of national development.

JOINT CONSULTATIVE COUNCILFOR THE CONSTRUCTION INDUSTRY
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jcctt1@gmail.com www.jcc.org.tt

24th October, 2012

Mr. Reynold Cooper
The Permanent Secretary,
Office of the Prime Minister,
#13-15 St. Clair Avenue,
St. Clair,
Port of Spain

Dear Sir,

Re - Freedom of Information application for the Bernard Report

This Commission of Enquiry into the Piarco Airport scandal submitted its Report in August 2003.

The JCC has requested publication of the Bernard Report on numerous occasions, most recently in our letters to the Prime Minister on 24th April and 3rd October 2012.

In that connection our S.13 application for the Bernard Report is attached and we await your early written response.

Yours faithfully,
JOINT CONSULTATIVE COUNCIL
FOR THE CONSTRUCTION INDUSTRY

Afra Raymond, BSc, FRICS
President

SCHEDULE

(Section 13)

THE FREEDOM OF INFORM.A.TION ACT. 1999

Request for Access to Official Document(s)

(pursuant to section 13)

1. Name of Public. Authority...OFFICE OF THE PRIME MINISTER
2. Name of Applicant. JOINT CONSULTATIVE COUNCIL FOR THE CONSTRUCTION INDUSTRY ....
3. Address of Applicant, 11-13 FITZBLACKMAN DRIVE, UNITB202, WRIGHTSON RD, SOUTH, POS .....
4. Telephone Number of Applicant 623-9396; 6272522 .....

5.	Doc. No.	Description of Document Requested	Form of Access
	1.	REPORT OF THE COMMISSION OF ENQUIRY INTO THE PIARCO AIRPORT PROJECT UNDER THE CHAIRMANSHIP FORMER CHIEF JUSTICE CLINTON BERNARD SUBMITTED 30TH AUGUST 2003	COPY
	2.		
	3.		

[Note: Applications Shall identify the document(s), or provide sufficient information to enable an officer/employee of the p authority who is familiar with the relevant documents, to identify the documents, to identify the document(s) with reasor effort.

Continue on a Separate Page if necessary.

Subject to the provisions of the Act access to a document ay be granted by supplying a printed copy of it or by making it available for inspection or, if appropriate, by supplying a copy of a tape, disk, film or other material containing the information, by supplying a transcript of such tape, film or other material or by making arrangements for the hearing or viewing the such tape, disk, film or other material].

6. Assuming that all documents requested are exempt documents, give the Document Number of the documents described above of which you would like to have access to an edited version, if possible.

The making of this request is free of charge, but where access to a document is to be given in the form of a copy (printed or otherwise), the applicant shall be required to pay the prescribed fee.

Date of Application..24th October 2012

Signature of Applicant.....

RECEIVED JAN 1 5 2013

OFFICE OF THE PRIME MINISTER

#13-15 ST. CLAIR AVENUE, ST. CLAIR
REPUBLIC OF TRINIDAD AND TOBAGO

OPM: 14/4/5 Temp. (12) #166

January 15, 2013

Mr. Afra Raymond
President
Joint Consultative Council for
the Construction Industry
1st Floor Unit B202
11-13 Flitzblackman Drive
Wrightson Road South
PORT OF SPAIN

Dear Mr. Raymond,

Re: Application under the Freedom of Information Act (F.O.I.A.) submitted by Mr. Afra Raymond

I acknowledge receipt of your request for information under Section 13 of the Freedom of Information Act 1999 (F.O.I.A.) which was received in the Office of the Prime Minister on October 24, 2012.

In this connection, enclosed is the Certificate of Exemption dated January 09, 2013 issued by the Secretary to Cabinet under section 24 of the said Act.

Please be informed accordingly.

Yours sincerely,

/f/ Permanent Secretary
to the Prime Minister

CERTIFICATE OF EXEMPTION

Issued by the Secretary to Cabinet under section 24 of the Freedom of Information Act, Chap. 22:02

I certify that the document(s) in connection with the report of the Commission of Enquiry into the Piarco Airport Development Project under the Chairmanship of former Chief Justice Clinton Bernard, which is the subject of a Request for Access to Official Documents,
dated 24/10/12, is exempt under section 24 of the Freedom of Information Act, Chap. 22:02, it being–
dd/mm/yy

(*Tick as appropriate*)

☒ the official record of decisions of Cabinet

☐ a document that has been prepared by a Minister of Government or on his behalf, or by a public authority, for the purpose of submission for consideration by Cabinet

☒ a document which has been considered by Cabinet and which is related to an issue that is or has been before Cabinet

☐ a document prepared for the purpose of briefing a Minister of Government in relation to an issue to be considered by Cabinet

☐ a document that is a copy or draft of, or contains extracts from, a document referred to above being

.....

.....

☐ a document, other than a document by which a decision of Cabinet was officially published, the disclosure of which would involve the disclosure of a *deliberation/decision of Cabinet.

Secretary to Cabinet
Certificate of Exemption
Freedom of Information
Act, Chap. 22:02

Dated the 9th day of January, 2013.

A. Singh-Parag
Secretary to Cabinet (Ag.)

*Delete as applicable.

G.P., TR/TO. –X 128-20– /06

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6 January 2014

Mr. Reynold Cooper
Permanent Secretary
Office of the Prime Minister
#13-15 St. Clair Avenue
St Clair
Port of Spain

Dear Mr. Cooper,

Freedom of Information request for the Bernard Report

The JCC's original request in this matter was made on 24th October 2012, to which you replied on 15th January 2013, enclosing the Certificate of Exemption (dated 9th January 2013) claiming S.24 entitlements.

That Certificate of Exemption was issued on two grounds -

1. That the Bernard Report was, under S.24 (1) (a), '*the official record of decisions of Cabinet*' – That Report was prepared by a Commission of Enquiry into the Piarco Airport Project, so while it could have noted certain '*decisions of Cabinet*', it cannot possibly be considered '*the official record*' of any such decisions. Consequently, your claim for exemption of the Bernard report under this ground is baseless;
2. That the Bernard Report was, under S.24 (1) (b), '*a document which has been considered by Cabinet and which is related to issues that are or have been before Cabinet*' – That Report was almost certainly considered by Cabinet, so that limb of your claim for exemption is plausible.

The Bernard Report was submitted to the President on 30th August 2003 and there have been repeated promises by various political administrations to publish it. The continued failure or refusal to publish that Report prompted our several public requests, most recently in October 2012 via the Freedom of Information Act.

.... //2 The official

6 January 2014

Mr. Reynold Cooper
Permanent Secretary
Office of the Prime Minister
Freedom of Information request for the Bernard Report

The official Certificate of Exemption to refuse our request was founded on S.24 of the FoIA – the Cabinet exemptions – and it is therefore reasonable to consider those provisions carefully. The JCC is now inviting your attention to sub-section (2) of S.24 -

> *"...(2) Subsection (1) shall cease to apply to a document brought into existence on or after the commencement of this Act when a period of ten years has elapsed since the last day of the year in which the document came into existence..."*

Given that the Bernard Report was submitted in August 2003, the stipulated exemption period of '*ten years after the last day of the year in which it came into existence*' ended on 31st December 2013.

The JCC is now restating its request under the provisions of the FoIA for the publication of the Bernard Report.

We await your early, positive response.

Yours sincerely,
JOINT CONSULTATIVE COUNCIL
FOR THE CONSTRUCTION INDUSTRY

Afra Raymond, BSc, FRICS
President

Breakfast with the Honourable Prime Minister

Statement by Victoria Hobday, President TTSP

17 January, 2018

What is the purpose and value of land use planning in Trinidad and Tobago you might ask? Perhaps you think that planning exists simply to frustrate development aspirations, as I suspect that many, if not all of you have stories of your frustrations in seeking to secure planning permission. This is a major problem, and I would not care to guess how many projects are currently tied up in the Town and Country Planning Division and appeal system, that could otherwise be contributing to much needed economic stimulation. I have more than one project tied up, and I am just one planner.

However the management of development through what is popularly called the development control process, is only part of the function of planning. Planning is about more than just land and buildings, which unfortunately seem to be our main preoccupation in Trinidad and Tobago. In essence, planning is an approach which manages the distribution of people and activities, in spaces of various scales - national, regional and community. It involves the coordination of practices and policies which affect how our urban and rural spaces and activities are organized.

You will appreciate that there are many different factors which influence the organization of space, including built development, transportation and accessibility considerations, social and cultural customs, economic drivers and so on. The real role of planning is to coordinate and reconcile all of these at times seemingly conflicting factors, in the interests of enabling a sustainable, coherent and rational use of land. Public consultation and participation must also be integral parts of the planning process.

This is articulated through written and graphic plans and policies, which define the goals for the future of the space, and outline the road map for getting there. Such plans and policies should of course be regularly updated to ensure that they continue to be relevant and appropriate. Development proposals which are the subject of planning applications, are then evaluated against these plans and policies. Sounds good doesn't it?

The problem is that we do very little actual development planning in Trinidad and Tobago. There is a National Physical Development Plan that came into effect in 1984, and which has not been updated since. There is a National Spatial Development Strategy (NSDS) completed in 2014 which seems to have no locus standi. There are a number of policies which are obsolete, and bear no relation to what is happening on the ground. There are other policies, the genesis and status of which are often unclear and secret, and which frequently change with government administrations without notice. So at the best of times, there is a lack of clarity and consistency as to what constitutes policy, such that investors, property developers and development consultants operate almost with guesswork. To be fair to my colleagues in the public service,

this is as much a problem for planners in TCPD, as it is for those of us who have to interface with them in seeking approval for development.

The lack of development planning in Trinidad and Tobago means that development is largely driven by flavour of the day projects, in which the inclusion of planning feels like an afterthought. Strategic development decisions seem, for the most part, to be made on an ad hoc basis, without due consideration to the wider socio-economic and environmental implications. Like ripples in a lake, the consequences of these decisions are often felt more widely and for far longer than understood.

We continue to face a number of challenges as a nation, including decaying town centres, growth of informal settlements and squatting, urban sprawl and inefficient use of land, environmental degradation, traffic congestion, economic contraction and of course, ever growing levels of crime and disorder. It is easy to point the finger at global economic instability, declining oil and gas revenues, and the much-touted increase in gangs. However I assure you that the continued sidelining of planning has played a pivotal role in creating our current national reality.

The profession itself is another casualty, with bright, young, planning professionals becoming understandably demoralized by the dysfunctional system in which they are seeking to make a difference, with the result that they leave either the profession or the country. The outlook for planning appears bleak.

Yet planning and planners have important roles to play in realizing a better future than our present. However, a better future requires a major change from our current trajectory. For our part, the TTSP is committed to partner with the Government through the Ministry of Planning and Development, the private sector and civil society, to strategize on and support the implementation of initiatives that have the potential for wide reaching benefits at all levels of society.

We wish to strenuously propose the following:

- Update of the current planning legislation that is over 50 years old, and firm decisions on amendments recommended for the partially proclaimed Planning and Facilitation of Development Act;
- Progress in the institution of the Urban and Regional Profession Bill that will regularise the functions of planners, architects, and engineers. We have been in consultation with the Ministry regarding this Bill and we look forward to its passage into law at the earliest possible time;
- Decisive action to streamline and speed up the planning permission process;
- Making public the relevant plans and policies currently used by TCPD in determining applications.

At the start of a new year, this is the ideal time for us all to resolve to start taking real steps to move forward differently.

Can we gain Competitive Advantage in Regional Markets, while rooted in our Local Construction Industry?

Prime Minister the Honourable Dr Keith Rowley, other members of the Government, colleagues; fellow professionals of the construction sector, good morning. In the interest of time, I promise not to belabour any of the points made by previous presenters. We at the APETT, under the umbrella of the JCC are heartened at the prospect of a reinstated **Cabinet Committee for the Construction Sector,** especially if it is to be chaired by the Hon Prime Minister. The latter context is accentuated by Dr Terrence Farrel's statement in his recent resignation letter from the Economic Development Advisory Board (EDAB) that he did not have the patience to deal with the low pace of public sector implementation. We remain optimistic by his presence here today, that Dr Rowley will facilitate the expediting of the changes required to optimize the potential of the construction industry.

So before I get into my short discourse on the nexus between competitiveness and corruption, there are important issues to highlight for the aforementioned Cabinet Committee to address.

1. The very important amendments and revisions to the **Engineering Profession Act No 34 of 1985**. The major amendments being, the making of registration mandatory for the practice of engineering in Trinidad and Tobago and the introduction of a system of Continuing Professional Development (CPD) for maintaining registered engineer status. Draft legislation has been in the making since 2011 as a joint effort between the Board of Engineers (BOETT) and APETT and repeated consultation with the Ministry of Works and Transport. The amended legislation urgently needs to be passed on to the Office of the

Attorney General for review and inclusion in the legislative agenda in 2018/2019.

2. Our **Drainage sub-committee** currently exists in a vacuum, while we still do not have a comprehensive Drainage Code that embraces Climate Change and Climate Resilient solutions. I dare say that we can no longer afford to waste precious public funds on studies and adhoc plans for drainage infrastructure projects without concomitant mitigation of the frequency and alleviation of the severity of flooding throughout the country.
3. Similarly, our **Transportation sub-committee**, was consulted in 2017 by the Economic Development Advisory Board. They are still waiting to review the IADB Report on Mass Transit, which was requested from the Ministry of Planning. Our committee's comments on The Amended Road Traffic Act have been largely ignored except for the recommendation to increase the speed limit on the major highways.
4. The Board of Engineers has a standing Committee dedicated to keeping us up to date with respect to Structural Design Codes headed by Dr Richard Clarke of the UWI. Our country, especially Tobago, will be devastated if hit by Category 5 Hurricanes like Irma or Maria. Nor will we be able to withstand magnitude 7 earthquakes without significant damage and destruction. Proper structural assessment of existing older public facilities can be reasonably retrofitted and we have a duty of care to safeguard the public in this regard.

Competitive Advantage & Corruption

In the face of prolonged lower oil prices and reducing production rates within our oil and gas driven economy, there is an avid advocacy for striving to earn foreign exchange revenue from the non-oil sector. The construction & quarrying industry, as part of the non-oil sector in T&T, is estimated according to the CSO to turnover

an average of TT $4.5B annually between 2011 and 2016. This represents almost 5% of our average GDP or 7.7% of our non-petroleum contribution to the average 2011-2016 GDP.

There are 82 construction companies currently registered with the T&T Contractors Association (TTCA), but one can estimate that there are at least 200 greater than medium sized local contractors operating in T&T. One can also estimate that we have greater than 30 local engineering consultant companies of various disciplines still active in the industry. This is excess capacity. How many of these companies are successful in consistently winning and executing contracts within the Eastern Caribbean market? The number is not surprisingly, quite small. It is my view that a major contributing factor to this inadequacy to sell more of our engineering and construction services outside of T&T, has its genesis partly in corruption.

Corruption is defined by Transparency International (TI), as *'the abuse of entrusted power for private gain'*. T&T is ranked by TI via their Corruption Perception Index at 101/176 countries in the world, with a score of 35 /100. Insidious corrupt practices that plague our construction industry undoubtedly reflect the above scores and remain prevalent, transcending political parties, economic vagaries, globalization, and even education. It can therefore be referred to now, as endemic and likened to defective company DNA.

Can contractor and consultant firms develop the technical and managerial competencies to successfully compete in regional markets after being conceived and grown-up operating in a local industry fraught with corruption? Corruption within any industry, adversely affects 'true competitiveness' and therefore works against our local companies that are actively seeking to compete regionally, even as potential local work diminishes and the industry is reported to be owed over TT$4B by state agencies at this time. While these are obvious 'incentives' for local

companies to strive to break into regional markets, why are our companies choosing instead to downsize, close down, and cut salaries based on our recent experiences and ongoing anticipation of a smaller slice of a decreasing pie, as the government of the day struggles to balance its budget and the FOREX challenge continues to cripple the country?

Strategic management practice dictates that we constantly review our companies' strengths and weaknesses internally, while analysing the external environment to determine the threats to our industry (SWOT), but also simultaneously searching for opportunities in new and existing markets. It is clear from the above discourse that declining O&G prices should have (and has), long been identified as a threat to our industry's viability. Apart from the obvious management reactions to address what is within their control, like internal company efficiency, there should be at least a serious strategic intent in this scenario to pursue work in regional markets. Regional market analyses would reveal that the majority of their engineering consultancy and ensuing construction projects are internationally funded. These lending agencies (CDB, IADB, EU, WB) all have very strict procurement practices but payment in FOREX is guaranteed and also invariably made on a timely basis. Winning bids for engineering consultancy and/or construction projects against international competition within the regional market, is therefore largely based on merit via transparent procurement practices. Once successful high quality performance is mandatory if one expects to stay in the game.

Companies that indulge in corrupt practices, directly or indirectly, have little need for strategic management, nor for the adoption of continuous improvement philosophies and the like that will engender efficiency and effectiveness of their operations. They consequently have minor interests in building human resource capacity that possesses integrity and proficiency; nor are they interested in executing

high quality work within the contracted time at the specified quality. These management driven activities when actively embraced are the invaluable ingredients for increased competitiveness in any market.

The local litmus test that separates companies that subscribe to corrupt practices from those that do not, is that the former are rarely contracted for ‘true’ private sector work. Even nepotism and cronyism have limits within the private sector which, attaches real value to the services and products that they purchase, especially in lean economic times.

The 'skills' of 'corrupt-minded companies' are honed in the art of landing public sector contracts by exploiting dubious procurement practices. The latter, no doubt a contributing factor to our low score of 35/100 by TI, can be linked to the arduous task of enacting and operationalizing procurement legislation, which after over 15 years of lobbying has only last week seen the appointment of The Procurement Regulator and Board. Even when procurement legislation becomes fully operationalized, there will be a protracted period before the industry adapts and a downward trend in corruption can be seen. This is simply because we have to change the mind-set of all stakeholders whom are interested in *private gain with little regard for the abuse of entrusted power*.

On the bright side, it is a fact that there are local contracting and consulting firms that are successful in the regional markets. Their success is based on selective tendering to match their true competencies and innovative approaches developed over time while operating within our local market, but generally steering clear of corruption.

If our construction sector is interested in developing true competitiveness in the local and external markets, we need to transform our organizations as described above.

The Government has an ongoing critical role to adequately fund and resource the Procurement Board and to ensure its independency.

As individual engineers, architects surveyors and planners we are supposedly held to high standards of professionalism and ethical behaviour by virtue of our code of ethics. If we adhere to these ideals, we can with time, and true operationalization of the procurement legislation, realize the revolution that is required within the construction industry. Only then we will have an influence on corruption reduction locally, while increasing our competitiveness regionally and perhaps even globally.

Fazir Khan BSc, REng, MAPETT

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jcctt1@gmail.com www.jcc.org.tt

2nd July, 2012

Ms. Verity Bynoe
Corporate Secretary
Educational Facilities Company Limited
2ND Floor, Long Circular Place
74 Long Circular Road
Maraval

Dear Ms. Bynoe,

The Joint Consultative Council for the Construction Industry (JCC) is enquiring, under S. 13 of the Freedom of Information Act (FoIA) into these aspects of EFCL's operations -

- Approved Contractors - Names, addresses, specialisations and contract limits of Approved Contractors, together with the dates of those formal approvals.

- Contracts Awarded - Project addresses, scope, contract sums and names of contractors as awarded, together with dates of those awards.

- Contract Workers/Officers - Names, positions, salaries & other benefits, starting date and final date of service for Contract Officers/Workers engaged by EFCL in the calendar years 2010 and 2011, as well as for the period 1st January to 30th June 2012. Names, positions, salaries & other benefits, starting date and final date of service for Contract Officers/Workers dis-engaged, dismissed or not renewed by EFCL in the calendar years 2010 and 2011, as well as for the period 1st January to 30th June 2012.

Our FoI application in that regard is attached for your early attention please.

We trust that our enquiries will be expeditiously and fully answered.

Yours sincerely,
JOINT CONSULTATIVE COUNCIL
FOR THE CONSTRUCTION INDUSTRY

Afra Raymond, BSc, FRICS
President

SCHEDULE

(Section 13)

THE FREEDOM OF INFORM.A.TION ACT. 1999

Request for Access to Official Document(s)

(pursuant to section 13)

1. Name of Public. Authority EDUCATION FACILITIES COMPANY LIMITED (EFCL)
2. Name of Applicant JOINT CONSULTATIVE COUNCILFOR THE CONSTRUCTION INDUSTRY . ...
3. Address of Applicant PROFESSIONAL CENTRE, 11-13 FITZBLACKMAN DRIVE, PORT OF SPAIN.....
4. Telephone Number of Applicant 623-9396; 627-2522 .....

5.	Doc. No.	Description of Document Requested	Form of Access
	1.	APPROVED CONTRACTORS - NAMES, ADDRESSES, SPECIALISATIONS AND CONTRACT LIMITS OF APPROVED CONTRACTORS, TOGETHER WITH THE DATES OF THOSE FORMAL APPROVALS.	COPY
	2.	CONTRACTS AWARDED - PROJECT ADDRESSES, SCOPE, CONTRACT SUMS AND NAMES OF CONTRACTORS AS AWARDED, TOGETHER WITH DATES OF THOSE AWARDS.	COPY
	3.	CONTRACT WORKERS/OFFICERS - NAMES, POSITIONS, SALARIES & OTHER BENEFITS, STARTING DATE AND FINAL DATE OF SERVICE FOR CONTRACT OFFICERS/WORKERS ENGAGED BY EFCL IN THE CALENDAR YEARS 2010 AND 2011,	COPY
		AS WELL AS FOR THE PERIOD 1ST JANUARY TO 30TH JUNE,2012	
		NAMES, POSITIONS, SALARIES & OTHER BENEFITS, STARTING DATE AND FINAL DATE OF SERVICE FOR CONTRACT OFFICERS/WORKERS DIS-ENGAGED,	
		DISMISSED OR NOT RENEWED BY EFCL IN THE CALENDAR YEARS 2010 AND 2011, AS WELL AS FOR THE PERIOD 1ST JANUARY TO 30TH JUNE, 2012.	
	4.		

Continue on a Separate Page if necessary.

[Note: Applications Shall identify the document(s), or provide sufficient information to enable an officer/employee of the pul authority who is familiar with the relevant documents, to identify the documents, to identify the document(s) with reasona effort.

Subject to the provisions of the Act access to a document ay be granted by supplying a printed copy of it or by making it available for inspection or, if appropriate, by supplying a copy of a tape, disk, film or other material containing the information, by supplying a transcript of such tape, film or other material or by making arrangements for the hearing or viewing the such tape, disk, film or other material].

The making of this request is free of charge, but where access to a document is to be given in the form of a copy (printed or otherwise), the applicant shall be required to pay the prescribed fee.

6. Assuming that all documents requested are exempt documents, give the Document Number of the documents described above of which you would like to have access to an edited version, if possible.

Date of Application 2nd July 2012

Signature of Applicant .....

Education Facilities Company Limited

P.O.Box 604; Long Circular Place, Second Floor, 74 Long Circular Road, Maraval, Trinidad, W.I.
Tel. No.: 628-5155, 622-6144, 622-2083;Fax Nos.: 628-7419, 622-1887
Email: info@efcl.co.tt

RECEIVED
23 JUL 2012

July 20, 2012.

Mr. Afra Raymond,
President,
Joint Consultative Council for the Construction Industry,
The Professional Centre Building,
1st Floor Unit B202,
11-13 Fitzblackman Drive,
Wrightson Road South,
Port of Spain.

Dear Sir,

Reference is made to the Joint Consultative Council for the Construction Industry's ("JCC") request for information dated July 2, 2012 pursuant to Section 13 of the Freedom of Information Act ("FOIA").

Having considered the said request, the Education Facilities Company Limited ("EFCL") has been advised that the EFCL is unable to accede to the said request since:

1) The FOIA (Section 11(1)) only entitles legal persons to make applications for information. On the face of the said application there is no evidence that the JCC is a "legal person" in law, and

2) By virtue of Sections 13(5) and 4(k)(i) and (iii) of the FOIA, requests for information from corporations such as the EFCL must be made to the corporation's line Minister.

Please note that once the application for information is made in the correct manner to the proper authority the EFCL will be happy to disclose the information requested once permitted by the terms of the FOIA.

Please be guided accordingly.

.....
Mr. Kiran Shah
Chief Executive Officer (Ag.)

JOINT CONSULTATIVE COUNCILFOR THE CONSTRUCTION INDUSTRY
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1st Floor Unit B202, 11-13 Fitzblackman Drive, Wrightson Rd. South, Port of Spain
Tel: (868) 623-9396/ 627-2522 Fax: (868) 625-5749
jcctt1@gmail.com www.jcc.org.tt

23rd July, 2012

Mr. Kiran Shah
Chief Executive Officer
Education Facilities Company Limited
P.O. Box 604 Long Circular Place,
Second Floor,
74 Long Circular Road,
Maraval

Dear Mr. Shah,

Further to your letter of 20th July, received earlier today, please be advised as follows-

1. The JCC is a registered company (T 4958 (95)) under the Companies Act 1995 and therefore is a legal person as required by the Freedom of Information Act (FoIA). A copy of our Certificate of Registration is attached for ease of reference;
2. Your point that our application should have been directed to the line Minister is taken, so our letter of even date to the Permanent Secretary of the Ministry of Education is attached for ease of reference.

We await your early reply.

Yours sincerely,
JOINT CONSULTATIVE COUNCIL
FOR THE CONSTRUCTION INDUSTRY

Afra Raymond, BSc, FRICS
President

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jcctt1@gmail.com www.jcc.org.tt

23rd July, 2012

Ms. Kathleen Thomas
Permanent Secretary
Ministry of Education
#18 Alexandra Street
St. Clair
Port of Spain

Dear Ms. Thomas,

We have enclosed for your attention the following correspondence;

1. JCC's Freedom of Information application to the Education Facilities Company Limited of 2nd July 2012;

2. EFCL's reply of 20th July 2012;

3. JCC's reply to EFCL of even date

We await your early reply.

Yours sincerely,
JOINT CONSULTATIVE COUNCIL
FOR THE CONSTRUCTION INDUSTRY

Afra Raymond, BSc, FRICS
President

RECEIVED MAR 1 8 2013

Education Facilities Company Limited
P.O.Box 604; Long Circular Place, Second Floor, 74 Long Circular Road, Maraval, Trinidad, W.I.
Tel. No.: 628-5155, 622-6144, 622-2083;Fax Nos.: 628-7419, 622-1887
Email: info@efcl.co.tt

March 18, 2013

Mr. Afra Raymond
President
Joint Consultative Council for the Construction Industry
The Professional Centre Building
1st Floor Unit B202
11-13 Blackman Drive
Wrightson Road South
Port of Spain.

Dear Mr. Raymond

Re: JCC's Freedom of Information request to Education Facilities Company Limited (EFCL)

Reference is made to your letter dated January 30, 2013.

In response to the areas where you require further assistance, kindly be informed of the following:-

1. The colours represent the year that the employee commenced employment in the Organization.
2. The names of workers/officers engaged, disengaged, dismissed or not renewed, as you may well know, Section 30(1) of the Freedom of Information Act protects against the unreasonable disclosure of personal information of an individual. So that the EFCL may make a determination as to the reasonableness of the requested information, could you kindly supply the reason(s) why it is necessary for the JCC to obtain this information.
3. Consideration is being given with respect to the request for a soft copy of the information.

Should you require further information or clarification please contact the undersigned at 708-3086.

Yours faithfully,

Lindy-Ann Mitchell
Legal Officer

JOINT CONSULTATIVE COUNCIL
FOR THE CONSTRUCTION INDUSTRY
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9th December, 2013

Ms. Lindy-Ann Mitchell
Education Facilities Company Limited
P.O. Box 604,
Long Circular Road
MARAVAL

Dear Ms. Mitchell,

Re - JCC's FoIA request to EFCL

Thank you for your letter of 18th March in reply to ours of 30th January.

Our responses are -

1. Colours - We need the key so as to decipher the information provided, so please let us know the colours which relate to the particular years.

2. Names - As an applicant we are under no obligation whatsoever to disclose a reason for seeking information. That said, the stated rationale in relation to '*unreasonable disclosure of personal information*' is contrary to the Public Interest Test which S. 35 of the FoIA obliges you to perform. That is like the EFCL decision to seek contractors' opinions before answering our original FoIA queries - are we to assume that a contractor who chose to view our request as '*unreasonable disclosure of personal information*' would have been facilitated by EFCL in suppressing that firm's details? We await your decision in this matter.

3. Soft Copy - Plainly, the details you compiled in your original reply of 18TH March, 2013 were done on a computer system, so a soft copy must have been created. There is no additional cost and only nominal time involved in providing us with the requested soft copy. As such, the only possible consideration would seem to be the extent to which EFCL wishes to facilitate or obstruct our enquiry. Given that the FoIA is intended to facilitate disclosure, we again make our request for the soft copy.

We await your early reply.

Yours sincerely,
JOINT CONSULTATIVE COUNCIL
FOR THE CONSTRUCTION INDUSTRY

Afra Raymond, B.Sc., FRICS
PRESIDENT

2013

Report of the Independent Review Committee of the Debe to Mon Desir Segment of the San Fernando to Point Fortin Highway

Submitted by: Dr. James Armstrong
Chairman

March 3, 2013

3rd March 2013

Report of the Independent Review Committee of the Debe to Mon Desir Segment of the San Fernando to Point Fortin Highway.

Submitted by,

Dr. James Armstrong
Chairman
Independent Review Committee

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EXECUTIVE SUMMARY

EXECUTIVE SUMMARY

INTRODUCTION

This Report of the Highway Review Committee (HRC), which was established to undertake a technical review of the Debe to Mon Desir segment of the extension to the Sir Solomon Hochoy Highway (SHH), comes at an important juncture in the fiftieth year of our evolution and development as an independent State. The exercise demonstrated the advent of an era of enlightenment in which the governance machinery of State and civil society representatives, while in an entrenched face-off of divergent positions, embraced an opportunity to reflect on common interests often assumed in a modern democracy and indeed in the safeguards enshrined in our Constitution. In this regard, there are no winners and losers.

HISTORICAL CONTEXT

The decision to build the 'San Fernando to Point Fortin Highway' was conceived over three decades ago and has been considered by successive governments. The National Physical Development Plan (NPDP) of 1984 includes an alignment for such a highway, quite apart from the South Trunk Road. A pre-feasibility study was actually undertaken in 1998, followed by a full feasibility study and initial designs between 2005 and 2007. The final report of the latter study titled *Solomon Hochoy Highway Extension to Point Fortin: Final Report on Feasibility Investigations, Volume 1 - Engineering and Economic Feasibility*, which was prepared by LEA-Trintoplan in association with Ecoengineering, indicates that the 1998 study pointed to "three distinctive traffic issues which need to be addressed:

1. A more direct route between San Fernando and the Point Fortin-La Brea area is needed.
2. There are significant traffic delays on sections of SS Erin Road from Cross Crossing to Siparia.
3. There are significant traffic delays on the two-lane section of the South Trunk Road and Southern Main Road between Cross Crossings and St Mary's Junction.[1]"

Consequently, various alternative alignments were considered for a route between San Fernando and Point Fortin. Particular consideration was given to a route which approximates the alignment reflected in the NPDP.

Three options *(See Figure 1)* were studied as discussed further in this Review Report. The western alignment was the least feasible because it traversed the Oropouche Lagoon directly and would have had significant environmental impacts and be quite costly. The eastern alignment was also found to have significant negative environmental impacts and would have been the most expensive. The centre alignment, from Golconda to Debe to Siparia, to Mon Desir was considered to be superior both from the environmental perspective since it did not significantly impact the lagoon, and from an overall perspective. Trintoplan Consultants, at Section 2.2 *in the Final Report on Feasibility Investigations, Volume 1 – Engineering and Economic Feasibility* proposed that the extension of the highway should follow a route to Point Fortin via Penal and Mon Desir. This is the route that was found to be most appropriate. It was pointed out that construction of the entire route to four-lane standard was not justified

[1] Section 4.2, Page 4-1.

in the near future from an economic viewpoint and that the best alternative for extension of the network to 2020 was a two-lane standard highway. This section of the report, however, notes a directive from the "Ministry" that:

- The South Trunk Road between Dumfries Road and Paria Suites should be widened to four lanes.
- The SHH extension from Golconda to Point Fortin should be to freeway standard.
- A highway connection be established between the route serving the Penal and Siparia areas and that serving Point Fortin.
- A four-lane extension from Golconda to Debe should be the initial freeway implementation contract of the overall project.

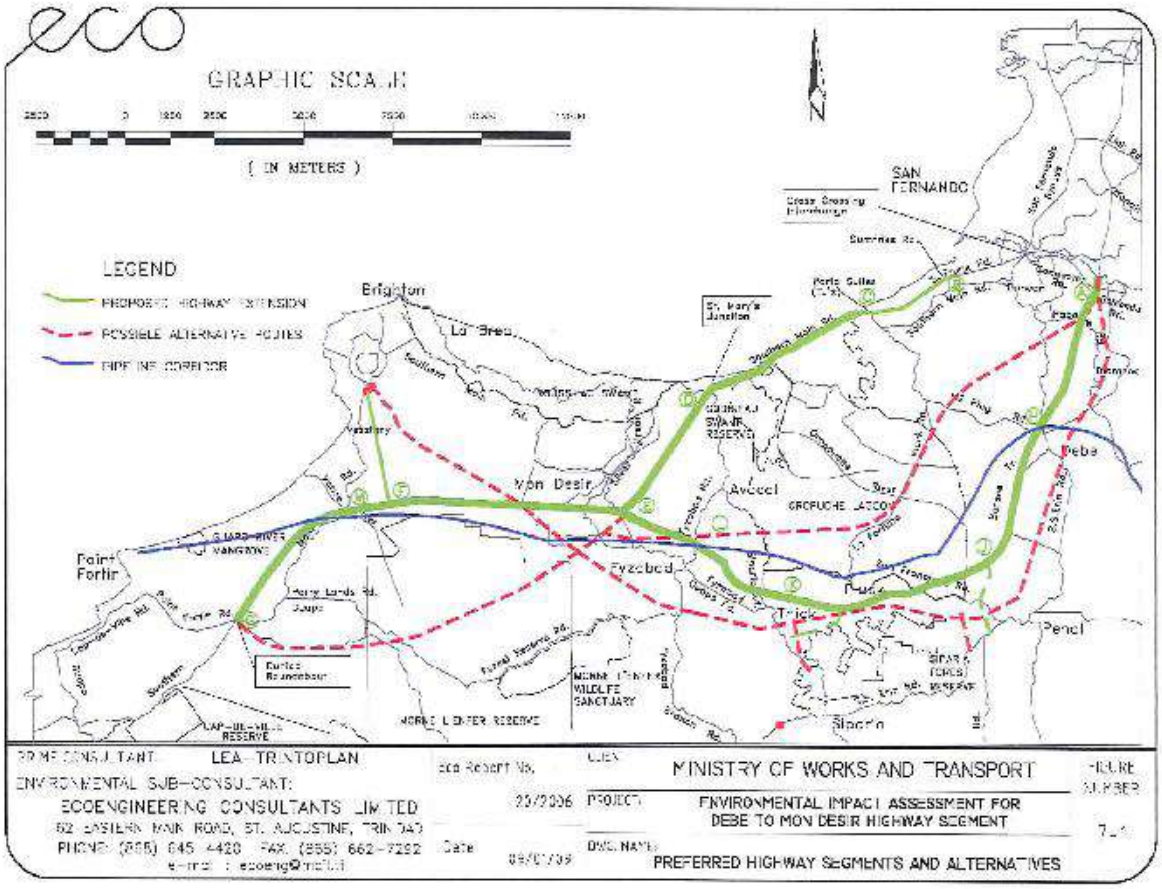


Figure 1: Alternative Alignments Considered

Source*: Highway Extension to Point Fortin: Debe to Mon Desir (Environmental Impact Assessment, Volume 1: Text (Revision 1)*

According to an account of events provided by the National Infrastructure Development Company Limited (NIDCO), as the "detailed designs were completed more than five years ago (2005-2007), and for other pertinent reasons, a decision was taken to tender the construction of the highway, on the 24 February 2010, utilizing the Design-Build model of procurement." In effect, this meant that the project was no longer going to be phased as was originally envisaged. A Brazilian company Construtora OAS Ltda (OAS) was procured in 2011[2] to build the entire highway. Actual construction commenced in September 2011, with a planned completion date of September 2015. Under this arrangement, OAS is fully responsible for executing the design of the entire highway on behalf of the Ministry of Works and Infrastructure (MOWI) and NIDCO. The Ministry and NIDCO must approve the design at intervals and, therefore, OAS has engaged the services of international consultants HALCROW to prepare designs that satisfy the requirements of the contract. Further design checks are to be undertaken by reputable consultancy firms.

As details of the decision to build the entire highway at a cost of $B7.5 emerged various individuals raised concerns about a number of issues. These individuals eventually morphed into the Highway Reroute Movement (HRM). In February 2012 the HRM wrote to the Prime Minister of Trinidad and Tobago requesting that the proposed Debe to Mon Desir segment of the highway should be discontinued and that consideration be given to an alternative route as discussed in the Traffic and Transportation Section of this Review Report. The concerns of the HRM, as outlined in the affidavit filed in the Supreme Court of Trinidad and Tobago by Dr. Wayne Kublalsingh on August 03, 2012 and enunciated in other documents submitted by the HRM were, *inter alia:*

- The route was conceptually flawed and could lead to urban sprawl.
- Disconnectivity of well-established communities.
- An increase in flooding caused by the highway embankment.
- The demolition of homes, well established business, places of worship and an orphanage.
- The destruction of agricultural lands and the splitting of landholdings, orchards, commons and fishing.
- The consultations required for a project of this type were inadequate and flawed.
- The cost of the highway was prohibitive compared to the benefits.

According to a countervailing account given by NIDCO, in the June 2012 *Report on the Debe to Mon Desir Segment Sir Solomon Hochoy Highway*, the State enumerated various benefits to the Highway including:

- A reduction of traffic congestion afforded by an optimized design that allows for the efficient flow of traffic and easy access to otherwise inaccessible areas for the transit of products, goods and services.
- A reduction in road user and life-cycle costs in the form of savings in vehicle operating costs and travel time costs due to reduced travel distances created by more direct routes and increased travel speeds.
- The provision of a safe, efficient, affordable, and aesthetically pleasing highway for all citizens.

[2] NIDCO: Report on the Debe to Mon desir Segment Sir Solomon Hochoy Highway-Project Background, Wednesday 13th June, 2012.

- The provision of improved access to Siparia, La Brea and Point Fortin to accommodate the anticipated economic growth as expected from government's designation of the south west region as a growth pole.
- Improvement of local road networks in the south west region, increasing connectivity to the main population centres such as Debe, Penal, Siparia, Fyzabad, La Brea and Point Fortin.
- Efficient movement of goods to/from ports within the Gulf of Paria.
- The highway will promote a host of downstream industries poised to stimulate the transportation industry, service contractors, and small entrepreneurs who provide food and other ancillary products.
- Construction of the highway will increase the demand for skilled and unskilled labour resources, thus potentially resulting in a decrease in unemployment levels and increase in income levels. It should be noted that the Contractor (OAS) must utilize a minimum of 40% local inputs which include skilled and unskilled labour, as well as materials, equipment and suppliers.
- Additionally, there will be a transfer of technology to the local construction industry.

The HRM proposed that the Highway should be stopped at Debe with a link to Mosquito Creek and that serious consideration should be given to upgrading local roads. NIDCO disagreed, citing various concerns as follows:

- The residents of the region will not receive the benefits of a modern highway facility that they deserve.
- There will be no reduction in road user costs in the form of savings in vehicle operating costs (VOC), and travel time costs for the people.
- The highway route has provisions for a utility corridor for WASA, T&TEC and other service providers to accommodate future expansion and maintenance of their infrastructure that will be required to service the communities effectively well into the twenty-first century. This benefit will be lost as the local road network cannot facilitate the anticipated improvements.
- Traffic congestion will continue in Debe, Penal and Siparia and worsen over time. A review of the local road shows that even if the government improves the existing road network (which is on-going), connectivity to the main population centres such as Debe, Penal, Siparia, and Fyzabad will still have traffic congestion and safety problems today, which will worsen considerably when one accounts for the projected traffic volume expected in twenty (20) years. This also means that our people will have to commute for hours on a daily basis to get to and from work.
- Traffic congestion will also be exacerbated with the imminent construction of the South UWI Campus at Debe, the development of industrial parks through eTeck, and the new hospital to be built in Penal. These facilities will generate additional traffic with the attendant problems and inconvenience.

Efforts to resolve these opposing positions were not successful. The HRM clearly concluded that their concerns were falling on deaf ears. The stand-off resulted in a principal of the Movement proceeding on a hunger strike on November 15, 2012. The impasse raised serious concerns within the population and various civil society groups, led by the Joint Consultative Council of the Construction Industry (JCC), brokered an agreement which led to the establishment of an independent Highway Review Committee (HRC) to examine "all the documentation on the project provided by NIDCO and all other relevant

documentation and to produce a report within 60 days" from December 03, 2012. It was agreed, however, that in the interim work on the Highway could not be ceased on the sections which were already released to the contractor.

The Terms of Reference (TOR) of the Committee required the review of all of the related technical material, and the receipt and consideration of oral submissions with specific reference to social impacts, hydrology, environmental impacts, and cost/benefit issues. The Committee comprised a Chairman, and consultants in various disciplines, including environmental impact assessment (EIA); social impact assessment (SIA); economic cost benefit analysis (ECBA); urban and regional planning; traffic and transportation planning; land tenure and acquisition; hydrology and hydraulics; law; and archaeology. While most of the consultants were sourced locally, three off-shore consultants were also engaged to provide technical backstopping and advice to the Chairman in critical areas.

The Committee engaged in desk reviews of the subject matter, held inter-sectoral meetings and discussions, and conducted various interviews with representatives of NIDCO and the HRM, as well as with the Debe/Penal Regional Corporation and individuals who wished to make submissions. Members also toured the area by air and traversed the communities to get a first-hand impression of the issues at hand.

SUMMARY OF FINDINGS

Following is a summary of the findings of the consultants reviewing the various aspects of the Highway project.

Urban and Regional Planning

The planning of the proposed Debe to Mon Desir segment of the extension of the SHH highway needed to have been undertaken as part of a comprehensive plan that seeks to balance the land use and transportation needs of south west Trinidad, and to do so with a minimum of disruption of human communities.

Given the limited land space that is available in Trinidad and Tobago, and the large land-take associated with road infrastructure such as highways and interchanges, the Planners need to come up with mechanisms and approaches that would effectively address long-term congestion problems and provide the accessibility that is needed to improve connections between the various areas of the country without severely impacting the lives of people.

Environmental Impact

The environmental impact issues as set out in the Certificate of Environmental Clearance (CEC) and the EIA as issued by the Environmental Management Authority (EMA) were considered critical as a starting point for the review of the relevant documentation. The Committee determined that while the requirements for the environmental assessment were generally adequately set out in the TOR issued by the EMA in April 2006, these were quite dated. The EIA was actually submitted in February 2009, almost three years after the issuance of the final TOR. The initial submission of the EIA for the CEC 1372/2006

was rejected by the EMA with references made to generic deficiencies as elaborated by the EMA's Review Panel comprising various technical state agencies. The deficiencies cited by the EMA's Review Panel were outlined in a Review Assessment Report of 27 October 2009 and included, in part:

- There was insufficient detail with respect to the socio-cultural environment and more details were needed.
- There appeared to be a lack of adequate consultation with agricultural land owners.
- There was no clear provision for the compensation of persons who stood to lose property.
- There was no indication of arrangements for individuals, households, businesses, and farmers to be displaced by the right-of-way (ROW), by resettlement or otherwise.

The responses from the Ministry of Works and Infrastructure (MOWI) to the issues raised by the Review Panel were found by the HRC to be inadequate and often dismissive. The CEC was issued on April 20, 2010, although the Administrative Records at the EMA provided no additional information to determine the basis of its decision. The opinion of the HRC is that the EIA was not acceptable and should have been rejected and returned to the Applicant. It seems that the EMA relented without having the Applicant provide adequate responses.

Social Impacts

A closer examination of the treatment of SIA within the EIA also indicates that this was quite inadequate. It was noted that the study area of direct and indirect impacts was not clearly defined, and not drawn sufficiently wide to allow for the consideration of all of the relevant social issues. The consultant concluded that there is insufficient data in the EIA to adequately assess the social impacts, to classify them in terms of severity, and to plan adequately to mitigate them.

There is need for an adequate SIA to be conducted in accordance with international best practice that is based upon the reality that development interventions as significant as the Highway improvement works under review are likely to have tremendous impact, both positive and negative, on the social fabric of the catchment area that extends way beyond the proposed alignment. These impacts need to be scientifically determined and effective mitigation measures formulated to protect the human element before final decisions are taken regarding this highway development.

Human Settlement

The alignment of the Debe to Mon Desir segment of the SHH route impacts on those settlements that have grown out of economic endeavours pursued over a century ago and which over time have developed into well-established communities. In the event that persons are to be removed from the path of the alignment, it is essential that relocation be based on an Integrated Human Settlement approach that combines a range of land usages designed with sensitivity to the physical environment of the wider area, and arranged in village clusters**.**

Indications are that approvals for development of the proposed resettlements sites at Petit Morne and Golconda were not obtained from the appropriate authorities, which suggests a flagrant flouting of the

statutory requirements. It is felt that Golconda offers a better option for the consideration of relocation as it allows for conditions similar to those to which the relocates are accustomed.

Economic Cost/Benefit Considerations

The HRC was unable to make an adequate assessment of the economic cost-benefits of the highway segment. It is felt that the EIA and other documents presented did not detail any quantifiable benefits that may be incorporated into a Cost-Benefit Analysis (CBA). Further, while some adverse impacts were anticipated, such as the acquisition of houses; disruption of current and traditional land uses; and loss of business opportunities, there were no quantifiable indicators to make informed assessments. There was no holistic treatment of the project to adequately reflect a convergence of the salient environmental, social, and economic issues that arise. It appears that none of the key agencies involved in the project *viz*, the EMA, the Ministry of Works and Infrastructure (MOWI), Ministry of Finance, NIDCO, or any of the consultants sought to provide an integrated assessment of the project, including primarily a CBA.

Traffic and Transportation

In reviewing the traffic and transportation issues it was found that the need for a highway is driven more by the expected traffic growth from San Fernando and northern areas to the Debe-Penal corridor, than by the through traffic to Point Fortin. The earlier Trintoplan study did include a northern route as is being suggested by the HRM. However, it was found that the HRM's traffic proposals are short-term in nature and do not seem to take into account future increases in car numbers and traffic. These issues are further clouded by a separate decision by the Government to expand the Mosquito Creek segment to four lanes, by the conflation to build a highway to Point Fortin with a paradigm to develop the Siparia-Fyzabad-Penal area, and by the lack of any up-to-date traffic plans for the area. It was noted that NIDCO recently commissioned a traffic study in this connection. The preliminary findings of the recent study conclude that the HRM's proposal will not be the preferred alternative as it does not provide enough capacity for the future traffic requirements in the area to 2030.

Hydrology and Hydraulics

In the area of hydrology and hydraulics it was felt that the Hydrology Report of 2007 fulfilled the objectives of determining the hydrologic information required for inputs to the hydraulics for bridge and culvert preliminary designs at points of intersection of the highway and river crossings. However, the analyses are not carried out in the context of an Integrated Watershed Management Plan for the South Oropouche River Basin. It was again felt that projects of this type must be undertaken in a more holistic manner. It was further observed that the EIA process failed to take into consideration comments by the EMA's Review Panel. The Committee agreed that the EIA considerations were eventually compromised by the Design-Build approach, and concluded that this approach was ill-advised for this project as the implementation risks are in direct conflict with Best Practice, and therefore not in the best interest of the people of Trinidad and Tobago.

Land Tenure and Acquisition

Various observations were made with respect to property acquisition practices related to the project. It has been reported that entry on to property for executing the project might have been made without Section 4 authority as required by legislation. It must be stressed that improper land acquisition procedures are the

cause of substantial delays. The policy and arrangements for 'ex-gratia' awards in many cases appear to be unsatisfactory.

Conclusion

The Trinidad and Tobago Constitution guarantees certain rights and freedoms which are considered fundamental to the operation of a democratic society. Section 4 of the Constitution guarantees the right of enjoyment of property and the right not to be deprived thereof except by due process of the law. It follows that there is no breach of a person's constitutional rights if that person's property is acquired in strict compliance with the law and that such person receives adequate compensation, including consideration of trade-offs. A significant concern with the Debe to Mon Desir Highway is whether or not the lawful authority responsible for this large public expenditure is conforming to due process, including observance of various oversight statutory requirements for environmental management, the development of land, and due consideration of socio-economic impacts of the affected persons.

The HRC found that there were significant shortcomings which warrant further interrogation to determine the way forward. The complex and sensitive issues involved in this project certainly could not be addressed within the confines of this 60-day review period. Should the Government decide to proceed with the construction of the Debe-Mon Desir segment, the HRC is of the considered opinion that shortcomings resulting from the inadequacies of proper assessment of the likely impacts on the human and natural environment must first be determined and resolved.

RECOMMENDATIONS

1. Recommendations Specific to the Proposed Debe to Mon Desir Project

The following recommendations of the Highway Review Committee seek to address deficiencies discussed in this Report, and are grounded in the need for the proponents of the Debe to Mon Desir segment of the Highway to observe the requirements of the relevant legislation, in particular the EMA Act, the TCP Act, the Land Acquisition Act (LAA), and the Municipal Corporation Act (1990). They include factors that need to be taken into consideration in arriving at a decision regarding the construction of the Highway.

In keeping with the TOR for this review, proposals that could be of benefit to the project in social, environmental, and economic terms are also included.

1.1 The CEC 1372/2006 contains an extensive list of conditions intended to address the lack of detail presented to the EMA at the time of the application. A significant amount of work still needs to be undertaken to obtain approvals before any additional site activities are carried out. It is recommended that no further work be undertaken on the Highway site until all of the conditions contained in the CEC have been fulfilled, including the need for all plans specified in the EIA to be submitted to the EMA, and for approvals to be obtained from the relevant agencies. This includes the Storm Water Management Plan and the Water Management Plan, consideration of which involves stakeholder consultation and feedback via the Working Group which is required to be formed as part of the CEC conditions.

1.2 In accordance with the TCP Act no further construction work should be carried out on the site until all of the conditions attached to Notice of Grant of PP referenced T7M: 0440/2007 and Notice of Grant of PP referenced T8N: 0443/2007 have been fulfilled.

1.3 It is imperative that a proper Social Impact Assessment be undertaken before a decision is made whether or not to continue with the Debe to Mon Desir segment of the Highway given the potential for severe adverse impacts on the resident population and other stakeholders within the immediate and wider area of impact, including the potential severing of extended family ties. In this regard non-relocated residents, and the agricultural stakeholders who would be affected by the loss of their lands, as well as the non-relocated business people who would be affected by the Highway, also need to be drawn into the study. The SIA studies should include attention to the alternate routes proposed by the HRM and by MOWT/NIDCO.

1.4 In view of the issues relating to the dislocation of persons from their homes it is critical that a Re-settlement Plan showing compliance with condition (iii) (e) of the CEC, that is, “The Applicant should pursue …..resident relocation and resettlement utilising best industry practices…..” should be prepared and submitted to the EMA before any decision is finalised regarding the resettlement of affected persons.

1.5 No further engineering operations are to be undertaken on the land at Petit Morne, St. Madeline on which it is proposed to relocate persons residing in the path of the alignment until all necessary approvals are obtained from the relevant agencies.

1.6 Quantitative assessment is critical to this project in the areas of hydrology and drainage. Hence, a quantitative surface and groundwater hydrology model and study of the wetland as a hydrodynamic system should be undertaken in the public interest as part of Best Practice before an informed decision can made as to whether or not this segment of the Highway should proceed as proposed.

1.7 An Environmental Economic Study of this Project must also be undertaken to inform a decision whether or not to proceed with this Highway segment. This should include a cost-benefit analysis, comparing the economic costs of the various alignment alternatives that were assessed to demonstrate the costs of the adverse effects compared with the projected benefits.

1.8 Off-site impacts, such as the impact of removing and transporting extraordinarily large quantities of aggregate to be sourced from areas far removed from the Project Area, for example, quarries in the Northern Range, also need to be determined and measures designed to mitigate any negative impacts.

1.9 The HRC recommends that the APDSL studies be continued. The HRM spokesperson on traffic should be drawn into this study as part of the community involvement in this major transportation investment programme. It is further recommended that consideration be given to staging highway improvement for the south western peninsula to allow the phased development of the transportation system and minimize the potential for 'overbuilding' the road network at the expense of competing land uses and to the detriment of the communities within the direct or indirect range of the alignments.

1.10 The HRC recommends that all relevant state agencies together review their policy for the assessment of damage at Section 3 of the LA Act. This must include the Commissioner of State Lands (COSL), MOWI, the Valuation Division (VD), and the Ministry of Food Production. It also recommends that the Institute of Surveyors of Trinidad and Tobago (ISTT) be consulted and that consideration be given to including the Agricultural Society and the Law Association. It is further recommended that the Commissioner of Valuation (CoV) ensures proper compliance with the law and Land Economy principles.

CONCLUSION

The HRC found that there were significant shortcomings which warrant further interrogation to determine the way forward. The complex and sensitive issues involved in this project certainly could not be addressed within the confines of this 60-day review period. Should the Government decide to proceed with the construction of the Debe-Mon Desir segment, the HRC is of the considered opinion that shortcomings resulting from the inadequacies of proper assessment of the likely impacts on the human and natural environment must first be determined and resolved.

2. Recommendations for Consideration of Future Projects

2.1 Infrastructural projects of this scale should be conceptualised in the context of land use/spatial plans that incorporate solutions that address employment/housing mismatches, and that are based on the establishment of various modes of travel and improved public transportation facilities that would serve to reduce the need for highway expansion. Such plans should be done at the level of the watershed, and might take the form of Integrated Watershed Management Plans which appropriately address the interests of the various stakeholders and provide a balanced approach to the water resources management and stormwater management in the watershed. Only in the context of an overall Integrated Watershed Management Plan can a proper hydrological assessment be carried as part of the EIA and as support for the detailed designs.

2.2 For future projects of this magnitude it is recommended that the EMA insist on the design and implementation of a proper hydrological data monitoring programme either before a CEC is granted or as a condition of the CEC.

2.3 The Design-Build approach that is being followed in the construction of the Highway is suitable for well-defined projects, such as buildings, with a clearly defined scope of works and list of requirements. In the case of infrastructural works such as highways, the concept should be applied only in situations in which detailed designs are available at Tendering Phase, and the design tasks will be focussed primarily on value engineering and further detailing. The Design-Build approach for the implementation of large infrastructural projects involves a major risk with respect to construction delays as it is dependent on the approvals of the detailed designs and plans by numerous approval agencies and the involvement of stakeholder consultation. Design-Build is not the appropriate implementation strategy for any future large infrastructural projects.

2.4 It is recommended that the Rules governing the preparation of an EIA should give explicit consideration of physical/natural impacts and the socio-economic impacts of proposed projects. The economic valuation should be a mandatory aspect of the EIA to determine direct and indirect costs and benefits. The inadvertent omission of values of non-marketed goods and services results in an undervaluation of project costs as appropriate mitigation measures that may be employed. The HRC has recommended a range of indicators which should be considered for future projects of this type.

2.5 It is also important that the relevant legislation – including the EM Act, the TCP Act, and the State Land Act – be reviewed as a matter of urgency to address the deficiencies highlighted in this report. There is need for early resolution of the incongruent sequential relationship between TCPD approvals and the CEC process.

2.5 The Committee advises that it is necessary to strengthen the capacity of the relevant institutions, including the EMA and the TCP, and to provide the necessary infrastructure and resources, including human resources expert in the areas of Social Impact Assessment and Hydrology to ensure that social impacts and hydrological considerations are adequately treated in EIAs.

2.6 Finally, effective stakeholder participation is essential in the decision making process. The relevant agencies must ensure that proper consultation is carried out following effective communication of information to all stakeholders. What has transpired with this project may not have occurred if an appropriate process for incorporating stakeholder involvement was applied.

I. INTRODUCTION

BACKGROUND

The Debe to Mon Desir Highway forms one segment of the Golconda to Point Fortin Highway, described as the SHH extension. It is part of the Trinidad and Tobago National Highways Programme: Trunk Roads Expansion Component, initiated in 1998 under the management of the Ministry of Works and Transport (MOWT), now designated the Ministry of Works and Infrastructure (MOWI).

One of the objectives of the Trinidad and Tobago National Highways Programme: Trunk Roads Expansion was stated as:

> *"To address the necessity for providing highway improvements to the south and west of San Fernando, involving improving the road access to La Brea, Point Fortin and Siparia."*

This will, it elaborated:

1. Reduce travel times between the local regions and other urban areas,
2. Support industrial development,
3. Increase employment and income levels, and
4. Improve movement of people, goods and services, all to the benefit of the regional population as a whole and the national economy.

In 1998 a pre-feasibility study of the SHH extension was commissioned by the Government of Trinidad and Tobago through the MOWT from a foreign-local joint venture of ND LEA (Canada) and Trintoplan, (LEATrintoplan). The study area comprised the wards of Erin, La Brea, Siparia and the Borough of Point Fortin in St. Patrick County, and a part of the ward of Naparima in Victoria County. Within the area a network of roads existed that included the San Fernando Siparia Erin Road (S.S Erin Road), the South Trunk Road/Southern Main Road, the Siparia Road, the Fyzabad Road and San Francique Road. The Southern Main Road was the main route to Point Fortin and the S.S Erin Road provided access to Debe, Penal, Siparia, Palo Seco and Erin.

The Pre-feasibility study concluded that the most economical way to satisfy the total road transport demand of the area was through four separate projects as opposed to a single route between the Solomon Hochoy Highway Extension and Point Fortin. These projects were identified as:

1. The La Brea By-pass, starting at St. Mary's Junction and running cross country south of La Brea joining with the Southern Main Road south of Vance River
2. Rehabilitation of the Southern Main Road from Vance River to Point Fortin
3. Extension of the SHH to S.S. Erin Road, Penal
4. Dualling of the South Trunk Road

The Pre-feasibility Study was completed in October 1999 and a final report in three volumes was submitted to the then MOWT.

In 2005, under IADB Loan 932/0C-TT Trunk Roads Expansion Project, the joint venture of LeaTrintoplan undertook the Feasibility Study for the extension of the SHH (Golconda to Point Fortin a distance of 32km), one of three road projects listed in the programme. Trintoplan indicates in its report documenting the history of the project that at this stage there was a review of the findings of the Pre-feasibility Study completed six years earlier in 1999 and further traffic analyses were carried out to determine the final options for the highway extension project. It noted that, as had been done in the in the pre-feasibility study, several alternative road alignment routes were analyzed. After consultation with several stakeholders most notably PETROTRIN, the main land owner, the final route was determined. The final route comprised two components:

1. Extension of the SHH from Golconda in an alignment which runs in a southerly direction just west of Debe, Penal, Siparia before turning in a westerly direction to Fyzabad, Mon Desir, La Brea Connector and Point Fortin.
2. Widening of the South Trunk Road from Dumfries Road through Mosquito Creek and St. Mary's Junction and in a southwesterly direction to meet the alignment described at (1) above at an interchange at Mon Desir.

The outcome of the Feasibility Study was the Final Reports on Feasibility Investigations of May 2006.It comprised four volumes: Volume 1 Engineering and Economic Feasibility; Volume 2 Environmental Feasibility; Volume 3 Potential Socio-Economic Impacts; and Volume 4 Institutional Strengthening and Maintenance.

On February 23, 2006.The Certificate of Environmental Clearance (CEC) Application for the Debe to Mon Desir highway segment was submitted by the Ministry of Works and Transport. The EMA indicated that an Environmental Impact Assessment (EIA) would be required for this development, and issued draft Terms of Reference (TOR) for the EIA. Final TOR were issued on May 25, 2006.

In August 2006 public consultations were held as part of the EIA process, and as a result of what was described in the EIA Report (June 2009) as ‘intense public resistance to the preferred alignment’ mainly from the Debe community, the MOWT, agreed to a more in-depth analysis of the three route alignments; a central, western and eastern alignment. Two field studies were commissioned, to obtain more site-specific information on the geotechnical characteristics of the area and the wetlands within the area.

The outcome of the analysis was the choice of the centre alignment as the preferred route, eliminating the other two on the basis that:

- The central alignment is longer than the western alignment and poses some geotechnical challenges, although it largely avoids the wetlands and has reasonable connectivity to Penal and Siparia.
- The eastern alignment is the longest, and involves significant acquisition of houses, and the western is problematic and perhaps prohibitive from a geotechnical standpoint, is associated with adverse impacts on the wetlands, and poor connectivity to Penal and Siparia.

In February 2007 four public meetings were held to present the findings of the EIA, and seek comments from stakeholders or respond to their questions. The meetings were at the:

- Fyzabad Regional Community Complex on February 08, 2007;
- San Francique Hindu School on February 10, 2007;
- Debe Community Centre, on February 13, 2007; and
- Delhi Road Community Centre on February 15, 2007.

The EIA report states that residents raised objections over the houses and lands which would need to be acquired in the Bunsee trace area and suggested an alternative alignment west of that roadway crossing the South Oropouche Wetland area and the Tennant Hills. In response to these objections the Consultant's Design Team undertook a route comparison assessment which is documented in a *Route Comparison Report* produced by Lea - Trintoplan in December 2007.

Two new alignments were reviewed with the objective of reducing the number of houses to be acquired. Alignment 1, the original alignment, and Alignment 2, one shifted slightly eastward to reduce the number of houses to be acquired along Bunsee Trace and south of the Oropouche River, were described in the Report as virtually identical in all aspects. An alignment described as "corresponding closely to the route proposed by residents" was developed and became Alignment 3 (west of Bunsee Trace crossing the South Oropouche Wetland area and the Tennant Hills).

The Route Comparison Report concluded that Alignment 2 'was clearly the better of the two alternatives' and stated with respect to Alternative 3;

> *"There are greater environmental concerns over the potential loss of wildlife habitat, noise impacts on wildlife, pollution and risk of squatters in the wetlands with Alignment 3. The construction costs and risk of unforeseen cost increases of Alignment 3 are greater."*

In the EIA report submitted in June 2009 the MOWT states that the preferred alternative alignment of the Debe to Mon Desir segment of the SHHE 'is based on all three of these comparisons 1998, 2006, and 2008).

This review of options undertaken in 2007 is said in the EIA report (Appendix L) "….to have delayed the completion of the EIA by almost two years".

The original version of the EIA, dated February 13, 2009, was submitted to the EMA on February 18, 2009. By letter dated February 27, 2009, the EMA returned that EIA for revision. A meeting was held on March 26, 2009, to discuss the EMA's reasons for returning the EIA Report, and a revised EIA Report was prepared and submitted on June 26, 2009.

In the 2009 Report the overall objective of the highway expansion project as stated was;

- To improve accessibility to the Counties of Victoria and St. Patrick.

Consequential objectives given were:

- To stimulate social and economic development in the southwest region.
- To support development in the La Brea area (which is earmarked for light industrial activity) and the Point Fortin area (which currently hosts a liquefied natural gas plant).
- To encourage rural settlements by building up the area. The proposed extension will encourage new lands to open for development.

The project justification stated that the existing S.S. Erin Road was operating above the expected capacity for a 2-lane road surrounded by ribbon type development, and that existing traffic volumes would grow over time. The EIA listed the properties along the alignment that would need to be acquired.

It also noted that the Debe to Mon Desir segment of the proposed highway extension will cross a corridor housing several large-diameter high-pressure natural gas pipelines.

The projected start date of the segment was given as the third quarter of 2010 with site clearance and handover to take place from September to October, 2013.

The EIA, in Section 5.5 (page217), stated the expected benefits of the project:

General

- The proposed highway is part of a wider highway extension programme that has been designed to extend the current SHH. The proposed highway will improve accessibility to areas in southwest Trinidad (La Romain, Debe, Penal, Siparia, Fyzabad, La Brea and Point Fortin).
- It is expected that the highway will bring about social and economic development and progress in southwest Trinidad.
- There would be increase in potential for agricultural production and distribution.
- There would be increase in residential, industrial, and domestic and foreign tourism development.
- Previously small settlements would be encouraged to expand and additional areas would be opened up to built development and services.
- The increased accessibility afforded by the highway will tend to generally increase property values and so be a benefit of this project.

Construction Phase:

- Employment during site preparation and construction.

Operation Phase:

- The proposed highway will decrease the time taken to reach areas in south Trinidad by providing better roads and shorter travelling distances, as well as reducing the vehicular congestion on existing arterials.
- There would be the opening up of vistas along the route of the proposed highway.

In Section 5.5.2, a Summary Classification of Adverse Impacts was given in Table 5-4.

On October 27, 2009 the EMA issued its Review and Assessment Report (RAR) to the MOWT. On January 04, 2010 it gave an additional extension of the review period to March 2010, and issued CEC 1372/2006 on April 20, 2010.

On February 24, 2010, the Government of the Republic of Trinidad and Tobago (GORTT) issued an Invitation for Proposal stating its desire 'of improving access and mobility in the south western quadrant of the island of Trinidad, through the construction of 49.5 kilometers of a highway system originating at Golconda and ending at Point Fortin'. The highway system is identified as Package 3, one of five in the implementation of the National Highways Programme. The National Infrastructure Development Company (NIDCO) brochure describing the project states:

> *"As the detailed designs were completed more than five years ago (2005 - 2007) and for other pertinent reasons, a decision was made to tender the construction of the highway, utilizing the Design-Build model of procurement."*

The GORTT designated the NIDCO as the responsible agency to develop and implement the procurement and management of the design and construction services necessary to deliver the project to the satisfaction of the GORTT.

In May 2010, NIDCO engaged Engineering Consultants, AECOM to advise and support its appointed Evaluation Committee on the selection of the preferred Contractor with the best design and construction services bid. In January 2011, NIDCO appointed a Negotiation Committee to advise on the finalization of the procurement of the construction services offered in the preferred Contractor's bid, with support from AECOM. The project was described as follows;

The project comprises approximately 47 kilometres (km) of 4-lane highway and 2.5 km of 2-lane highway (excluding ramps but including connector roads) extending the SHH to Point Fortin, and it includes the following work packages:

- Phase 1 - Golconda to Debe & Dumfries Rd to Paria Suites to Godineau River;
- Phase 2 - Godineau River to Mon Desir Interchange, Penal Interchange and connector road, Siparia Interchange and connector road, and Fyzabad Interchange;
- Phase 3 - Mon Desir Interchange to Dunlop Roundabout, Point Fortin; AND
- Phase 4 - Debe to Mon Desir Interchange

On May 07, 2010, the closing date for this procurement, three proposals were submitted by 1.00 p.m. (from the 29 Request for Proposals issued)

The three entities submitting tenders were, in alphabetical order:

1. China Railway Construction Corporation Limited;
2. Construtora OAS Ltda (OAS); and
3. GLF Construction Corporation

On May 13, 2010 The NIDCO Evaluation Committee submitted its Final Report and recommended OAS as the Preferred Respondent, and so informed OAS by letter dated May 25, 2010. On October 20, 2010 the MOWI hosted a public consultation at the Debe High School to inform stakeholders of the GORTT intention to proceed with the highway project.

On November 27, 2010 a press conference was held between the then Honourable Minister of Finance, Mr. Winston Dookeran, the then Honourable Minster of Works and Transport, Mr. Austin Jack Warner, and NIDCO's President, Dr. Carson Charles to announce the construction of the Highway. Negotiations between NIDCO and OAS took place during the period from January 05, 2011 to January 14, 2011 in Port of Spain. On January 25, 2011, the Honourable Prime Minister, Kamla Persad-Bissessar turned the sod for the construction of the Highway and in February, 2011 Cabinet approved the overall project cost of the Highway: TT$ million7,502.80

In 2011, OAS, a Brazilian company was procured, and physical construction of the Highway started in September 2011. Construction of the entire highway is scheduled to be completed in 2015.

Under the contract, OAS is fully responsible for executing the design of the entire highway on behalf of the MOWI and NIDCO who are both required to approve the designs. Accordingly, OAS has employed the consultant, HALCROW to prepare designs that satisfy the requirements of the contract. Further, design checks are carried out by the international consultant, ARUP and technical oversight of the designs and construction is being done by AECOM.

NIDCO describes the Integral Benefits of the Highway in its brochure (2012) as follows:

Construction of the proposed highway brings many benefits to the region and the country as a whole. Some of these benefits are summarized below:

- Reduction of traffic congestion afforded by an optimized design that allows for efficient flow of traffic and easy access to otherwise inaccessible areas for the transit of products, goods and services.
- Reduction in road user and life-cycle costs in the form of savings in vehicle operating costs and travel time costs due to reduced travel distances created by more direct routes and increased travel speeds.
- Provision of a safe, efficient, affordable, and aesthetically pleasing highway for all citizens.

- Provision of improved access to Siparia, La Brea and Point Fortin to accommodate the anticipated economic growth. It should be noted that Government has proposed the southwest region as an economic Growth Pole in the Medium- Term Policy Framework 2011-2014 (MTPF).
- Improvement of the local road network in the southwest region, increasing connectivity to the main population centers such as Debe, Penal, Siparia, Fyzabad, La Brea and Point Fortin.
- Efficient movement of goods to/from ports within the Gulf of Paria.
- The highway will promote a host of downstream industries poised to stimulate the transportation industry, service contractors, and small entrepreneurs who provide food and other ancillary products.
- Construction of the highway will increase the demand for skilled and unskilled labour resources, thus potentially resulting in a decrease in unemployment levels and increase in income levels. It should be noted that the Contractor (OAS) must utilize a minimum of 40% local inputs which include skilled and unskilled labour as well as materials, equipment, and suppliers.
- Additionally, there will be transfer of technology to the local construction industry

The Ministry of Works and Infrastructure NIDCO Comprehensive Land Transportation Programme: San Fernando to Point Fortin Highway (MOWI/NIDCO brochure) 2012.

Description of the Project

The project involves the construction of a 4-lane divided highway to international freeway standards, and comprising several segments of length totaling 47 km of 4-lane highway and 2.5 km of 2-lane high-way (excluding ramps but including connector roads). The highway has been planned to free-way standards with a design speed of 110 km/hr (70 mph). Other features include:

- Golconda Interchange
- Debe Interchange
- Penal Interchange
- Siparia Interchange
- Fyzabad Interchange
- Mon Desir Interchange
- St. Mary's Interchange
- La Brea Interchange
- Underpasses
- Overpasses
- Bridges
- Utility corridors
- Golconda to Debe
  Approximately 5km segment of new 4-lane highway begins at the southern end of the Solomon Hochoy Highway at Golconda and ends at the Debe Interchange.
- Debe to San Francique Road

Approximately 6km section of new 4-lane highway begins at the new Debe Interchange and ends at the San Francique Overpass.

- San Francique Road to Fyzabad Interchange approximately 6.3 km section of new 4-lane highway begins at the San Francique Overpass and ends at the Fyzabad Interchange.
- Fyzabad Interchange to La Brea Connector (Includes Mon Desir Interchange)
  Approximately 10km section of new 4-lane highway begins at the Fyzabad Interchange and ends at the La Brea Interchange.
- La Brea Connector to Dunlop Roundabout
  Approximately 6 km section of new 4-lane highway beginning at the La Brea Interchange and ending at the existing Dunlop Roundabout
- Dumfries Road to Paria Suites
  Heading southwest from San Fernando, a 3.1 kilometre section of the existing South Trunk Road (an existing 2-lane highway), is to be widened to 4 lanes.
- Paria Suites to St. Mary's Junction
  The road, a length of approximately 5 kilometres is to be widened from two to four lanes with provision for widening to (6) six lanes.
- St. Mary's Junction to Mon Desir Interchange (Delhi Road)
  This 3.7 km section of new 4-lane highway begins after St. Mary's Junction and ends at Mon Desir interchange. `

The document indicates that "Site access will be provided to the contractor in three phases:"

Phase1 Golconda to Debe and Dumfries Road through Paria Suites to Godineau River

Phase II Godineau River to Mon Desir Interchange; Penal Interchange and Connector Road; Siparia Interchange and Connector Road; Fyzabad Interchange and Connectors

Phase III Mon Desir Interchange to Dunlop Roundabout, Point Fortin and Debe to Mon Desir Interchange

<u>Project Rationale</u>

The socio-economic development of the South West Region has been identified by the GORTT in the MTPF as one of the major growth poles. The project is a key component of this development as it will:

1. Support industrial and agricultural development
2. Increase employment and income levels all to the benefit of the regional population and the national economy.
3. Improve the road network in the South West Region,
4. Provide connectivity to the main population centres such as Debe, Penal, Siparia, Fyzabad and Point Fortin.

METHODOLOGY

Upon the agreement of the various parties to establish an independent Highway Review Committee, the JCC approached the Chairman designate to discuss the parameters of the assignment. The TOR of the work of the committee was agreed as follows:

1. Review all technical reports/data and information of relevance to the project, and the Debe/Mon Desir segment in particular.

2. Invite written and oral submissions of the principal parties including the executing agency - National Infrastructure Development Co. (NIDCO); the HRC and other stakeholders.

3. Ascertain the veracity of technical issues raised by the respective parties and the consequences/impacts in respect of the Mon Desir to Debe segment, keeping in mind related international best practice.

4. Make specific recommendations in the public-interest.

5. Outline proposals that could be of benefit to the project in social, environmental and economic terms.

6. Based on the findings, outline recommendations which could inform the process for development projects of this magnitude in the future.

The Chairman was required, with the support of the Joint Consultative Council for the Construction Industry (JCC), to identify a number of consultants to initiate the process to address the inter-sectoral tasks. While all the disciplines were available locally, it was felt that the input of experts in the relevant areas who were somewhat more removed from the situation and not as exposed to the extensive media coverage of the matter, should be sourced. Consequently, three consultants were engaged, one each from Barbados and Jamaica, and a Trinidad and Tobago national who resides in the USA. These persons were assigned discrete tasks but were also required to provide specialised technical backstopping to the Chairman and to comment from time to time on selected aspects of deliverables by local consultants.

Following its initial meeting on December 20, 2012 the consultants undertook a desk review of documentation provided by the relevant agencies and other bodies as indicated in Appendix 3. Members of the Committee toured the proposed highway alignment and surrounding areas from the air and also traversed the communities by land transport, on occasion meeting with residents of the affected areas.

Various meetings were held with representatives of NIDCO and the HRM. The Chairman and Councillors of the Penal/Debe Regional Corporation also requested an opportunity to make a presentation to the Committee and were received accordingly. The public was also invited to make submissions via the public media. The schedule of these meetings is also listed in Appendix 3.

Records of all proceedings and documentation will be lodged with the JCC for any future reference.

II. REVIEW AND CRITICAL ANALYSIS OF THE ISSUES

1.0 URBAN REGIONAL PLANNING

1.1 Introduction and Background

The Terms of Reference (TOR) for the Senior Urban-Regional Planner Consultant on the Committee for Review of the Extension of the Solomon Hochoy Highway (SHH) requires the examination and review of the land use and spatial development issues associated with the proposal for the Debe to Mon Desir segment of the extension of the highway to Point Fortin.

The Consultant is required to, *inter alia*:

- Review the TOR for the Environmental Impact Assessment (EIA) as prescribed by the Environmental Management Authority (EMA), as well as the resulting EIA, to glean an appreciation of the spatial development implications of the proposed Highway extension, within the context of National Human Settlements Development;
- Review the National Physical Development Plan of 1984 (NPDP) which, although dated, would still have implications in relation to the earlier decision to extend the SHH;
- Review the relevant municipal level Regional Plans for implications/consistency with ongoing/proposed spatial development projects;
- Review implications of the resettlement requirements resulting from the current alignment of the Highway extension, with consideration of any alternative, and land use implications thereto; and
- Ascertain the compliance of ongoing/proposed land use, including the resettlement schemes, with statutory requirements.

The work required an appreciation of transportation needs of Trinidad and Tobago in general, and of the south west of Trinidad in particular, and an understanding of the connection between land use planning and transportation planning that would allow for an assessment of the positions being advanced by the various parties, *viz*., the proponents of the highway, mainly the Ministry of Works and Transport (MOWT) and the NIDCO on the one hand; and the Highway Reroute Movement (HRM) on the other.

The Debe to Mon Desir segment of the highway is planned to run southward a distance of 4,050 metres (m) from the intersection of the M2 Ring Road and San Fernando Siparia Erin Road (S.S.Erin Road) in the Debe area to the San Francique Road area, and then a further 11,100 m westwards through the Thick and Pluck areas, terminating in the Mon Desir area.

According to the document titled *Highway Extension to Point Fortin: Debe to Mon Desir (Environmental Impact Assessment, Volume 1: Text (Revision 1)*, hereinafter referred to as the EIA, and other documents related to the project, the right of way (ROW) was planned to be 100 m wide[3], the area considered to be the study area for the purposes of determining the impact on land use (Table 4-1). Approximately 44m of this will be occupied by a four-lane dual carriageway, the remainder to be reserved for future expansion and possible utility corridors (4.1.1).

[3] The National Infrastructure and Development Company Limited has, at a meeting held with the Committee on January 08, 2013, indicated that it is proposed to reserve a ROW 60 metres in width.

The development includes interchanges at Debe, Penal, Siparia and Fyzabad; overpasses at five locations including San Francique Road, Siparia Road, and Fyzabad Road; a number of frontage roads; and two connector roads – the Penal Connector Road, and the Siparia Connector Road. It will require the acquisition of 150 dwelling houses (27 in Debe, 42 in Penal, 31 in San Francique, 35 in Fyzabad, and 15 in Delhi Settlement); 13 businesses (two in Debe, three in Penal, three in San Francique, four in Fyzabad, and one in Delhi Settlement); a church; and a mosque. A total of 119 agricultural parcels ranging in area from one acre to 137 acres, and five parcels of State-owned land are also earmarked for acquisition to make way for the highway segment (3.3.1.2).

Three alternative alignments were studied for the segment. Factors considered in comparing the options and determining the final alignment were: geotechnical characteristics, the impact on wetland systems in the area, the number of residential buildings that would be affected, the length of the route, and connectivity to the towns of Penal and Siparia.

1.1.1 The Ministry of Works and Transport (MOWT) /National Infrastructure and Development Company (NIDCO) Position

The justification given for extension of the highway relates to the fact that the S. S. Erin Road is considered to be operating above capacity and that, with projected increases in traffic volumes, the situation would be exacerbated.

The overall objective of the project, as stated in the EIA and other relevant reports is to "improve accessibility to the Counties of Victoria and St. Patrick." Consequential objectives indicated are:

- To stimulate social and economic development in the south west region;
- To support development in the La Brea and Point Fortin areas; and
- To encourage rural settlements by building up the area, the proposed extension encouraging the opening up of new lands for development."

The highway is expected to bring about:

- An increase in potential for agricultural production and distribution;
- Increase in residential, industrial, and domestic and foreign tourism development;
- An expansion in small settlements and opening up of additional areas to built development and services; and
- General increase in property values due to the increased accessibility afforded by the highway.

1.1.2 The Highway Reroute Movement Position

Following are the land use and spatial development issues raised by the HRM as outlined in affidavit filed in the Supreme Court of Trinidad and Tobago by Dr. Wayne Kublalsingh on August 03, 2012 and enunciated in other documents submitted by the HRM:

- Thousands of acres of agricultural land would be destroyed including land used for domestic-scale agriculture that is practiced in most homes in the area;
- Thirteen communities would be split by the proposed alignment;
- Hundreds of buildings including homes, schools, and businesses would be demolished; and
- Urban sprawl would take place in the Fyzabad, Siparia, Penal and Debe areas.

Alternatives put forward by the HRM as indicated in Dr. Kublalsingh's affidavit include:

- Developing a highway link from Paria Suites in the west to Golconda in the east across vacant "Caroni lands";
- Utilising old "Caroni" roads and other ROWs to add to the system;
- Repairing and widening certain roads in the network;
- Building roads around town centres to increase accessibility; and
- Improving the national transport system for maximum efficiency.

1.2 Review of the Environmental Impact Assessment (EIA)

1.2.1 Review of the Terms of Reference for the EIA

Section 1.1 of the TOR stipulates that "the proposed highway alignment needs to be considered in the context of the land use policy for the area, the nature and sensitivity of the areas, the developmental initiatives scheduled for the area, as well as the potential to open up Green-field areas to subsequent development". This indicates that the EMA required the proponents of the project to take account of the relationship between spatial planning and transportation planning.

At 2.1, the EMA required a determination of the area of study "by the extent of direct and indirect impacts on the ….. environments…..during site preparation and construction". It might not have been clear that impacts anticipated during the operation stage of the project were required to be addressed. Apart from this, the TOR properly covers the issues that needed to be studied as part of the process of assessing the impacts of the proposed highway.

1.2.2 Review of the Environmental Impact Assessment (EIA) Report

The following first considers the response of the EMA to the EIA as conveyed in the *Review and Assessment Report (MOWT Environmental Health and Safety Unit - EIA for the Establishment of a Highway Alignment from Debe to Mon Desir (CEC 1372/2006), Response to Review and Assessment Report)* and the response of the proponents to that review, since a number of this consultant's observations concur with those of the EMA. Other comments not made by the EMA are indicated next.

(a) Settlement of Displaced Persons

EMA Comment

"The EIA report did not provide any possible areas where displaced landowners may resettle or any other arrangements for individuals, households, businesses and farmers displaced by the ROW."

MOWT Response

"Relocation issues are addressed in Appendix S. More details than provided ….. are simply not available at the EIA stage and will not be available until much later in the acquisition process."

Consultant's Comment

Some details regarding alternative accommodation for displaced persons should have been provided at this point as the MOWT should have been sufficiently mindful of the social impacts of the project to have this information to present to stakeholders at the mandatory consultations. Section 2.7.5 of the TOR requested a "…..resettlement action plan addressing the social and economic issues arising from the need to relocate occupants…..", and included a stipulation for the identification of resettlement sites. It is noted that other terms and conditions outlined at iii (c) of the CEC include a requirement for the applicant to develop and submit a resident relocation and resettlement plan to the EMA not less than one month prior to the start of works. The CEC also stipulates, at (iii)(e), that "the applicant should pursue, where applicable, resident relocation and resettlement utilising best industry practices, such as the World Bank operational policy on involuntary resettlement, operational policy 4.12".

(b) Analysis of Alternatives to the Proposed Project

EMA Comment

"The report does not properly assess the 'no action' alternative. No comparison of impacts was provided. Furthermore, the justification for the project should be contextualised in the context of a feasibility study regarding the transportation needs of the south western region of the island of Trinidad."

MOWT Response

"A Feasibility Study of the transport needs in the south western region ….. was not within the scope of the project. We also disagree with the request for a detailed comparison of impacts relative to the 'no-action' alternative."

Consultant's Comment

The TOR required the proponents to identify and compare alternatives that could achieve the same objectives (that is, improving accessibility to the south west of Trinidad; stimulating social and economic development in the region; supporting development in the La Brea and Point Fortin areas; and encouraging rural settlements by facilitating the opening up of new lands for development). This is critical to the proper evaluation of the need for a highway of the level proposed, and the land use impacts of inaction needed to have been explored with reference, for example, to the imbalance of the physical development of the country in favour of the north and west of Trinidad.

(c) <u>Mapping</u>

EMA Comment

"The study area for the socio-cultural survey should have been mapped, providing details on the residences, agricultural lands and businesses to be acquired."

MOWT Response

"This information is already provided in Appendix S. Maps in that appendix show all properties to be acquired and tables summarise the areas….."

Consultant's Comment

What is provided in Appendix S is cadastral mapping with the alignment superimposed thereon. This Consultant is of the view that what was required was detailed land use information relating to all of the buildings in the path of the alignment. A land use survey should have been undertaken to determine the exact location of the properties to be acquired and the use to which each one is put, and the results of the survey mapped and submitted with the EIA.

Other Comments of the Consultant

The TOR, at 2.1, specified that the study area should also identify adjacent and proposed developments in south west Trinidad, industrial developments in particular, that could influence the project. There are two large projects, *viz*., the Union Industrial Estate and Port at Brighton, and the La Brea Industrial Estate and Port[4] which are both shown on the map at Figure 4.13 of the EIA but for which no other information is given. These are

[4] Union Industrial Estate and the Port at Brighton is situated on approximately 400 hectares of land, and will cater for a mix of heavy and light downstream gas-based industries. La Brea Industrial Estate and Port managed by the National Energy Corporation of Trinidad and Tobago (NEC) through the La Brea Industrial Development Company (LABIDCO) is comprised of 162 hectares of fully developed land subdivided into 58 serviceable lots and will cater for a mix of heavy and light downstream gas-based industries. (www.nec.co.tt).

quite significant for their employment-generating potential and for the impact which the highway might have on their sustainability, and needed to have been examined and discussed in some detail.

Section 2.5 of the TOR required the proponents to undertake a review of the activities (existing or proposed) in the wider area of study, and to determine the potential cumulative impacts of these activities, including any that might stem from "…..the opening up of Green-field areas to development." The EIA, at 5.4.3.1.1, does identify the potential for land use conflict during the operation phase of the proposed highway which the proponents expect would make the areas more attractive for development for residential, commercial, and industrial purposes, and tend to "…. increase pressure for conversion of agricultural lands to built development (induced development). However, some attempt should have been made to project or to predict in more detail the impact which the proposed highway would have on the landscape of the south western peninsula. This consultant suggests that the improved accessibility would increase the potential for development in the area, but that other factors including economic growth; and the provision of infrastructure, in particular drainage infrastructure to mitigate the flooding problem experienced in the area (and that the HRM fears may be exacerbated by the highway), would also influence the impact that the new highway might have. Outside of the immediate area of impact, the Petroleum Company of Trinidad and Tobago Limited (PETROTRIN) has large land holdings in the Point Fortin area which could become attractive for development and which would make a significant change to the economic fortunes of the region.

With respect to what is referred to as 'authorised development'[5] the EIA recognises that, if unmitigated, the potential impact may be extreme, major in intensity, and long term in duration. The suggestion that the adverse impacts could be mitigated by the preparation of a plan and the determination of development proposals in accordance with such a document, and in accordance with the mandates of the relevant agencies, is simplistic and unrealistic given the history of enforcement against unauthorised development in Trinidad and Tobago.

The acquisition by the State of the large acreages proposed would appear to encourage squatting, which is treated at section 5.4.3.1.2, particularly given the approach of the state through the NIDCO of making *ex gratia* payments to squatters who are to be removed from the path of the highway.

Section 5.4.3.2 attempts to address one of the areas of greatest concern to the HRM, that is, the reality that the proposed highway would split settlements at Ghandi Village, Suchit Trace, Tulsa Trace, San Francique Road, Siparia Road, and Fyzabad Road, disrupting community networks forged over generations; would separate children from schools, and

[5] Reference should be made to development on legally owned, as opposed to illegally occupied, land. Development is not 'authorised' unless it has been granted Planning Permission by the TCPD on behalf of the Minister under the TCP Act.

communities from recreational and religious facilities; and would separate a number of agricultural holdings from the residences of the farmers. It is difficult to determine the efficacy of the proposed mitigation measures, that is, the construction of interchanges and overpasses at the affected locations.

1.3 Review of Relevant Planning Instruments

The intention to improve road connectivity between the Capital Region and the south west of Trinidad as far as Point Fortin is reflected in all spatial or physical development plans prepared by the Town and Country Planning Division (TCPD) dating back to 1974, including the NPDP. These documents are reviewed in the following section.

1.3.1 Planning for Development: The South West Region

This plan was prepared in 1974 to cover the south western peninsula of Trinidad including the entire area of direct impact of the proposed Debe to Mon Desir highway segment.

The goals based on which the plan was formulated include the provision of "…..the best possible accessibility for the movement of people and goods to, from, and within the region; and the development of a pattern of identifiable urban and rural communities functionally related to one another and to the needs of people."

Proposals in the plan include the development of a "…..transportation network in the region to provide a more efficient service between districts inside and outside of the region." The plan recommended the extension of the SHH to link Point Fortin and Siparia with San Fernando and other points to the north; and the provision and/or upgrading of rural access roads through key agricultural areas. The view was expressed that the capital costs of this project should be measured against the benefits to be derived in the form of shorter travel times and distances between the Capital Region and St. Patrick; industrial development carded for the region; and the opening up of new lands for development in the Siparia, Fyzabad, and Point Fortin areas.

It was also recommended that improvements be effected to the road network in the region as the "basis of a more efficient system of bus routes and a more reliable public transport service."

1.3.2 The National Physical Development Plan Trinidad and Tobago (NPDP)

Land use planning in Trinidad and Tobago is guided by the Town and Country Planning Act, Chapter 35:01 (the Act) which was proclaimed in August 1969. Part II, Section 5 of the Act requires the Minister (with responsibility for town and country planning) to prepare and to submit for the approval of Parliament a development plan indicating the manner in which it is proposed to utilise the land space of Trinidad and Tobago. The NPDP was prepared in accordance with this

Part, and was approved by Parliament in 1984. It is the only statutory guide to the use and development of land in the country.

The following are among the objectives on which the Plan is based (Volume 1):

- The stimulation of agricultural productivity and production….;
- The effective improvement of the networks and systems of transportation…..to raise the level of accessibility…..;
- The reduction of disparities in income, employment opportunities, etc., between and within geographical areas; and
- The improvement in the standard of living in rural areas.

Section 6.5 of the Survey portion of the Plan lists problems associated with internal transportation to include:

- High levels of congestion in the major urban areas caused, *inter alia*, by the patterns of ribbon development along major arterials together with a high proportion of secondary and direct access points; and absence of alternative routes to destinations;
- Major deficiencies in the mass transportation system including inadequate service in rural areas; and
- The poor condition of many segments of major roads.

Among measures suggested to assist in relieving traffic congestion were:

- Promoting closer relationship between residences and employment opportunities, schools and retail centres, in order to reduce the incidence of commuting;
- Making mass public transportation an attractive alternative for commuters;
- Developing a more effective system for the maintenance of major roads;
- Limiting ribbon development along main roads;
- Developing and upgrading rural access roads; and
- Promoting rational land use decisions which bear in mind such considerations as traffic generation.

Plan proposals included the development of a major growth centre at Point Fortin, and the implementation of "…..strong land use controls particularly with respect to agriculture and conservation areas – the most suitable agricultural lands in parts of the Oropouche lagoon, for example, being designated green belts for agricultural use (18.5)." The settlement system proposed involved the establishment of Sub-regional centres at Point Fortin and Siparia and a District centre at Penal (19.3).

Transportation proposals in the Plan (Section 23.8) were intended to, *inter alia*, "…..provide adequately for present and future traffic demands in order to achieve an improved level of accessibility; and provide for better land development." The need was stressed for "…..a national transportation plan which would analyse transport demand in the context of the NPDP and detail transportation proposals for implementation and phasing: over the ensuing 20 years. The Plan

also recommended the establishment of a limited number of new major routes, one of the most important of which was a link from San Fernando to Point Fortin in the form of an extension of the SHH (Figure 1.1).

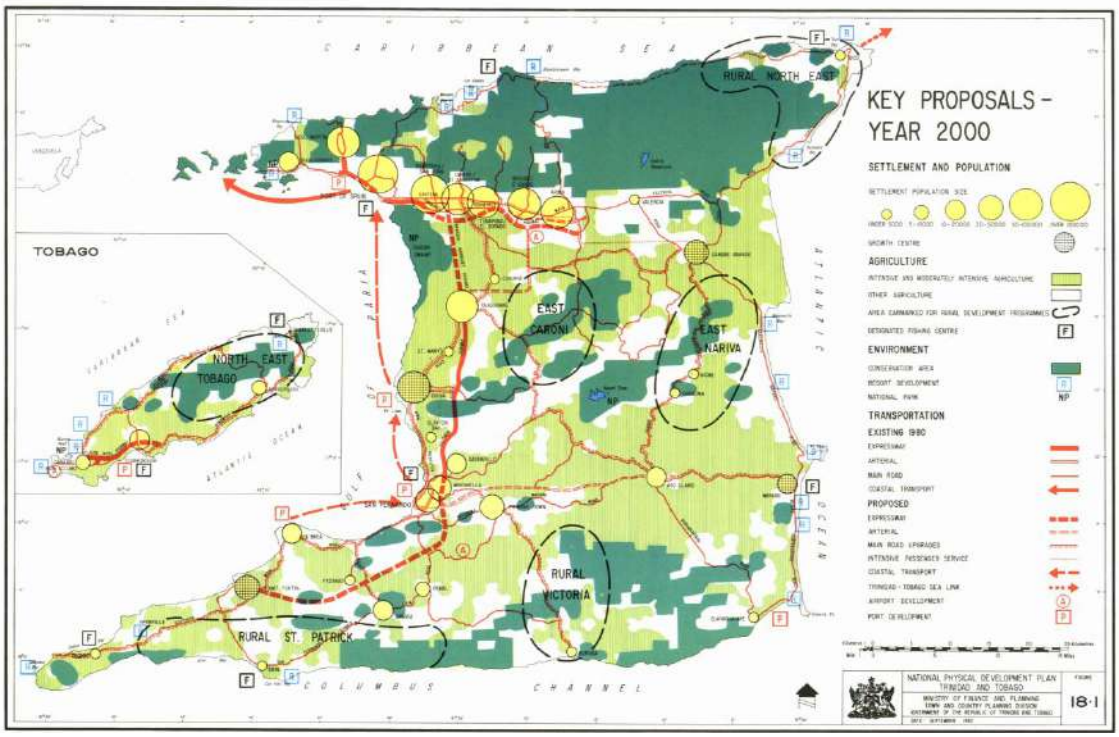


Figure 1.1: National Physical Development Plan, Proposals Map
Source: *National Physical Development Plan, Volume I.*

It was also recommended that ribbon development along key access roads be controlled, and that alternative means of transportation for people and goods, such as rail transportation, be investigated.

Although outdated, the NPDP is generally used as the basis of policy applied by the TCPD. It has also been indicated as the framework for regional level plans for the municipalities of Siparia and Penal/Debe, and the Borough of Point Fortin, the relevant sections of which are covered in the following section. These Plans have been accepted by the Cabinet of the Government of Trinidad and Tobago and are being used by the relevant Corporations as a guide to the determination of projects for implementation.

1.3.3 Review of the Relevant Municipal Level Plans

1.3.3.1 Siparia Final Draft Municipal Development Plan

Most of the area through which the Debe to Mon Desir segment is routed falls within the municipality of Siparia for which the *Siparia Final Draft Municipal Development Plan* (the Siparia Plan) was prepared for the Ministry of Local Government in 2009-2010.

The planners noted that the major road networks such as the S.S. Erin Road and Siparia Road are in need of repair, upgrading and, in some instances, re-alignment.

The SWOT analysis undertaken during the survey phase of the planning exercise identified a number of weaknesses including insufficient room for improvement along major road networks, and remoteness from main centres; and opportunities such as the potential for the creation of linkages to the outer lying regions of the South, and heavy industrial development at Union at La Brea estates and Brighton Port.

Among the strategic objectives listed as informing the plan proposals was improvement in the region's accessibility (inter-regional transport and intra-regional mobility) through, *inter alia*, the provision of highway access from San Fernando; integration of land use and transportation systems for efficient access to services and facilities; and promotion of the use of public transport over private vehicles in order to reduce congestion.

One of the priorities listed with respect to transportation was the proposed highway to Point Fortin which was considered as important in providing easy highway access which is critical to the development of the region. The planners recommended that the Siparia Corporation promote the early implementation of the highway project.

The Plan projects that the La Brea Industrial Estate and Port and the Union Industrial Estate and Port at Brighton would create employment opportunities throughout the region, and act as stimuli to development in the areas around the Siparia and Fyzabad interchanges and at locations at which the new road connections are opened.

1.3.3.2 Penal/Debe Regional Corporation Final Draft Municipal Development Plan

One of the objectives of the Penal/Debe Plan is to "Improve the Region's accessibility and inter-connectivity."

Issues listed in the *Supplementary Report of the Situational Report 1* as requiring attention in the Penal/Debe municipality relate to the decline of the agricultural sector and the need to encourage the participation of farmers; and the necessity for more effective development control to avoid the loss of valuable agricultural lands to housing and other forms of built development.

Weaknesses listed in the SWOT analysis conducted for the plan exercise include the deterioration of roads; unplanned housing developments; and traffic congestion and lack of parking facilities in Debe and Penal. Opportunities were seen in the potential for the revitalisation of the agricultural sector including downstream agri-businesses, while threats identified relate to "urban sprawl" and lack of sufficient control over squatting.

The proposed highway extension project was considered as being important in the efforts to improve accessibility in the region for the links that it would effect between Debe, San Francique Road, and subsequently to Fyzabad, La Brea and Point Fortin. The planners indicated that the proposed highway had partly formed the basis of "…..the preferred development scenario which promotes economic opportunity through this planned development corridor."

Since the Plan was prepared a decision was taken by the Government to establish the University of the West Indies Law Campus at Debe. Subsequent planning exercises would need to determine, and plan for, the spin-off effects of this development.

1.3.3.3 Point Fortin Plan

Although no portion of the Debe to Mon Desir segment of the highway falls within the Borough of Point Fortin, it is useful to review the plan that was prepared for the jurisdiction, given that it is the terminus of the proposed highway and the location of land use activities that would generate opportunities for growth in the overall region.

The objective for transportation is to improve the accessibility and permeability of the Borough based on a policy of "…..establishing a transportation system complementary to the land use system and offering safe, convenient and effective access to and within the Borough." As is to be expected, the proposed Golconda to Point Fortin highway is included among the main transportation features of the plan.

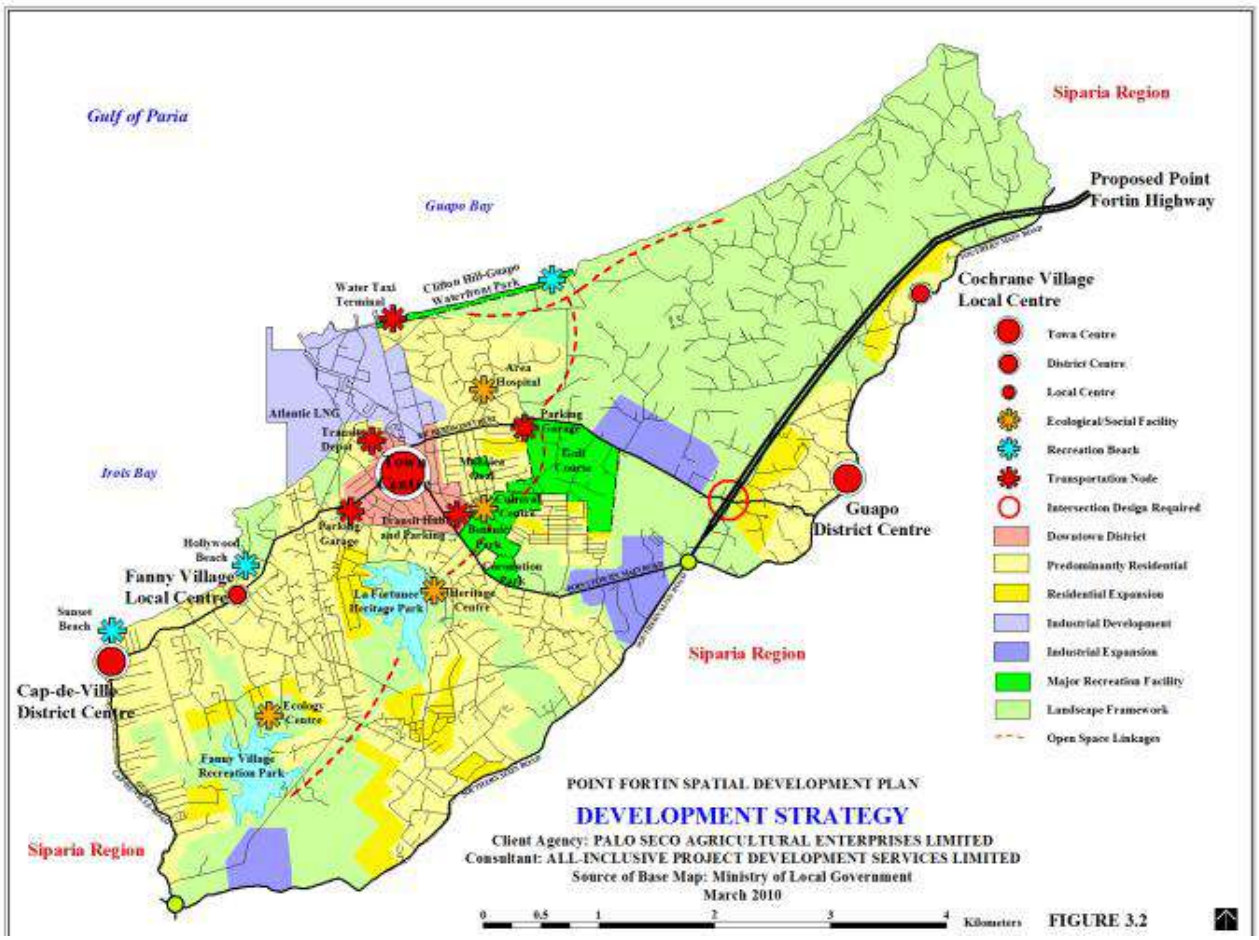


Figure 1.2: Point Fortin Development Strategy
Source: Point F

With respect to economic activity, the objective is to "attract investment projects and business enterprises that will generate meaningful and secure jobs at appropriate locations in the Borough" with the emphasis on "…..downstream industries linked to the proposed major industrial development at La Brea and Union Estates."

1.3.4 The National Spatial Development Strategy

A new NPDP is currently being developed in the form of a National Spatial Development Strategy (NSDS) which is intended to "…..articulate a more strategic approach to the integration of national socio-economic and spatial goals towards the sustainable development of the human and physical" resources of the country. The NSDS is intended to take account of a Growth Pole Development Strategy which has been enunciated by the Government in the *Medium Term Policy Framework 2011-2014*, and which seeks to stimulate development and decentralise economic activity in five areas of the country including the South Western Peninsula of Trinidad. The

Request for Proposals for the development of the strategy specifies a Civil Engineer/Transportation Planner as one of the core professionals, reflecting an understanding of the imperative of incorporating transportation issues into spatial planning. The Minister of Planning and Sustainable Development has indicated that once the Strategy has been completed work will be started towards the revision of the municipal level plans.

1.4 Implications of Re-Settlement Requirements

The *NIDCO Report on the Debe to Mon Desir Segment* dated June 2012 refers, on page 9, to land to be given to displaced persons at a "new development at Petit Morne" to "build a new community"; the possibility of accommodating some persons "within small village expansion projects to be developed by NIDCO in other areas"; and the intention to allocate two-acre plots to affected farmers.

Further information provided by NIDCO indicates the location of the Petit Morne site (Figure 1.3). The displaced farmers are to be granted plots on a site at Golconda shown in Figure 1.4. It is noted that the displaced residents currently occupy plots that are almost all significantly larger than 10,000 square feet, many in excess of one-half acre (EIA Appendix S). According to the HRM most of these parcels accommodate a kitchen garden. It can be expected that there are also instances of poultry and livestock rearing as is the practice in many rural areas in Trinidad and Tobago.

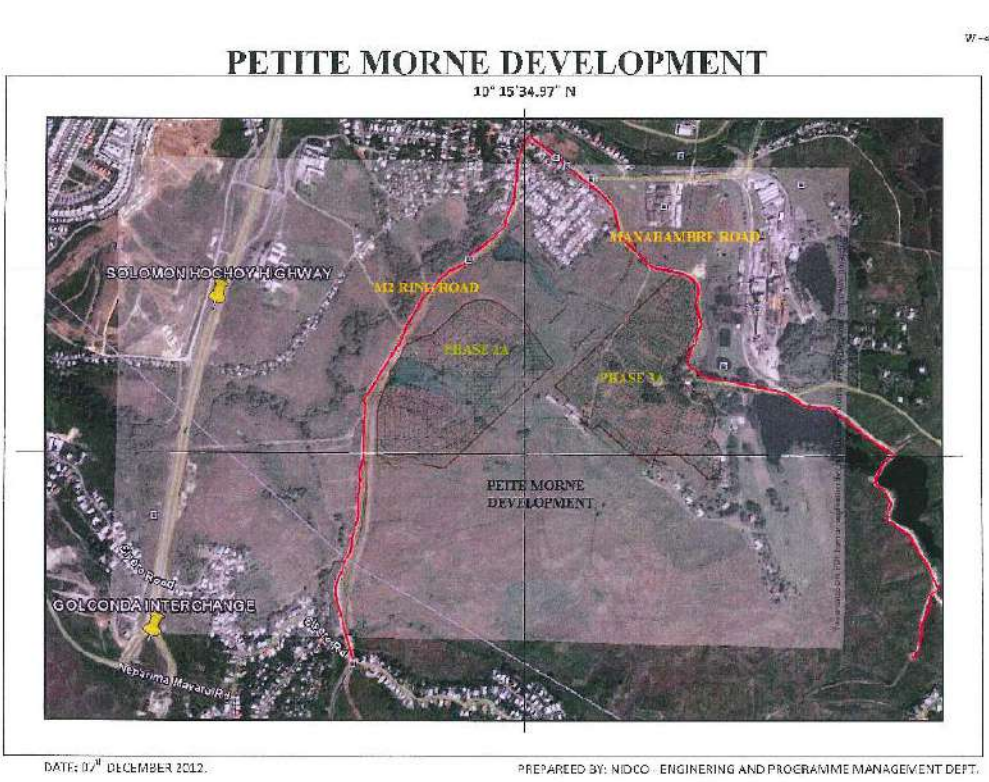


Figure 1.3: Location of land at Petit Morne
Source: NIDCO

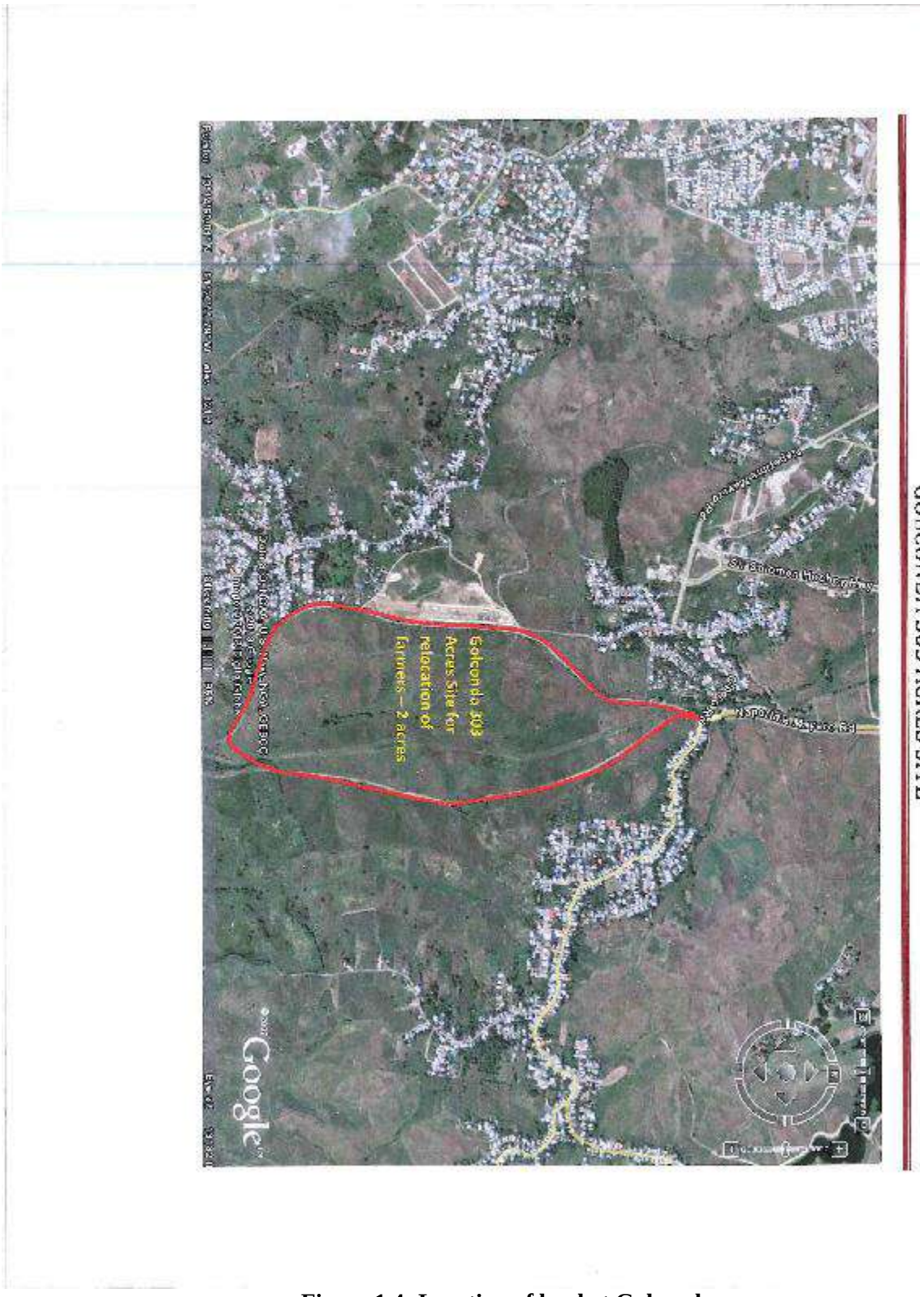


Figure 1.4: Location of land at Golconda
Source: NIDCO

A more reasonable alternative to the Petit Morne type concept would be for suitable land to be identified and developed for village expansion on the fringes of existing settlements, or to the rear of ribbon development, to accommodate persons who need to be moved to make way for the highway.

1.5 Statutory Requirements

Part III of the TCP Act, which relates to the control of development of land, stipulates that permission is required for any development that is carried out after the commencement of the Act, development being defined to include the carrying out of building or engineering operations in, on, over or under any land; the making of any material change in the use of any land; and the subdivision of any land.

1.5.1 Requirements relating to the Proposed Highway

Full Planning Permission is required for new road construction that is not within the operational land of the statutory undertaker, that is, the MOWT. Hence, the two submissions described in the following were made to the TCPD by the MOWT and determined as indicated.

(i) Application **T7M:0440/2007** – this submission was made on March 05, 2007 for Planning Permission (PP) for the development of 160 hectares of land for "Transportation purposes" including the subdivision of the land, stated as being then used for "abandoned and active agriculture; minor forestry; oil fields; some residential and commercial". The existing use of the land was indicated as being "one hundred and fifty houses and thirteen commercial structures…" and it was indicated that these buildings were to be demolished. Whereas the location of the land was given as "Debe – Mon Desir" and the alignment shown on what appears to be a location drawing is the entire alignment of the segment under review, all of the other drawings attached to the application show only the stretch from the intersection of the M2 Ring Road and the S.S.Erin Road in the Debe area to the proposed Fyzabad Interchange.

The application was determined following the grant of the CEC (CEC1372/2006) by the EMA. PP was granted by *Notice of Grant of Permission to Develop Land Subject to Conditions* (notice of PP) dated May 19, 2010 for "…..the subdivision of land for the creation of several parcels together comprising 160.0 hectares and the amalgamation of those parcels and for the construction of the extension to the Solomon Hochoy Highway….." One of the conditions attached to the PP was that the consent of the Local Authority be obtained prior to the commencement of development in accordance with the requirements of the Municipal Corporation Act (1990).

Application **T7M:0443/2007** was submitted on March 05, 2007. The submission was not available for inspection as the TCPD is currently unable to locate the documents. However, the notice of PP was provided by the NIDCO and the TCPD, and this document indicates that the permission was granted, by notice of PP dated March 12, 2009 for "…..the development of land situated between St. Mary's Village South Oropouche to Mon Desir-Delhi Road

Fyzabad and to Dunlop Roundabout Point Fortin and of an unspecified area by the subdivision of land for the creation of several parcels together comprising 100 ha and the amalgamation of those parcels and for the construction of the extension of the Solomon Hochoy Highway for transport purposes in accordance with the proposals set out in your application …..submitted 2007.03.05…..” The permission was also conditioned upon the consent of the Local Authority under the Municipal Corporation Act (1990).

(ii) Drawings seen at the offices of the MOWT on January 31, 2013 show that this submission included the stretch of the (Debe to Mon Desir) segment that runs from the Fyzabad Interchange to Mon Desir, and which forms part of the alignment for which CEC1372/2006 was granted on April 20, 2010. It should be noted, therefore, that PP was granted before the CEC was obtained, whereas the CEC Rules stipulate that PP cannot be granted until a CEC is obtained from the EMA.

1.5.2 Requirements relating to the Resettlement Sites

Full Planning Permission is also required to be obtained for the sites for the proposed resettlement of the persons to be displaced from their residences and/or agricultural plots. With respect to the residential development, it is assumed that serviced sites are to be allocated, in which case the application would need to be for permission to subdivide land and install infrastructure in the form of roads, drains, and water and sewerage facilities, and would require the prior approval of the relevant agencies, *viz*., the relevant Municipal Corporation, the Division of Drainage, and the Water and Sewerage Authority. This process is also applicable to the agricultural sites.

Investigations reveal that an application referenced T7K:3216/2009 was submitted to the TCPD on December 24, 2009 for outline PP for the development of a site of 193.3836 hectares at M2 Ring Road and Manahambre Road, Petit Morne, St. Madeline for residential purposes. Outline PP was granted by letter dated June 15, 2010 with a condition that the permission “…. shall lapse and become null and void unless the particulars and plans…..are submitted ….within one (1) year from the date of this Outline Permission.” Verbal communication from the TCPD indicates that no particulars and plans were submitted pursuant to the grant of the outline PP, so that there is currently no permission for these lands to be developed. Site visit on January 13, 2013 revealed that engineering operations are underway on land at Petit Morne, but the exact location of the area earmarked for the relocation of displaced persons could not be determined.

It should be noted that where land to be developed is in excess of two hectares the CEC Rules, 2001 requires that a CEC be obtained, and that the relevant application must be made to the TCPD. In accordance with the provisions of the legislation a CEC must be obtained before PP can be granted by the Minister under the TCP Act. In this case, outline PP was granted in contravention of this law.

The process involved in allocating sites in this development to persons displaced by the proposed Debe to Mon Desir Highway is therefore likely to be a lengthy one. Even after a CEC is obtained

and all of the other statutory requirements (including the grant of PP) are met the TCPD would require that all infrastructural facilities are completed to the satisfaction of the competent authorities before applications for PP to develop individual plots are entertained.

Investigations reveal that PP has not yet been sought for the development of the Golconda site for agricultural purposes.

1.5.3 Relationship between the TCP Act and the Land Acquisition Act

The requirements of part III of the TCP Act are relevant to the issue of compensation for persons whose properties are to be acquired under the Land Acquisition (LA) Act, Chapter 58:01. In establishing the value of land, the LA Act specifically excludes the consideration of unapproved use and the consideration of illegal development as a means of increasing property value, account being taken only of the lawful existing use of the land and the value attributable to any PPs granted and in force. In this regard it is noted, on site inspection, that a large number of buildings pointed out as affected by the alignment do not appear to meet site development standards enforced by the TCPD and might not have been granted Planning Permission. For example the 25-foot building setback distance required to be observed from major roads, such as the S. S. Erin Road, and that is intended to allow for future road improvements, is more often breached than observed.

1.6 Conclusions and Recommendations

The planning of the proposed Debe to Mon Desir segment of the extension of the SHH highway needed to have been undertaken as part of a comprehensive plan that seeks to balance the land use and transportation needs of south west Trinidad, and to do so with a minimum of disruption of human communities.

Given the limited land space that is available in Trinidad and Tobago, and the large land-take associated with road infrastructure such as highways and interchanges, land that could be more efficiently utilised for other productive purposes, the Planners need to come up with mechanisms and approaches that would effectively address long-term congestion problems and provide the accessibility that is needed to improve connections between the various areas of the country without severely impacting the lives of the people.

The NSDS and planning exercises that are to follow would need to incorporate these considerations and seek out solutions that must involve addressing employment/housing mismatches, and establishing various modes of travel and improved public transportation facilities that would serve to reduce the need for highway expansion.

2.0 ENVIRONMENT

2.1 Objectives

This report was created in response to Terms of Reference issued by the Chairman of the Highway Review Committee (HRC) for a review of the environmental aspects as they pertain to the proposed segment of the Solomon Hochoy Highway Extension (SHHE)from Debe to Mon Desir). The objectives of the review are as follows:

- To determine whether the procedural requirements for granting of Certificate of Environmental Clearance for this Project were carried out in accordance with the provisions of the Environmental Management Act 2000 and the Certificate of Environmental Clearance (CEC); including the CEC Rules (2001), the CEC (Designated Activities) Order and the CEC (Fees and Charges) Regulations (all 2001)

- To determine whether the substantive content of the environmental studies done, their review and assessment, and related decision-making were in keeping with Acceptable Practice and whether enough satisfactory environmental information had been provided to allow for a properly informed decision to have been made with regard to granting the CEC

- To determine the validity of the concerns brought forward by representatives of the Highway Reroute Movement (HRM)

2.2. Approach

The task of undertaking the review included a number of interdisciplinary meetings amongst the members of the Highway Review Committee to discuss all issues at hand.

Additionally, meetings were held with NIDCO whose role is to project manage the establishment of the Highway and with the HRM, the group which has sought the cessation of the Highway. This was done in order to obtain a full understanding of the dispute. A detailed review of all relevant documentation was carried out, including the Environmental Impact Assessment submitted in accordance with the CEC application, along with other supplementary submissions in support of the application. Further, the Administrative Record, lodged at the information centre of the EMA was reviewed in order to glean a proper understanding of the application process for the Project.

While undertaking the review, the main areas of concern brought forward by the HRM, as well as those presented by their Environmental Specialist were examined. The issues raised by the latter were as follows:

- A poorly defined Study Area within the
- The EIA ignoring the importance of the Oropouche Lagoon as one of the country's most significant wetlands and its use in the context of the National Wetlands Policy
- The fact that the Siparia Forest Reserve is in close proximity to the Highway and should have been included in the Study Area
- The omission of a hydrological study in the EIA
- The health and safety issues associated with likely human crossings across the proposed highway
- The inadequate assessment of the socio-cultural environment and of socio-cultural impacts within the EIA
- The mention in the EIA of important and rare indigenous species, the impacts on which were not properly assessed

2.3 Overview of the CEC Application Process for CEC 1372/2006

The Certificate of Environmental Clearance Rules were made law on July 07 2001 pursuant to Section 26 (h) of the Environmental Management Act 2000. The CEC Rules require that once a project includes a proposal to undertake any of (or more than one of) the 44 activities listed and defined in the Certificate of Environmental Clearance Order (2001) that a Certificate of Environmental Clearance must be obtained prior to commencement of those activities. The Administrative Record for CEC 1372/2006 at the EMA Information Centre was reviewed and it can be reported that the CEC process for this case was followed according to the chronology below:

2.3.1 Submission of Application

An application was made in accordance with Sub-rule 3 on February 16 2006 and stamped received by the EMA on February 23 2006. In it was a claim for confidentiality regarding the cost of the Project with a reason given that placing that information in the public sphere could compromise the contractor bidding process. The EMA upheld the claim.

The Applicant was the Highways Division, Project Implementation Unit Ministry of Works and Transport.

The EMA acknowledged the application on March 09 2006 in accordance with Sub-rule 4, indicating that a CEC was required for the activity and that an EIA was required.

2.3.2 Issuance of the Terms of Reference for the EIA

A Draft TOR for the EIA was issued to the Applicant as required by Sub-rule 5 on April 13 2006. It must be noted that there is no documentary evidence that the EMA consulted with the Applicant prior to the preparation of the TOR according to Sub-rule 5 (1) (a). The latter clause does not however specify that the consultation must occur prior to preparation of the 'Draft', yet it is implied.

The TOR indicated that Activity 33 (a) of the CEC Order was applicable to the Project and a review fee of $10,000.00 TT was charged in accordance with the CEC (Fees and Charges) Regulations (2001).

The Applicant wrote to the EMA reporting on its consultations with a number of stakeholders (in adherence to Sub-rule 5 (2)) and requested changes to be included in the Final TOR. There were a number of written comments from stakeholders; however none specifically requested changes to the TOR. Comments were received from The National Gas Company of Trinidad and Tobago Ltd.NGC), Water and Sewerage Authority of Trinidad and Tobago (WASA), Town and Country Planning Division (TCPD) and two village councils.

In response to the TOR, an e-mail was sent to the EIA preparers on behalf of the Murray Trace Action Committee and Secret Sports Club and the councillor for the area, citing the possible negative impacts of the development on his community including: "flooding impacts on farmers, river crossing, land acquisition, road crossings, traffic lights existing roads to connect…along the proposed route".

The EMA hereafter responded to written modifications to the TOR (as required by Sub-rule 5 (3)) made by the Applicant and made changes to the Draft TOR in preparation of the Final TOR. The changes made were largely with regard to the specificity of language in the TOR as opposed to substantive content. The Final TOR was issued on May 25 2006.

2.3.3 Initial Submission of the EIA

The EIA was submitted almost three years after the issue of the Final TOR on February 17 2009. The EIA discussed a change in route made and the re-doing of public consultations. The Administrative Record does not however contain documentation of such changes, including notification to the EMA of any change in scope of the Application that may have resulted in such a long hiatus between TOR issue and EIA submission.

The EMA, in 2006 instituted an initial review of submitted EIAs to ensure that they included the basic elements outlined in their Terms of Reference. The CEC Rules outline the legal requirements for the elements of an EIA in Sub-rule 10 (a) to (k) most of which are typically contained in the Terms of Reference.

Other than this, there are no overt clauses within the CEC Rules that guide this policy; however an assumption could be made that proper legal interpretation of Sub-rule 10 and other aspects of the EMA legislation may have been used to justify its implementation. It was however never made clear to the public by the EMA, which aspects of the EMA legislation were used to guide this policy. At the end of this initial review, the EMA may either accept the EIA for further review and processing or return the EIA to the Applicant and require that the EIA is resubmitted. According to this policy, the 80-day period specified in Sub-rule 6 (1) (b) restarts only when the EIA is accepted.

In this case, the EMA returned the EIA to the Applicant citing deficiencies. It should be noted, that in accordance with the policy of the EMA in this regard, deficiencies at this juncture refer only to elements and sections of the TOR that were not addressed at all or were incorrect in form, for example, scales of maps. It does not refer to the quality of the content in these elements and sections.

2.3.4 Rejection of the Initial Submission

The EIA for CEC 1372/2006 was rejected after the preliminary review, with the EMA citing the use of guidelines from the International Association for Impact Assessment (IAIA) to make the determination. The EMA outlined generic deficiencies to the Applicant and requested that the EIA be augmented and resubmitted.

2.3.5 Acceptance of the EIA for Further Review

The Applicant resubmitted the corrected EIA on June 30 2009, following which the EMA wrote to the Applicant stating that the EIA was "acceptable for further processing".

2.3.6 Public Review

The accepted version of the EIA was lodged at designated locations throughout Trinidad and Tobago for public review and to solicit public comments. This is normal procedure with regard to the review of EIAs and it is assumed that the normal notifications were made in national daily newspapers, as this is the instituted practice of the EMA in this regard. The notice is also placed in the Trinidad and Tobago Gazette. The designated review period for this EIA was August 10 2009 to September 11 2009.

Upon review of the Administrative Record, one set (only) of written public comments submitted during this period were found to be on file, and they were from the Non-governmental organization (NGO) Council of Presidents of the Environment (COPE). These comments responded to the EIA section by section, but all comments were from a document quality control perspective for example "Documentation of consultations – good"

2.3.7 Technical Review

Letters can be found on the Administrative Record dated August 20 2009 written to a number of Government Agencies and one NGO requesting their inclusion on a technical review panel for this EIA and giving clear guidelines as to what was required of them as reviewers. This is normal practice by the EMA during the EIA review process. The responsibilities of the technical review committee include examining the EIA to ensure that it has properly addressed any areas of

potential impact in a manner such that an informed decision can be made with regard to granting or denying the CEC as set out in Sub-rule 6 (1) (b).

The technical review panel is typically selected to include those state bodies that may be called on to issue permits and consents for a given project, as well as those considered to offer disciplinary expertise on the type of project in question. In this case the EMA selected the following agencies to be part of the technical review panel in addition to itself (note that the names of some of these Ministries and State bodies may since have changed): the Drainage Division (Ministry of Works and Transport), WASA and the Water Resources Agency (also WASA), the Trinidad and Tobago Meteorological Office, the Ministry of Energy and Energy Industries(MEEI), the Forestry Division (Ministry of Agriculture, Land and Marine Resources), the Fire Services Division, the Archaeological Committee and the Siparia Regional Corporation.

It should be noted that the TCPD, the Wildlife Division and the Soil Experimentation Station (Centeno) were also invited to be part of the technical review panel, however from the documentation held in the public record it would appear that the invitations to TCPD and the Wildlife Division were not accepted. Written comments from the Soil Experimentation Station are on record, but the EMA does not list them as having been part of its technical review panel in the Review and Assessment Report (RAR).

2.3.8 Submissions from the Technical Review Panel

Many, though not all members of the technical review panel, submitted written comments on the EIA. The summary of main concerns identified in submissions by the technical review panel members is as follows:

Drainage Division

- Lack of proper analysis of the role of existing drains in the right of way of the proposed Highway.
- Lack of proper analysis of the effect of surrounding wetland (Godineau Swamp and Oropouche Lagoon) in its role as a 'natural detention system'.
- The effect of the project on slope stability in the area.
- The EIA does not indicate the return period used in devising drainage.

WASA

- Inadequate descriptions of mitigation measures and use of somewhat dismissive language where this was concerned.
- Lack of proper assessment of utility (especially water) crossings.

Water Resources Agency

- The lack of a "comprehensive evaluation of this wetland"
- Figure 4-5 in the EIA showing groundwater has a "fundamental error" showing the Durham and Sum Sum sands within the study area rather than the Morne L'Enfer formation.
- The EIA did not discuss the fault system along the proposed route and does not consider the type of displacement in the area and therefore the effect that faulting could have on the integrity of the highway in the medium and long term.

Ministry of Energy and Energy Industries (now Affairs)

- The lack of set back distances from existing wells both operating and abandoned
- Quarrying sites and transport routes for materials should be considered in the study area and impacts and mitigation of the aggregate requirement aspects of the project should have been included.
- Lack of proper discussion of treatment of crossings with energy pipelines
- There were no pre-meetings as are required, with the MEEI to discuss any issues related to energy infrastructure
- No consultation with regard to abandonment of wells.
- A question as to whether an analysis was done on the price changes on aggregate that would likely occur as a result of the very large demand placed by this project
- The MEEI included a stern warning about the requirement for the proponent to meet with them to iron out their concerns

Forestry Division

- Reminder of the need for permits to remove trees
- A concern about the possible changes in hydrology within the neighbouring (Siparia) Forest Reserve
- Unsatisfactory mapping and identification of sample points and a lack of comprehensive data set descriptions
- Recommendations that data set and sample point data should be "unpacked and upgraded to eliminate vague impressions"
- The need for mitigation measures to protect against scouring and erosion along embankments
- The need for functional detention ponds

Meteorological Office

- Incomplete mapping of flood prone and landslip areas for example Debe is a flood prone area that was not mapped in fig 4-2 Bunsee and Banwarie Trace should have been mapped as areas with unstable slopes.
- Need for mitigation measures to deal with leveling and cutting of slopes

- A specific concern was stated about a "vegetative gully system" along the Fyzabad Main Road opposite the Pepper Village Government School. The gully as an existing flood control system which will be removed, what is the impact?
- The use of the Pepper Village Government School car park as a point through which the highway passes. What is the effect of this on safety at the School?
- Concern about loss of Wetland. What are the impacts?
- Point of disagreement with the EIA that the project will not impact on climate. An expected impact could be on the micro-climate as the removal of large areas of vegetation can cause changes in wind flow and rainfall patterns which could be "inimical to the survival of the wetland since the nature of this environment depends on water excesses".
- Need for a microclimate study (which this review recommends, should be included in a hydrology study)

Soil Experimentation Unit (invited but not listed on the Review Panel)

- 'Endorsed' EIA.
- Descriptions of soils were correct

2.3.9 The Review and Assessment Report

On October 27 2009, the EMA submitted a letter accompanying its (RAR) to the Applicant indicating that the review of the EIA was complete and that a determination of the application could not be done before the applicant submitted a response to the RAR. It also stated that the new date for a determination was January 08 2010, which was 50 working days after the expiration of the initial 80 day period. Sub-rule 6 (2) makes an allowance for such an extension. This is normal procedure for the EMA when it deems that there are content deficiencies in an EIA.

The RAR indicated a number of areas of the EIA that needed to be augmented and categorized them into 1. Critical Information 2. Supplementary Information 3. General Comments. The EMA's overview of the EIA was stated as follows:

"There was a general adherence to the majority of the requirements of the TOR. However, deficiencies were identified as certain requirements of the TOR were either not adequately addressed or not considered in the document."

The EMA then went on to provide detailed descriptions of the deficiencies it found. In common practice, the EMA would usually consolidate the written concerns of the technical review panel for inclusion in the RAR, however the RAR from the EMA seems to omit a significant number of the concerns raised by other members of the panel. This will be discussed further below. The deficiencies listed in the RAR are summarized below and for ease of reading, summarized responses from the Highways Division, Project Implementation Unit, Ministry of Works and Transport are included in this Section:

2.3.9.1 *Deficiencies listed in the RAR and MOWT Responses*

Reference TOR Section 2.5

- There was no justification given for correlating the peak flow periods to a rainfall event (this should have stated 'return period') for example1:25 or 1:50 rainfall event.
- The document does not provide calculations to justify the size of relief culverts and "as an adequate measure to control sheet flow".
- It requests further information on integration of the Highway drainage system with natural and artificial drainage systems in the area.
- Need to identify streams used for abstraction of water, abstraction points, duration of abstraction.
- Despite identification of water in most rivers in study areas as polluted "no remediation measures were considered to ensure that polluted water is not to be used as a dust control measure".

Response from MOWT

In the absence of local guidelines, a rainfall recurrence of 1:50 years was used. For relief culverts, engineers examined the profile of the existing ground and placed culverts where there was a depression in the profile. Given the nature of sheet flow, the size of culverts was dictated by maintenance considerations.

The "information provided is adequate for the purposes of an EIA". Drainage calculations were to be submitted to the Drainage Division and "not normally part of an EIA"

Information on stream abstractions not available at that time. Permissions for any abstraction would be obtained from the Water Resources Agency.

Reference TOR Section 2.5: 5, 6, 8

- Request to provide dust noise and vibration mitigation measures to be employed at the Pepper Village Government School.
- Why was no noise profiling done at Pepper Village Government School
- Provide frequency of air monitoring. Mitigation measures if parameter standards are exceeded.

Response from MOWT PIU

Submissions on monitoring air and noise were submitted as an addendum to the Response. A number of generic mitigation measures were provided to reduce impacts on air during construction e.g. covering truck trays, washing tires, regular vehicle servicing retention of vegetation buffer.

Proposed mitigation during operation included air monitoring and conference with the Ministry of Education for collaborative solutions "if it is determined from monitoring that the school is being affected"

Mitigation of noise included; outfitting vehicles with noise abatement devices, consultation with school administration, scheduling of works after hours and during vacations as best as possible, repair or compensation for property damaged by construction work, a retaining wall built along the common boundary.

The EIA preparers also "strongly recommended" a 2.5 m high grouted blockwork wall as measure to "protect children from falling onto the highway" and for additional noise attenuation.

A noise monitoring report was submitted as an attachment to the response (Attachment 2)

Reference TOR Section 2.7.5

- Requirement to provide an explanation for why Pepper Village Govt School was not considered for resettlement

- Requirement to provide a proposal for compensation for those who stand to lose property. EIA report did not provide any possible areas for resettlement "or any other arrangements for individuals, households, businesses and farmers displaced by the ROW".

Response from MOWT PIU

Relocation of the school is not justified on the basis of expected noise or air quality impact.

Details were not available at the response points the EMA to Appendix S of the EIA. It states that further time.

Reference TOR Section 2.3.3

- "The EIA does not provide enough detail with respect to the socio-cultural environment…" Social mechanisms to treat with immediate concerns of residents are not identified or outlined. "The EIA report requires a more in-depth investigation of the socio-cultural environment". A justification for the method of study used is required.

- The venues used for consultation with the Village Council Representatives did not attract a wide enough cross section of the community.

- "Further research is indispensable…" "the communities affected by the highway were not consulted in a meaningful way" to allow effective mitigation of impacts.

- EIA did not provide evidence of proper consultation with agricultural land owners.

- The study area for the socio-cultural survey should have been mapped providing details of residences, agricultural lands and businesses to be acquired.

Response from MOWT PIU

The response stated disagreement with the EMA's assessment that the treatment of the socio-cultural environment was inadequate and pointed the EMA to a number of sections in the EIA within which it was treated.

The response stated strong disagreement that the communities affected by the highway were not consulted in a meaningful way. It stated that the EMA's comment "ignored" the meetings and surveys that were done.

The response pointed the EMA to the survey of property owners reported in Appendix L.

The response pointed the EMA seemed to disagree about the comment vis a vis mapping of the socio-cultural study area and pointed to Appendix S which it said showed all the properties to be acquired

Reference TOR Section 2.6

- Poor assessment of 'No Action Alternative'. No comparison of impacts.

- "The justification for the project should be contextualized in the context of a feasibility study regarding the transportation needs of the south western region of the island".

Response from MOWT PIU

Response claimed that a Feasibility Study for the transportation needs of the south west region of the Island were not within the scope of the Project. The response disagreed with a request for comparison of impacts relative to no action. It further lists impacts of no-action as:

No benefits of the project will be realized, existing impacts on the environment will intensify and the environmental concerns listing in the EIA will be largely eliminated.

The MOWT PIU did not respond to any further deficiencies listed in the RAR.

Reference TOR Section 2.1

- Requirement to provide a map showing the location of the 61 wells to be plugged and setback distances of the wells in relation to the proposed highway.
- Requirement to clarify if the Ministry of Works and Transport would be doing the abandonments.

Reference TOR Section 2.2

- Requirement to state 'realistic expectations' on how the new highway alignment would address the projected traffic capacity.

Reference TOR Section 2.3.2

- Need to clarify an inconsistency in the statement of distance of the site from the Siparia Forest Reserve (in Section 5.3.2.6 quoted as 4km from site and in section 5.3.2.1 as 0.5 km)

Reference TOR Section 2.5

- Requirement to clarify if there would be compensatory measures for 'moderate' loss of wildlife and wildlife habitat.
- Requirement to clarify why impact of sources for construction material was not reduced after application of mitigation measures
- Justification for why dust and exhaust fumes during transport were classified as 'low;
- No projection of vehicle emissions during operational phase so as to allow an assessment of the impact on air quality.

- EIA did not consider impact of disrupted foot traffic. Were walkovers considered and if not, provide a justification for the lack of mitigation measures for loss of foot access within communities severed by the Highway.

2.3.10 Further Extension of Review Period

In a letter dated January 04 2010, the EMA sent a letter to the Applicant giving an additional extension of the review period to March 10 2010. The reason given was that no response to the Review and Assessment Report had been received and therefore a determination of the CEC was not possible.

It should be noted that at this point, the EMA is simply using its discretion in giving the applicant another chance for the possibility of a positive outcome. The Authority was well within its legal bounds at this time to issue a refusal of the application based on Sub-rule 6 (2).

2.3.11 Issue of the CEC

The Certificate of Environmental Clearance was issued dated April 20 2010. There is no further documentation in the Administrative Record that can allow the reader to determine what the EMA's further considerations were in making its decision, apart from the MOWT Response to the RAR. One can only assume that the EMA determined that the response had satisfactorily addressed its concerns cited in the RAR and that a CEC could be granted as outlined in Sub-rule 7 (a).

2.4 Opinion on the Content of the Final Terms of Reference for the EIA

2.4.1 Terms of Reference as Required by the CEC Rules

The EMA's TOR is consistent with typical Terms of Reference that the Authority has issued since the onset of the CEC rules in 2001. In this case, the TOR broadly covers most of what can be seen as critical issues surrounding this development. It at least covers the basic requirements laid out in the CEC Sub-rule 10 (Standards for Preparation of EIA). It should also be noted that the basis for the EMA TOR is a generic EIA Terms of Reference that was used by the World Bank at least up until 2001. It was first adopted by the EMA shortly after the implementation of the CEC Rules in 2001.

2.4.2 Scoping

The flaws in the TOR as well seen in the EIA seem to reflect an omission of a proper scoping exercise prior to developing the TOR. Scoping is a fundamental component of EIA best practice. It must however be said that the CEC Rules do not contain a requirement for a scoping exercise and the EMA has not implemented the requirement prior to its own TOR preparation, nor does it require such an exercise of the proponent as part of EIA preparation.

2.4.3 Terms of Reference Deficiencies

What this TOR fails to do is what some EMA TORs have done in the past; to identify and emphasize the Oropouche Lagoon as an area of particular environmental sensitivity. This would have forced the EIA study area to have included the lagoon in its entirety, though in its requirement for definition of the study area, the TOR does require the inclusion of wetlands and forest reserves among other environmental elements.

Although it is not designated as an Environmentally Sensitive Area (ESA) under the ESA Rules, the Oropouche Lagoon was listed by the EMA as an area that should eventually be considered for that status when the first ESA designations were done.

The TOR requests a Re-settlement Plan for potentially evicted residents but while it touches on the subject with a request for 'the acceptability of the project' to residents, it does not require a detailed assessment of how acquisitions would affect various aspects of the community and its lifestyles. It does not specifically require a Social Impact Assessment (SIA) but rather touches on aspects of socio cultural impacts. This could give the impression that there was an initial lack of understanding of how severely the acquisitions could have affected the receiving communities.

As is typical with EMA TORs, but nevertheless a drawback, the TOR does not require the use of quantitative methods to assess impacts, except in the area of risk and coastal hydrodynamics. Quantitative assessment seems critical to this project in the areas of hydrology and drainage and in the assessment of human impacts.

2.4.3.1 *Specific Biological Concerns*

> While there are questions arising about the criteria used to define the immediate and wider study areas, based on the TOR, the EMA makes reference to the "*wider study area*" in Section 2.3.2 Biological Environment, stating, "*Provide definitions, characterization and location of the vegetation types and associated habitats with the development site, special attention should be paid to the wetland ecosystems and forests (both natural and secondary) located in the wider study area*." It leads to the question whether this was the guiding principle in the choice of excluding the South Oropouche Swamp (also known as

the Godineau Swamp, the largest swamp on the western coast second only to the Caroni Swamp) and the Siparia Forest Reserve as part of the immediate study area.
Section 2.3.2 of the TOR requests that information be provided on "*the presence of endangered/protected species in the wider study area*," and that this "*data must include sources of baseline data as well as location of sampling points.*" Based on this, three items of importance can be inferred: (i) information on the presence of endangered and/or protected species should be provided for the *wider* study area only, with exclusion of this information being provided for the study area; (ii) the Proponent was expected to conduct sampling and/or provide data for the wider study area and (iii) the understanding of what the "*study area*" and "*wider study area*" are, is unclear to the preparers of the TOR.

The EIA (Section 3.3.2.1 Clearing of Vegetation) states the amount of forested area to be cleared. It clearly exceeds 2ha in a 2-year period. The CEC application included Activity 8 (a) The clearing, excavation, grading or land filling of an area of more than 2 hectares during a two year period and Activity 8 (b) The clearing of more than one half a hectare of a forested area during a two year period, yet the TOR only makes reference to Activity 33 (a) The establishment (inclusive of associated works) of a road of more than 1 kilometre in length.

2.5 Opinion on the Contents of the EIA

2.5.1 Rationale for the Project

There is a very vague and brief rationale for the proposition of the project. There are no specific goals or objectives that clearly explain why this segment of the highway is needed as well as who needs it. Given the high significance of impacts associated with the highway, not the least of which is human displacement, one would expect that the time would have been taken to develop present a clear, specific and convincing case for why this highway needs to be built. That was not done.

2.5.2 Definition of the Study Area

The study area for this project was defined in Table 4-1 of the EIA. The area studied is defined differently for each environmental element studied, which is highly irregular and poor practice. In most cases it resulted in the examination of a small swath of area on either side of the proposed route Right of Way(ROW), as opposed to including areas where direct and indirect impacts could extend, for example river courses.

The method used for defining the study area is not best or even acceptable practice in the conduct of EIAs and one is left to wonder why it was not immediately rejected by the EMA, or flagged by the technical review panel. This definition immediately absolved the EIA of having

to include the study of the Oropouche Lagoon and the Siparia Forest Reserve as ecological units, or the communities as continuous groups of people. It should have been rejected right away.

In its RAR, the EMA only addresses the Study Area with regard to the identification of wells to be abandoned, the need to map them and their setback but there is no mention of the *area* defined as the study area, which is inexplicable.

2.5.2.1*Specific Biological Concerns*

In Section 2.1 Study Area of the TOR, the proponent is provided with a general study area definition that should include the proposed right of way (ROW), adjacent forested lands, wetlands, rivers, streams/tributaries and communities that can be affected by noise, dust, traffic and surface runoff during site preparation and construction. This study area definition was requested to include an area that is expected to experience both direct and indirect impacts. However, the EIA presents an immediate study area with a mere 100m on either side of the ROW - an area which does not encompass any of the potential indirect impacts to the site. Of note, many of the rivers within the study site empty into the Gulf of Paria and pass through the Godineau Swamp, including the Oropouche River, Timull's Channel, St. John's Channel, Blackwater Canal, Coora River and Gucharon River. Greater consideration should have been paid to these areas downstream of the rivers traversing the site for the proposed ROW.

International EIAs for highways have used the approach of defining the immediate study area as a certain distance on either side of the ROW, but this is dependent on several factors including:

(i) the complexity and variety of the ecosystems present;
(ii) the species composition of the ecosystems, many of which are affected by edge effects at a minimum of 500m from ROWs;
(iii) the spatial zone from which the effects of pollutants will be exerted; and
(iv) The area in which indirect and cumulative impacts on ecological communities will occur, especially in light of the fact that the proposed highway for this EIA will be in conjunction with other highway segments.

2.5.3 Mapping in the EIA

Mapping in the EIA is generally poor, with too few maps being included in the body of the EIA. Some maps included in the appendices for example the map of the Oropouche Lagoon in the Institute of Marine Affairs (IMA) Wetland Report should have been included in the chapter describing the environment. It is the only map in the document that shows the natural boundaries of the Lagoon and would have been critical to any reader immediately understanding the

relationship between the highway route and the Oropouche Lagoon. Further, the communities to be affected are not properly mapped such that densities and settlement patterns can be observed.

It would seem that portions of published maps showing geology, hydrogeology etc. were simply scanned and the route superimposed on them, rather than the use of a geographic information system (GIS) to generate maps. This seemed to have resulted in a 'fundamental flaw' in the hydrogeological map, which was flagged by the Water Resources Agency in its review comments. The Durham and Sum Sum sands were mapped as groundwater resources in the study area and this is incorrect.

2.5.3.1 *Specific Biological Concerns*

According to Section 2.1 Study Area of the TOR, the EMA requested that "*Printed maps should be provided to indicate the general layout of the proposed routes, as well as their relationship to the overall study area. The study area should be properly identified and described with accompanying aerial photographs, maps and diagrams at easily understood scales to illustrate the spatial extent of the project and the impact area.*" The EIA does not provide any specific map that clearly delineates the boundaries of both the defined immediate or wider study area. While Figure 4-12 and Figure J-2 show the boundaries of the Siparia Forest Reserve, the boundaries of the Godineau Swamp are not displayed. Figure 4-10 only shows some parts of the rivers that were sampled for the study, but does not show their exit points along the Gulf of Paria or where they join to other rivers. Given that effects on rivers are not stationary, the rivers should have been clearly mapped so that potential downstream effects and the spatial extent of the impacts could have been assessed.

2.5.4 The Physical Environment

While a number of requisite studies were done using normal methods for conducting baseline studies used to describe the surrounding environment, the sample collection plan for each is unacceptable by virtue of the poorly defined study area and therefore these studies are not representative of what is required to properly assess the impacts of this Project. Once again this was grounds for the out right rejection of this document.
While other inadequacies are present in the EIA, this review has focused on those considered most critical to decision making where this Highway is concerned.

2.5.4.1 *Hydrology Study*

The omission of a hydrology study as part of the EIA is one of its most significant deficiencies. The discharge and flow of water within the wetland, both surface and groundwater is the most important factor that defines that type of terrestrial environment. It is essential in determining soil conditions and therefore the type of vegetation that can be supported, which in turn determines habitat conditions and ultimately the type of fauna

that can survive. If the proposed project could possibly impact negatively on hydrology, for example interrupting sheet flow from some areas and 'drying' them out, it could cause significant changes to its ecology and wetland destruction. This issue was raised in some detail by the Hydrologist representing the HRM.

A quantitative surface and groundwater hydrology model and study of the wetland as a hydrodynamic system must be done before an informed decision can made as to whether this segment of highway should proceed as proposed or not. It should be noted that the EIA in fact cited the wrong aquifers in the description of the environment, referring to the Durham and Sum Sum sands which are formations that exist in Central Trinidad, rather than the Morne L'Enfer sands which are part of the study area. This was flagged by the Water Resources Agency in its review comments, but not by the EMA in its Review and Assessment Report (RAR), most likely because the WRA submission was dated after that of the RAR.

Interestingly, the lack of a hydrological study to assist with decision-making was flagged in one way or another by most members of the EIA technical review panel but was not included in the RAR. The EMA should have made this issue a 'showstopper' in its decision to grant or deny a CEC, both by virtue of its own determinations, as well as those of the panel members and it did not.

2.5.4.2 *Hydraulic Study*

While the EIA describes the drains to be constructed and expected peak flows, it does not include the return period and calculations used to develop the drainage plan. The Drainage Division flagged this in the EIA review and the EMA described this deficiency in its Review and Assessment Report.

The response of the MOWT PIU could be interpreted as dismissive, whereby it provided the return period used in the drainage calculation as 1:50 but does not provide the calculation done, stating that it would be provided to the Drainage Division and was not normally part of an EIA. It is untrue to say that the submission of drainage calculations is not normally part of an EIA and the EMA very often insists on drainage calculations even for smaller projects not requiring EIAs. It is not fully understood why the EMA relented on this point, given the level of concern expressed in consultations vis a vis flooding.

2.5.4.3 *Topographical Features, Structural Geology and Slope Stability*

The Meteorological Office, as a member of the technical review panel pointed to the incomplete nature of the slope capability mapping. It also specifically referred to a vegetated gully close to the Pepper Village Government School and the fact that the R0W would see this feature removed. One could ask how many such gullies may be in the pathway of the selected route. The WRA also raised the need for consideration of fault zones in the area and how they could impact on the long-term stability of the highway.

The EMA did not address any of these concerns in its RAR and therefore these concerns remain.

A geological (as differentiated from a soil engineering) survey along the Highway route should be done. This type of ground-truthing is an important exercise that should be used to determine possible impacts on land and slope stability, as well as on drainage. Existing literature such as the geological and topographical maps for the entire island do not map localized features resulting from fault zones (e.g. rock jointing and fracturing), nor do they map small localized topographical features (like gullies), interference with which could have deleterious effects both on the environment and on the highway. A geological survey would resolve these issues.

2.5.5 The Biological Environment

For the water sampling regime, there were five selected sites along Debe, Oropouche and Coora Rivers, Blackwater Channel and St. John's Canal, while Table 4-1 Definition of Study Area states that the study area for surface water quality includes: Debe, Gucharon, Oropouche, Quebrada, Coora, Morocunapo, Cunapo and John Rivers, Blackwater and Timull's Channels and St. John's Canal. With two sample points located upstream of the designated activities and only one sampling point each of these five chosen rivers in the study, it would be difficult to develop an effective monitoring plan without upstream and downstream data to access the variability and short-term or long-term changes in water quality. These changes can possibly have a significant effect on the ecology of the waterways and the downstream Godineau Swamp.

Overall, the species richness presented for the secondary forest is low, possibly due to the narrow belt of land used as the study area. The information provided on the biological environment does not give a clear picture of overall ecosystem health or function as it mostly includes species richness.

As with terrestrial ecosystems, the numbers of species of benthic fauna says little about ecosystem health. By providing information using the species diversity indices and indicators of environmental conditions, a better picture of ecosystem health could have been provided. For example, Apple snails (*Marisa* sp.) which were present in the benthic samples, while tolerant to a variety of conditions, thrive in rivers that receive an input of nutrient-enriched waters with low dissolved oxygen content. Diversity indices, species richness and densities of benthic communities are excellent indicators of aquatic health as benthic macrofauna are sessile and sensitive to changes in aquatic conditions. Diversity indices could be then be used to assess overall changes in the freshwater environment and can form part of the monitoring regime.

Reference is made to the ecology of Puzzle Island, but the location of this area is not included in any of the Figures presented either in the main body of the EIA or the Appendix J – Ecology. However, information on the location of Puzzle Island is made available in Appendix K – IMA Wetland Report. This should have been included in the main report since reference is made to it. The IMA Wetland Report also supplies information related to the boundaries of the Godineau

Swamp, which would have proved useful in the main body of the EIA report5.06 The Socio-Cultural Environment

The issue of a poorly selected study area extends to the study of the socio cultural environment. While the TOR asks for direct and indirect impacts, the EIA only considers the residents in the direct ROW and in doing so, overlooked negative and/ or positive impacts on the wider community. Additionally, while the public consultation will have reflected some of the objections to the highway, the myopic examination of social impacts resulted in only those households in the ROW being surveyed. Among other impacts of same, could be that surveys would have completely missed any groups that may in fact foresee benefits of such a project and may want it to proceed. The EIA should therefore have sought a much broader sample of the community, expanding the general study area to all communities that could have direct access to the proposed highway.

The survey, labeled as an 'Attitude Survey' is in fact a poorly devised demographic survey. It includes minimal information on the attitudes of the residents to removal of their properties. Given the evolution of the Highway Reroute Movement (HRM), it is plain to see that the work done was simply inadequate.

Apart from poor surveying, the EIA's treatment of the Socio-Cultural Environment was cursory at best, dismissive at worst. The EMA in its RAR made several damning remarks about the socio-cultural work done, yet it does not go far enough in prescribing what corrective measures should have been taken to eliminate the deficiencies.

Further, the MOWT PIU responded to the EMA's findings defending what had been presented in the EIA and offered no further information in this regard. According to the public record, the EMA *did* appear to have pressed further on this point.

2.5.5.1 *Community Linkages*

The impacts of the highway on the surrounding communities are many and far reaching. From anecdotal evidence (personal communications) it would seem that there are many members of surrounding communities who are in fact looking forward to the highway being built since they have long commutes to work in north and central Trinidad. There are also directly affected members from the communities who feel very passionately about loss of their properties and severing of their neighbourhoods.

Some of the concerns raised by the latter include potential severing of extended family ties, organizations, religious congregations, school bodies. The HRM Highway raised issues of generational land ownership, loss of income from agricultural use of land, loss of commercial business, the splitting of local access roads used by the communities. There seems to be significant fear about the intrusion of new people into the communities leading to deterioration of security. Members of the HRM do not seem to be informed

about what types of developments will be introduced into the areas given the additional access of the highway. These are all legitimate concerns that require further study.

2.5.5.2 *Health and Safety*

In one presentation given by a member of the HRM, the question of humans crossing the highway was raised as a health and safety issue. If people who live on either side of the highway are used to interacting closely for example, extended families, there will be a tendency to want to cross the highway by foot. This can lead to serious and fatal accidents. The EMA raises this as a concern in its RAR, however words its concern in a manner that could seem to allow the proponent to explain away why it did not include mitigation measures for this potential impact. This issue should be included in an expanded Social Impact Assessment

Further, the Meteorological Office, in its review comments, flagged the proposed use of the Pepper Village Government School carpark as part of the ROW. The EMA subsequently asked why this school was not considered for re-settlement. This issue is a critical one that must be resolved for the safety of students, staff and parents of the school.

The TOR asks for a Re-settlement Plan and none was provided. It is mentioned in the RAR, however, the EMA did not seem to hold the proponent to this requirement. Based on information received at the recent meeting of the Highway Review Committee (HRC)with NIDCO, it would seem that no comprehensive document on re-settlement has been developed up to this time.

It is imperative that a proper SIA be undertaken before a decision is made to continue or discontinue the Debe to Mon Desir segment of the highway. The human impacts, which at this time are still not fully understood, have the potential to be too significant to proceed otherwise. The Terms of Reference of the EIA would suggest that there is a need for a subject matter expert in the area of Social Impact Assessment to develop the TOR for the SIA.

2.5.5.3 *Concerns of the Ministry of Energy and Energy Industries*

The MEEI flagged in its review comments, great concern over its lack of prior knowledge with regard to points at which the proposed highway would cross pipelines and the wells to be abandoned. It demanded in its comments that the applicant be asked to consult with it to further discuss any interactions with pipeline infrastructure. The concerns of the MEEI were barely mentioned in the EMA's RAR.

There is no response on record to any of the stated MEEI concerns listed post review.

2.5.6 Public and Stakeholder Engagement

The reporting of the consultations held with village council leaders as well as reports of the public consultation meetings were paraphrased. It is unclear to the reader whether the content is complete or if some of what transpired may have been lost. It is common practice in preparing EIA's that paraphrasing could be used in the body of the document; however it is extremely useful to have verbatim transcripts of these meetings in the appendices. This was not done, but in fairness to the EIA writers, it was not specifically prescribed in the TOR. Consultations seem to have been done at least in keeping with the requirements of the EMA's TOR.

A number of concerns were raised during the public consultation meetings by affected. community members and not resolved in the EIA.

2.5.7 Method for Assessing Impacts and Proposing Mitigation Measures

The EMA in its TOR does not call for quantitative assessment of impacts. In the case of this Highway however, it was very important that the hydrology and hydraulic impacts be modeled or at least quantified. This was not done. There was also a need to do more quantitative impact assessment as it pertained to loss of ecological resources as well as socio-cultural impacts. The EIA is inadequate in this regard. The description of impacts in the EIA came across as shallow and in some cases dismissive of issues that should have been absolutely critical to decision making. Without quantitative assessment, the random and subjective nature of the significance ranking (which is a universal problem with environmental impact assessment) allowed for the authors to downplay many of the major impacts such as surface runoff and flooding.

2.5.7.1 *Proposed Mitigation Measures*

The EIA seemed to have considered mitigation measures in passing. This entire chapter should be re-done to include detailed descriptions and specifications of mitigation measures to be used to mitigate specific significant impacts.

2.5.8 Analysis of Alternatives

Given the presentations made by members of the HRM, it would seem that there are at least two other alternatives that need to be assessed in detail:

1.The upgrade of the existing Murray Trace

There was some discussion about the upgrade of this route, which is seen by the HRM as a means for quick egress out of the general area. There was a suggestion that it could be upgraded and re-classified with some use of safety measures in areas of dense population. It should be assessed to

see whether it is a solution with regard to the concerns of the HRM as well as those who want relief from extended commutes to north and central Trinidad.

2.The building of elevated segments of the South Trunk Road along the existing Mosquito Creek

The hydrology assessment by the HRM postulates that the portion of the SS Erin Road along the Mosquito Creek may be resulting in a coastal limitation of the Godineau Swamp to expand seaward and suggests that the solution to this may be an elevated portion of the freeway which can allow water to flow freely below it. This should be considered in the context of alternatives.

2.6 The Role of the Public in the EIA Review Process

As evidenced by the initiation of this review, the proposed Debe to Mon Desir highway segment has been the source of many objections. Interestingly, the Administrative Record for this EIA does not contain even one submission of public comment in accordance with the public review period from August to September 2009. The copy of the Administrative Record available to the public shows that the EIA was viewed by some members of the public, however there are several other copies held by the EMA outside of the public record which would give a complete picture as to how many members of the public reviewed the lodged EIA. There is however only one set of public comments on file; those from the NGO COPE, which seemed to have done a point by point quality grading of the EIA document. No significant concerns were raised in their comments.

The lack of documented public concerns from the local communities seems to have been a missed opportunity by those who are calling for a reversal of the decision to proceed with the Highway. If public comments had been submitted in writing iterating many of the concerns being brought forward during this HRC review and in the great detail that has been presented by the HRM to the HRC, the EMA *should* have had to have demonstrated greater consideration of the perceptions of this group.

2.7 The Role of the EMA in Reviewing the EIA and CEC Decision Making

There are three main findings with respect to the review of the EMA's role in determining the CEC.

1. The EMA followed the statutory requirements and its policies developed further to the CEC Rules to the letter. Each required step of the CEC application process was adhered to by the EMA from a strictly legislative view and no fault can be found in this regard.

2. The Review and Assessment Report was a poorly done assessment of the EIA and did not go far enough in getting the preparers to correct its deficiencies.

The most glaring failure of the EMA in the review was with regard to the definition of the Study Area. As described above, the EIA should have been rejected outright for this reason and sent back to the preparers to re-do.

The EMA failed to represent many of the concerns of the members of the technical review panel in its RAR and in so doing did not address some of the most fundamental issues that required closure prior to a decision being made. The most critical of these was the lack of a hydrological and ecological study of the Oropouche Lagoon. It must be said in fairness that the dates of submission and receipt on two sets of comments (the WRA and the Drainage Division) after the date of the RAR may have exempted the inclusion of their content in the RAR. The EMA nevertheless had a responsibility to bring the significant issues that these two panel members raised to the Applicant's attention, whether via an addendum to the RAR or otherwise.

This review also finds that the Town and Country Planning Division and the Wildlife Division had a responsibility to accept the EMA's invitation to participate on the technical review panel. Additionally, the Ministry of Community Development and the Valuation Division should have been invited to the review panel to offer guidance in their areas of specialty vis a vis Community relations and land acquisitions.

The EMA importantly, failed to relay the concerns of the MEEI, which were significant safety concerns with regard to energy infrastructure.

1. It is not common practice for the EMA to prepare a document explaining its reasons for issuing a CEC, nor is such a document required in any Sub-rule of the CEC Rules 2001. The basis for the final decision to issue this CEC is however, unclear.

   Even after submission of a response to the EMA's RAR by the Applicant, most of the issues flagged by the EMA were not adequately redressed in such a manner that concerns about the project's impacts and the proponent's ability and commitment to mitigating them were assuaged. In fact many of the most significant impacts remain improperly assessed whereby the Applicant simply disagreed with many of the concerns stated in the RAR and in only few instances provided additional information. Substantive information was not provided in response most critical issues that apply to this Project.

   It should be noted, that there have been many cases in the past where the EMA has issued several RAR addenda when it is not satisfied with the responses of Applicants. That process can extend until the Authority considers all outstanding issues to be resolved. It is not understood why this approach was not taken in this case.

   It is difficult therefore, for anyone reading the Administrative Record, to make a clear connection between the information that was submitted and the decision to grant the CEC. It is possible that further meetings were held between the Applicant and the Regulator that gave the EMA sufficient

confidence to issue the CEC, however there is no evidence that allows the public to understand how the gaps were bridged. This leaves lingering questions about why and how the EMA came to its decision to grant CEC 1372/2006.

2.8 Main Conclusions

The EIA was not acceptable and should have been rejected by the EMA and returned to the Applicant at an early stage in the eighty day review period for revision. The reasons being; poor study area selection, inadequate assessment of the environment and of significant impacts.

There seemed to have been a lack of appreciation by the EMA and members of the Technical Review Panel of the gravity of impacts posed by (at the very least), the land acquisitions associated with the proposed highway segment.

The EMA seemed to ignore many of the concerns listed by its technical review panel and therefore many of the most critical comments provided were not posed to the Applicant for response.

The EMA should have played a stronger role in ensuring that a thorough EIA and inclusive SIA were done such that its decision to grant or deny a CEC would have been evident.

The entire submission in support of CEC application 1372/2006; EIA and RAR responses could give the impression that insufficient effort was extended to identifying, assessing and mitigating the most important impacts posed by this Highway.

The Authority relented too easily with respect to having the Applicant provide proper assessments of issues that it raised as critical post review. The Applicant provided responses that in most cases simply disagreed with many of the concerns listed in the RAR. The EMA did not insist that its concerns were resolved prior to granting the CEC and this was a significant failure on its part.

2.9 Recommendations

2.9.1 General Recommendations with regard to the Regulators

1. The EMA in future may consider implementing a joint scoping exercise between itself and the proponent prior to generation of its Terms of Reference.
2. The EMA may consider playing a greater role in defining study areas for EIA in order to prevent entire studies being done around poorly designed study areas.
3. The EMA should consider augmenting its capabilities in the areas of hydrology, hydraulics and social impact assessment.

4. The EMA needs to define criteria for weightings of socio-cultural issues in decision making. For example, the Regulator does not have a scheme to quantify or to help it determine when social impacts are so significant that they may warrant a CEC denial.
5. Significant effort needs to be made by the State to resolve the incongruent sequential relationship between the Town and Country Planning Division Approvals and the Certificate of Environmental Clearance. It has been well documented that the current sequence of the requirement for a proposed project to obtain Outline Planning Approval followed by the CEC, then (Final) Planning, then other Approvals (Drainage, WASA etc) results in Proponents perceptions that doing detailed designs for the EIA is a wasteful (and costly) exercise when the likelihood of the TCPD and other Agencies requiring subsequent significant changes is very high.

2.9.2 Recommendations with regard to this Project

1. A hydrological and ecological study of the Oropouche Lagoon should be initiated such that impacts of this project can be modeled or quantified to inform a decision to/ or not to proceed with the Project.
2. The potential of this project to impact on flooding needs to be understood.
3. A Social Impact Assessment and Environmental Economic Study of this Project must be done to inform a decision to proceed or not to proceed. This study should capture broad segments of the affected communities and should seek to get opinions from both antagonists as well as protagonists of the highway.
4. A proper evaluation of possible impacts on the Siparia Forest Reserve should be done to inform further decisions.
5. The construction of the Debe to Mon Desir segment of the Highway (SHHE) should not proceed until the recommended studies are done and it can be scientifically demonstrated that residual impacts are low.

3.0 SOCIAL IMPACTS

3.1 Introduction and Background

The Terms of Reference for the Social Impact Assessment (SIA) Specialist included inter alia:

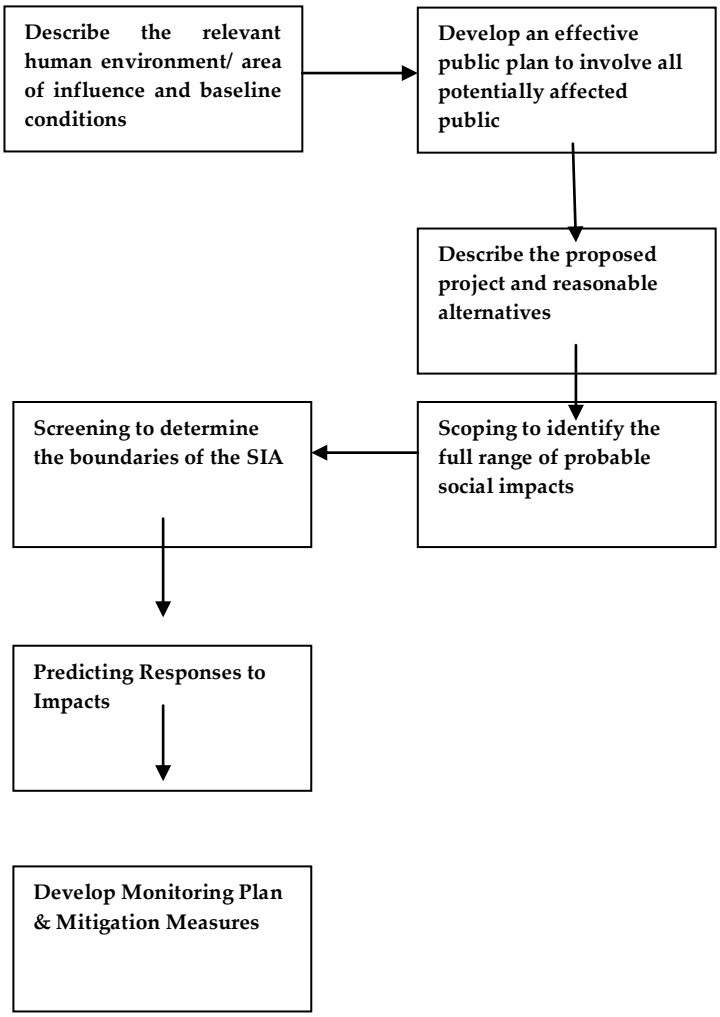
1. Set out a brief of critical baseline indicators pertaining to social impact assessments within the context of major infrastructure works and human settlements developments in Trinidad and Tobago, along with processes for the conduct of an SIA accordingly.
2. Review all relevant documentation/survey data, particularly the Terms of Reference for the Environmental Impact Assessment as prescribed by the EMA, as well as the resulting EIA, to determine the procedures and treatment of social impact considerations and consequences of the Highway extension, particularly the Mon Desir/Debe segment, and any mitigation measures as may be set out to inform policy, planning and development.
3. Comment on implications of pros and cons of the social impacts of the current alignment in relation to proposed alternatives.
4. Evaluate written and oral submissions from interested parties with respect to social impact implications of the Highway Project, and in particular the section between Debe and Mon Desir.
5. Participate in inter-disciplinary meetings to consider and advise on social impact assessment implications of the project.
6. Provide specialist advice to the other consultants within the group
7. Prepare an objective technical assessment of findings and recommendations for inclusion in the Final Report of the Committee

3.2 Critical Baseline Indicators pertaining to Social Impact Assessments (Best Practice)

There are many organisations which detail the requirements for good SIAs including the World Bank, and the European Commission. With some minor differences these tend to be very similar and we have selected a procedure by Vivek Misra which is relevant to the highway project under consideration as being an example of "best practice".

Misra notes that "Social Impact Assessment (SIA) is predicated on the notion that development interventions have social ramifications and it is imperative that decision-makers understand the consequences of their decisions before they act and people affected get the opportunity to participate in designing their future." This is the basic position which guides this review.

Misra defines the following stages in Social Impact Assessment;



An eight point model (modified from Misra) has been used to illustrate an appropriate process for conducting an SIA relevant to the Debe to Mon Desir segment of the highway project under consideration. The eight steps are as follows:

1. **Public Involvement - Develop an effective public plan to involve all potentially affected publics.**

   Stakeholders are to be identified, and representatives from each group should be systematically interviewed to determine potential areas of concern/impact, and ways each representative might be involved in the planning decision process.

2. **Identification of Alternatives - Describe the proposed action or policy change and reasonable alternatives.**
   In the next step, the proposed action is described in enough detail to begin to identify the data requirements needed from the project proponent to frame the SIA.

3. **Baseline Conditions - Describe the relevant human environment/area of influence and baseline conditions.**

   The baseline conditions are the existing conditions and past trends associated with the human environment in which the proposed activity is to take place. For construction projects, a geographical area is identified along with the distribution of special populations at risk.

4. **Scoping - After obtaining a technical understanding of the proposal, identify the full range of probable social impacts that will be addressed based on discussion or interviews with numbers of all potentially affected.**

   After initial scoping, the social impact assessor selects the SIA variables for further assessment situations. Consideration needs to be devoted both to the impacts perceived by the acting agency and to those perceived by affected groups and communities.
   Relevant criteria for selecting significant impacts include:

   - Probability of the event occurring;
   - Number of people, including indigenous populations that will be affected;
   - Duration of impacts (long-term vs. short-term);
   - Value of benefits and costs to impacted groups (intensity of impacts);
   - Extent that the impact is reversible or can be mitigated;
   - Likelihood of causing subsequent impacts;
   - Relevance to present and future policy decisions;
   - Uncertainty over possible effects; and
   - Presence or absence of controversy over the issue.

5. **Projection of Estimated Effects - Investigate the probable impacts.**

   The probable social impacts are then formulated in terms of predicted conditions without the actions (baseline projection); predicted conditions with the actions; and predicted impacts which can be interpreted as the differences between the future with and without the proposed action.

It is also important to analyse impact equity (the old, the young, and the differently-abled) and to identify clearly who gains and who loses from the project.

6. **Indirect and Cumulative Impacts - Estimate subsequent impacts and cumulative impacts.**

   Indirect impacts are those caused by the direct impacts; they often occur later than the direct impact, or farther away. Cumulative impacts are those impacts which result from the incremental impacts of an action added to other past, present, and reasonably foreseeable future actions regardless of which agency or person undertakes them.

7. **Changes in Alternatives - Recommended new or changed alternatives and estimate or project their consequences.**

   Each new alternative or recommended change should be assessed separately.

8. **Mitigation - Develop a mitigation plan.**

   A social impact assessment not only forecasts impacts, it should identify means to mitigate adverse impacts. Mitigation includes avoiding the impact by not taking or modifying an action; minimizing, rectifying, or reducing the impacts through the design or operation of the project or policy; or compensating for the impact by providing substitute facilities, resources, or opportunities.

3.3 Review of relevant documentation - The TOR for the Environmental Impact Assessment

One of the key items in the Highway Reroute Movement's (HRM) objection to the proposed Debe to Mon Desir segment of the highway is the lack of an SIA.

It is noted at the outset that there is no specific requirement for an SIA in the TOR. However the TOR relating to the EIA for this highway segment was examined to glean what is required of the project proponent that could be identified as elements of an SIA.

The TOR for the Debe to Mon Desir segment of the proposed highway contains many of the elements described above as being required for an acceptable SIA, although they are not specifically identified as such.

For example, the TOR in Section 1.2 describes the objectives of the environmental assessment as follows:

> *"The scope of the environmental assessment will be to determine the extent of environmental and* ***social impacts arising from the proposed highway alignment from Debe to Mon Desir*** *and at the same time* ***examining the cumulative impacts from ongoing and other proposed development for the southwest Trinidad.*** *It will also include a management plan to provide* ***mitigation measures*** *to deal with the negative impacts,* ***a monitoring plan*** *to gauge effectiveness of mitigation, and an assessment of the risks and hazards associated with the activity.* ***The timely provision of adequate data to support the environmental assessment process is important."***

The highlighted phrases point to key elements of an adequate SIA.
More detailed requirements for the SIA are embedded in those specified for the EIA. These are highlighted below from the TOR document.

3.4 The Study Area

The study area should be **determined by the extent of direct and indirect impacts on the** physical, biological and **social environments**. This should include the location of the proposed Right-of-Way (ROW) for the proposed highway extension, adjacent forested lands, wetlands, roads, rivers, streams/ tributaries, major natural gas pipeline corridor, industrial sites, quarries as well as surrounding communities in and adjacent to the project site that can be affected by noise, dust, surface runoff and traffic during site preparation and construction. **The study area should also identify adjacent and proposed developments in southwest Trinidad.**

The most detailed requirements for the SIA are described in the TOR document under Section 2.3.3 headed Socio-Cultural Environment. The requirements are as follows:

- Describe the project area in terms of past and present land use as well as development plans.
- Identification and location of all human settlements (including ribbon development) impacted by the proposed project as well as support activities. This should be presented using suitable maps and in relation to the proposed ROW;
- Determination of the socio-economic and cultural activities that take place presently in the project related area (both year-round and seasonal);
- Description and qualification of the area in terms of past, present and proposed planning and land use. This should include a statement on the compatibility of the highway design with the areas where it is proposed to be located;
- Identification of occupants of parcels located in the project area subject to relocation/ resettlement using cadastral information as related to the proposed ROW;

- Employment and labour market – indicate opportunities for employment generation and the availability of such employment in affected communities:
- Compatibility of the proposed highway alignment in the context of industrial development and existing infrastructure with particular emphasis on oil and gas sector, as well as related downstream industries;
- Customs, aspiration and attitudes – indicate the acceptability of the proposed project to nearby communities such as South Oropouche, Debe (with particular reference to Bunsee Trace and San Francique Road), Avocat, Pluck ,Thick and Mon Desir as well as other stakeholders who use the area for commercial and recreational activities, environmental non-governmental organizations and community based organisations;
- Agricultural and fishing activities (with details of acreages and types of crops/ species harvested);
- Determination of emergency resources, indicating if the existing resources can adequately respond to a potential increase in emergencies;
- Existing roads, bridges, traffic in relation to ongoing and future activities (including other highway extension works on this overall project);
- Existing and proposed infrastructure including, but not limited to, water (inclusive of well fields and associated treatment plants), electricity, telephones, oil and gas infrastructure, sewerage systems as well as buried utility lines affected by the proposed development;
- Assessment of archaeological artefacts/ historic sites in the wider study area;
- Traditional uses of the study area, access routes, planned and approved future activities.

Identify all significant impacts that could arise during the different phases of the activity, and after the completion of the project.

Human Beings

- Relocation and resettlement, loss of property, disruption of daily life;
- Disruption of traditional access routes and uses of the area during and subsequent to the project such as agriculture, fishing, recreation, community facilities and institutions;
- Labour force (short and long term);
- Archaeological and cultural resources;
- Disruption to the quality of life as perceived by resident communities and other stakeholders;
- Suitability of the use of pesticides, fertilizers and other project related chemicals for use near human settlements;
- Loss of crops and livestock due to possible flooding resulting from project based activities;
- Provide a proposal for compensation to persons affected by loss of property, relocation, loss of income, etc.
- Demonstrate consultation with affected property owners and tenants to address the resolution of grievances.

In addition Section 2.8 outlines the monitoring requirements as follows:

A detailed monitoring plan must be provided for the different phases of the project to ensure that mitigation measures are achieving their objectives and where this is not so, contingency plans should be described to minimise adverse situations that may arise. Monitoring programmes should address the physical, biological **and social impacts and the parameters to be monitored and their respective frequencies of measurement must be stated.**

Finally, the consultation and public participation requirements are outlined in Section 2.9 as follows:

> *"Consultation and public participation can assist in identification and mitigation of impacts while **preventing** environmentally unacceptable development, **controversy, confrontation and delay**.*
>
> *The stakeholders that can assist in the provision of information relevant to the project should be determined and their input into its feasibility sought as it relates to the impact assessment process."*

Summarizing the above, the TOR for the EIA requires the following elements as they relate to an SIA:

- Identification of stakeholders and implementation of consultation and public participation measures.
- Identification of areas of direct impact and the wider areas of influence in the South Western peninsular
- Description of the relevant human environment
- Identification of the social impacts of the highway *and* of its alternatives
- Development of mitigation measures
- Development of monitoring plans

The actual SIA elements contained in the EIA report are now examined from two viewpoints viz.

1. To what extent it conforms with the requirements of the TOR and to "best practice".
2. To what extent it addresses issues raised by the HRM.

3.5 Conformity with the Requirements of the SIA and with "Best Practice"

In our view, a major failing of the SIA components of the EIA related to the Debe to Mon Desir segment of the Solomon Hochoy Highway Extension to Point Fortin project begins with inadequate scoping.
The scoping phase of an SIA is designed to determine "the full range of probable social impacts". These include the geographic scope (the study area) and the issues scope. Having defined the scope, the determination of stakeholders, issues impacts and acceptable mitigation becomes clearer. The scoping exercise requires a clear definition of the project so as to be able to determine the areas of direct impact and the areas of influence.

3.6 Geographic Scope

The project has changed several times since its inception. It has most recently been described as follows:

> '*The "Sir Solomon Hochoy Highway Extension to Point Fortin" project consists of two separate, but connected roadway corridors, plus numerous local road network connections. The first corridor will consist of approximately 33 km of new highway from the Golconda Roundabout to the Dunlop Roundabout near Point Fortin, including Mon Desir Interchange. The second corridor involves the widening and reconstruction of approximately 12 km of the Southern Main Highway and Southern Trunk Road from Dumfries Road to Delhi (Mon Desir). The project therefore affects or is directly located within the Penal-Debe Regional Corporation, San Fernando City Corporation, Siparia Regional Corporation, and Point Fortin Borough Corporation.'*

Source: Sir Solomon Hochoy Highway Extension to Point Fortin Traffic Volumes and Operational Analysis Report (Halcrow).

Note that this definition recognises "two separate, but connected roadway corridors, plus numerous local road network connections."

If the Halcrow definition is accepted it is clear that the geographic scope of the project is considerably expanded and that SIAs need to be done along both corridors. **No SIA studies have been found relating to the segment relating to the "widening and reconstruction of approximately 12 km of the Southern Main Highway and Southern Trunk Road from Dumfries Road to Delhi (Mon Desir)."**
With respect to the second roadway corridor, the Debe to Mon Desir segment, two studies have been examined which have relevance to the SIA requirements of the project viz.:

1. Final Report on Feasibility Investigations: Volume 3 - Potential Socio-economic Impact Submitted by Roy Mc Cree and Richard Braithwaite in association with **LEA** - Trintoplan Consultants Ltd. and Ecoengineering Consultants Ltd. April 2006.

2. The Ministry of Works and Transport: Highway Extension to Point Fortin: Debe to Mon Desir. Appendix L. Attitudes to Proposed Highway.

The Mc Cree and Braithwaite report does not clearly delineate the geographic scope of the project and relies on secondary data (Census et al) relating to the counties, wards and communities, surrounding the proposed highway. As an example the data relating to unemployment and poverty reads as follows:

> *The average rate of unemployment throughout the decade of the 1990's was 19.5 percent for St. Patrick and 23.9 percent for Pt. Fortin. Historically, Point Fortin has had the highest level of unemployment of all regions in the country which stood at 24.4 percent in 2003 compared to the national figure of 10.5 percent (CSO, 2003). The corresponding figures for St. Patrick (13.4%) and Victoria (12.7%) were relatively much lower and closer to the national figure. The establishment of an LNG Plant in Point Fortin in 1995 therefore, seems to have had little sustainable long-term impact on unemployment in the Borough and its environs.*
>
> *The historically and relatively high levels of unemployment may also help explain the relatively high levels of poverty in the two main regions. In St. Patrick, for instance, despite the relatively lower level of unemployment, the incidence of poverty stood at 34.9% in 1997/1998 compared to the national average of 24% (IADB, 2005: 54), while the figure for Victoria also remained high at 33% (ibid.). In Point Fortin, the level of poverty level stood at 36% in 1992, the most recent year for which data are available for that region (Survey of Living Conditions, 1992: 25).*

Even in 2006, some of the data was outdated (1992) and there was no attempt to obtain current data that would be relevant to the actual areas of direct impact which were undefined in the Report. This Report is inadequate even as a description of baseline conditions.

With respect to the second major document containing data relevant to an SIA *(Appendix L Attitudes to the Proposed Highway*), three features are noted which make the study inadequate viz:

1. Inappropriate use of data gathering techniques
2. Restriction of the target groups of the surveys to those directly in the ROW and who were earmarked to be displaced.
3. Failure to clearly identify impacts in such a manner as to be able to quantify them for cost benefit analysis and for purposes of mitigation.

The report notes that its sources were as follows:

- Focus Group Meetings with Village Council Representatives,
- A Questionnaire Survey of House Owners,
- A Questionnaire Survey of Business Owners,
- A Questionnaire Survey of Institutions,
- Meetings with the Penal / Debe Regional Corporation and Siparia Regional Corporation;
- Public Consultation Meetings.

The document further stated that "specific information on the relocation preferences of home owners, businesses and institutions was acquired from questionnaire surveys," and that "in order to collect socio-economic information for this EIA, focus group meetings were set up at the Debe Community Centre, the Fyzabad Regional Community Complex and the Delhi Road Hindu School."

The first point to note is that the use of focus groups to collect socio-economic data is inappropriate. The sample of persons in such groups is small and typically not representative of the population of interest. Such groups are very useful to gain insights into socio-cultural issues such as lifestyles and stakeholder identification. These then have to be followed up using surveys and depth interviews of a representative sample of persons in the areas of direct impact and the areas of influence.

The socio-economic data collected from the groups was general and vague and could not be used in either identifying precise impacts or in quantifying costs and benefits. Typical questions and responses from the focus groups are shown below to illustrate:

Q: What percentage of the population of this area depends on agriculture today for a livelihood?
R: About 60-70% of the population depend on agriculture.

Q: What are the main agricultural and fishing activities in this area?
R: Growing all the major crops (short crops, citrus, etc). Fishing activities include commercial and recreational.
Q. What types of crops are grown in this area?
R: Every kind of agricultural crop is grown in this area (short term, long term)

Q. What types of fish are caught in this area?
R: The types of fish caught in this area include cascadura, tilapia, and coscorub, three types of sardine, wabine, crapaud fish, grand ecaille, brochet, mullet and catfish. The villagers also mentioned that they caught crabs and crayfish and said that there are caiman in the rivers in the area."

It is unclear why detailed data on the "agricultural and fishing activities (with details of acreages and types of crops/ species harvested)" - required by the TOR - was not sought from the Ministry of Food Production, Land and Marine Affairs (MFPLMA) in the area.

A single visit to the regional offices of the MFPLMA in Debe on Jan 30 2013, yielded data on the Oropouche State Lands Section III with respect to: total acreage (40 hectares comprising 97 parcels), average size of holding (.08 hectares – 2.46 hectares); total acreage cultivated (12 hectares), total number of farmers (approximately 60), total number of active farmers (approximately 20) and crops cultivated (vegetables- mainly ochro and bodi).

The Agricultural Officer noted that in the Section III Block:

- Approximately 50% of the Block was affected by salt water intrusion and depending on the tidal activity, 90% could be affected.
- The majority of the Block was abandoned with cultivation taking place only in the dry season. The last occupancy survey done in 2012 indicated that only 17% of the Block was cultivated.
- There was no water or electricity on the Block.

If this data was obtained and evaluated it would have signalled, inter alia, that the cumulative effects on agricultural production of the proposed highway segment could be extremely significant. This is in the light of the 90% salt water intrusion and that only 17% of the Block was under cultivation.

The same issue of inappropriate data collection techniques arises with respect to travel data in the areas of impact. A sample of focus group questions and responses follows:

Q: Roughly what proportion of workers travel out of the area to their jobs?

R: It was felt that approximately 90% of the workforce who reside in the Debe and San Francique areas travel outside of the area to work, this being mainly to the north within the San Fernando area. This is mainly attributed to the presence of no industries in the area and lack of job opportunities. It was estimated that less than 10% of villagers depend on agricultural practice for sustenance.

Q: Roughly what proportion of students travel out of the area to go to school?

R: Approximately 50% of pre-schoolers attend classes in the local community while the remaining 50% attend schools that are nearer to where their parents work. Approximately 25-30% of primary school students attend school in the local communities."

Accurate data on travel patterns was required however the estimates given are unreliable.

With respect to the Survey of House Owners, the report notes:

> *"To make way for the construction of the highway extension from Debe to Mon Desir, 150 houses are earmarked to be acquired. In 2006, an attempt was made to interview the occupants of all such properties, and at that time the occupants of 122 of those houses were interviewed. The remaining 28 were not interviewed for a number of reasons: some simply declined to be interviewed, others wished to consult with their lawyers before answering the questionnaire (and did not get back to us), and still others could not be contacted. Those 122 interviews form the primary basis for this section of Appendix L."*

Note that the house owners interviewed did not include any that were nor directly in the ROW – a major omission in the determination of social impacts. All of the data collected on the ROW properties to be acquired, should have been collected on a sample of households in say a 2-4 km wide band on either side of the proposed roadway. (The exact area depends on the definition of the area of direct impact and may

be wider)This includes data on commuting, location of employment, and age structure of households (to assess vulnerability of the old and children) and community structures.

The report however, clearly identifies the objections of the homeowners to the proposed segment of the highway. It notes in this regard that:

> *"Residents of the Debe to San Francique area objected strongly to the proposed alignment of this highway segment, and the Ministry of Works and Transport instructed that other alignments should be considered, including an alignment suggested by the residents between Debe and San Francique."*

The failure to identify this group as a critical stakeholder is reflected in the fact that many years later the issue has escalated to a point of major contention.

The report also notes:

.

> *"As it turned out, the original alignment proved to be the preferred option (see Appendix P), but the review of options delayed the completion of the EIA by almost two years.*
> *For this reason, it was deemed prudent to re-interview a sample of the households to identify any changes in attitude. This was done in October and November, 2008, when 40 randomly selected households (eight from each area), were re-interviewed."*

Note that because of the two year delay caused by these objections "it was deemed prudent to re-interview a sample of the households to identify any changes in attitude". It seems strange that a further four year delay in the execution of the project elicited no similar desire to revisit the communities to identify any changes.

The Survey of Business Owners related to a survey of four business owners earmarked for acquisition to make way for the construction of the highway extension from Debe to Mon Desir. The same criticisms apply to this portion of the study viz:

- Its restriction to business owners earmarked for acquisition rather than a random sample of businesses in the areas of direct impact.
- Failure to clearly identify impacts in such a manner as to be able to quantify them for cost benefit analysis and for purposes of mitigation.

Similarly the Survey of Institutions was restricted to the two that were earmarked for acquisition with attendant limitations. The two were:

- The ASJA P.C.O.L. Mosque
- The New Testament Church of God, Miracle Fountain of Life Ministries

The limitations of the SIA related reports of the EIA were recognised by the EMA which noted in its response (RAR) to the CEC submission that:

> ***"****The EIA report does not provide enough detail with respect to socio-cultural environment as evidenced by Section 4.4.3.1.3 of the EIA report. This section stated that "the question on future development of their community may have been posted to the wrong group, since that would be best answered by Government agencies" is rather ambiguous and the EIA should address and make recommendation on the future development of these areas. Also Section 4.4.3.1.3 mentioned that a 'social mechanism must be part of the construction phase to meet and treat with immediate concerns of residents". However, these social mechanisms were not identified, neither was the process outlined. The EIA report required a more in-depth investigation and analysis of the socio cultural environment. It is suggested that a detailed justification be provided for the methodology employed in the study."*

The EMA went on to note:

> *"Section 4.4.3.1 as well as Appendix L of the EIA report, deals with feedback from meetings with the Village Council Representative. Unfortunately, these venues did not attract a wide enough cross- section of the community in order to get comprehensive feedback. Further research is indispensable with respect to community and institutional structures, political and social resources, individual and family changes and community resources. The information provided in the EIA report indicated the communities affected by the highway were not consulted in a meaningful way to assess the impacts of the proposed ROW so as to effectively mitigate potential impacts."*

The response of the developer, the Ministry of Works and Transport, was extraordinary. The MOWT responded as follows:

> *"We strongly disagree with the statement that communities affected by the highway were not consulted in a meaningful way. The comment above focuses only on the focus group meeting with Village Council Representatives. It ignores meetings with the two Regional Corporations (see Section 9.2 of the EIA Report), questionnaire surveys with 136 property owners (see Section 9.3 to 9.5) and 4 public meetings attended by 380 persons (see Section 9.6). All of these are for a documented in Appendix L."*

Since the CEC *was* granted, it can be assumed that the EMA accepted the response of the developer – an even more extraordinary outcome in the opinion of the reviewer.

3.7 Evaluation of Issues Raised by the Highway Reroute Movement

The most comprehensive statements on the SIA submitted by the HRM were papers delivered to the Highway Review Committee by Terrence Boodhai and Dr. Jolynna Sinanan.

Mr Boodhai summarizes his case for not constructing the Debe to Mon Desir segment of the highway as follows:

1. According [to] the EIA Report (Jun 26 2009) submitted by the Ministry of Works of Trinidad and Tobago, this highway will achieve certain objectives related to the social development of the region through which the highway passes.
2. The EIA does not identify how these objectives will be achieved.
3. The EIA does not seriously consider the severe negative and permanent impacts that the highway will have on the social fabric of the communities.
4. A scientific and objective Social Impact Assessment was not done for Debe to Mon Desir highway
5. The highway should not be constructed on the basis of these severe negative and permanent impacts which cannot be mitigated.

He notes that based on the objectives outlined in the EIA, it is clear that "social development is a key theme of the highway". This social and economic development is to be achieved because (according to the EIA):

- There would be increase in potential for agricultural production and distribution.
- There would be increase in residential, industrial, and domestic and foreign tourism development.
- Previously small settlements would be encouraged to expand and additional areas would be opened up to built development and services.
- The increased accessibility afforded by the highway will tend to generally increase property values and so be a benefit of this project.

The focus here will be on the social development aspects of the HRM position as outlined by Mr. Boodhai as the economic costs and benefits will be addressed in another HRC reviewer's report.

Mr. Boodhai notes that:

> *"Social development is hinged upon the creation and sustaining of social capital. It is achieved through:*
>
> - *Development of social networks*
> - *Promotion of family life*
> - *Recreational facilities for communities*

- *Enhancement of quality of life of community groups*
- *Development of systems and policies that protect the poor, disadvantaged and vulnerable groups in the community, namely the elderly, women and children.*
- *Promotion of health and well-being, both physical and psychological*
- *Provision of security*

However, the EIA does not address any of these key areas. It does not elucidate how the proposed highway will achieve or help to facilitate any of the above."

Dr. Sinanan concurs. She notes that:

> *"The EIA suggests there will be benefits to the community. But this is based on speculation. It doesn't provide either evidence or calculations…"*

The above conclusions of Mr Boodhai and Dr Sinanan (and by extension, the HRM) that the EIA "does not elucidate how the proposed highway will achieve or help to facilitate [social development] is clearly correct.

Dr Sinanan spent two days in the area (Debe to Mon Desir) to elucidate some of the social impacts which would relate especially to elderly women and children; issues of impact equity. She is well aware of the preliminary nature of the findings (given the short time period and the small samples of people interviewed) but they are instructive for three reasons:

- Firstly, they illustrate the need for data.
- Secondly, they illustrate some of the techniques used world wide in assessing social impacts of this nature
- Thirdly, they illustrate what a scoping study even of such short duration could achieve in terms of study area definition, issue identification and selection of significant impacts to be further investigated in the full SIA.

She notes:

> *"In the absence of an adequate SIA, I spent two days in the area of the proposed segment of the highway and spoke with people who are going to be affected, whether they would be remaining in their homes or relocated. I focused on elderly people and on women in particular, because as seen in worldwide trends, in initiatives for the purpose of development, it is often women and the elderly who are affected the most and are often left behind in the consultation process (Moghadam, 2005)."*

The sample of 40 women living outside of and within the ROW was interviewed on two separate days.

Sample I

The sample consisted of "20 people aged over 60 were spoken with in Gopie Trace, Banwarie Br. Trace #1, Jokhan Trace and the immediate vicinity who are living in the proposed segment of the highway."

The general findings are summarized as follows:

"We don't have to look for anything, it have everything here".

The average time that had been spent on extending and repairing a property: 10 – 15 years, which implies accumulative resource investment put into homes. This has not been taken into account in remuneration.

Most households have multiple streams of income: in addition to their pension, people in this age group also rely on small farming (garden and animal rearing), which they suggest contributes to sustaining the household, allowing them to depend less on grocery and market shopping. Many also receive contributions from their children (from professional and informal sectors, suggesting a strong informal economy as well.)

Health problems and accessing health care are the key concerns, most travel to the health clinic and pharmacy because it is easy and convenient, most respondents did not want to burden their families with asking to be transported or their families worked and could not be available to transport them during the day.

Those who face relocation are concerned with how they will access health care that they need on an ongoing basis, and for those who remain, they are concerned how the section of the highway will disrupt their means of travelling by taxi, which at the moment is relatively close to their homes (100 – 200m walking distance).

Most respondents are independent and self sufficient and some are primary caregiver for grandchildren and relatives with special needs (such as physical disabilities). Half of the respondents care for grandchildren while the parents are working; the social support they provide will be disrupted in the cases of relocation and could have a detrimental effect on the parents and their livelihoods.

Apart from travelling for necessities: grocery, market and health care, the 'quality of life' for many of the elderly surrounds home life; their homes are comfortable due to the accumulation of extensions and renovations which have been undertaken in over a decade and family and friends visit every day to every few days. Although they largely remain at home, social and emotional support from family and friends is still available and close at hand. (This suggests a tight knit system of social capital and social support that again has been accumulated over decades.)

<u>Sample II</u>

This sample consisted of: "20 women between the age of 22 and 68 were spoken with in Murray Trace, Doubles Trace, Debe Trace and Banwarie Br Trace and the immediate vicinity who are living in the proposed segment of the highway".

The general findings are summarized as follows:

Women are the primary caregivers for 2 children on average; half also care for an elderly relative or a relative with special needs.

In addition to care giving, half are responsible for all grocery and market shopping and rely on taxis for transport. They find this a safe and convenient way to travel. Half rely on their husbands for transport and occasionally husbands without their own means of transport will travel to obtain household necessities.

For women with children in primary school (one third of respondents), children attend school nearby. For children who travel, their parents' main concern would be, even if they remain in the area affected and are not required to relocate, how will the proposed section of the highway affect their safe accessibility to school. A key concern is whether adequate pedestrian walkways have been considered.

All respondents have close relatives living nearby, siblings and in-laws. Those with children (Three quarters of respondents) describe their children as growing up in a close-knit and safe environment; this is the aspect of 'community' which not only means a great deal to them, but comprises of an intact network of support. For those who are being relocated (One quarter of respondents), one of their key concerns is with potential separation that comes with the relocation of individual nuclear families from extended family.

Such information is rich and nuanced and gives a clearer picture of the social impacts than is available in the SIA data presented in the EIA and allows for a better basis for classification of impacts and the need for mitigation.

Mr. Boodhai lists the social impacts outlined in the EIA:

- Acquisition of Homes
- Acquisition of Institutions
- Transportation impacts (road congestion and damage to existing roadways)
- Air quality
- Disruption of Current and Traditional Uses (Agricultural Lands)
- Land Use Conflict (Squatting)
- Severing of Communities
- Loss of Business Opportunities

He notes that *"there are several shortcomings in the method by which data was collected, the accuracy of the results, an assessment of the impacts (in particular those that are significant negative and permanent) and a general understanding of the local social context and community values and norms of the affected persons along the route."*

The above comment by Mr Boodhai is one with which this review fully concurs.

3.8 Evaluation of NIDCO's Position on the SIA

One of the major issues in the HRC review with respect to the SIA is that NIDCO seems to be of the opinion that the SIA data from past studies is adequate to guide the present construction of the project.

While under the design-build arrangement an engineering consulting firm (Halcrow), has been appointed to ensure proper design and standards from an engineering viewpoint, no such arrangement is thought to be necessary to determine, assess and monitor social impacts as the design of the highway changes.

There is ample evidence that the data on which the original designs were based have now changed substantially.

The recent report by APDSL with respect to traffic flows and volumes is a case in point. It notes in part:

> *The Lea-Trintoplan Traffic Study (2005) found that analysis of their origin and destination survey showed: (a) A high proportion of traffic from San Fernando and from the Solomon Hochoy Highway as destined for areas close to San Fernando; (b) Total traffic levels entering and passing through Point Fortin at about one quarter of those totals immediately south of San Fernando; (c) A small long-distance traffic component travelling between San Fernando and Point Fortin; and, (d) A preponderance of relatively short-distance traffic in the overall travel patterns in the study area. They concluded that the attractiveness of new routes through the study area will depend upon convenient access to local areas along any such route in addition to providing for the small volumes of long-distance traffic.*
>
> *The current study found major differences from the Lea-Trintoplan work. Figure 3.1.1 gives the Travel Desire Lines for daily weekday two-way Total Vehicle Trips in the study area. It shows that (1) more than 10,000 vehicles travel daily between the northern and southern external zones; (2) more than 6,000 vehicles travel daily between the northern external zone and Debe Proper; (3) more than 6,000 vehicles travel daily between the northern external zone and Penal Proper; (4) about 3,000 vehicles travel daily between Siparia and the northern external zone, and a similar number between Siparia and the internal aggregated zones containing Fyzabad and Oropouche; (5) about 3,000 vehicles travel daily between the northern external zone and Barrackpore and Palmiste/Philippine; (6) more than 6,000 vehicles travel daily between the northern external zone and the internal aggregated zones containing Fyzabad and Oropouche; (7) about 6,000 vehicles travel daily between the northern external zone and La Romain /Duncan Village.*

These changes imply significant changes in social impacts as well as costs and benefits, and suggest that these should be monitored using rapid assessment techniques.

3.9 Implications of Pros and Cons of the Social Impacts of the current Alignment in relation to Proposed Alternatives.

The fundamental determination of this review is that there is not enough data in the current EIA to adequately assess the social impacts, to classify them in terms of severity and to plan adequately to mitigate them.

3.10 Recommendations

The review suggests that there are several severe potential social impacts which have not been properly evaluated and that this phase of the highway should not proceed until the following has been done:

- Rigorously define the study area of direct and indirect impact. This includes areas outside of the ROW and may include quarrying areas in the Northern Range and Sangre Grande.
- Conduct an EIA based on data that is relevant and current, using techniques and personnel that conform to accepted best practice.
- Quantify the impacts where feasible. This includes estimates of the value of current methods livelihoods, transportation costs related to work, school, recreation etc.
- Ensure that SIA studies include alternate routes proposed by the HRM and NIDCO.

4.0 HUMAN SETTLEMENTS

"How you shape the land so will you shape the civilization.....Community viability is one of the main pre-requisites for sustainable development."

Objective: To review the human settlements structure of the communities within the Debe to Mon Desir segment of the highway alignment.

4.1 Ethos & Working Definition

Human Settlement is an all-embracing approach to the sustainable development of the living environment. It incorporates shelter and housing; land use, land ownership and land development; productive economic activity particularly related to job creation in the formal and informal sectors; the quality of relationships within the community; the development of infrastructure; the provision of social services and recreational, sporting and cultural facilities. It is an approach requiring integration, cooperation and coordination which makes paramount the need for community participation. It generates important linkages with agriculture and tourism development and village revitalization.

4.2 Concept & Context

"To change your language you must change your life" – **Codicil**, Derek Walcott
"To change the world you have to change your language"- Lloyd Best

- In the context of the small islands of the Eastern Caribbean and, in particular, the infrastructural initiatives proposed for the South West Peninsula of Trinidad, the choice of language and modes of communication are of critical importance. Land settlement is about people and the way they inhabit and shape the environment over generations. In a development context, such sensitivity is vital for negotiating and balancing needs in order to avoid the collision of interests that could damage a nation's path to development and progress.
- Caribbean solutions to Caribbean problems must be drawn from a deep understanding of the Caribbean reality that is based on a scientific and empirical approach. This requires walking the land, listening to the voices and rejecting notions of development based on formulaic, one-size-fits-all solution that automatically privileges the grandeur of the "mega" over such concepts as staging and scoping.

Modern and progressive concepts of land settlements draw as much from Art as from Science and is expressed as equally in poetry as in engineering. Here in the Caribbean, we can find our way to land settlement options and solutions through:

- the poetry of Cesaire, M.G. Smith, Walcott
- the novels of Lovelace, Naipaul, the Guayanese Harris (who was a Land Surveyor)
- the writing of Fr. De Verteuil, Bridgette Bereton, Michael Anthony
- the music of Marley, Tanker, Kitchener, Sparrow, Rudder
- the Costa Rican architect Jimenez who works in the USA and who publicly attributed his design of a complex on the outskirts of Dallas, Texas to the novels of John Steinbeck.

4.3 Background

4.3.1 The major development centres in the South West Region of Trinidad are the industrial centres of Point Fortin and La Brea and the city of San Fernando. There has always been a need to connect these centres in a highway-type artery.

4.3.2. Based on engineering designs and environmental considerations between 2006 and 2010 the Government of Trinidad and Tobago decided to make this connection via two highway routes from the Golconda Interchange (GI) at the southern end of the Solomon Hochoy Highway:

1) The North Highway (NH) westward from the Golconda Interchange onto the South Trunk Road, then onto the Southern Main Road along the Mosquito Creek to St. Mary's Village and then onto Mon Desir Village.

2) The South Highway (SH) eastward from the Golconda Interchange west of Golconda Village between the San Fernando Erin Road and the M2 Ring Road, skirting Debe on the west, southwards accross the eastern end of the Oropouche Lagoon, then southwards touching the villages west and north of Penal and Siparia, skirting Fyzabad on the north and then onto MonDesir where it connects with the North Highway**. This is the highway route that is under review.**

   From Mon Desir, the route becomes a single highway westward onto La Brea and Point Fortin.

4.4 The Settlements

The South Highway route impacts on those settlements that have grown out of economic endeavours pursued since Emancipation in 1838 and which over time have developed into well-established living environments. Over the many years the economic endeavours focussed on the achievement of sustainable development, generating a communal rhythm to everyday living.

4.4.1 Over the course of the past 175 years, the economic activities in this region included:

- Cultivation of cocoa on the higher ground south of the Oropouche Lagoon and embracing Penal, Siparia and Fyzabad.
- Cultivation of sugar cane straddling the lands mainly to the north and east of the Lagoon – Debe, La Romain and Barrackpore.
- Settlement land usage responses appropriate for sustainable development - residential, communal, religious, commercial, agricultural gardening, recreational outlets.
- Cultivation of rice alongside freshwater fishing in the Oropouche Lagoon with the planting of foodcrops here during the dry season.
- Petroleum exploration and production from the first decade of the 20th Century when oil is discovered in Barrackpore, the outskirts of Penal and Siparia and Fyzabad, giving rise to a range of contracting enterprises (some of which are now quite substantial) and fuelling employment which, in turn, led to the consolidation of labour unionism.

Many residents of the settlements have a long generational connection to the Region with the result that some landholdings comprise multi-family occupation. Like long-settled communities everywhere, there are bonds of trust and cultural kinship which translate into high comunal activities and low crime rates.

4.4.2 From a human settlement perspective, the scoping domain adopted for the purposes of the Environment Impact Assessment (EIA) is not adequate for arriving at an informed position. In the context of the expenditure on the overall highway Project, the whole Peninsula and regions east of it should be the Study Area in order to support decisions that maximise the benefits to be derived from the highway project which is the country's most expensive infrastructure investment ever. This is especially important given the historically high levels of unemployment and poverty in the St Patrick region.

4.4.3 **Affected Areas**

"You see that ground? Constantine played cricket there when I was a young man. I never forget" – **Moruga resident to youthful land surveyor involved in the survey of plots of the Robinson Estate to tenants in the 1970s.**

- Debe and Penal are connected via Rochard Douglas Road to the Village of St. Mary's on the Moruga Road (where a Regularisation Project for the Land Settlement Agency is currently in the design stage). St Mary's is a semi-urban hub with access to Princes Town to the north, Grand Chemin to the south on the coast and, via Saunders Trace eastward to Rio Claro and Guayaguayare. The roads are in deplorable condition but have supported sugar-cane production and petroleum exploration and production in Barrackpore and Guayaguayare.

- Penal connects to Grand Chemin (Moruga Village) via the Penal Rock Road. Cocoa plantations embraced the connection with some quarrying and fishing with the later being a major entrerprise. Moruga is an old, established community with a distinct cultural character that incorporates the environment, settlement patterns and history that does not end with only a re-enactment of the arrival of Christopher Columbus on Discovery Day.

- Siparia is at the Settlements centre – Debe and Penal to the north Fyzabad and Mon Desir to the west. This Settlement was another cocoa region but also gave rise to Palo Seco, the petroleum centre to the south, and further on to Erin on the coast. The journey westward from Erin connected to Cap-de-Ville and Point Fortin to the north. But the Peninsula has its furthest reach at Cedros and Icacos travelling westward from Cap-de-Ville. Part of this area's past is the cultivation of coconuts with the production of product. Importantly, Cedros is Trinidad's natural gateway to Venezuela across the Gulf with significant human traffic occurring across the Gulf and through the rivers of the Orinocco Delta.

- Fyzabad enjoys a landmark position along the road to Independence. The development of oilfields in Apex and Forest Reserve with connections to industry in Guapo and Point Fortin provided the conditions that created a highly politicised labour movement that led to the Labour Riots of 1937 which ultimately opened the way to political Independence in 1962, organised labour and the mdern trade union movement of Trinidad and Tobago.

4.4.4 The above descriptions of the character of the affected communities make the case for broadening the scope of the Project beyond mere highway development to development of the Peninsula and neighbouring regions.

An enterprise lies before the Region that, if sensitively handled and planned with careful ***staging,*** has the capacity to stimulate the imagination, unleash our creative energies and get the most out of the major financial investment being made.

4.5 The Process

4.5.1 In terms of the process, the human settlement task is focused on the future viability of the settlements from the standpoint of their physical, psychological and cultural environments.

4.5.2 The EIA indicates that the section of the proposed highway from San Francique to Mon Desir, which is 11.1km long, has a Right-of-Way (RoW) of 100m (328ft.) which includes central median (9m), shoulders (4m), 4 lanes (14.6m) and clear zones (12m), totalling 39.6m. This leaves approximately 30m on each side of the Highway. The land acreage involved is approximately 67 hectares (165 acres) within which fall some of the residents earmarked for relocation. The actual length of the four-lane highway from Debe to Mon Desir is 16m.

In response to queries about the expansive 100m width of the RoW, NIDCO's President indicated to the HRC that it is being reduced in some areas to "maybe 60m" which will result in a reduction of about 50 percent in the properties that will need to be acquired.

The Construction Contract is design/build.. The nature of this contract is such that detailed engineering designs will include the final alignment of the Highway, the final RoW and the parcels to be acquired.

This means that the acquisition process and the construction process will proceed simultaneously. This raises the following questions:

- What time-frame is being given for those affected by the land acquisition requirements to move and be compensated?
- For those being offered relocation, what arrangements are being made for ensuring that the Relocation Site/s are ready for occupation at the point of relocation?

4.6 The Regional and National Context

4.6.1 At the time of review, a number of strategic studies of relevance to this major $7.5 billion highway project are either on-going or have been completed. These studies are:

- National Spatial Development Strategy (NSDS) – Ministry of Planning and Sustainable Development. This is now being formulated to establish the development trends for the next 10 to 20 years. It is expected that this Report

should be finalised by April of this year. The South West Region has been designated as a major development area.

- Transport Study related to the Highway Rout as commissioned by NIDCO.
- The Quarry Study recently awarded by the Ministry of Energy. The Study is an – Strategic Environmental Impact Assessment to locate by Lidar Surveys the existing quarries in Trinidad and Tobago and to establish Mining Zones.
- The Draft Climate Changes Forest and Protected Areas 2010 (Completed)
- Feasibility Studies and Detail Designs for the South Oropouche River Basin Flood Mitigation & Integrated Watershed Management Project. To be awarded by NIDCO.
- Three Regional Plans – Ministry of Local Government (2009 – 2010) – Penal / Debe Regional Corporation Municipal Development Plan, Siparia Municipal Development Plan, Point Fortin Municipal Development Plan.

It should be noted that the overall findings of these studies could have a significant impact on the section of the Highway under review. The findings should therefore be taken into consideration in the official decision-making process, both in terms of the Highway Project and in charting the way forward in developing the South West Region of the country in a national development context.

4.6.2 The Routes and Alternatives

Several routes have been proposed in addition to the one that has been adopted:

- The current routes being pursued by NIDCO
- The routes suggested by the Highway Reroute Movement which would require the upgrading of the existing road network encompassing Debe, Penal, Siparia and Fyzabad and a by-pass connection from Golconda to Debe Highway westward from Debe to join the NH at the Paria Suites Intersection.
- Improvement of the Golconda Highway connection to the Dumfries Road Intersection while maintaining the North Highway to Point Fortin.
- Construction of the Golconda To Debe Highway in an early phase with a connection to an upgraded existing road network between Debe and Fyzabad. In a subsequente phase, construct a highway between Fyzabad and the Mon Desir Interchange.
- Upgrading of the connector roads from the four Settlements eastward, south and westward to the other settlements of the Peninsula and those onto its eastern fringe such as Grand Chemin and St. Mary's Village Moruga.

4.6.3 Relocation Sites

Two sites have been proposed for the relocation of affected residentes: Petit Morne and Golconda.

- **Petit Morne (EMBD Project)**This site is north of Golconda Village. It is a proposed residential settlement offering single family plots at sizes currently used by the housing agencies. These are in the range of 465sq.m (5000sq.ft.). The records indicate that no approvals have been granted. Earthwork has been done and there is evidence of the road network having been cleared. Relocation to Petit Morne would take affected residents well away from their current environments and involve significant dislocation including school accessibility, family connections, and generational patterns of community. In addition the current approval and inplementation process indicates that the availability of usable residential plots at Petit Morne cannot be achieved under two to three years. **This site is not recommended for Relocation.**

- **Golconda (EMBD Project 303acs. / 123ha.)** This is a large site lying just north of Debe on the eastern side of the M2 Ring Road and fringing Golconda Village to the north. There is no evidence of any application for land use approval for the site though it is designated for 2-acre farms for the relocation of farmers who may be affected by the Highway. However, although the site is designated for relocation of farmers, given its location with the UWI South Campus Debe near to the south west, Debe directly south and adjacent NAMDECO, **GOLCONDA is ideally suited for an Integrated Human Settlement.** What is envisaged is a place that captures the essence of the community life of the settlements of Debe, Penal, Siparia and Fyzabad.

The recommended option is an Integrated Human Settlement of ***"village clusters"*** combining a range of land usages designed with sensitivityto the topography and to the physical environment of the wider area. The usages will include:

- Residential – single family and multi-family residences designed and structured to provide for elbow room.
- Residential / Commercial – residence above small business below. A family endeavour in the village tradition.
- Homesteads – small farms (1–2 acres each) where the family can reside in an atmosphere conducive to organic farming with experimentation in this form of agricultural pursuits, provided for the farmers by NAMDEVCO and taught in the schools – primary, secondary and tertiary at the UWI South Campus Debe.
- Commerce – centres for business activity of various types and linked to some possible relocation of those commercial activities that currently cause congestion in the business centres of Debe and Penal.
- Communal Spaces – for schools as necessary, for parks (passive recreation), for playgrounds (active recreation), for cultural and religious pursuits.
- Government Agencies – to service the Region.

4.7 Recommendations

- Expand the Study Area to cover the South West Region so as to ensure that sustainable development possibilities can be viewed from the standpoint of the Human Settlement Perspective.

- Draw on current and ongoing studies to ensure integration development strategies are achieved.

- Embrace a staged infrastructural upgrading programme to substantially improve the road connections within the Peninsula and to those Settlements to the east which will have the effect of opening up possibilities for enterprising endeavours, job oppurtunities and economic pursuits.

- Let GOLCONDA be the chosen site for Village Expansion – an Integrated Human Settlement.

5.0 ECONOMIC COST BENEFIT CONSIDERATIONS

5.1 Sectoral Terms of Reference

The specific TOR for the Consultant Economist included, *inter alia*,:

1. Setting out a listing of criteria/indicators and methodology normally employed in the consideration of major infrastructure projects;
2. Reviewing documentation for any available cost/benefit considerations in respect of the Debe to Mon Desir segment of the highway.
3. Reviewing relevant oral/written submissions to further inform the review;
4. Commenting on the process employed in any cost/benefit analysis;
5. Considering the cost/benefit implications and any mitigation measures for the Debe to Mon Desir segment, taking into consideration the following:
    - Overall assessment of the direct/indirect and cumulative costs and impacts of the project;
    - The fact that a contract has already been awarded for the entire project; and
    - Implications for consideration of any realignment; and
6. Preparing an objective technical assessment of findings and recommendations for inclusion in the final Report of the Committee.

5.2 Methodology for Review of the Project

In an effort to make an assessment of the extent to which the Economic Cost Benefit Analysis (ECBA) process for this project was executed diligently (in the context of the Consultant's TOR) the following documents were reviewed :

- *Environmental Impact Assessment for Debe To Mon Desir Highway Segment (Rev. 1)*
- *Final Report on Feasibility Investigations, Volume 1 - Engineering and Economic Feasibility*
- *Final Report on Feasibility Investigations, Volume 3 - Potential Socio-economic Impact*
- *An Analysis Of Inputs For A Projected Strategic Cost Benefit Analysis For The Proposed Debe To Mon Desir Highway* (submitted by Dr. W. Kublalsingh)

The above reports were supplemented by:

- Personal interactions/meetings/accounts with NIDCO personnel ; members of the HRM (See Appendix 3)
- Review of the relevant literature which could inform the review including, *inter alia*, identification of best practices Documentation relating to environmental and social impacts of the proposed projects

*In light o*f the abovementioned TOR three comments are made to provide a context for the review:

1. The literature (Bateman et al 2005) recognises that the CBA approach, when carried out comprehensively and impartially, has many distinct advantages over alternative appraisal systems. In theory, by minimising reliance on subjective decision making and imposing an

economic efficiency criterion, the system provides an explicit record of which impacts were considered and how that analysis was performed, including any assumptions regarding valuation. This should encourage inspection and provide a means of detecting any biases which may be present in political decision systems. When correctly executed the CBA approach allows options to be ranked according to their economic efficiency, ensuring that 'scarce' public resources are allocated in rational manner.

2. The role of ECBA in project evaluation - ECBA is a technique normally used to inform the economic feasibility of mega projects[6] including projects such as the highway extension under consideration in this specific instance.
3. In completing a full-scale ECBA the preferred approach is one which includes social and environmental impacts – positive and negative – so that the full benefit or cost of the proposed project can be fully appreciated. In other words direct and indirect benefits and costs are captured and valued so that the overall economic feasibility reflects environmental, social and economic considerations that may impact on the sustainable development dimension of the project.

A mega-project can be defined as a particular investment which will have a significant national impact in terms of the economy, society and environment as follows:

- **Economic impacts** would include contributions to national employment, livelihoods/ poverty eradication/equity, foreign exchange/government revenue, deepening of knowledge and linkages across economic sectors and gross capital formation;
- **Environmental impacts** would address negative or positive changes in eco-system goods and services, human and environmental health impacts, and waste absorption capacity; and
- **Social impacts** would cover negative or positive changes in heritage or other cultural assets, norms and behaviour and impacts on communities.

5.3 Economic Cost Benefit Analysis Technique

The ECBA approach is a well-known and recognised procedure used to structure and analyse available information in the evaluation of public infrastructure projects to address the efficiency issue and the economic growth such projects may generate. Facilitating choice among projects and allocation of public resources are the two main objectives of the ECBA. This requires setting-up a base case and comparing other scenarios against it.

The technique is recommended for the appraisal of partially or fully publicly financed investment projects in order to allocate resources in a way most profitable to society. The objective is to set a monetary value for the benefits and economic costs of the project when compared to the base case. All elements of cost and benefit must be detailed and the appropriate monetary value attributed to them. The diagram at Figure 5.1 summarises the general process of conducting an ECBA. It is important to note that in an

[6] The President of NIDCO noted that the project was the largest of its kind ever attempted in Trinidad and Tobago and attention ought to be paid to the public cost and seeking the public interest.

ECBA, it is also recognised that the market prices of goods and factors of production do not necessarily reflect their social value and costs respectively. Corrections to market prices are normally therefore made.

Traditional cost-benefit analysis of highway projects concentrates on savings in vehicle operating cost, maintenance cost, and time savings. The contention is that road projects create benefits that come in the form of savings of costs. They do not create revenues *per se* as in the case of other types of projects in which one may factor into the ECBA the "stream of revenues" that may arise from the project. In road projects, externalities are the major source of benefits, and the challenge is to internalise these externalities and thus give a measure and a value of the effects on vehicle operating costs, people's time, their lives, and the environment, among other factors.

It is also recognised that investment in transportation infrastructure can generate substantial secondary benefits by reducing costs for existing productive activities, providing access to new areas with economic development potential, and triggering investment activities. These secondary benefits are usually translated in generated traffic, and are generally captured in the forecast activity.

Simply stated, public and private sector analyses differ in the nature and the range of benefits and costs taken into consideration. With public sector projects consideration ought to be given to the "earning power "of an investment not only from an individual point of view but from the national perspective. The Section below provides further details, including a discussion on Economic Valuation.

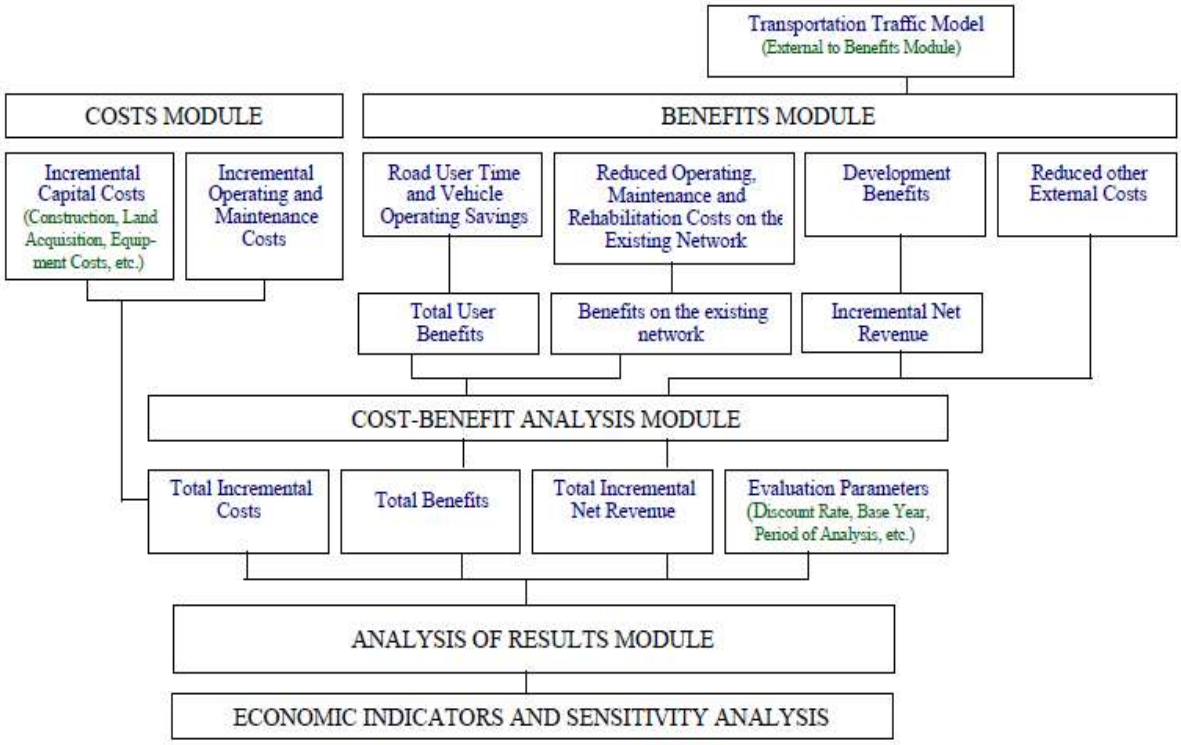


Figure 5.1: General Process of an ECBA

5.3.1 Best Practice for conducting Economic Analysis of projects which have a social, economic and environmental dimension

The following section provides some guidelines in terms of best practice for undertaking an economic analysis of projects for which there is an environmental dimension. "Environment" in this context is taken to mean both the natural and social environment. The section also includes summary information on the methodology involved in valuing "non-marketed" goods and services such as the psychological impact of an event on the well-being of an individual.

The World Bank (1998) notes that "Successful economic development depends on the rational use of natural resources and on reducing as far as possible the adverse environmental impacts of development projects. Environmental assessment (EA) is a primary tool for achieving this objective, by inserting critical environmental information into the process of project identification, preparation, and implementation. Economic analysis, by comparison, is employed to determine if the overall economic benefits of a proposed project exceed its costs, and to help design the project in a way that produces a solid economic rate of return. Adverse environmental impacts are part of the costs of a project, and positive environmental impacts are part of its benefits. Consideration of environmental impacts, therefore, should be integrated with the other aspects of the project in the economic analysis to the extent possible."

The Bank goes on to state that, "…environmental costs and benefits should be quantified to the extent possible, and economic values should be attached where feasible." This should be done for both alternative project designs and alternative mitigation options. Moreover, EA findings and recommendations should be taken into account in project appraisal and supporting benefit-cost analysis."

In the first stage, the economic analysis will normally consist of estimating monetary costs and benefits (valuation) of the various environmental impacts identified in the EA, using a range of valuation techniques. In the second stage, the analysis is extended to consider the costs and benefits of preventive and mitigative measures, so that comparisons can be made with the original project impacts. At the third stage, the monetary values for the selected alternative are integrated into the overall economic evaluation of the proposed project. For the environmental impacts of a project to be valued, they must first be identified and measured. This is generally far from straightforward. Environmental impacts are often dislocated in time and space, making cause and effect difficult to establish. The severity of environmental impacts often depends on the accumulation of problems (over time, over space, or both). Many environmental goods and services do not enter markets, or do so only imperfectly. The difficulties this causes for valuation are compounded by the empirical limitation that available data are often scarce or of poor quality.

Benefit-cost vs. cost-effectiveness - Two approaches are possible to the economic analysis of environmental impacts. The first is to use standard benefit-cost criteria, in which the benefits of an action are compared to its costs to determine whether the action is worth undertaking. This approach is commonly used to compare alternative options and requires that the environmental impacts be identified and that monetary values be placed on the outcomes. In some cases, however, a traditional benefit-cost analysis may not be feasible or desirable. It may not be possible to make monetary estimates of benefits. For example, some natural areas may be so unique that it might be felt that they should be conserved at all costs. In other cases, there might

be substantial uncertainty about the benefits provided by environmental goods and services, either now or in the future, or great problems in determining appropriate values in monetary terms. When loss of these goods and services would be irreversible it may be desirable to choose the strategy that minimizes maximum possible losses due to environmental damage, unless the social cost to do so is unacceptably large - this is known as the safe minimum standard approach. In such cases, the appropriate approach to the analysis is one of cost-effectiveness rather than cost benefit; that is, the issue becomes one of finding the cheapest and most effective way of achieving the conservation objective or some other goal. Note that the cost-effectiveness approach **does** identify the most efficient way of reaching a goal, but does not indicate whether or not the expected benefits justify the costs.

Cost of Illness and Human Capital

The HRM suggests that the prospect of the project being executed is resulting in significant human health impacts to the community. Many environmental impacts, such as air and water pollution, have repercussions for human health. Valuing the cost of pollution-related morbidity (sickness) requires information on the underlying damage function (usually some form of a dose-response relationship) which relates the level of exposure to the degree of health effect as well as information on how the project will affect the level of health impact. The costs of an increase in morbidity due to increased pollution levels, for example, can then be estimated using information on various costs associated with the increase in morbidity: any loss of earnings resulting from illness, medical costs such as for doctors, hospital visits or stays, medication, and any other related out-of-pocket expenses.

Economic Valuation Techniques

Two valuation techniques are summarised below:

(i) Travel Cost Technique

The travel cost (TC) method is an example of a technique that attempts to deduce value from observed behaviour. It uses information on the total expenditure of visitors to visit a site in order to derive their demand curve for the site's services. The technique assumes that changes in total travel costs are equivalent to changes in admission fees. From this demand curve, the total benefit that visitors obtain can be calculated. The TC method was designed for and has been used extensively to value the benefits of recreation.

(ii) Contingent Valuation Technique

Unlike techniques which use observed data, the Contingent Valuation (CV) technique relies on direct questioning of consumers (actual or potential) to determine their willingness-to-pay (WTP) to obtain an environmental good. The actual valuation can be obtained in a number of ways, such as asking respondents to name a figure, having them chose from a number of options, or asking them whether they would pay a specific amount (in which case, follow-up questions with higher or lower amounts are often used). CV can, in principle, be used to value any environmental

benefit. Moreover, since it is not limited to deducing preferences from available data, it can be targeted quite accurately to pose question about the specific changes in benefits to be derived from the proposed project. This also means that, with appropriately-worded questions, CV can provide an all-encompassing estimate of the perceived costs and benefits of environmental changes, in contrast to other techniques which, as noted above, often only provide a partial estimate of environmental costs and benefits. Because of the need to describe in detail the good being valued, interviews in CV surveys are often quite time-consuming. It is also very important that the questionnaire be extensively pre-tested to avoid various sources of bias.

Below shows the linkages between environmental assessment, economic analysis, and the project cycle. In summary, the TOR for the environmental assessment should be clearly defined from the outset of the project and costs derived for environmental costs or benefits so that the economic appraisal of the project reflects the direct and indirect social and environmental factors that might affect the developmental impact of the particular project.

Table 1. EA, economic analysis, and the project cycle

Project stage	*EA activity*	*Associated economic analysis activity*
Preparation	Environmental screening	Potential environmental costs and benefits are considered on a preliminary basis
	Preparation of EA TORs	Requirement to quantify environmental impacts and assign monetary values spelled out
	EA team selection	EA team includes resource or health economist, as appropriate
	EA preparation	EA team analyses the impact of project alternatives and compares them, using monetary values on their costs and benefits, where feasible
	Review of EA	The Bank reviews the EA report, including the economic analysis
Appraisal	Incorporation of EA into project design and documentation	EA findings, including the environmental costs and benefits, are incorporated into the project economic analysis and the estimation of the economic rate of return
Negotiations	Agreements reached on actions to be taken, based on the findings of the EA	
Implementation	Environmental supervision	Supervision includes monitoring the project's actual environmental costs and benefits

Figure 5.2: Table of Economic Analysis, and the Project Cycle
Source: E n v i r o n m e n t a l A s s e s s m e n t UPDATE. The World Bank: Washington, D.C. 1998

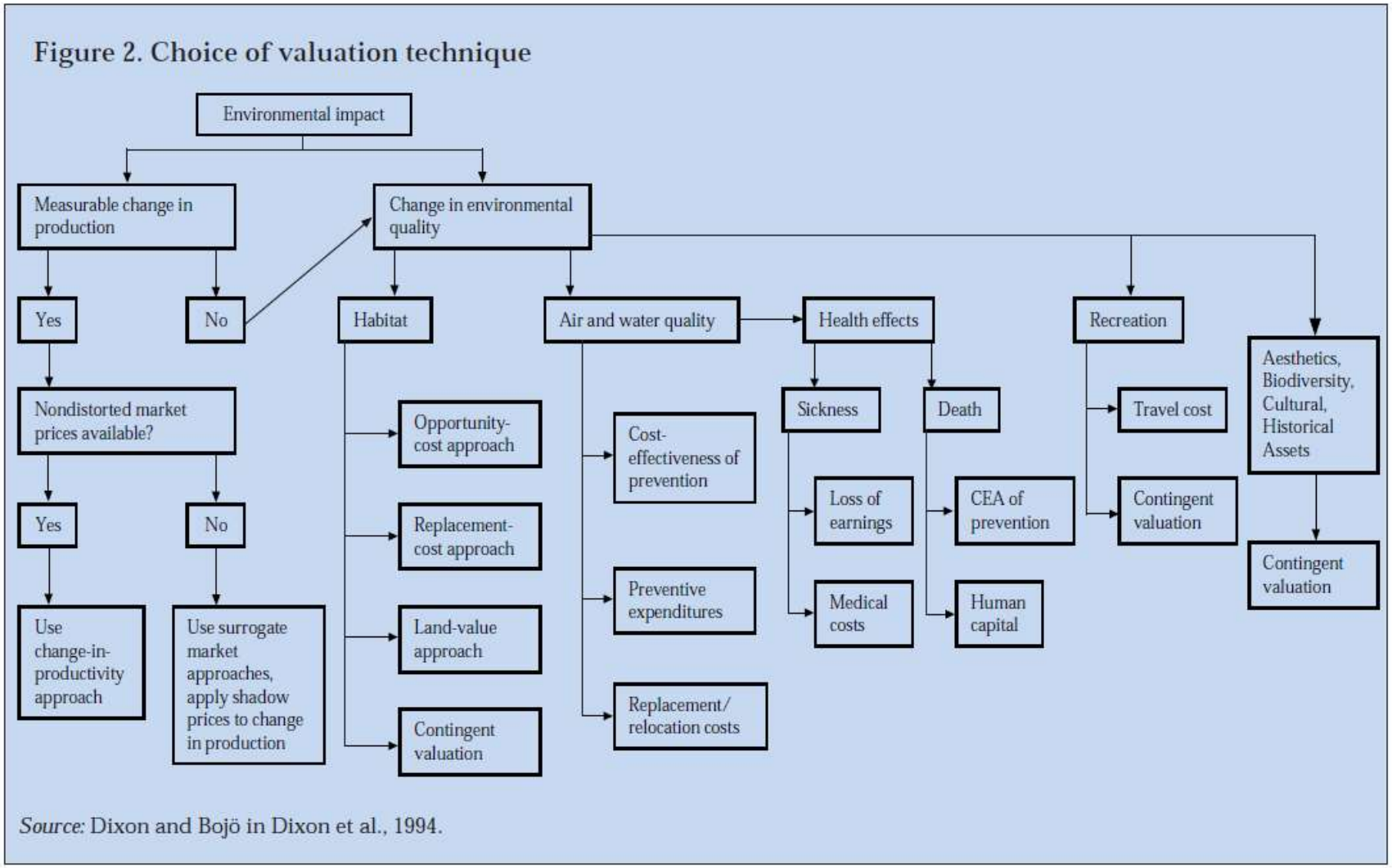


Figure 5.3: Choice of Valuation Technique

Source: E n v i r o n m e n t a l A s s e s s m e n t UPDATE. The World Bank: Washington, D.C. 1998

5.4 Findings

5.4.1 *Environmental Impact* Assessment for Debe to Mon Desir Highway Segment (Rev. 1)

With respect to anticipated benefits and costs of the project, the EIA noted, *inter alia*, the following:

(i) Project Benefits

a) The proposed highway will improve accessibility to areas in southwest Trinidad (La Romain, Debe, Penal, Siparia, Fyzabad, La Brea and Point Fortin).
b) It is expected that the highway will bring about social and economic development and progress in southwest Trinidad.
c) There would be increase in potential for agricultural production and distribution.
d) There would be increase in residential, industrial, and domestic and foreign tourism development.
e) Previously small settlements would be encouraged to expand and additional areas would be opened up to built development and services.
f) The increased accessibility afforded by the highway will tend to generally increase property values and so be a benefit of this project.
g) Employment will be generated during site preparation and construction.
h) The proposed highway will decrease the time taken to reach areas in south Trinidad by providing better roads and shorter travelling distances, as well as reducing the vehicular congestion on existing arterials.
i) There would be the opening up of vistas along the route of the proposed highway.

Consultant's comments:

a) The EIA presented, as well as other documentation reviewed, do not detail any quantifiable benefits that may be incorporated into a CBA for the project so it is unclear, for example, what economic value (dollar value) is placed on "… residential, industrial, and domestic and foreign tourism development." Regarding tourism development for instance, what would the nature of that anticipated tourism development be, and will it result in increased employment (by how much), revenues (by how much), economic growth in the area (by how much).
b) Regarding the benefit of "increased accessibility afforded by the highway [that] will tend to generally increase property values and so be a benefit of this project" there is no documentation on the current values of properties in the area and therefore the likely incremental increase that may be used to make a judgement on the beneficial impact of the project
c) Employment is likely to increase during the construction phase. This is customary in many projects, and given that the area is marred by high unemployment levels this could alleviate that unsustainable situation. However it would be useful to have clarity on the nature of the employment to be available during the construction phase and whether the project area contains persons with the requisite skills. If employment is to be generated for unskilled persons this is unlikely to yield sustainable benefits from the project.

(ii) Adverse Impacts

Adverse impacts were assessed (with and without mitigation measures) based on numerical analysis, experience on earlier projects, and expert judgment. Some of the adverse impacts identified in the Project EIA are as follows:

- Acquisition of houses
- Acquisition of institutions
- Disruption of current and traditional uses (agricultural lands)
- Air quality (fumes from hot asphalt paving)
- Rare, Vulnerable and Endangered Species
- Waste disposal and management
- Land use conflict Loss of business opportunities

Consultant's comments:

As with the proposed benefits there is an absence of specific and quantifiable information on the economic impact of the above mentioned adverse impacts. The EIA notes for example:

a) The loss of rare, vulnerable and endangered species. This means that the EIA identified species in danger of extinction and/or likely to become endangered. The HRM also notes this negative impact and identifies the Sulphury Flycatcher which is classified as rare (spotted in Murray Trace, on route of highway); the Blue and Yellow Macaw which is classified as an endangered species (spotted at Supra Trace Ext, close to route); the Scarlet Macaw which was first sighted in Trinidad and Tobago at Supra Trace Extension. The Scarlet Ibis which nests at the Oropouche Lagoon is classified as a vulnerable species. The highway embankment will provide a "formidable" barrier for howler monkeys to cross; and, as their habitat will be disturbed, may face dislocation. (All information on these threats is taken from the EIA report).

Trinidad and Tobago is signatory to the Convention on International Trade in Endangered Species (CITES) as well as the Convention on Biological Diversity, which means that insufficient mitigation measures to protect such species may contravene commitments such as contained in the National Biodiversity Strategy and Action Plan (NBSAP), for example. It is necessary to place a value on these rare and endangered species by using economic analysis that would calculate:

i. the willingness to pay by surveyed households for ecosystem protection (Contingent Valuation)
ii. The likely revenues to be earned from ecotourism (visitors paying to view these rare, species etc)

b) Disruption of current and traditional uses (agricultural lands): At a time when the Government of the Republic of Trinidad and Tobago is speaking about increasing national agricultural production (in the context of headline inflation increasing as well

as food import bills) it is curious that no cost was attached to the loss of agricultural lands.

5.4.2 The Ministry of Works and Transport (MOWT) /National Infrastructure and Development Company (NIDCO) Position

The MOWT and NIDCO "positions" reflected in this report are culled from mainly two documents:
(i) Final Report on Feasibility Investigations, Volume 1 - Engineering and Economic Feasibility and (ii) *Final Report on Feasibility Investigations, Volume 3 - Potential Socio-economic Impact.*
Apart from the cited documentation, information in this section is gleaned from a meeting held with NIDCO on January 08, 2013 The Report on the potential socio-economic impact which was prepared by Mc Cree and Braithwaite in 2006, notes the "…*In the short-term, the most important impact would be on the relatively high level of unemployment that plagues the region. Road construction is usually a labour intensive activity and requires some degree of unskilled labour. Given the significant number of unskilled and unemployed persons in the region, the construction of such an extensive network can provide many job opportunities for local residents….*" Page 24). Additional economic impacts are detailed in the report as follows:

- As a consequence of the change in the flow of traffic, own account workers and micro entrepreneurs will be "adversely affected" which may require such persons to find alternative employment. This loss in employment by be "matched" by "benefits to similar own account workers along the new highway" (Page 26).
- Loss of social and human capital may be stymied since the highway will facilitate easier commute by more trained and educated members of the community. The report suggested that the "new highway will provide easier access to the rest of the country and encourage persons to live in the community" which will bring "additional economic benefits"
- Regarding the environmental impact, McCree and Braithwaite locate the potential negative impacts from the construction of the highway in the context of " a widespread perception that there has been and will be severe environmental damage" and given the "proximity of the highway network to the Oropouche Lagoon, the Godineau Swamp and the Rousillac Swamp, this may raise environmental fears …"

The socio-economic report does not attempt to quantify any costs or benefits but concludes that *"*The decision to extend the Solomon Hochoy Highway to Pt. Fortin is a positive step towards stimulating the socio-economic development of southwest Trinidad."
The Final Report on Feasibility Investigations, Volume 1 - Engineering and Economic Feasibility (2006) noted that the network improvement scheme "… meets the requirements of the government in terms of road linkages and satisfies the future requirements of PETROTRIN for development of petroleum reserves in the project corridor. It also has a lower capital cost than the alternative routes investigated [however] …In economic terms the scheme does not meet the normal investment criteria expected by an international development bank. However, in the feasibility investigations, benefits have been estimated on the perhaps narrow basis of road user

cost (vehicle operation and passenger time) savings. The work did not attempt the larger task of quantifying and evaluating the developmental and social benefits in south western Trinidad that will be derived from the vastly improved road communications links to and within the region which will result from project implementation." (LEA-Trintoplan Consultants, 2006; 6-1)

5.4.3 The Highway Reroute Movement (HRM) Position

The HRM Position is culled from the report submitted entitled An Analysis Of Inputs For A Projected Strategic Cost Benefit Analysis For The Proposed Debe To Mon Desir Highway. Information also is gleaned from meetings with the HRM held on January 10 and January 21, 2013.

The above captioned report notes, " One of the standard tools used to guide the planner to answer these questions is the Cost Benefit Analysis. In this analysis such inputs as the bio-physical and socio-economic environments are predicted and measured in dollar terms. Two problems arise. First, how does the economist or econometrician measure such non-market, unpriced impacts and effects. Second, what is to be done when there is little or no data available. Attempts to solicit data on the economics of this project from the project managers, NIDCO, and the Ministry of Works have proved futile. This report confronts this problem by omitting costing altogether; and instead focuses on listing the known inputs that would have to be costed and analysing their likely magnitude in verbal terms. It is not to be regarded as a Cost Benefit Analysis".

Consultant's comments:

As mentioned earlier there are economic valuation techniques that may be employed when there are no readily available "market prices" for environmental goods and services. The HRM/Kublalsingh document correctly notes that the NIDCO documents did not seem to contain the requisite economic data to facilitate a CBA. The HRM/Kublalsingh document lists a number of costs – financial, social and environmental costs that might arise as a result of the project.

In weighing the costs and benefits of the proposed highway, the HRM/Kublalsingh report notes, "Even a cursory glance at the potential costs and perceived benefits of the Debe to Mon Desir High-way shows that this project is an unmitigated planning disaster. Its potential destructive impacts are non-mitigatable and permanent:

(i) It will bifurcate thirteen well-established communities and engender permanent disconnectivities.
(ii) It will disaggregate a socially, economically, and culturally empowered region.
(iii) It will jeopardize the future of the Oropouche Lagoon as a potential food basket.
(iv) It will fragment a system of well-connected road system West of the Siparia-Erin Main Road.
(v) it will compromise the system of hydrology of the Oropouche Lagoon and its ecology.
(vi) Its financial costs will be exceedingly more than advertised by the state and will jeopardize the other viable segments of the highway, and the national economy.
(vii) It will lead to significant and permanent negative environmental and health effects on residents who live within its catchment.

(viii) It would cause flooding to remaining communities stretching as far back as Barrackpore in the East; particularly if hydraulic systems are not maintained; the costs of these systems will be permanent.

(ix) The aggregate required will be 1.4 million tons which will jeopardize the water, soil and vegetation systems of the Northern Range and North East Trinidad.

Perceived benefits, as listed in the EIA for this project, and implied in the rationale and objectives for this project are either negligible when contrasted with potential costs; and are based on flawed conceptions of "development" and "progress". Reports done by the IMA in 2006, and the IADB in 2009/2010point to the hazards of Debe to Mon Desir on the one hand and on the government's approach on the other."

Consultant's Comments

The Consultant concurs with the general sentiment of the HRM as stated above given the absence of quantifiable evidence to corroborate the benefits and costs of the Project. It should be noted though that the HRM/Kublalsingh report also does not detail any dollar values for the ranges of negative impacts from the project that it has identified.

5.5 Summary of Findings

1. There is no holistic treatment given to the project, that is, no document that reflects convergence of the salient environmental, social and economic issues that arise in the project.
2. It would seem that none of the key agencies involved in this project *viz*, the EMA, the MOWT, the Ministry of Finance, NIDCO, or any of the Consultants engaged by the proponents sought to provide an integrated assessment of the project including primarily a CBA.
3. The scope of the project (including the project area) is broad and does not delimit the particular project area and the communities that are likely to be affected by the project. In an effort to correctly capture "what is at risk" and therefore what costs and/or benefits might be incurred or accrued, there was need for clear demographic and socio-economic data specific to the area so that appropriate mitigation measures could be identified and valued, for example, the value of agriculture taking place in the Oropouche Lagoon (in terms of fish stocks, number of persons whose livelihoods depend on the Lagoon, etc.).
4. Although the TOR for the EIA requires consideration of direct and indirect impacts the indirect impacts are not valued or included in a comprehensive ECBA
5. Sweeping statements are made by proponents and opponents of the Project regarding its potential benefits or costs in the absence of any associated dollar values for same.
6. There seems to be a general lack of appreciation for what is entailed in doing a CBA for which equal consideration and weighting ought to be given for social, environmental and economic benefits/costs.

5.6 Recommendations

This Consultant recommends as follows:

1. That economic valuation is a mandatory aspect of an EIA and SIA to determine the direct and indirect costs and benefits of a project. By including such values the full economic, social and environmental impact of a project may be quantifiable, leading to more transparent and informed decision making as well as efficient use of resources. The inadvertent omission of values of non-marketed goods and services results in an undervaluation of project costs and possible benefits as well as appropriate mitigation measures that may be employed.
2. In the context of national Sustainable Development, to which this project is meant to contribute, it should be noted that the SD framework includes procedural issues considered important dimensions of the democratic process, *viz*, participation, consultation, transparency, accountability and public right to information. This project seems to fall short in many of these areas.
3. In seeking to capture the full environmental, social and economic costs and benefits of a mega project in a Cost Benefit Analysis, such as the one under consideration, the following are some metrics suggested :

    a) Construction costs
    b) Land costs
    c) Demolition costs
    d) Building/replacement costs
    e) Compensation costs
    f) Maintenance costs
    g) Vehicles operating costs (based on market prices of fuel, operating costs, etc.)
    h) Time savings
    i) Accident reductions (re value of life, value of health)
    j) Recreation/amenity loss
    k) Traffic noise quantified
    l) Visual obstruction
    m) Visual intrusion
    n) Air pollution
    o) Built environment/heritage
    p) Ecological sites
    q) Pedestrian/cyclists

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6.0 TRAFFIC AND TRANSPORTATION

6.1 Terms of Reference

The Terms of reference for the Transportation issues are to

1. Review all technical reports/data and information of relevance to the project, and the Debe/Mon Desir segment in particular..
2. Invite written and oral submissions of the principal parties including the executing agency - National Infrastructure Development Co. (NIDCO); the HRM and other stakeholders.
3. Ascertain the veracity of technical issues raised by the respective parties and the consequences/impacts in respect of the Mon Desir to Debe segment, keeping in mind related international best practice.
4. Make specific recommendations in the public-interest.
5. Outline proposals that could be of benefit to the project in social, environmental and economic terms.
6. Based on the findings, outline recommendations which could inform the process for development projects of this magnitude in the future.

6.2 Traffic & Transportation Issues.

The major issues raised by the Highway Reroute Movement (HRM), from the point of view of traffic and transportation analysis are as follows

- The Debe to Mon Desir segment of the extension of the Solomom Hochoy Highway will not be an optimal solution to traffic and transportation needs in the area. The HRM agrees that the extension of the Solomon Hochoy Highway (SHH) to Debe will be beneficial, but contends that the Debe-Penal Siparia-Fyzabad region would be better served by upgrading local roads.
- The HRM has proposed an alternative route (the Northern Route which is defined later in this report). The HRM claims that NIDCO has not properly examined this alternative

In the course of the review, the consultants have posed the following questions.

- Were the traffic and transportation requirements of the region itself adequately considered?
- Do the projections justify the planned construction?
- What were comments made by the various consultants on staging?

6.3 Documents & Notation

This report will refer to several documents, a subset of those studied by the consultants.

- Halcrow-Fox Sir Solomon Hochoy Highway: Extension to Point Fortin: Traffic Volumes and Operational Analysis Feb 2012 *Ref Halcrow*
- Highway Re-route Movement: Addressing Transportation Issues in the Debe to Mon Desir Area Jan 2013 *Ref HRM*
- Lea-Trintoplan Final Report on Feasibility Investigations Volume 1 - Engineering and Economic Feasibility *Ref Trintoplan Apr 2006*
- Lea-Trintoplan National Highway Programme : Trunk Road Expansion Component Solomon Hochoy Highway Extension : Debe To San Francique Road Route Comparison Report *Ref Trintoplan Route Comparison Dec 2007*
- NIDCO :Report on the Debe to MonDesir Segment of the Solomon Hochoy Highway Extension *Ref NIDCO*
- NIDCO :Report on the Debe to MonDesir Segment of the Solomon Hochoy Highway Extension Appendix 2: Discontinuation of the Debe to Mon Desir Segment June 2012 *Ref NIDCO Appendix2*
- NIDCO - Debe to Siparia Highway Segment - Economic and Traffic Feasibility Study - Problem Diagnosis REVISED - Nov 2012.pdf *Ref APDSL*
- NIDCO - Debe to Siparia Highway Segment - Traffic Feasibility Study - Traffic Assignmenrt - Report.pdf Nov 2012 *Ref APDSL 2*

In this review, the terminology used in the Trintoplan documents has been adopted: ***Northern routes*** are routes using the Dumfries Rd. -PariaSuites-Mosquito Creek –St Mary's Junction path, which is an alignment following a section of the Southern Main Road . ***Southern routes*** are routes passing to the south of the bulk of the Oropouche Lagoon.

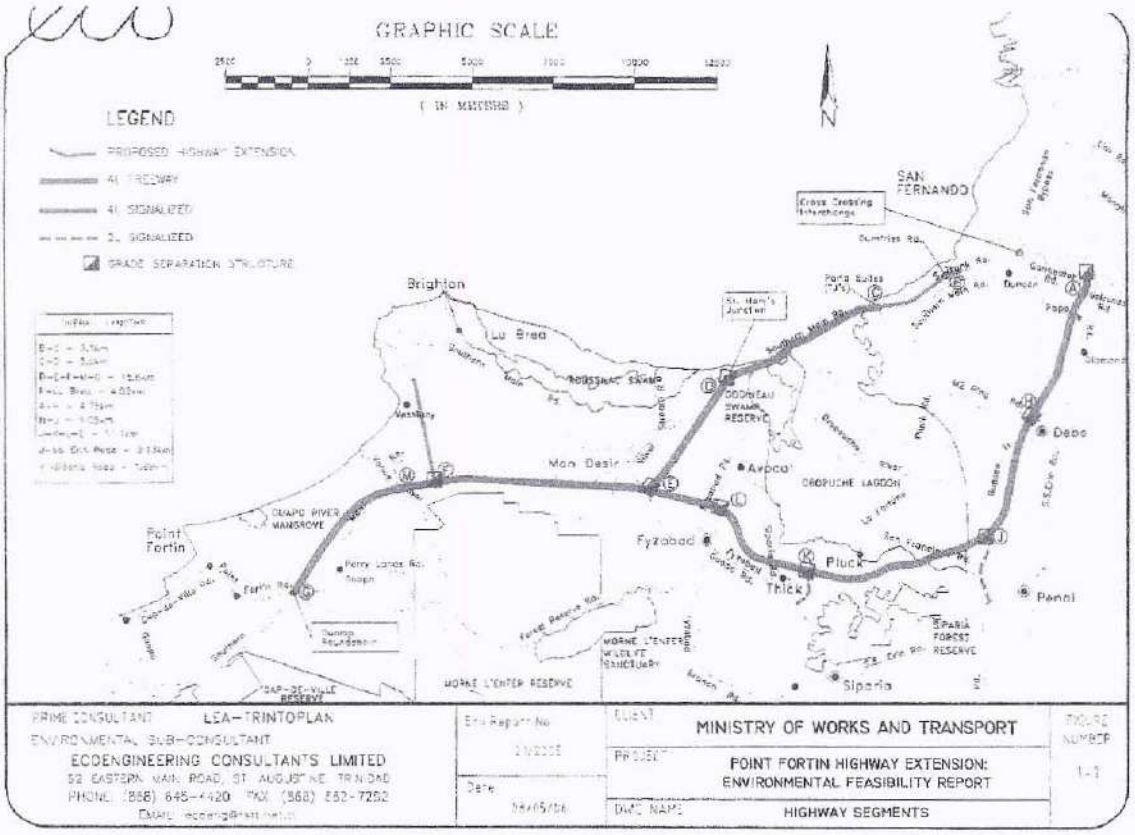


Figure 6.1 Golconda to Point Fortin Highway Segments

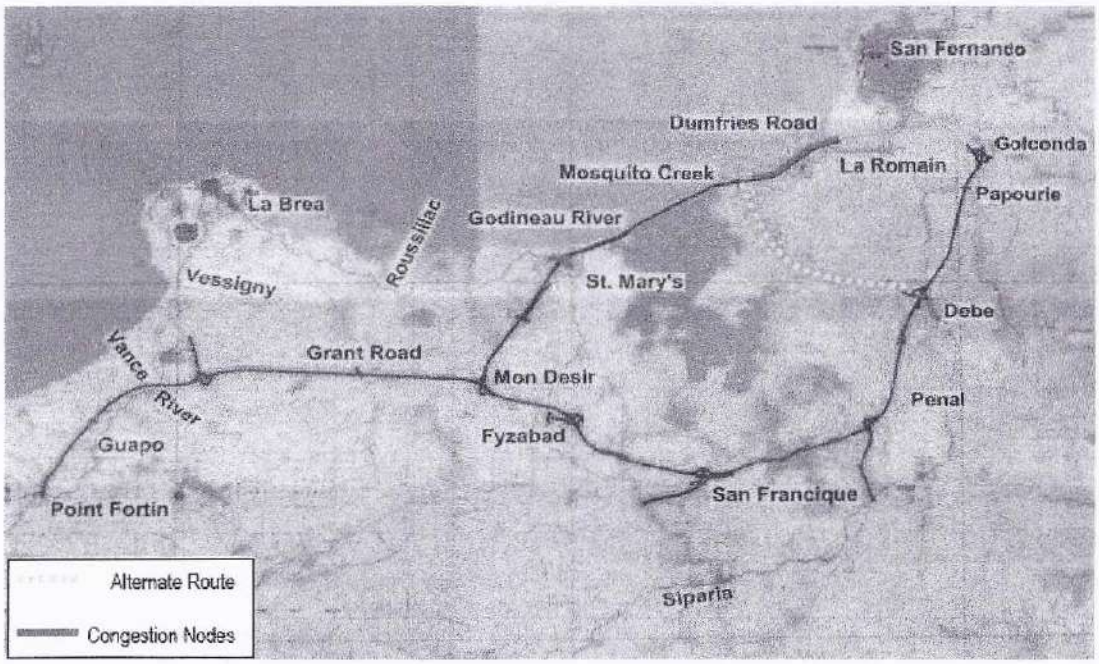


Figure 6.2: Golconda to Point Fortin Highway and Alternative Route Proposed by the HRM

6.4 Methodology

6.4.1 NIDCO/Trintoplan Consultants Route Analysis

The Consultants reviewed the Trintoplan documents, and subsequently met with Trintoplan to discuss some of the issues raised.

One issue was the choice of a southern route over the northern route. In its study, Trintoplan evaluated various configurations (four-lane freeway, four-lane road, two-lane freeway (*?ibid*), two-lane road) . and concluded;

1. *The extension of the SHH as the future route to Point Fortin should follow the Southern route via Penal and Mon Desir.*
2. *Construction of the entire route to four lane standard is not justified in the near future from an economic viewpoint.*
3. *The only 2010 option evaluated that comes close to meeting normal economic criteria is extension of the SHH from Debe to Penal to two lane standard (Option 2).*
4. *The best alternative for extension of the network by 2020 is two lane standard.. "*
5. *The comparisons .. have been significantly influenced by the high cost of improving the Paria Suites St. Mary's link. If the cost of this link were similar to others the Northern route would be more favourable ...'*

The Trintoplan report points out that the Ministry of Works and Transport had directed that

- South Trunk Road between Dumfries Road and Paria Suites should be widened to four lanes
- SHH extension from Golconda to Point Fortin should be to freeway standard.
- A highway connection be established between the route serving the Penal and Siparia areas and that serving Point Fortin.
- A four-lane SHH extension from Golconda to Debe should be the initial freeway implementation contract of the overall project.

It is the opinion of the consultants that the Trintoplan analysis and recommendations were sound. In adding further directives, the Ministry seems to have had an objective that is not well captured by the rubric "a highway to Pt Fortin". This is borne out by the fact notwithstanding the Trintoplan Projections, the Ministry still, did not revise the route allocation when it apparently decided to improve the segment from Paria Suites to St Mary's junction to four lanes.

In the light of this conclusion, the consultants are of the opinion that the Ministry should have requested studies specifically centred on the region under consideration. Such studies are currently being undertaken by APDSL.

Among the options considered by Trintoplan was a route which effectively is the option suggested by the HRM (*See Figure 6.3).*

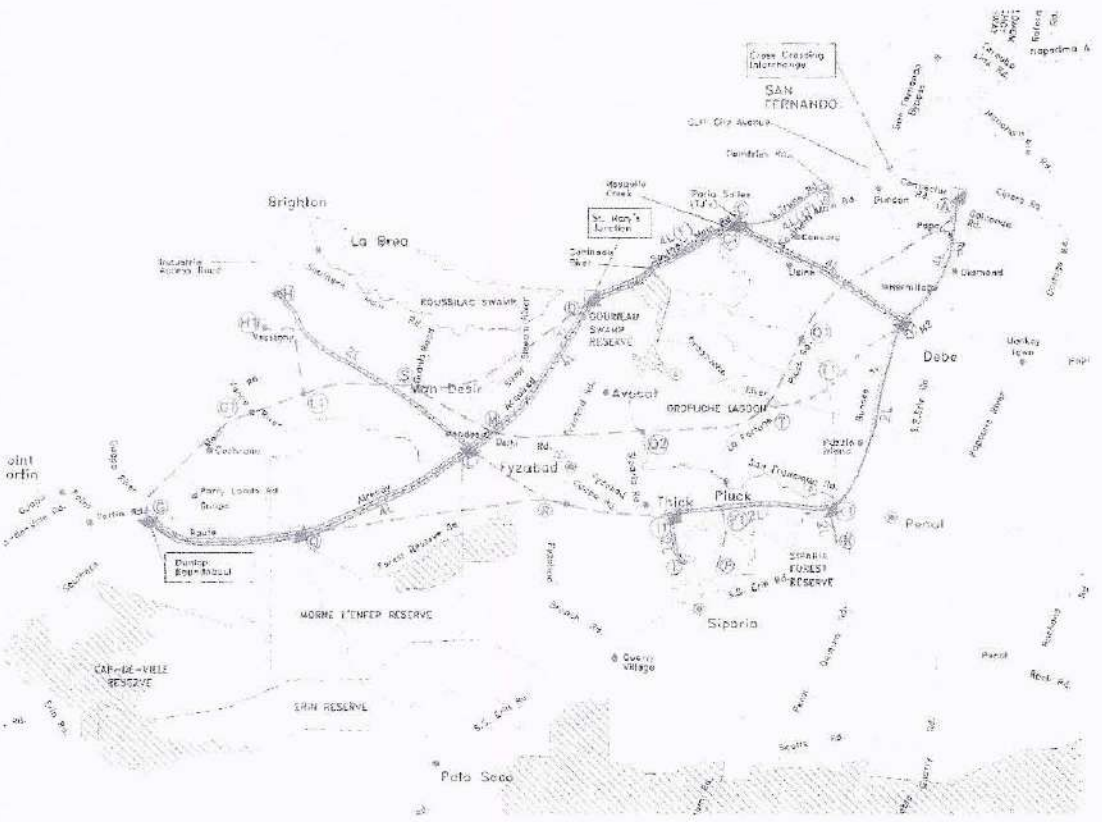


Figure 6.3: Golconda to Point Fortin Highway, Possible Route Options

Source: *Solomon Hochoy Highway Extension to Point Fortin, Final Report on Feasibility Investigations, Volume 1 - Engineering and Economic Feasibility,* LEA-Trintoplan Consultants Ltd, Figure 2.4.B.a.

6.4.2 Highway Reroute Movement

The consultants reviewed the oral and written submission by the HRM's Traffic advocate. The traffic analysis was centred around the existing traffic congestion problems in the area. The analysis identified the possible causes and offered potential solutions for the Debe/Penal areas in particular. These solutions include road widening and upgrades of tasker roads as a means of improving the road network within the study area. Given the limitations of their

situation, it appears to us that the HRM advocates had considered carefully the areas where whatever congestion problems existed in the region could be mitigated. The consultants own observations of the SS Erin Road during a typical weekday morning is that the road serves a multiplicity of purposes. It is both the main thoroughfare linking the major conurbations of Debe, Penal and Siparia as well as the local access road directly serving households and businesses. In many areas it is also the terminal (Parking location) for auto users and the taxi terminal. This is typical of the main roads in ribbon developments in Trinidad e.g. Eastern Main Rd. and Western Main Rd. in North Trinidad and the Southern Main Road further west of the S.S.Erin Rd.

Whilst some of the ideas put forward have merit in a short term Traffic Management context, the proposals will require a quantitative analysis to determine their effectiveness. Furthermore, the potential for these solutions to cater for the expected growth in activity (even without the UWI Campus) and thus traffic would have to be ascertained.

6.4.3 NIDCO Preliminary Response to HRM

The Consultants reviewed four documents from NIDCO: a lead document, two Certificates of Environmental Clearance, and a fourth report on the discontinuation. The lead document reviews the history of the implementation of the highway. It also lists benefits of the project for the community, and tabulates "dis-benefits" of not constructing the highway. The document then closes with a repudiation of the points raised by the HRM.

The Certificates of Environmental Clearance confirm that approval was granted for the construction of the Golconda to Debe and Debe to Mon Desir sections of the SHH extension.

The fourth report is a detailed rebuttal of the HRM proposals. It does not appear to represent an independent review of the proposals. Furthermore there is not enough rigour in the quantitative analysis to counter a possible claim of bias.

6.4.4 Halcrow

The Halcow work is aimed at ensuring that the highway construction meets or exceeds quantitative and traffic capacity targets. It is therefore of limited value to our study, which considers the other end of the spectrum: i.e. whether the highway is necessary or not.

6.4.5 APDSL

In 2012, NIDCO engaged APDSL to undertake a Traffic Feasibility Study and Urban Traffic Plan for Debe, Siparia and the surrounding areas. The purpose of this study is quoted as

> "Study Purpose
> This study is a traffic feasibility study and urban traffic management plan for Debe to Siparia and surrounding areas. Its objective is as follows:
>
> 1. Primary data collection through traffic surveys and field walk-throughs.

2. Traffic analysis and forecasts, and presentation of the results, including preparation of Trip Distribution Plans and Road Network Assignment Plans.
3. Preliminary road planning and alignment options for efficient highway linkage between Golconda and Dumfries Road / South Trunk Road area.
4. A highway alignment and traffic level-of-service requirements in the Debe to Siparia and surrounding areas that respect current and future stakeholder needs and demands.
5. An urban traffic management plan for the Debe to Siparia and surrounding areas, in order to improve unresolved intra-urban traffic linkage needs.

The diagnosis involves estimation of the existing vehicle and person traffic through collection and review of existing data, and new data collection and analysis."

APDSL carried out extensive traffic engineering surveys in September 2012. Based on the analysis of the data collected thus far, Traffic Forecasts and Traffic Assignment were done for five year intervals from 2015 to 2035. Both the existing road network and the proposed HRM route were examined. The report concluded inter alia that there was urgent need for an urban primary arterial system connecting the South Western peninsular to improve accessibility to the urban centres in the region including Debe, Penal, Siparia, Fyzabad, La Romaine, Oropouche, La Brea and Pt. Fortin. It also noted the requirement for Traffic Management Solutions in the Debe area. Furthermore, the analysis showed that the HRM proposed routeing would not have the capacity to cater for the 2015 Traffic forecast

6.5 Conclusions

The consultants have concluded that

- The need for the Debe to Mon Desir segment of the highway has been driven more by the expected traffic growth from San Fernando and Northern areas to the Debe-Penal corridor than by the through traffic to Point Fortin.
- Among the options considered by Trintoplan was a route which effectively is the option suggested by the HRM.
- The report NIDCO Appendix 2, which addresses the HRM counter-proposal, including their Northern Route, is a defense of NIDCO's position, and not the independent unbiased study which should have been undertaken.
- The HRM traffic proposals are short-term in nature, and do not seem to take into account future increases in car population and traffic.
- The issues are clouded by a separate decision to expand the Mosquito Creek segment to four lanes, by the conflation of a plan to build a highway to Pt Fortin with a

paradigm to develop the Siparia-Fyzabad-Penal area, and by the lack of any up-to-date traffic plans for the area.

The phrase "highway to Pt Fortin" encourages residents of the area to view the project as a highway from the North to Point Fortin, passing through their territory.

The APDSL study is not yet finalized. From the results of this study that the consultants have seen so far, it can be concluded that the HRM proposal will not be the preferred alternative as it does not provide enough capacity for the future (2030) traffic requirements in the area.

6.6 Recommendations for Immediate Consideration

(1) The consultants recommend that the APDSL studies should be continued and that the HRM traffic presenter should be drawn into this study. The proposed Debe to Mon Desir Highway segment will not solve the congestion problems on the S.S. Erin Rd between Debe and Penal which are due to localised travel patterns and behaviours, as have been highlighted by both the HRM and APDSL.

(2) The consultants recommend that consideration be given to staging the highway improvement programme for the South-Western peninsular. Both Trintoplan and APDSL recognise that staging the construction had economic advantages, although, to quote Trintoplan

"In economic terms the scheme does not meet the normal investment criteria expected by an international development bank. However, in the feasibility investigations, benefits have been estimated on the perhaps narrow basis of road user cost (vehicle operation and passenger time) savings. The work did not attempt the larger task of quantifying and evaluating the developmental and social benefits in south western Trinidad that will be derived from the vastly improved road communications links to and within the region which will result from project implementation. The traffic volumes predicted on the links west of Debe and St Mary's do not justify four lanes before 2020 and there is considerable scope for capital cost savings if staged construction were adopted for these links, namely two lanes in the first instance with a further two lanes built when traffic so justifies. However, because there are serious road safety implications in the provision of two lane high speed roads and because the government is ready to invest in trunk road improvements now, it is appropriate that construction should proceed apace in order to obtain the attendant transport benefits for project corridor residents and the nation as quickly as is possible."

6.7 Recommendations for Future Developments

1. **Major Transportation Investments Should be Preceded by a Transportation Planning Study.**

The Institute of Transportation Engineers (ITE) in its internationally recognised and used *Best Practice Guide, the Transportation Planning Handbook, 2nd. Ed. p. 422* states as follows:

"The MIS (Major Investment Study) is reserved for situations where it is clear that a ***large investment*** *is required and offers a rigorous method to evaluate the trade-offs, for example, between additional expressway lanes, HOV(High Occupancy Vehicle) lanes or fixed guide way rail transit. Just as the public and stakeholder groups were involved in the development of the plan, this same requirement exists on a more focused basis for the MIS."*

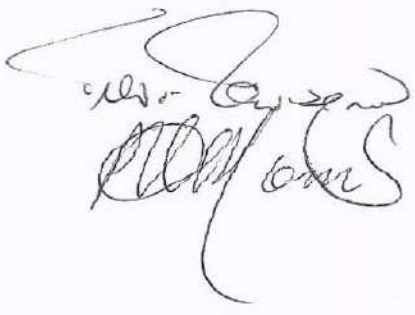
The key element in these studies is that the planners should recognise the importance of having an open process that involves the community in a meaningful way and broadly examines corridor solutions without preconceived biases.

2. **Transportation Sector Improvements should complement proposed land use/ activity patterns**

Travel is a derived demand. As such, while appropriate transportation linkages are essential to support economic activity, it is unlikely that the mere existence of the link would generate the activity. The development of the transportation sector in a region should be timed to coincide with the requirements for movement of people and goods given the spatial development strategies being pursued. This is especially important because much transportation infrastructure is relatively inflexible and represents a significant resource allocation.

3. Investment in Transportation Infrastructure should be staged.

Staging would allow the phased development of the transportation system and minimize the potential for "over-building" the road network at the expense of competing land uses. This is especially so in this case where there are clear competing land uses that are going to be significantly disrupted by the highway. Staging would also allow the highway planners the opportunity to adjust the design parameters based on the actual experiences as the stages are implemented. It would also allow for the use of less costly and disruptive alternatives such as Transit System improvements and Traffic Management Schemes, which would ensure that whatever road improvements are made, are optimized in terms of fulfilling the demands for accessibility and linkages between key human activities. By deciding to build the entire project as a single one, the options are locked in from now into the foreseeable future.



7.0 HYDROLOGY AND HYDRAULICS

7.1 Sectoral Terms of Reference – Hydrology

The HRC is required to undertake the following in relation to hydrology:

- Review all technical reports/data and information of relevance to the project, and the Debe - Mon Desir segment in particular. See reference list for an overview of available material.
- Invite written and oral submissions of the principal parties including the executing agency - National Infrastructure Development Co. (NIDCO); the HRC and other stakeholders.
- Ascertain the veracity of technical issues raised by the respective parties and the consequences/impacts in respect of the Debe to Mon Desir segment, keeping in mind related international best practice.
- Make specific recommendations in the public-interest concerning Hydrology
- Outline proposals that could be of benefit to the project in social, environmental and economic terms.
- Based on the findings, outline recommendations which could inform the process for development projects of this magnitude in the future.

Please note that explanations of the abbreviations can be found at the end of the section on hydrology, immediately after the list of references relevant to this section.

7.1.1 Main Objective

The main objective of this report is to review the reports pertaining to the hydrology and hydraulics for the Debe to Mon Desir Highway extension, provide an assessment of its adequacy for the project, examine the concerns that were raised by the Highway Reroute Movement and to make recommendations for the present highway project as well as future similar infrastructural projects.

7.2 Sector Issues - Hydrology

7.2.1 Background

The Government of the Republic of Trinidad & Tobago has embarked on the extension of the Solomon Hochoy Highway to Point Fortin which is located in the south western area of Trinidad. This highway extension involves several segments, one of which is from Debe to Mon Desir which is the main area of focus of this hydrology review.

The project is located in Hydrometric Areas 7 and 8 (Water Resources Agency), namely South Oropouche and Central West Coast. The terrain is essentially flat with some undulating hills and a considerable portion of wetland with significant depression storage capacity

The proposed Highway Route Alternative A to be implemented between Debe and Mon Desir cuts the eastern side of the South Oropouche Swamp near Puzzle Island and the South Oropouche River. From the mapping exercise undertaken by the Institute of Marine Affairs in 2006, the South Oropouche Swamp is a tidal marsh, mangrove swamp of approximately 3171 hectares. The area referred to as the South Oropouche Swamp includes the Godineau Swamp which is the mangrove swamp along the coastline.

The swamp extends from the Gulf of Paria on the coast to the eastern boundary inland just west of the San Fernando Siparia Erin Road, while the southern boundary extends to just north of the San Francique Road, except for a small area that extends south of the San Francique Road. The South Oropouche swamp is about 50% of the size of the Nariva Swamp and the third largest swamp in the country with the Nariva Swamp (6234 ha) and Caroni Swamp (5611 ha) being larger.

The South Oropouche River drains an area of approximately 438 km^2. The highway crosses flood prone areas in the vicinity of the South Oropouche River, Black Water Channel, Coora River, San Francique Road, Timital Trace, Siparia Road and Thick Village.

Over the years, considerable land use changes and related realignment and diversions of streams would have significantly influenced the hydrologic processes.

The areal extent of the South Oropouche Swamp may have been reduced as a result of legal developments and squatting while the water quality has deteriorated due to anthropogenic activities, such as poor agricultural practices and poor waste disposal practices.

The South Oropouche Swamp, like other swamps, serves to protect against coastal erosion and flooding, filter contaminants in water, support carbon absorption and provide support to a particular ecosystem that has emerged based on the environmental conditions.

From the standpoint of hydrology and hydraulics, the potential negative impacts of the highway route are identified as:

- Increased total local runoff because of larger impervious surfaces;

- blockage by embankments of drainage and sheet flow, which could lead to increased flooding;
- a loss of available water to the swamp either from obstructed flood plain sheet flow and /or other sources of water;
- increase of local flood depth due to reduced locally available space as result of the space requirements of the highway embankment;
- impact of the concentrated of flows through a limited number of crossings; and
- Increased concentrations of water pollution.

A number of reports pertaining to the extension of the Highway from Debe to Mon Desir was reviewed to determine the extent to which the hydrology and hydraulics were addressed in the feasibility design process and the Environmental Impact Assessment.

A list of References relevant to Hydrology, including technical documents, affidavits, TORs is presented at the end of this review.

7.3 The Review

The hydrology review is based on the assessment of several documents (reports, affidavits, CEC) and the results of meetings with the Preliminary Design consultants Trintoplan, representatives of the Highway Reroute Movement and the representatives of the Debe - Penal Regional Corporation.

The notes and observations are represented in the following sections and are followed by a listing of conclusions in Section 4 HRC Summary of Observations and Conclusions.

7.3.1 Notes on Report by Narinesingh (2012)

The report ([5] Sept 2012) prepared by Dr. Pramenath Narinesingh **(PN)** addresses the hydrology and potential impacts on the environment by the proposed highway section between Debe and Mon Desir based on a review of the Environmental Impact Assessment (EIA) report by EcoEngineering ([3] 2009).

In the following, the main points of concern brought forward by Dr P. Narinesingh, in relation to hydrology are presented:

[5] Page 1:

- *There is no detailed study presented in the EIA on the Hydrology or Hydraulics of the*

South Oropouche River Basin

- *Works on the highway should be halted until a detailed full hydrological study is completed, which has to include impacts of any flood mitigation actions on the South Oropouche Swamp and its ecosystem.*

[5] Page 2 – (from [3] EIA Appendix J 6.1.1)

Historically the hydrological regime of the South Oropouche Swamp has been changed extensively to facilitate human needs such as settlements, flood mitigation and agriculture. The channelization of watercourses and construction of embankments have altered the wetland characteristics and by extension influence the present ecology of the area.

The EIA further identifies the following potential impacts:

- *Loss of habitats, mainly tidal marshes*
- *Fragmentation of wetland habitat*
- *Altered hydrological conditions (diversion of watercourses, loss of permeable surface, potential increase of flood depth and frequency)*

[5] Page 5 – (from [3f] EIA Appendix K -IMA Wetland Report)

"It is a natural function that wetlands spread flood water through them and retain flood waters for some time. This allows for the deposition of sediment necessary for the building of the wetlands and the flushing /migration of aquatic life to the ocean".

Previous construction projects such as the Forty Foot Trench, the New Cut Channel, levees and sluice gates in the South Oropouche Swamp area have demonstrated that the engineering solutions focussed on flood control in a wetland environment have negative impacts on the ecology of the wetlands by changing the flood patterns and allowing saltwater intrusion farther into the river system.

[5] Page 7

PN: *"The EIA TOR recommends that consideration be given to the developments triggered by the highway and the impact on the ecological sensitive areas. This is not sufficiently addressed in the EIA".*

[5] Page 8

PN: *Maintenance of peak flows as a basis for the design of drains is not appropriate for the analysis of sheet flows necessary for the preservation of the hydrological system. Sheet flow analysis on location, depth, duration and timing is essential for the preservation and sustenance of the native ecology of the swamp and its connected hydrological environments."*

The Highway Review Committee (HRC) noted that the preliminary design is based on limited assessment of the sheet flows and their function for the ecology of the wetlands. This is considered normal practice for preliminary design. However, the final design is required to include a detailed analysis of the sheet flow at each location as part of the development of the Water Management Plan and the Stormwater Management Plan. Both of these plans together with a detailed Sedimentation Management Plan are required by the CEC and are part of Best Practices in the development and implementation of a highway,

This detailed analysis may result in changes to the proposed preliminary design to mitigate any unacceptable negative impacts according to the highway design standards developed by AASHTO and the requirements of the Drainage Division (MOEWR). These changes could for example include construction of a causeway to cross a flood plain instead of flood relief culverts or construction of a series of ponds along the alignment which act as retention basins as well as wetland preservation measures.

7.3.1 EIA Review

The Environmental Impact Assessment Report ([3[EcoEngineering, 2009) was reviewed with respect to issues related to hydrology and hydraulics.

In the executive summary it was noted that the required environmental approvals mentioned in the table does not provide a complete overview. Notably absent in relation to hydrology, were approvals for:

- Stormwater Management Plan (by Drainage Division and Regional Corporations)
- Water Management Plan (by WRA, Drainage Division and Regional Corporations)
- Sedimentation and Erosion Management Plan (by WRA, Drainage Division and EMA)

These are supplementary plans to the Environmental Management Plan (EMP). The Environmental Management Plan (EMP) needs to be approved before ANY construction activities can take place. This includes the preparation, construction and operational phase of the highway project.

A large segment of the hydrology and environmental concerns have not been sufficiently addressed in the EIA as only a conceptual/preliminary design was available. These are therefore to be addressed in the detailed design phase and proposed mitigation measures which are to be reviewed and approved before construction can take place. This approval process requires including stakeholder consultation since the detailed design may significantly alter the preliminary design and impact on several stakeholders.

This consultation and approval process may further alter the designs, delay the construction and subsequently change the implementation and costing. This is a significant negative aspect of the Design-Build approach for a highway project where detailed designs are not available at the

tendering phase and when the Environmental Impact Assessment is undertaken

The HRC notes (see environmental review section) the following comments from stakeholders involved in the review of the EIA:

Drainage Division (Ministry of Environment and Water Resources, (formerly part of MOWT))

Concerns expressed:

- Lack of proper analysis of the role of existing drains in the right of way of the proposed Highway.
- Lack of proper analysis of the effect of surrounding wetland (Godineau Swamp and Oropouche Lagoon) in its role as a 'natural detention system'
- The effect of the project on slope stability in the area is not adequately addressed
- The EIA does not indicate the return period used in devising drainage nor does it make recommendations.

Water Resources Agency

Concerns expressed by WRA:

- The lack of a "comprehensive evaluation of this wetland"
- Figure 4-5 in the EIA showing groundwater has a "fundamental error" showing the Durham and Sum Sum sands within the study area rather than the Morne L'Enfer formation.

Forestry Division

Concerns expressed:

- Possible changes in hydrology within the neighbouring (Siparia) Forest Reserve
- The need for mitigation measures to protect against scouring and erosion along embankments
- The need for functional detention ponds

Meteorological Office

Concerns expressed:

- Incomplete mapping of flood prone and landslip areas e.g. Debe is a flood prone area that was not mapped in fig 4-2. Bunsee and Banwaree Trace should have been mapped as areas with unstable slopes.
- Need for mitigation measures to deal with leveling and cutting of slopes
- A specific concern was stated about a "vegetative gully system" along the Fyzabad Main Road opposite the Pepper Village Government School. The gully as an existing flood control system will be removed; what is the impact?

EIA Review and Assessment Report (RAR)-Reference TOR Section 2.5

The following are also noted from the EIA RAR:

- There was no justification given for correlating the peak flow periods to a rainfall event (this should have stated 'return period) e.g. 1:25 or 1:50 rainfall event. Only single 24-hour rainfall events were considered while reality shows that multiple-day rainfall events cause the most severe flood events, especially for the South Oropouche River which drains a large catchment (438 km2).
- The EIA does not provide calculations to justify the size of relief culverts and "as an adequate measure to control sheet flow". Detailed design requires detailed assessment of the sheet flow patterns, the function of the sheet flows and the impact of concentrating flows at flood relief crossings. However, the EIA is based on preliminary designs, which generally do not provide such detailed analysis.
- Further information on integration of the Highway drainage system with natural and artificial drainage systems in the area is required.
- There is a need to identify streams used for abstraction of water, abstraction points, and duration of abstraction. This is also a condition of the CEC and requires approval by WRA...
- Despite identification of water in most rivers in the study areas as polluted "no remediation measures were considered to ensure that polluted water is not to be used as a dust control measure".

The Highway Review Committee noted that a quantitative surface and groundwater hydrology model and study of the wetland as a hydrodynamic system should be done as part of Best Practices, which are required by the CEC, before an informed decision can made as to whether this segment of highway should proceed as proposed or not.
It should also be noted that the EIA in fact cited the wrong aquifers in the description of the environment, referring to the Durham and Sum Sum sands which formations that exist in Central Trinidad, rather than the Morne L'Enfer sands which are part of the study area. This was flagged by the Water Resources Agency in its review comments, but NOT by the EMA in its Review and Assessment Report (RAR)

The lack of a hydrological study to assist with decision-making was highlighted in one way or another by most members of the EIA review panel but was not included in the RAR. The EMA should have made this issue a 'showstopper' in its decision to grant or deny a CEC and it did not.

Hydraulic Study

While the EIA describes the drains to be constructed and expected peak flows, it does not include the return period and calculations used to develop the drainage plan. The Drainage Division flagged this in the EIA review and the EMA described this deficiency in its Review and Assessment Report. The responsibility for this seems to be shifted towards the CEC conditions, which require a detailed Water Management Plan and a detailed Stormwater Management Plan.

It seems unusual to grant a CEC without the detailed plans and designs but this is the result of an (preliminary) EIA and a Design-Build Tender based on preliminary designs, which do not include detailed stormwater designs. This practice should not be accepted by the EMA.

Wetland Report [3f] *Appendix K - IMA Wetland Report*

One of the objectives of the Wetlands Report prepared by the Institute of Marine Affairs is a description of the vegetation communities and hydrologic conditions that exist at the proposed site for construction of the highway. However, the hydrologic conditions did not include anything on the existing hydrology as it pertains to climate/rainfall, the water quality, sedimentation, flooding, etc.

Even though a listing is made of the potential impacts of the highway construction no attempts are made for a preliminary assessment of these impacts and the required mitigation measures.

No Sedimentation Management Plan for the South Oropouche River basin is available; however this is considered part of Best Practices and an essential part of an Integrated Watershed Management Study and an integral part of a Wetland Management Plan. This is because the characteristics of the flood plains, wetlands and swamps are strongly influenced by the sediment deposits in the watercourses and those as result of overflow onto the flood plains.

The main value of the IMA Wetland Report is considered the description of the wetlands and the delineation of the South Oropouche Swamp. However, a more comprehensive analysis of the impacts of the highway project is expected to support the overall EIA.

It was further expected that the Wetland Report would at least identify recommendations to address the issues related to the potential impact on the hydrology and ecology of the South Oropouche Swamp but this was not the case.

7.3.2 Notes and Questions Resulting From the CEC Review:

The following observations were made during review of the CEC 1372/2006, which was granted on April 20, 2010, and which directly or indirectly influence the approach to hydrology issues in the design, construction and operation of the highway section between Debe and Mon-Desir.

- The CEC 1372/2006 was granted in April 2010 and requires extension before April 2013.
- Before any construction can take place, including site preparations, it is a MUST that all **conditions of the CECs** are fulfilled. This includes submission of plans to EMA and approvals by different stakeholders (Drainage Division, Regional Corporations, Town & Country, etc…).

(I) General Conditions (GC)

- GC (c) and (d): This Certificate shall ONLY validate activities included in the scope of works submitted to the EMA, in accordance with the application for this CEC. Modifications to the scope MUST BE submitted to, and approved by EMA, prior to the start of the works related to such modifications.

- GC (e): Applicant is required to submit a source application to the EMA at least 45 days prior to the release of ANY water pollutant. Examples of effluent that may contain water pollutants include stormwater, release from settling/detention ponds, facility wash-down runoff, etc...

(II) Mitigation Measures (MM)

Communication Plan

- MM (a): Applicant shall conduct a well-published public consultation/interview at least 4 weeks before start of works in order to identify and conduct face-to-face interviews with ALL potentially affected stakeholders regarding the project. Within 2 weeks following these interviews the Applicant shall establish a Working Group with representatives of stakeholders throughout the lifespan of the project until at least 18 months after the start of the operation of the highway. The Applicant shall appoint a Community Relation Officer (CRO) out of the Working Group and develop a detailed Communication Plan. This plan shall consider factors, inclusive of, but not limited to: (4) Plans associated with the project such as: **Stormwater Management Plan (SMP)** and **Water Management Plan (WMP).**

It is noted by the HRC that since the Communication Plan has to be submitted two months prior to any site activities, these hydrology related plans (the SMP and WMP) also must be submitted and approved by the EMA and the relevant approval entities such as Drainage Division and Regional Corporations, **prior to the start of any works** related to this project. Any concerns by other stakeholders related to issues addressed by these plans can be put forward via the Working Group, which in turn will inform the EMA. The Communication Plan needs to be approved by the EMA and the Applicant shall ensure that activities do not proceed until the outstanding issues are resolved and receive approval from the EMA.

Pre-Construction

- MM (d): The Applicant shall ensure that its contractors adhere to the conditions of this CEC 1372/2006.

  This means that the Applicant is responsible for ensuring that all the CEC conditions are met by any (sub-) contractor and (sub-) consultant related to this project, which includes the submission to the EMA of the finalized scope of works and detailed scheduling two months prior to the commencement of ALL site activities.

Site Preparation and Construction

- MM (l): **Temporary drainage** shall be designed to prevent runoff of silted material in surrounding areas and/or watercourses

- MM (m): **All temporary and permanent drainage shall be designed to ensure that there is no net increase in surface runoff from the pre-development to the post-development phase.**

ALL the temporary and permanent drainage designs shall be approved by the Regional Corporations and the Drainage Division prior to commencement of site activities.

It is expected that all these drainage designs are part of the Stormwater Management plan which addresses the stormwater management both during construction phase and operational phase. Stakeholders, other than the approval entities, are able to review and comment on these designs through the Working Group.

- MM (n): Drainage network is to be adequately designed and maintained to prevent unnecessary accumulation of water at the other locations on the site and to retain the maximum expected runoff from the site, hereby ensuring that there is no net increase in peak runoff (see MM (m) above).

- MM (o): The Applicant shall ensure that existing stormwater drains are protected by the installation of suitable filtering devices to prevent pollutants, such as sediments, from entering these systems as well as to ensure **that the stormwater runoff does not contribute to any flooding events and additionally retains the stormwater runoff in the event of flood events.**

This is expected to address the concerns brought forward by HRM concerning the impact of storm water runoff from the highway on surrounding areas in respect of sediment and increase of flooding. **However, it has to be stressed that the stormwater designs are to be made available to the approving agencies, the EMA and the Working Group prior to ALL site activities**, according to the CEC conditions, to ensure that proper review can be done in a timely manner and that the subsequent required adjustments to the designs can be implemented before construction activities commence.

- MM (q): The Applicant is responsible for ensuring that sediment-retention measures are utilized prior and during any earthworks to minimize the amount of sediment migrating off-site.

(III) Other Terms and Conditions (OTAC)

- OTAC (a) the highway design, including hydrology and hydraulics, **shall comply with the latest internationally accepted codes and standards such as the American Association of State Highway and Transportations Officials (AASHTO)** and in consultation and compliance with the requirements of the Drainage Division (MOEWR).

The AASHTO design codes for Highway Design include hydrology and hydraulic design standards for e.g. the design of stormwater systems, river crossings, flood relief culverts and crossings of flood plains and wetlands. Following these design codes may result in significant changes to the preliminary designs and require detailed reviews and approvals of relevant entities. It is expected that once this code, and other conditions of the CEC, are followed the identified potentially negative impacts will be sufficiently addressed and mitigated. It is the responsibility of the CEC Applicant that the Design Engineer follows these design codes. Potential delays and/or resulting extra costs as a result of significant design changes will have to be agreed upon between the Applicant (the Client) and the Design-Build Contractor.

- OTAC (b) the design, layout, scale and components of the development shall be **subject to the approval of relevant authorities**, such as the Drainage Division, MOWI, WRA, WASA, and the Regional Corporations.

This includes review and approval of all the detailed designs and plans such as the Stormwater Management Plan and the Water Management Plan, which are required as part of the conditions of this CEC.

- OTAC (c) **Submittal of finalized scope and detailed schedule at least two months PRIOR to ALL site activities**.

Considering the approvals which are required, it is expected that the period between detailed design and start of site activities will be significantly greater than two months. They have to be publicly available via EMA as those are impacting stakeholders and are likely to be different from the preliminary scope and schedule on which the EIA and CEC was based.

- OTAC (m): **A CEC is required for the catchment, abstraction or treatment for distribution of potable or process water**.

- OTAC (n): **Permission has to be obtained from WRA for abstraction** of water from the watercourses.

7.3.2.1 *General conclusions with respect to the CEC*

It is noted that the Applicant for this CEC is the Programme Implementation Unit, Highway Division, Ministry of Works and Infrastructure. The ultimate responsibility for the fulfilment of the conditions of this CEC is therefore with this Applicant. It is not clear how this responsibility has been addressed in its agreement with NIDCO, which is the implementation agency for this project, and its contract with the Engineer's representative (AECOM), which is responsible for e.g. managing the contract, quality control and checking the designs.

It is the opinion of the Highway Review Committee that many concerns, related to hydrology, brought forward by the Highway Reroute Movement are a logical result of available information based on the preliminary designs and the Environmental Impact Assessment, which were based on the results of the Feasibility Study. The CEC is also based on the information from the Feasibility Study and EIA and has not reviewed the detailed designs and construction methodologies. The result is that this CEC has extensive conditions to be met in addressing this lack of detail at the time of the application. A significant amount of work has to done prior to commencement of ANY site activities.

The Committee has been advised that no drainage approvals have been granted by the Drainage Division (MOEWR).

As a result the detailed design, including the many plans such as the Storm water Management Plan, is still subject to approvals by the relevant state entities **before ANY site activities can start**. This must also involve stakeholder consultation and feedback via the established Working Group which has to be formed as part of the CEC conditions. This approval process has to be done in an appropriate manner and is expected to take significant time as is considered normal for such a large project.

This strongly begs the question if Design-Build is the appropriate manner to approach the implementation of (large) infrastructural projects. A major risk involved in this approach is that the construction is significantly delayed as it is depending on the approvals of the detailed designs and plans and involves stakeholder consultation and numerous approval agencies.

7.3.3 Review of Hydrologic and Hydraulic Engineering Feasibility Study, 2007

The objective of the *Hydrologic and Hydraulic Engineering Feasibility Study* undertaken by Dr. Shrivastava ([2] LEA Trintoplan January 2006) was to identify the streams between Debe and the Southern Main Road segment of the Solomon Hochoy Highway Extension Project, determine a preliminary estimate of the 50-year design peak flows for the streams at the proposed points of stream/highway intersection where bridges and culverts may be required and to recommend a methodology for the site-specific hydraulic design of bridge(s) during the detailed design phase.

The report by Dr. Shrivastava provides general guidelines for the hydraulic designs of the crossings, including the method for flow estimation, the sizing of the waterway opening and the determination of the scour depth at the abutments and channel below the bridges. The report also included estimates of the 50 year design peak flows for nine (9) highway/river crossings from Southern Main Road to Siparia Road and nine (9) highway/river crossings from Siparia to Debe.

The Highway Review Committee considers the methodologies described in this report are accepted practice for the hydrologic analyses and hydraulic designs for preliminary design but require review for the detailed design phase.

The final *"River Crossings"* reports by Dr. Cooper ([2] LEA Trintoplan, Oct 2007) provide detailed hydraulic requirements for the highway/river crossings including adequacy of the proposed bridge openings, estimates of scour depths at abutments and channel below bridges, and suggestions for the protection of the abutments from scour. The detailed design of the six river crossings undertaken by Dr. Cooper are the Silver Stream crossing, the Tarouba river crossing, the Guapo river crossing, the Oropouche river crossing and the Godineau River and Mosquito Creek Crossings. Of these five crossings only the Oropouche river crossing is located between Siparia and Debe.

For the hydraulic design, Dr Cooper undertook the hydrologic analyses required to estimate the 50-year design peak flows and for the scour depth estimation which normally must be considered under conditions of at least the 100-year design peak flows. The latter were also determined utilizing the same methodology.

The two main hydrologic design criteria used are 1) a return period of 50 years for the design of bridges and culverts and 2) a design life of 50 years for the project. The latter is required for extrapolating present peak flows and for taking into account the likely impacts of climate change.

Estimation of peak flows

The 50 year peak design flows were estimated using the National Resources Conservation Service (NRCS) triangular hydrograph method which is normal acceptable practice. It was considered necessary to adjust the estimated design peak flows for storage attenuation, since a considerable part of the catchments is low lying and has significant depression storage. The analyses undertaken did not include a multiple-day rainfall event with subsequent flood event with the consequence that the peak flows could be seriously underestimated. The committee believes that this type of multiple-day rainfall event should be considered in the design flood event which will need to be addressed in the detailed design analyses.

For the estimation of the design storm depth for the highway/river crossings in the feasibility study undertaken by Shrivastava, the Rainfall Intensity Duration Frequency (IDF) Curves for Palmist (Station 7:9) and Siparia (Station 7:1) from the Water Resources Agency 1995 were used, and the greater values of the rainfall intensities were used. However, in the hydraulic designs,

only the Palmiste IDF curves were used to determine the rainfall intensities. The HRC recommends that updated IDF curves be used for the detailed design phase.

Anticipated changes in land use and climate likely to occur in the future were also taken into consideration by extrapolating the estimated 50-year design peak flows. The total increase in urbanization by 2055 is estimated to be 26% and the rainfall intensities are expected to increase by approximately 2.5% in Trinidad during the next 50 years. The Highway Review Committee notes that significant land use changes are anticipated as a result of the construction of the highway even if this is not planned.

The Regional Plans were not available at that time therefore the projected land use changes following from these reports have not been incorporated. These should be included in the Detailed Design phase. As the highway improves access to a large area, significant land use changes can be expected and these development scenarios need to be included in runoff analysis scenarios. The estimated increase in urbanization should therefore be reviewed in the detailed design as it may be significantly higher than estimated.

Hydraulic Design of Bridges

The two main components that were determined in the hydraulic design of the bridges are the bridge waterway and the scour depth. As part of the proper design of the bridge waterway, the top water surface width at the design peak flow and the freeboard were estimated. The necessity for freeboard is to permit the safe passage of floating debris and to include a factor of safety for the passage of flood flows greater than the estimated design peak flow.

The hydraulic analysis (Cooper, 2007) for the river crossings is based on the methodology recommended by Shrivastava (2005) for designing hydraulic structures required for the highway crossing watercourses.

Hydraulic considerations for structures at highway crossings are required to minimize the risk of flooding and to prevent their collapse due to foundation undermining, failure from hydrodynamic forces or impact by debris. In the hydraulic analysis, peak flow, freeboard and scour depth are determined.

The following design assumptions and approaches were made/used:

- The peak flows for the 50-year flood and the 100-year flood were determined with the 100-year peak flow being estimated for determination of the scour depth.
- The NRCS procedure was used for estimation of the peak flow.
- An area reduction factor of 0.2 was applied to the daily rainfall to account for the spatial variability over the large catchment.
- A factor of 1.1 was applied to the rainfall to account for uncertainties in the current

rainfall as the rainfall curve for the rainfall station was developed using a very dated data set (1947 to 1967).

- A storage attenuation factor of 0.7 was use for the South Oropouche River crossing

The peak flow estimation is sensitive to the formula chosen for determining the time of concentration. Hence the Bransby-Williams empirical equation developed for rural flat catchments was chosen to estimate the time of concentration.

The Muskingum method was used for routing the hydrographs generated in the upper reaches through reaches connected to the outlet at Godineau River Bridge at the coastline.

A hydraulic analysis was performed on a reach of the River in the vicinity of the proposed crossing to determine the freeboard. The scour depth at a bridge is the net effect of the scour due to:

a) the degradation and aggradation of the stream;
b) local scour due to turbulent flow at the abutments and piers;
c) contraction scour due to increased flow intensities at the constricted waterway through the bridge; and perhaps
d) Effects of migration of the stream.

The three components comprising the effect of scour were determined.

Two aspects that were considered regarding the water level in the design of the highway profile are that:

(i) the lowest elevation of the highway as it traverses the floodplain should be above the expected flood water elevation, with some additional freeboard added; and
(ii) The proposed highway should not increase the flood water elevations, if the design flood were to occur under existing conditions.

Drainage – Box culverts and surface drains were sized based on rainfall intensities and peak flow estimates to accommodate the expected increase in runoff.

The Highway Review Committee considers the approach and the design assumptions to be acceptable for preliminary design for the crossings of the main watercourses. Serious consideration should be given in the detailed design analysis to review the design standards and the impact of the availability and reliability of the hydrological data. Also to be reviewed is the correlation between the design flow and the relation to rainfall events as it is the opinion of the Committee that a 50-year 24-hour rainfall event causes a flood event with a return period which is smaller than 50 years.

The influence of the hydrological data and analysis on the costs of the highway are considered to be significant, since the results determine the sizing of the structure for all the river crossings, the required levels of the highway embankments through the flood plains (and therefore required fill)

and the design of the stormwater system. A sensitivity analysis should be part of a value engineering exercise and result in recommendations for the detailed final designs.

Meeting with Trintoplan – JAN 9th, 2013

On January 9th, a meeting took place between the HRC and Trintoplan at their offices. The following notes were made with respect to hydrology:

Trintoplan stated that the hydrology (location of the rivers and wetlands, angle of crossings, etc...) had no major impact on the determination of the alignment.

At the time of preliminary design Trintoplan was informed that an Integrated River Basin Study was about to commence for the South Oropouche River Basin. This was expected to inform the detailed design of the highway and the detailed assessment of the hydrology and hydraulics.

As there was very little information available from the Drainage Divison at the time, and recognizing that several stretches of the alignment are prone to flooding, it was decided to design in such a way as to avoid or minimize the impact on flooding. This was done by ensuring all culvert soffits were above ground level, by implementation of flood relief culverts at low points between regular culvert crossings and sizing them based on maintenance considerations.

Trintoplan indicated that according to their analysis the tidal influence would reach Penal on the New Cut Channel, but would not reach the SS Erin Road.

Trintoplan indicated that design flows were based on anticipated flows from upstream; assuming that present constriction upstream may be removed in the future. This is generally a conservative approach to determine the design peak flows, and detailed design phase this will need to be further investigated and assessed. The South Oropouche River crossing was designed assuming no constriction downstream.

The recommendations by Trintoplan for the Detailed Design phase included:

- Assess the need for additional flood relief culverts to deal with sheet flow.
- Include the back water effects caused by downstream bridges, such as the Silver Bridge, on the capacity upstream
- Consider re-alignment of several water courses as they approach the highway in order to shorten the crossing and subsequently reduce downstream velocities and subsequent scour.
- Check the downstream velocities to implement energy dissipation mechanisms as part of the erosion control management
- Allow for wider floodplain downstream by avoiding embankments along the water course and allow the water to spread.
- The development by the Drainage Division of national guidelines for the design of hydraulic structures, in order to obtain a more consistent approach country-wide.
- Trintoplan would, in hindsight, give greater attention to analysis of sheet flows and

assessment of the impact of the quality of the limited available hydrological data

7.4 Summary of Observations

It is noted that the historic channelization and embankment of watercourses in the South Oropouche Swamp has considerably eliminated the natural meandering character of the lower reaches of the watercourses and therefore altered the characteristics of the wetland system of the South Oropouche Swamp.

The highway crosses rivers and wetland areas which are considered part of the South Oropouche Swamp. It is observed that the characteristics of these wetlands (function, connectivity, ecology, storage and drainage) and the potential impact of the highway on these characteristics is not sufficiently addressed in the preliminary design report and the EIA and therefore require detailed analyses in the detailed design phase.

As part of Best Practices, required by the CEC, an Integrated Watershed Management Plan for the South Oropouche River Basin is required to assess the impact of alterations to the river and drainage system and develop a Wetland Management Plan for the South Oropouche Swamp. This would include the potential impact of any infrastructure and developments including the proposed highway and identify required mitigation measures.

It is noted that the preliminary design is based on a limited assessment of the sheet flows during flood events and their function for the ecology of the wetlands. The final design is required to include a detailed analysis of the sheet flow as part of the development of the Water Management Plan (part of the CEC conditions). The analysis may potentially result in significant changes to the proposed preliminary design to mitigate any unacceptable negative impacts. These could include e.g. construction of a causeway to cross flood plains instead of flood relief culverts and/or the construction of ponds along the alignment which act as retention basins as well as wetland preservation measures.

Any large infrastructural and/or development project crossing a river and flood plain should include a dam break analysis of any reservoir dam upstream in order to assess the impact of the project and to update the emergency response plan. In this case this would include Moora Dam, which is approximately 4 km upstream of the highway crossing of the Coora River. This impact assessment should not halt the project, however it should have been included in the CEC conditions and can be carried out while the project is implemented.

The natural character of the South Oropouche River Basin is such that large areas are inundated on a regular seasonal basis and therefore benefit from deposits of sediment. Prevention of overflow from the rivers, due to embankments or blockage of flows by for example infrastructure (roads, highways), has an impact on the natural character and development of these flood plains and wetlands. It is therefore essential that a Sediment Management Plan (SMP) is developed as part of the Integrated Watershed Management Study for the South Oropouche River Basin. This SMP will be instrumental in assessing the

impacts of any developments, including the highway, on the sediment balance in the watercourses, the flood plains and the wetlands.

Some of the areas, where the highway is crossing, are agricultural lands which are under water and are served with a network of internal small drains. Inundation takes place from local rainfall which is impeded from draining towards the watercourses due to low gradients and high water levels in the courses. The construction of the highway may actually include the risk that the drainage along the highway might improve drainage of the surrounding areas and therefore change the character of these areas. This could potentially be both positive for agriculture as well as negative for natural wetlands. It is noted that most of the areas along the route are in agricultural use.
Noticeably lacking was an assessment of impacts on the groundwater and the impacts of groundwater on the river basin in particular the wetlands in terms of both quantity and quality.

A concern expressed by PN (HRM) is that the highway may trigger development which will have an impact on the hydrologic character of the area. The HRC noted that this has not been sufficiently addressed in the EIA and in the preliminary design. The assumption of 26% increase in urbanization need to be re-evaluated in the detailed design phase considering the impact on the runoff and resulting design flows.

There was no justification given for correlating the peak flow periods to a rainfall event (this should have stated 'return period) e.g. 1:25 or 1:50 rainfall event. Only return periods of single 24-hour rainfall events were considered which are not equivalent to flood events with the same return periods. Reality shows that the most severe flood events are multiple-day rainfall events. Detailed design requires much more detailed analysis.

While the EIA describes the drains to be constructed and expected peak flows, it does not include the return period and calculations used to develop the drainage (stormwater) plan. The Drainage Division flagged this in the EIA review and the EMA described this deficiency in its Review and Assessment Report. The responsibility for this seems to have been shifted towards the CEC conditions, which require a detailed Water Management Plan and a detailed Stormwater Management Plan.
It is unusual to grant a CEC without the detailed plans and designs but this is the result of an approach with an (preliminary) EIA and a Design-Build Tender based on preliminary designs, which do not include detailed stormwater designs. This practice should not be accepted by the EMA.

Trintoplan indicated that many engineering judgements had to be made due to the lack of data or the poor quality of the available data. Since the highway is built in a relatively flat area, small changes in topography and calculated peak water levels would have significant influence on the flows in the watercourses and the resulting flood patterns on the flood plains and in the wetlands. Detailed topographic data through LIDAR is considered a must for detailed design Best Practices. The present resulting conservative approach may result in significant extra costs for the construction of the structures and embankments of the highway.

The final design may significantly differ from the preliminary design however it is not assessed in the Environmental Impact Assessment nor is it subject to publicly available reviews and approvals. No public

information is available on the final designs, which would be normal in case of an EIA based on the final design. It therefore it does not stand up to public scrutiny.

The Highway Review Committee believes that the preliminary design sufficiently addresses the concerns expressed for hydrology; however the Environmental Impact Assessment should have included more detailed assessment of the impacts on the wetland system and identification and assessment of mitigation measures. The available information is not sufficient to make a judgement on the final designs and the impact on the wetlands.

The Committee expects, after analyses of the proposed alignment, that the concerns put forward by the Highway Reroute Movement concerning hydrology, will be properly addressed in the detailed design phase using Best Practices and design standards such as AASHTO, to minimize the impact on the hydrology. HRC also acknowledges that those concerns were not sufficiently addressed at the preliminary design stage and in the EIA.

7.5 General Conclusions and Recommendations

The Hydrology Report ([2], 2007), as part of the Feasibility Study, fulfilled the objectives of determining the hydrological information required as input to the hydraulics for bridge and culvert preliminary designs at the points of intersection of the highway and river crossings. However, the analyses are not carried out in the context of an Integrated Watershed Management Plan for the South Oropouche River basin. This study, which has been in the planning since 2006, but has still not commenced, is considered to be part of the use of Best Practices for such a river basin and nationally important highway project.

Groundwater impact assessment was not a focus for this project at feasibility stage but is an important consideration in the context of integrated watershed management, the assessment of the impacts of the Highway infrastructure and the impacts on the characteristics of the wetlands. The EIA did not address this sufficiently.

Projects of this nature must be undertaken in a more comprehensive and holistic manner. The Hydrology of a Highway project or any type of project that has such a great environmental impact given the types of land uses and impacts in the area, requires an Integrated Watershed Management Plan.

Effective stakeholder participation is required in the decision making process including discussing all hydrology concerns. What has transpired with this project may not have occurred if an appropriate process for incorporating stakeholder involvement was applied. From interaction with officials of the Regional Corporation it followed that they are not sufficiently aware of their responsibilities concerning reviews and approvals.

There is need for quality control in the EIA process for ensuring that relevant and appropriate comments provided by reviewing organizations are incorporated – apparently not all comments from reviewing

organizations were addressed by the EMA at the required level of detail.

Considering the required detailed design studies and high investment in this infrastructural project it is astonishing that the quality of the available hydrological data is not at the required levels and therefore is considered to have a significant impact on the implementation risks, the (conservative) designs and subsequently increased implementation time & costs.

More updated maps e.g. detailed topographic maps to do 2d analysis are needed. LIDAR topographical data is an imperative for a river basin with such extensive flood plains and wetland as the South Oropouche River Basin. Small changes in ground levels determine the drainage, the sheet flow patterns and the sedimentation for extensive areas and detailed topographical data is therefore a critical requirement to achieve the required level of assessment of the hydrology of such areas and subsequently the sensitivity of the ecology and agriculture to changes.

Updated land use maps are required and development projections based on a National Physical Plan or at least based on the Regional Development Plans should be included. The estimated urbanization increase of 26% by the year of 2055, which is used in the determination of impervious surfaces for the hydrological calculations, has to be revisited and done in the context of several realistic development scenarios for different areas in the watershed.

More reliable hydrologic data and information in terms of rainfall, rainfall distribution and intensity duration frequency curves, and stream flow data are needed, therefore an improved water resources monitoring system is required. This data gathering exercise is only a fraction of the extra cost that can result from a conservative approach to design due to a lack of proper data. Hence a proper hydrological and water quality monitoring system for this river basin, including the wetland, needs to be established.
The EMA should have insisted in the implementation of a proper hydrological and water quality data monitoring programme as a condition of the CEC and in advance of the implementation of the highway.

Rainfall correction factors are based on engineering judgements. However they should be based on a consistent national approach. This also applies to the proposed effect of Climate Change which should follow from a National Policy, regarding the impact of Climate Change on sea level rise and rainfall patterns, which is not present at this moment.

Lack of Stormwater Design Standards (Drainage Code) in Trinidad & Tobago is a recurrent problem for all drainage and river management plans and designs. This leads to inconsistent approach between similar projects across the country depending on the individual consultants involved as well as the individual representatives of the Drainage Division who are responsible for reviews and approvals.

Flooding is addressed in flood disaster preparedness and mitigation plans and should include the assessment of dam break analysis for reservoirs, such as the Moora Dam, in the various catchments.

Considering the observations and conclusions in this hydrology review report, it is clear that there are a number of risks in granting a CEC based on a preliminary EIA which is based on a preliminary design.

The Design-Build approach is considered suitable for well-defined projects with a clearly defined scope of works and list of requirements e.g. buildings. In the case of infrastructural works, such as highways, Design-Build should only be applied in cases where detailed designs and plans are already available at Tendering Phase, and the design tasks will be limited mainly to value engineering.

The available preliminary design, and the EIA which is based on this, are not sufficiently detailed to assess the impacts of the highway and the identification and design of the required mitigation measures. The consequence is that identified mitigation measures during the detailed design may not be in direct interest of the D-B contractor as it may potentially lead to delays and extra costs. Any proposed changes to the original scope are also expected to naturally encounter "approval resistance" of the Client since it will tend to avoid having to explain any delays and extra costs to Cabinet. This tendency is considered in conflict with the requirement to use Best Practices, as indicated in the conditions of the CEC.

The Committee therefore concludes that the Design-Build approach for this infrastructural project should not have been used as the implementation risks are in direct conflict with Best Practices and therefore not in the interest of the people of Trinidad and Tobago. It is doubtful that these concerns can be addressed sufficiently via the conditions of the CEC.

7.6 Main Conclusions for the Present Project

It is the opinion of the Highway Review Committee that many concerns related to hydrology that were brought forward by the Highway Reroute Movement, are a logical result of the limited available information based on the preliminary designs and the Environmental Impact Assessment, which were both based on the results of the Feasibility Study.

The CEC is also based on the same information from the Feasibility Study and the EIA and has not included reviews of the detailed designs, different plans and construction methodologies. The result is that this CEC has extensive conditions which directly and indirectly address this lack of detail at the time of the application. A significant amount of work still has to be carried out to obtain approvals prior to commencement of ANY site activities.

The detailed design, including the many required plans such as the Stormwater Management Plan, is subject to approvals by the relevant state entities before any site activities can start. This process also involves stakeholder consultation and feedback via the Working Group which has to be formed as part of the CEC conditions. This approval process has to be done in an appropriate manner and can take significant time which is considered normal for such a large project.

The Design-Build approach for the implementation of (large) infrastructural projects includes a major risk with respect to construction delays as it is dependent on the approvals of the detailed designs and required plans by numerous approval agencies and the involvement of stakeholder consultation.

The AASHTO design codes for Highway Design include hydrology and hydraulic design standards for e.g. the design of stormwater systems, river crossings, flood relief culverts and crossings of flood plains and wetlands. Following these design codes may result in significant changes to the preliminary designs

and require detailed reviews and approvals of relevant entities. It is expected by the Highway Review Committee that once this code and other conditions of the CEC are followed, that identified potentially negative impacts would be sufficiently addressed and mitigated. It is the responsibility of the CEC Applicant that the Design Engineer follows these design codes. Potential delays and/or resulting extra costs as a result of significant design changes will have to be agreed upon between the Applicant (the Highway Division, MOWI) and the Design-Build Contractor.

A large infrastructural project like this highway should not be undertaken without an Integrated Watershed Management Plan, which appropriately addresses the different interest of different stakeholders and provides a balanced approach to the water resources management and stormwater management in the watershed. Only in the context of an overall Integrated Watershed Management Plan can a proper hydrological assessment be carried out as part of the EIA and as support for the assessment of different routes and subsequently the detailed designs.

The implementation of the highway requires that all the approvals are obtained and all conditions of the CEC are met. This includes the submission of the approved detailed designs and plans such as the Storm Water Management Plan and the Water Management Plan. As the detailed design may considerably differ from the preliminary design, these should be available for public stakeholder consultation and they require review by the appropriate approval agencies.

The Highway Review Committee has been advised that the Drainage Division (MOEWR) has not issued any formal approvals for the temporary and final drainage designs (e.g. river crossings, stormwater systems and erosion control). The start of construction activities are subject to having these approvals in place (per each CEC).

Further, the legally required compliance by the Applicant to the CEC conditions is, at present, not sufficiently checked by the EMA which has the legal obligation under the Environmental Management Act.

7.7 Main Conclusions for Future Similar Projects

All large infrastructural projects should be designed in the context of an Integrated Watershed Management Plan considering the potential impacts on the hydrology of the whole watershed.

Appropriate monitoring systems must be established to allow designs to be based on reliable data and information.

It is the opinion of the Highway Review Committee that Design-Build approach is not the appropriate implementation strategy for future (large) infrastructural projects. Main reasons are:

- Approvals are generally dependent on detailed designs, which may cause significant delays and extra costs due to design changes compared to the tendered design.

- Large infrastructural projects are of national importance, require significant investments and must involve proper stakeholder participation, including in the detailed design phase, to ensure the required quality and adequate attention to the interests of different stakeholders

- The final Environmental Impact Assessment should not be based on preliminary design but on detailed design, and a final CEC should not be granted with so many outstanding issues.

- At most a preliminary CEC can be granted based on preliminary designs, which will not guarantee that a final CEC will be granted for the implementation of the project since final approval will be subject to the results of the detailed analysis, detailed designs, final Environmental Impact Assessment and approval of proposed mitigation measures.

- A large part of detailed hydrology and hydraulic designs are dependent on the availability of detailed data, which is often not available at feasibility and preliminary design phase. This also applies to the Environmental Impact Assessment.

- Any of the recommended major design changes which are identified as part of the detailed design and which result from detailed analysis, and which incur in extra delays and costs, will encounter "approval resistance" with most parties involved (especially the Client, the implementation agency, the Engineer's representative and the Design-Build Contractor). This resistance potentially may stand in the way of Best Practices and achieving the optimum design in the interest of the People of Trinidad and Tobago.

The legally required compliance by the Applicant to the CEC conditions is at present not sufficiently checked by the EMA, which is their legal obligation under the Environmental Management Act. The EMA needs therefore to improve on their fulfilment of their responsibility to enforce the Environmental Management Act and obtain the required resources to do so.

7.8 Road Design Standards

The Civil Engineer operated as part of the Engineering Design, Hydrology and Hydraulics group of consultants.

1. SOURCE OF INFORMATION.

The report is based entirely on the Lea-Trintoplan *Final Report on Feasibility Investigations Vol.1 Engineering and Economic Feasibility* and sent to the Ministry of Works and Transport on May 14th 2006. The referenced sections include Chapter 3 - *Modification to Design Standards and Chapter 6 -Preliminary Designs.*
Trintoplan is no longer involved with the Debe to Mon Desir segment of the Solomon Hochoy Highway extension project and the HRC consultant was unable to access design data from NIDCO or Halcrow although these were requested.

2. DESIGN DETAIL.

Engineering specifications have been done to ASTM and AASHTO requirements. Design criteria were based on roadway classification and speed and a four lane highway is classified as arterial or freeway.

The design standards are set out in Chapter 6 -Preliminary Engineering, Table#6.5 and are as agreed with the project proponent, the Ministry of Works and Transportation. This sets out acceptable criteria for:- Design and posted speeds, stopping controls, horizontal controls, vertical controls with maximum and minimum gradients, curves, clearances, cross sectional elements and clear zones.

3. STABILITY ANALYSIS.

The note at the bottom of Table 3.1 from the section on 'Modification to Design Standards' states that cut and fill slopes outside of clear zones will be 1:3 or flatter depending on geotechnical considerations, however, Chapter 6, 6.2.3.1-'Slope Stability', states that;
"for major roads, the side slopes should not exceed 1:4 for safety reasons so that vehicles leaving the road unintentionally have a chance to recover."

This does not appear to have been followed in all of the cases in which the slopes were designed by 'Slope stability Analysis' as shown in Table 6.1-'Side Slopes for Route A-K' . These show slopes varying from 1:1.5 for a 3m cut to 1:3.4 for a 10m cut and from 1:2 for a 2m fill to 1:3 for a 10m fill.

This consultant observes that the source of fill material and soils characteristics, are not stated in the note.

The soils in the area under review consist of clays with some mix of silts and sands and are highly compressible which will lead to settlement. The project consultants proposed that the section from Debe to the S.S Erin Road south west of Penal should be pre-loaded to a height of 1.5 to 2.0m above ground level for a period of about three years.

This consultant observes that Wick piles would accelerate the consolidation process by faster dissipation of the pore water pressure.

4. PAVEMENT DESIGN.

The design soaked CBR value of 2% for the sub-grade was obtained from test pits dug along the route. Axel loads used in the design conforms to 'Overseas Road note # 31-Loading.' On the basis of this criteria, the recommended pavement designs varied between 75-150mm Asphaltic Concrete, 175-250mm Aggregate Base course, 250mm Aggregate Sub base and 300-350mm Capping layer dependant on the location.

5. BRIDGES.

The duelling of the 'Princess Margaret Highway' (now the Butler Highway) introduced the use of BS 153: Part 3 A which was eventually supplemented by BS 5400 and the loading included the application of 37.5 units of HB loading. This gives a heavier loading than the AASHTO HS-20 truck and HS 25 truck used in some jurisdictions in the U.S.

The use of HB loading has been recommended for this project.

Bridge foundations will require piling to an anticipated average length of 25m.

6. CONSULTANT'S FINDINGS AND RECOMMENDATIONS

i. The design standards used for the Geometric and Pavement designs are standard for highways of this nature.
ii. The loading used for bridge designs of 37.5 units of HB loading allows for the predicted heavy industrial traffic.
iii. The proposed maximum design slopes of cut and fill of 1:4 to allow for possible recovery of traffic running off the highway has not been followed.
iv. The source of fill material is not mentioned and the soils characteristics therefore unknown.
v. The area from which the fill material is to be sourced should have been investigated to determine the possible deleterious effect of dust and destruction of local roads on residents.
vi. Wick drains are an alternative method to preloading the existing weak soils and causes consolidation in much faster time and should be considered.

8.0 LAND TENURE AND ACQUISITION

8.1 Terms of Reference

The Senior Acquisition/Valuation Consultant is required to *inter alia*:

1. Review all documents submitted by the NIDCO and affiliated agencies;
2. Review the relevant municipal level Regional Plans;
3. Review implications of resettlement, including alternative routes, on the acquisition process including acquisition cost;
4. Examine compliance with existing laws, policies and basic public service management principles;

8.2 Background

The extension of the Butler (formerly Princess Margaret) Highway to Cedros was initially conceived in the 1960s.It was not intended to be built as a single project but in **stages** as the need arose. It was an integral part of a highways policy incorporated in The Highways Act Ch 48:01. The policy included provisions to facilitate improvement of other public roads, adoption of private roads and provisions to optimize the carrying capacity and safety of all roads. It contained more sophisticated land acquisition provisions than the then Land Acquisition Act (LAA).

The Highways Act was an integral part of a national land reform initiative including the Town and Country Planning Act (TCP Act) and the Valuation of Land Act, and included a national Information Management System. Initiated in the 1960s, its aim was to facilitate a multi-disciplinary approach to national planning.

The Valuation Division (VD) plotted every parcel of land in the country with detailed data on each plot of land available, on maps supplied by the Director of Surveys (DOS). Many State agencies utilized the data which was especially useful in Section 3 valuation reports.

The Chief Technical Officer (CTO) of the Ministry of Works & Transport (MOWT) chaired a standing "Highways Committee" representing the various public service entities, agencies, contractors, consultants, special advisors and other experts. The Committee was effective in dealing with legitimate concerns although it sometimes fell victim to interference. Each representative submitted a monthly status report. The VD submitted valuation reports relevant under Section 3 and Section 5(*Appendix 6)* When claims were received, the status of each claim was included. It is important to note that the onus is on claimants to submit a claim within one year of the Section 5 date and that no compensation is paid before a claim is made. Claimants must prove their entitlement at their expense.[7]

[7] Supporting references and discussion of legislation cited in the report, can be found in Appendix 6.

8.3 Issues Raised by Highway Re-Route Movement (HRM)

Following are the land issues raised by the Highway Reroute Movement:

a) Thousands of acres of agricultural land would be destroyed by construction of the highway, including land used for domestic-scale agriculture which is practiced in most homes in the area;
b) Thirteen communities would be split by the proposed alignment;
c) Hundreds of buildings including homes, schools, and businesses would be demolished
d) Urban sprawl would occur in the Fyzabad, Siparia, Penal and Debe areas;
e) Property owners are not being given sufficient information relevant to State acquisition of their land.
f) There is a lack of consistency in the advice being given to property owners with some residents being given verbal notice without regard to the strict conditions laid out in the formal process;
g) Inconsistency in quantum of compensation paid.
h) Inconsistency in the selection of person being paid compensation.

These issues were reiterated at a meeting HRC/HRM on 10th January 2013:

1) Many property owners in the affected communities are confused about the status of their homes and land as a result of the often incomprehensible quality of Statutory notices. (*See Appendix IV*), In some cases, their anxiety has intensified as a result of being verbally informed about the State's intention to acquire their property.
2) Public consultations have not been effective enough in addressing the residents' concerns about their property because of the inadequacies of the resource team.
3) A lack of transparency in the calculation of compensation for some who have agreed to be relocated.

8.4 Review of the Issues

On the 9th of January 2013, a meeting was held with the HRC/NIDCO where many of the HRM issues above were raised. Because of the importance of this matter and the inconclusive nature of the discussions, a subsequent meeting was arranged with NIDCO on the 25th January 2013 to specifically address the Land Tenure and Acquisition issues as stated above and the provision of any outstanding documentation. The relevant extract of the document 'The Highway Review Committee-Questions and Observations to be raised with NIDCO and Request for additional documentation', which guided discussions on the 9th January 2013, was tabled for discussion.

Some verbal responses were provided by NIDCO officials but those were inconsistent and offered little by way of rationale. Up to the time of concluding this report, NIDCO had not provided written documentation to the HRC consultant as discussed and promised in that meeting**.**

With respect to resettlement, the MOWT position as understood by this consultant is that more information on resettlement was simply not available at the EIA stage and is to date still unavailable, even after contracts have been awarded for the highway construction.

As reported, despite the fact that the majority of persons at the public consultations expressed a preference for finding their own relocation site, an expensive controversial relocation exercise has been initiated for which no documented policy seems to be available. This could have serious implications for making the land available for the project, with the possibility of significant and expensive delay.

At the meeting of January 25, 2013, NIDCO/HRC, at which this consultant was present, NIDCO representatives admitted that such delays were likely to attract substantial claims for damages from the contractors. Further, given that the relevant Section 3 Notice was not issued until February 03, 2012, it would be important to establish how the provisions for alternative accommodation for displaced persons appeared in the Certificate of Environmental Clearance (CEC) April 2010. For, without the issuance of this notice, the Commissioner of Valuation (COV) would have no authority to enter properties in order to calculate their values.

In addition, the decision to resettle affected residents on 5,000 square foot plots is inconsistent with the larger plot sizes which obtain in this rural area. The HRC consultant has found no evidence that estimates of acquisition cost were factored into the feasibility reports, especially in assessing alternative routes.
No evidence was found of detailed land use information relating to all of the buildings in the path of the alignment with the estimated cost of acquisition of each stage.

Claimants are entitled to be reimbursed "the reasonable costs incurred in the preparation and submission of claims and negotiating the quantum payable". This does not include legal costs or costs related to submitting or proving title. Like any prudent purchaser, the acquiring authority will check the title documents provided at its own expense. If the State sub-contracts this task it will have to bear the cost of this only. The preparation and submission of claims and negotiation of the quantum payable is a land economy function and the maximum reimbursement is the reasonable fee of the reputable valuer.

NIDCO stated that its contracts in respect of compensation are in the main awarded to legal firms on condition that they employ qualified valuers. Information gleaned by this consultant suggests that fees paid by NIDCO include the cost of provision and proving of title in addition to the "checking" of title. It is conceivable that this change in approach may be related to the amendments to the LAA in 2000 and for the use of Private Treaty.

The relatively recent decision of the State to make *ex gratia* payments without a clear transparent policy is alarming. *Ex gratia* awards are normally made by the State to persons with a legitimate right to an asset/ benefit which was lost by their failure to conform to "procedure" and where the State has obtained the asset//benefit (*See Appendix 6*). In cases involving squatters who do not qualify according to law or official policy, *ex gratia* awards are not recommended.

8.5 Findings

1. The NIDCO claim to be operating under the "Shadow of Complusory Purchase" cannot be accepted. (*See Appendix 6)*.
2. It appears that there has been failure to observe due process in the following instances;

    a) Section 3 notices were issued on 3rd Feb 2012, but entry for activities permitted under Section 3 were said to be conducted up to six years previously.
    b) Improper treatment of "crops" in the valuation process which has increased abuse
    c) Improper treatment of encroachers onto road reserves, squatters and unauthorized development which has had the effect of increasing abuse.
    d) Improper treatment of accommodation works (including resettlement, injurious affection, severance and betterment which too, has increased abuse of the process.

3. State agencies are using policies relating to land acquisition of which professional bodies are unaware, thereby negatively affecting the ability of affected persons to obtain proper professional advice.
4. The Highways Committee is no longer limited to administrative, technical or professional representation but now includes non-experts.
5. The absence of a national Information Management policy has created a critical data void.
6. The departure from established procedures and rules is having detrimental consequences on the delivery of quality public services within the confines of the law, the required timescales and budgets.
7. Amendments to the LAA and the State Lands Act are causing serious problems in land acquisition and state land management.
8. It appears that payment is being made for relatively large acreages of crops on the unit value normally ascribed to a few plants which will result in excessive payment. (*See Appendix 6, III*)
9. It appears that vegetation over a substantial portion of the ROW is being destroyed before the Section 5 Notice or the exercise of Section 4 presidential authority or payment for the damage as described above. Unless such damage was necessary in the proper exercise of Section 3, such payments will be excessive. If this is being done outside of Section 3 authority it is unacceptable as it represents the State's illegal interference with the Constitutional right of the citizen to enjoyment of property without interference, other than as allowed by exercise of law.
10. Improper land acquisition procedures could be the cause of substantial delays. This seems to be the result of an improper definition of the term "acquisition under the shadow of CP" and the deployment of persons in positions for which they do not have the necessary expertise. In consequence, precedents may have been set that are beyond the State agencies' capacity to manage properly. The extension of the Butler (formerly Princess Margaret) Highway to Cedros was initially conceived in the 1960s in a period of acute shortage of professional and technical staff at the VD and a COSL with inadequate Land Economy (LE) expertise. .
11. The decision to build the entire highway from Golconda to Point Fortin as a single stage was beyond the capacity of the State agencies.

12. The State's consultation methodology is unsatisfactory, in both the reform of its land acquisition policies and its development of this particular project.
13. The policy and criteria for the recent award of *ex gratia* awards in many cases is unknown, which is unsatisfactory.
14. Highway "authorities" do not appear to appreciate that the Highways Act assumed a co-ordinated approach to "access" under the "technical authority" of the Chief Technical Officer MOWT, as it includes provisions to facilitate road improvement, road safety and optimizing traffic capacity on roads.
15. The procedure for reimbursing costs in accordance to the LAA or Highways Act, could not be ascertained.

8.6 Recommendations

1. That the GORTT ensures that all Public Service agencies, including state companies, abide by the law and official policy.
2. That all Public Service agencies, including companies, report officially to (or through) the Permanent Secretary and not directly to the Minister or political advisors.
3. That all official policies of which the public and/or their professional advisors should be aware should be made readily available on TT Connect or a similar facility to the public and to the professional organizations.
4. That the Highways Committee be restricted to technical/professional persons involved in the process and include representation from the relevant agencies such as the T&CPD, the VD and the DOS with appropriate administrative, technical or professional expertise .
5. That the State reinstate a national Information Management policy and the VD be empowered to update their data base. That maximum use is made of data in the VD.
6. That SPAs and other state agencies whose functions are better suited to the Public Service be phased back in to the Public Service. That where their functions include "land management", they be required to operate in accordance with the policies of the State "authorities" such as the T&CPD, the DOS, The COV and MOWT, subject to Cabinet's over riding policies. This must also apply to departments of the public service such as the COSL, the VD, the Property and Real Estate Services Division of the Ministry of Public Administration, the Land Settlement Agency.
7. Require all State agencies to review their activities annually in consultation with major stakeholders where advisable. Consideration should be given to posting their recommendations on a facility such as TTConnect, subject to security and confidentiality provisions. .
8. That Government commitment to review the LAA and the State Land Act be undertaken urgently and include an examination of the reasons for the amendments in 2000 with a critical review of the consequences of the amendments including improper reimbursement of funds and the improper use of Private Treaty.
9. That all relevant State agencies together review their policy for the assessment of damage at Section 3.This must include the COSL, MOWT, VD and the Ministry of Food Production. It is recommended that the Institute of Surveyors of Trinidad and Tobago (ISTT) be consulted and consideration be given to including the Agricultural Society and the Law Association. That the COV ensure proper compliance with the law and LE principles.

10. That more consideration must be given to dealing with mega projects in manageable stages where feasible.
11. That the State needs to improve its consultation methodology in conjunction with NGOs especially the professional associations.
12. That the State needs to learn from the mistakes made in the Guaymare and Oropune resettlements and develop a proper resettlement policy less conducive to manipulation.
13. That the State needs to make a proper policy in respect of *ex gratia* awards which must be readily available to all; at least on TT connect.

III. REPORT OF RESOURCE CONSULTANTS

REVIEW OF THE CEC/EIA PROCESS OF THE
FOR THE
ESTABLISHMENT OF A HIGHWAY ALIGNMENT
FROM DEBE TO MON DESIR

JANUARY 2013

By:

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A. INTRODUCTION

As a result of demands for an independent technical review of the SHHE Project: Debe to Mon Desir Segment, this writer was tasked with reviewing the CEC/EIA documentation of the subject project with a view to advising on the relevant salient issues. In the course of conducting the review, it became apparent that salient issues of the EIA Report were not the only items of concern. The whole CEC/EIA process itself begged for closer examination. Two reports were generated as a result of the documentation review. Report 1 concerned itself with a review of the EIA Report, while Report 2 is concerned with a review of the CEC/EIA process. This instant report is Report 2.

This review of the CEC/EIA Process was undertaken with a view to making recommendations for the improvement of the process. It was conducted under the headings of the recognized stages in the process, namely:

1. Screening
2. Scoping
3. Preparation of Terms of Reference
4. EIA Preparation
5. Public Consultations
6. EIA Review
7. Monitoring
8. Auditing

The report hereunder presents under each heading the findings of an examination of the CEC/EIA Process for the instant project.

B. SCREENING

Screening is the procedure initiated at the beginning of the EIA process to identify all possible interactions between a project proposal and the environment, and to determine if the project should be subject to EIA. Criteria for this determination include the nature and magnitude of the project and the sensitivity of the receiving environment. Some projects in some jurisdictions, by their very nature and magnitude, automatically require an EIA. Such is the situation in Trinidad and Tobago, where positive lists of projects for which EIA is mandatory have been incorporated into EIA regulations via the CEC (Designated Activities) Order, 2001.

In the designated activities, thresholds of size are often used to define the magnitude of a project. Activity 33(a), the establishment of a road more than 1 km in length, is applicable to the SHHE project.

The use of thresholds can create problems from three sources, namely:

1. The general wording may not be adequate to deal with a highly specific and unusual proposal.
2. It does not take into account cumulative impacts.
3. It takes no account of location and the environmental sensitivity attached thereto.

Happily, these problems did not arise in the case of the SHHE project, since it did not escape the EIA requirement net, having easily qualified on the grounds of nature and magnitude.

C. SCOPING

Scoping is a vital and underestimated stage in the EIA process. It refers to the activity of identifying from a broad range of potential problems, those key issues that should be addressed by an EIA. It attempts to focus the assessment on a manageable number of important questions.

For the instant EIA, a scoping exercise was conducted before the application for a CEC was submitted. The exercise relied on existing data and limited field reconnaissance to describe the affected environment, and the use of general checklists to identify areas of environmental concern. Much of the existing data came from the report on the Prefeasibility Study for this highway extension, prepared in 1999 by Eco engineering Consultants for Lea Trintoplan. The Environmental Scoping Report, which took the form of an Environmental Feasibility Report, was completed in 2006 and accompanied the application for a CEC.

The Environmental Scoping Report bore no evidence of a consultative exercise to shortlist key issues. It was in fact an Initial Environmental Evaluation (IEE) based on old overly comprehensive generic EIA Terms of Reference put out by the EMA. Such an approach is useful when a full-blown EIA is inevitable and an upgraded IEE might suffice. However, this approach invited the EMA, having reviewed the totality of the CEC application, to issue their standard cumbersome boiler-plate Terms of Reference for a full-blown EIA before they could grant a CEC. An opportunity to get the EMA to be more flexible in Terms of Reference was lost.

For the future, it is recommended that a CEC application be submitted without a Scoping Report. This would provide the opportunity and basis for a collaborative effort by the environmental consultants and the EMA to jointly produce a Scoping Report. So that both parties could get on the same page at the very outset.

The joint exercise could take the following standard steps:

1. Conduct a field reconnaissance of the Project Area and the identified Study Area.
2. Develop a communication plan – Identify key stakeholders and construct a timetable for making contact. A consultative meeting for stakeholders might be an option.
3. Assemble information that will be the starting point of discussions.
4. Make the information available to stakeholders.
5. Identify the issues of concern to stakeholders.
6. Organize information according to issues, including grouping, combining and setting priorities.
7. Develop a strategy for addressing each key issue and prepare Terms of Reference.

D. PREPARATION OF TERMS OF REFERENCE

The EMA has imported generic EIA Terms of Reference formats from foreign institutions such as the World Bank. There appears to be no native intelligence applied to these imports. Moreover, there appears to be little or no tailoring of generic Terms of Reference to specific projects. Under the present system, the EMA should do its own scoping exercise based on the CEC application and prepare Terms of Reference to suit. There is little evidence that this ideal is ever observed, and certainly not in the SHHE Project. The result is that site-specific issues do not get the necessary emphasis and boiler plate Terms of Reference are issued.

Generic Terms of Reference that attempt to be comprehensive stipulate the collection of a large amount of baseline data. Some observers regard the excessive demand for baseline data, often irrelevant, as madness. But there is perhaps some method to this madness. The EMA is a relatively young institution. It was gestated by World Bank loan conditionalities at a time when environmental awareness in Trinidad and Tobago was in its infancy and environmental baseline information was sorely lacking. It is opined that the wide and detailed EIA Terms of Reference was the means by which the EMA compiled its in-house national database of environmental information. The EMA has now been in charge of the EIA process for more than 15 years and it is now high time for all the baseline data collected over this period to be properly compiled and organized and made available to all EIA preparers in the EMA Information Centre. Use of GIS technology might be useful. The preparers could then judiciously extract that which is relevant to their study, supplementing it with additional field work, as required. Judicious extraction will prevent the wholesale regurgitation of baseline data in report after report.

On the subject of regurgitation, it is baffling how the EMA's Terms of Reference for all projects invite a playback of a description the Regulatory Framework for environmental management. One might expect such a requirement for an externally commissioned EIA, say, by the World Bank, because they might wish to satisfy themselves about the integrity of environmental management in a borrower country. This surely does not apply to an indigenous institution like the EMA, already seized of knowledge about the legislative and institutional framework for environmental management.

In May 2006, the EMA provided Terms of Reference for an EIA of the SHHE: Debe to Mon Desir Segment. In response the environmental sub-consultants upgraded their Scoping Report or IEE in 2007/2009 and presented it as a full-blown EIA. It must have been carelessly done, for all copies of the EIA Report submitted were returned by the EMA in February 2009 with the observation that a number of items in the final Terms of Reference were not addressed in the Report. At length, after discussion with the EMA and further work, a revised EIA Report was submitted in June 2009. This formed the basis for the preparation of a revised EIA Report.

E. EIA PREPARATION

The essence of EIA Preparation is the scientific and objective analysis of the scale, significance and importance of impacts identified. Various techniques and methods are employed in the conduct of an

EIA. Technique refers to a mechanism for predicting future changes in specific environmental parameters (e.g. an air pollutant dispersion model). The technique is evaluative when the magnitude of the effect is quantified. Method refers to a structured aid which guides collection, manipulation and comparison of impact data through use of various EIA techniques. Effectively, methods are the organizational principle of the EIA process, e.g. check lists and matrices.

The end result of EIA preparation is an EIA Report. In some jurisdictions, such as the U.K, this is called an Environmental Impact Statement (EIS). This latter terminology is preferable to the former, because it connotes focus and brevity. The word "Report" in this context invokes images of pages and pages of printed matter and endless appendices

Shortcomings in techniques and methods in the instant EIA Report, particularly those of a quantitative nature, have already been identified in Report 1.

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F. EIA REVIEW

Review of an EIA will usually comprise two parallel elements – the public review and the technical review.

In the public review, the public is afforded an opportunity to comment on the EIA Report. The public may comment on the adequacy of the EIA Report in terms of addressing their concerns and may raise questions that arise from the information provided in the EIA Report.

The public review process in Trinidad and Tobago is satisfactory. Public access to the EIA Report is allowed through its open placement, not only at the EMA offices, but also at strategic locations across the country. Mandatory public consultations after the EIA Report has been prepared are also specified in the Terms of Reference. It should be emphasized that these post-EIA public consultations are not meant to replace the meaningful consultations that should take place during EIA preparation. It should also be pointed out that the public review process is not a replacement for the technical review.

Technical reviews are conducted by the EMA and based on these reviews; top management makes a decision of the granting of a CEC, invariably with conditions attached. Decision-making is sometimes regarded with public mistrust. The EMA is seen as a State body, without real independence, since its Board is appointed on the recommendation of the Cabinet. Political interference in the decision-making of the institution is feared. One former Chairman did not have his tenure extended because he described the Government action of paving the Queen's Park Savannah as illegal and immoral. A former Managing Director was publicly accused of bowing to political dictates by putting his signature to the CEC for the construction of the massive out-of-scale NAPA, without the benefit of a public consultation.

And now, one is witnessing the case of the Highway Reroute Movement which clamored for an independent technical review. They have displayed serious mistrust of the Government, perhaps with some justification. The EMA review of the EIA Report regarded as a deficiency the treatment of the drainage/flooding issues of the proposed highway development. A somewhat impertinent response from the proponent, MOWT, dismissed the EMA criticism and sharply declared that what they had put forward

was sufficient. After a lapse of two months with no apparent further exchanges between the parties, a CEC was granted. How the EMA was persuaded to do this is unclear.

This report is being written because Government succumbed to the demand for an independent technical review and agreed to such a review under the auspices of the JCC. This is a fortuitous occurrence, for by so doing, Government has laid the foundation for technical reviews to be done by independent panels instead of the EMA. It is recommended that this practice be regularized through the appropriate administrative arrangements.

G. MONITORING

Monitoring is normally adopted as a mechanism to either check that any conditions imposed on the project are being enforced or to check the quality of the affected environment. Current EIA Terms of Reference contain adequate provision for the development of monitoring plans as part of the EIA Report. The proponent is primarily responsible for the monitoring function during both the construction and operation phase of the project. It is not known how much the EMA oversees this monitoring or how much it delegates this oversight function to specialized agencies. The EMA has been known to be unable to police Consent Order undertakings for one reason or another. Monitoring programmes need to be more strictly overseen since they provide the necessary and essential input into auditing.

H. AUDITING

Auditing, in the context of EIA, refers to the activity involved in synthesizing impact monitoring data, over a range of impacts, and then comparing the actual impacts with the predictions made. Until now audits have, almost exclusively, been implemented in the developed countries. They certainly have not been done in the Trinidad and Tobago EIA culture, largely because of paucity of quantitative impact methodologies and predictions already alluded to. Auditing in the Trinidad and Tobago system must necessarily be deferred until such time that EIA techniques become more sophisticated.

I. SUMMARY OF RECOMMENDATIONS

The CEC/EIA process in Trinidad & Tobago, though adequately framed, could be improved by implementing the following recommendations:

1. Establishment of the joint preparation of a Scoping Report, by the EMA and the environmental consultants of the proponent.
2. Joint preparation of more focused EIA Terms of Reference, based on the Scoping Report.
3. Commissioning of an exercise to consolidate, organize and make available to EIA preparers all the acceptable baseline environmental data presented to the EMA over the years in EIA Reports. The use of GIS technology should be explored for this exercise.
4. Making permanent the practice of independent technical reviews to replace EIA Report reviews done by the EMA.

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REVIEW OF THE SOCIAL COMPONENTS OF THE ENVIRONMENTAL IMPACT ASSESSMENT FOR THE TRUNK ROADS EXPANSION PROJECT HIGHWAY EXTENSION TO POINT FORTIN: DEBE TO MON DESIR

JANUARY 2013

1 INTRODUCTION

Based on the terms of reference (TOR) provided, the consultant was required to undertake four tasks:

1. Set out a brief of critical baseline indicators pertaining to social impact assessments within the context of major infrastructure works and human settlements development projects, along with processes for the conduct of an SIA accordingly.
2. Review the Environmental Impact Assessment for the Mon Desir to Debe segment of the Highway, particularly the Terms of Reference prescribed by the EMA, to determine the procedures and treatment of social impact considerations and mitigation of impacts.
3. Provide advisory briefs to the Chairman on any issues pertaining to the SIA process.
4. Review the findings on the SIA review by local personnel and advise the Chairman on implications for inclusion in the Final Report.

This report addresses items 1, 2 and 3. Findings by local personnel have not been sent to facilitate the completion of item 4.

The indicators are provided in section 2. This is followed by a full review of the SIA in section 3. A summary brief explaining the findings to the Chairman concludes the report.

2 INDICATORS

The following indicators were selected to indicate the requirements for an SIA to meet international best practice. The first indicator focuses on the terms of reference:

Indicator	Explanation
Were appropriate TORs established for the SIA?	This indicator is necessary to ensure that proper guidelines were given for the conduct of the SIA. Failure to provide appropriate TOR for the study could lead to critical gaps in the data and this would impact negatively on the decision making process.

The next indicator focuses on the relationship between the TOR and the SIA. It seeks to ensure that the SIA meets the requirements of the TOR.

Indicator	Explanation
Did the SIA comply with the requirements of the TORs?	This indicator is necessary to ensure that the SIA undertook all of the tasks as delineated within the TOR. Failure to do so would lead to critical gaps in the data and this would impact negatively on the decision making process.

The next set of indicators addresses the quality of the SIA. They consider whether best practice was followed in the methods selected and utilised; and in the way the data was analysed.

Indicators	Explanation
Were fully qualified professionals engaged to conduct the SIA?	The impact assessment should be undertaken by suitably qualified and experienced professionals who can provide the expertise required to address the issues identified in the TOR .
Were the potentially impacted communities and development described?	The study area and buffer zones should reflect the extent and range of the potential impacts.
Were appropriate methods utilised in the conduct of the SIA?	The methods selected should be based on the type and size of the proposed development and the nature of the likely impacts.
Were appropriate public consultation approaches utilised? **Was the diverse set of potentially impacted stakeholders involved?**	The public consultation process must be inclusive of all potentially affected parties. It should be open and transparent to allow for a fair exchange of information about the proposed project.
Does the SIA address equity issues?	The impact assessment must identify who will win and who will lose, and emphasise the vulnerability of under - represented groups.

Indicators	Explanation
Are both the beneficial and adverse effects clearly explained?	All of the characteristics of the potential impacts (i.e. nature, magnitude, extent, timing, duration and likelihood) must be described. The significance must also be determined (i.e. compliance with existing standards or criteria)
Were the risks of adverse consequences evaluated?	If the TOR required it, a risk assessment must be undertaken. This is usually a requirement for large infrastructural developments such as highways.
What alternatives are considered: no project? Other sites? Other technologies?	A critical aspect of the justification for a project in the decision making process is whether it is more or less beneficial to implement it as opposed to doing nothing or something else.
EMP? What mitigation measures are proposed, and who is responsible for implementing them?	The impact assessment report must contain a management plan that details how the projected impacts will be mitigated as well as contingency plans should the impacts exceed the expectations or the mitigation fail.
Monitoring: What are the parameters to be monitored so that the state of the environment can be studied throughout the project	The most critical aspect of the impact assessment process is implementation. If the conditions that are set for the operation of the project are not undertaken, then the likelihood of negative impacts increases.

The final set of indicators address the relevance of the SIA to the decision making process. They seek to ensure that the data contained within the SIA is appropriate for decision making.

Indicators	Explanation
Are the key findings complete and satisfactory?	The purpose of the impact assessment is to provide information that would facilitate a decision about the proposed development. It is therefore critical that the information contained in the report not only be accurate but decision relevant, i.e. the report must present information that would facilitate the choice between alternate courses of action.
Is the information clearly presented and understandable by decision makers and the public?	
Is the information relevant and sufficient for the purpose of decision making and condition setting?	

3 REVIEW OF THE SOCIAL ASPECTS OF THE ENVIRONMENTAL IMPACT ASSESSMENT

3.1 The adequacy of the TOR

First of all it must be acknowledged that the TOR, though thorough, did not require a separate social impact assessment (SIA). However, it detailed most of the areas necessary to meet international best practice for incorporating social data into the EIA, including but not limited to:

- The instruction that the proposed highway be considered in the context of land use policy for the area; the nature and sensitivity of the area; the development initiatives scheduled for the area; and the potential to open up subsequent development – this established the broad based parameters within which the EIA should be undertaken.
- The full description of the proposed route of the highway and the likely associated works – this directed the impact studies to address the relevant issues in the potentially affected areas.
- Related highway extension works from other applications – this directed the EIA to address potential cumulative impacts.
- The fact that there would be resettlement and relocation of residents – this would facilitate investigation of the impact on this category of residents
- The need for the description of the study area to identify all communities and developments, existing and proposed that could be affected by the proposed highway construction – this directed the EIA to focus on all potentially affected communities/developments present and planned.
- The details included under the subsections: socio-cultural environment; impacts on human beings; impacts of dust, air quality and noise; traffic, utilities and cumulative impacts were thorough.
- The request for a quantitative risk assessment indicated a recognition of the potential risk to human life and the need to include this in the decision making process.
- The requirements for the environmental management and the monitoring plan were fully acceptable.
- The request for a resettlement plan demonstrated best practice.
- The details included in the section on consultation public participation were exceedingly detailed.

Therefore, based on the requirements contained within the TOR, the consultants were given clear guidance for the undertaking of the social aspects of the EIA.

However, notwithstanding the preparation of the feasibility study in 2006, the TOR should have included a requirement for more detailed economic analysis once the fuller impacts had been identified and quantified. Given that one of the objectives of the highway is to: "*To stimulate social and economic development in the South west Region. This would be achieved by the increased distribution of economic activities, the improvement in services to the area, and increased employment and income levels*," there therefore should have been a requirement for:

1. A cost-benefit analysis, comparing the economic costs of the various alignment alternatives that were assessed.
2. A more detailed and updated economic assessment of the development of the highway beyond what was contained in the 2006 feasibility study.
3. An economic assessment of the adverse effects to provide a comparison against the economic benefits of the highway development.

3.2 Compliance with the TOR

In this section the relevant components of the TOR are extracted to highlight the areas that should have been addressed in the social components of the EIA. It provides an indication of whether these tasks were completed but not an assessment of the quality. That will be conducted in subsection 3.3.

TOR requirements *(extracts of the sections relevant to the SIA)*	**Compliance or non-compliance**
The study area should be determined by the extent of direct and indirect impacts on the.... and social environments....as well as surrounding communities in and adjacent to the project site that can be affected by noise, dust, surface runoff and traffic during site preparation. The study area should also identify adjacent and proposed developments that can influence the proposed project with special reference to the industrial developments in southwest Trinidad.	✓
The study area should be properly identified and described with accompanying aerial photographs maps and diagrams at easily understood scales to illustrate the spatial extent of the project and the impact area....data for the study area shall be presented in separate themes for: property holdings....built environment....existing land use...	✓
Conduct studies to determine the baseline conditions of the study area during the wet and dry seasons, as they relate to the ....and socio-cultural environments	✓
Describe the project area in terms of past and present land use as well as development plans	✓
Identification and location of all human settlements (including ribbon development) impacted by the proposed project as well as support activities.....	✓
Determination of socio-economic and cultural activities that take place presently in the project related area (year round and seasonal)	✓
Description and qualification of the area in terms of past, present and proposed planning and land use. This should Include a statement on the compatibility of the highway design with the areas where it is proposed to be located.	✓
Identification of occupants of parcels located In the project area subject to relocation/resettlement.....	✓
Employment and labour market – indicate opportunities for employment generation and the availability of such employment in affected communities;	There is limited discussion of the range of opportunities for employment generation beyond what will be provided during the construction phase
Compatibility of the proposed highway alignment in the context of industrial development and existing infrastructure with particular emphasis on the oil and gas sector, as well as related downstream industries	✓
Customs aspirations and attitudes – indicate the acceptability of the proposed project to nearby communities such as South Oropouche, Debe (with particular reference to Bunsee Trace and San Francique Road), Avocat, Pluck, Thick and Mon Desir as well as other stakeholders who use the area for commercial and recreational activities, environmental non-governmental organizations and community-based organizations.	The focus was on the communities closest to the highway development. Therefore the perspectives of the wider range of stakeholders who use the area are not reflected in the report and there was no indication that this was used as part of the baseline.

Agricultural and fishing activities (with details of acreages and types of crops/species harvested).	✓
Determination of emergency resources, indicating if existing resources can adequately respond to a potential increase in emergencies.	✓
Existing and proposed infrastructure including but not limited to.....water, electricity, telephones....etc.	✓
Assessment of archaeological artefacts/historic sites in the wider study area.	✓
Traditional uses of the study area, access routes, planned and approved future activities.	✓
Potential impacts to be determined to include but are not limited to human beings: • Relocation and resettlement, loss of property, disruption of daily life; • Disruption of traditional access routes and uses of the area during and subsequent to the project such as agriculture, fishing, recreation, community facilities and institutions; • Labour force (short and long term); • Archaeological and cultural resources; • Disruption to the quality of life as perceived by resident communities and other stakeholders; • Suitability of the use of pesticides, fertilizers and other project-related chemicals for use near human settlements; • Loss of crops and livestock due to possible flooding resulting from project-based activities; • Disruption to utility services, including but not limited to water and electricity	The was limited assessment of: Disruption of traditional access routes and uses of the area during and subsequent to the project such as agriculture, fishing, recreation, community facilities and institutions. Disruption to life of stakeholders other than those being relocated. There was no assessment of: Suitability of the use of pesticides, fertilizers and other project-related chemicals for use near human settlements. Loss of crops and livestock due to possible flooding resulting from project-based activities.
Dust - impact of dust during site preparation and construction on activities.	✓
Air quality - vehicular and equipment emissions during the pre- and construction, as well as operational phases of the highway extension project	✓
The impacts of noise, lighting and vibration on humans, human activity and buildings.	✓
Traffic - during construction and operation.... as well as loss of traditional access routes	✓
Estimation of the demand on utilities as well as resources for stages of the project....	✓
The cumulative impacts.	✓
Conduct a Quantitative Risk Assessment.	✓
Describe reasonable alternative that were examined to achieve the same objectives.	✓
The Environmental Management Plan must address both the natural and social environments.	The consultant did not receive or review the EMP
The EMP must contain a conceptual Resettlement Action Plan addressing the social and economic issues arising from the need to relocate occupants presently located in the proposed project site	The consultant did not receive or review the EMP
Development of a Monitoring Plan	The consultant did not receive or review the monitoring plan
Consultation and Public Participation – see TOR for details	✓

3.3 Quality of the SIA

This section assesses the quality of the social components against the indicators that were listed in section 2.

3.3.1 Social assessment professionals

The Annex to Appendix A lists a summary of the environmental assessment preparers. The list as provided does not include anyone with social or economic qualifications or expertise. It indicates that professionals qualified and experienced in a diversity of engineering, natural science and environmental fields worked on the EIA. Collectively the group has an impressive number of years working on EIAs. However, the members of the group with the social and economic skills should be made explicit.

3.3.2 The description of the affected population

The study area and buffer zones should reflect the extent and range of the potential impacts. Therefore, the definition of the study area is critical in deciding what baseline data will be collected. At a broad environmental level the EIA has determined that for this development the study area varies between environmental components, ranging from 100 m to national. This is based on the Terms of Reference stipulation that "the study area be determined by the extent of direct and indirect impacts on the physical, biological and social environments." (EIA Vol.1: p. ES9) The stated purpose of the study is to: “improve accessibility to the Counties of Victoria and St. Patrick.” (EIA Vol 1: p.2) However the population study area is defined in Table 4-1 as:

> Firstly, the Debe/Penal and Siparia Regional Corporations, but focused on the communities closest to the proposed alignment such as Ghandi Village, Debe proper, Penal, Pluck Village, San Francique, Thick Village, Avocat, Pepper Village, Delhi Settlement, Fyzabad and Mon Desir. (EIA Vol.1: p.88)

The definition of the affected population for both positive benefits as well as those who could be affected adversely should be at a minimum the wider population of the Counties of Victoria and St. Patrick, or indeed the south western region. Therefore, Table 4-1 should be amended to also acknowledge the wider population of focus and not only those most immediately in the vicinity of highway construction impacts.

Likewise In section 4.4.2.1, which focuses on population, it is important to emphasise the fact that while there are communities that will bear the brunt of the adverse construction effects, there are others such as the residents of the two counties or indeed the entire south west region that will benefit. Fortunately, the data on employment and labour markets in 4.4.2.2 reflects the wider counties.
The primary focus in the report on those who will most likely be adversely affected by relocation and construction impact, has resulted in less emphasis being placed on the positive and negative impacts that will be felt by the wider range of stakeholders.

3.3.3 Methods utilised in the conduct of social components

The methods selected should be based on the type and size of the proposed development and the nature of the likely impacts. There are some issues pertaining to the methods used in the EIA that are of concern: (i) the narrow focus on the groups being relocated; (ii) the absence of data collection on the commuter

population among the most highly impacted groups; (iii) the methods used during the focus group sessions; (iv) the inconsistent reporting of the size of the survey sample in the report and appendices.

3.3.3.1 Narrow focus on relocated group

The data that was collected on the attitudes concerning the highway (section 4.4.3) only reflect the narrower group of residents, businesses and institutions that will be relocated. This meant that the collection of baseline data focused on surveys with the residents, businesses and institutions that are to be relocated; and focus groups with the village councils of the afore-mentioned areas; and meetings with the Penal/Debe Regional Corporation and the Siparia Regional Corporation. While the wider population did attend the 4 public consultations, these meetings were not for the purpose of baseline data, but to obtain responses to the results of the already completed EIA.

Data on the attitudes of persons within the wider population of the two counties is also relevant for consideration in the decision making process and should have been collected and used in the assessment of the social conditions. Methods that could have been utilised include:

- The internet and social media sites could have been set up to provide details about the project and to collect views.
- Small representative sample surveys could have been undertaken in a selection of the wider communities in the two counties/south west region.
- Open house sessions could have been conducted at various locations throughout the wider study area. Posters displaying maps of the highway development; as well as computer images could have been made available for viewing. Such open houses could have been half day or whole day events depending on the nature of the population. These would have provided information on the project as well as have been an opportunity to collect data using a shortened questionnaire.
- Field trips could have been taken to familiarise residents of critical aspects of the development – e.g. to demonstrate why some alignments were not feasible. In this regard it is important to note that the point was made at the public meeting at the meeting at the Fyzabad Regional Complex on 8 February 2007 that many people are unfamiliar with maps and find them difficult to understand. Alternative methods such as field trips and open houses provide opportunities for people to fully understand the information and make more informed comments.

3.3.3.2 Data on the commuter population

Another gap in the collection of the baseline data is that there is no clear indication of what percentage of the population that is in closest proximity to the proposed highway, currently commute long distances from their neighbourhoods. For example, only rough estimates of how many persons commute for education purposes or work are provided based on comments made by the village council participants at the focus group discussions of the village councils. Among the residents to be relocated who were interviewed, they reported that the majority (no indicated of actual percentage) of the respondents worked within their communities or in the surrounding areas." They also state that only 9% are tertiary vocational students who might leave the area. Therefore, there is no sense of how many persons in the most immediately impacted communities would benefit from a commuting perspective.

3.3.3.3 Focus groups

Focus groups were used during the public consultation. This is a good approach. However, the participants were divided into two groups and asked two different sets of questions. One set focused on traditional uses of the area and the other road conditions. While the separation of the focus group participants in this way allowed for discussion of a greater number of issues in a shorter time, it also had draw backs:

- Information was being collected on the issues from smaller groups, meaning that the representativeness of the wider population was diminished. This problem was compounded by the fact that the numbers of participants in the three focus groups ranged from 25, 13 to 4 at Delhi Road Hindu School. This raises the question of whether the four participants were also divided into two groups of two persons each, and whether this could be considered a fair representation of the views of those communities upon which to base a social analysis.
- The selection of the topics in this case polarised the opinions on the project. The persons who discussed the traditional uses were more likely to emphasise the negative impacts of the changes that would come as a result of the project. On the other hand, those who spoke about the road conditions (which were apparently not of the highest standard) were asked questions that caused them to list all the negative features of the existing roads (question 1 – 11); and then they were asked how the highway would improve things. Indeed the ordering of the questions on road conditions could be described as leading the respondents to acknowledge the improvements that the highway would bring.

  ROAD CONDITIONS (questions posed during the focus group)

  1. Describe current road conditions in this area.
  2. Are these roads adequate for the present volume of traffic?
  3. Are there any specific "accident black spots" in this general area?
  4. Estimate the average vehicle ownership per household in this area.
  5. How has this changed over the last generation (since about 1975)?
  6. How do you see this changing in the future?
  7. How do the road conditions affect your quality of life?
  8. Roughly what proportion of workers travel out of the area to their jobs?
  9. Roughly what proportion of students travel out of the area to go to school?
  10. Estimate the response time for emergency services (police, fire, ambulance) in each community.
  11. Do road conditions affect this response time?
  12. Will the construction of the proposed highway improve quality of life in this area? In what way?
  13. Are there any problems that you anticipate during the construction or the operation of the highway? Please explain.

The focus groups and the responses, especially those of the final group comprising 4 participants could be deemed unreliable. The data would have been more valid and reliable if (i) fewer, more strategic and objective questions were posed to the entire group; (ii) the number of participants was representative of the council members who had been invited.

3.3.3.4 Inconsistent reporting of the survey sample size

The stated number of residents in the survey changes multiple times in the various reports and appendices. On page 5 of the hand out in Appendix T it says that 125 homes were interviewed; this number is also given on page 5 of the notes of the meeting held in the Debe Community Centre, on 13 Feb 2007. However, on page L 21 of Appendix L it states that "*the occupants of 122 of those houses were interviewed. The remaining 28 were not interviewed for a number of reasons...*" In the executive summary of Vol.1, it states that 150 houses are to be acquired; however, in section 5.2- Acquisition Issues it states that 156 houses are to be acquired; and just below in section 5.2.1 - Acquisition of Houses it again states that there are 150 houses in the path of the proposed highway.

3.3.4 Quality of the public consultation

The TOR provided very detailed requirements for the public consultation process and the reports provided indicate that these requirements were met for the most part. However, the public consultation process must be inclusive of all potentially affected parties. As expected, the consultants prioritised the stakeholders who would be relocated as a result of the highway. Undoubtedly the impacts on this group outweigh the impacts on any other stakeholder. Consequently this group were selected for surveys and interviews and there was a good baseline established for this segment of the population. However, there are deficiencies in the baseline data provided, as well as the impacts assessed for the wider stakeholders.

3.3.4.1 Data on the wider stakeholder groups

The TOR specifically required that stakeholders be identified that could assist in the provision of relevant information to the project and their input into its feasibility sought as it relates to the impact assessment process. Groups that were listed in the TOR included:

- People living in the vicinity of the project that could be affected by the project, e.g. traditional users of the area
- Industrial stakeholders, particularly in the south western region of Trinidad who use the existing infrastructure for access to and from Point Fortin.
- Environmental and other non-governmental organisations
- Other companies engaged in oil and gas exploration and production
- Environmental experts
- Other business interests that could be affected by the project

Neither the main report nor Appendix T which focuses on public consultation provides reports of the meetings with these groups. It is clear that they were invited to, and some representatives attended the public consultation meetings which focused on the results of the EIA. However, there are no reports of how they were engaged during the assessment process and how their concerns were integrated into the study.

There is therefore no baseline of the people living in the vicinity of the project that could be affected other than those to be relocated. Other than population figures for the affected communities and the employment statistics for the counties of Victoria and St. Patrick, the customs, attitudes and aspirations are only reported for those who will be relocated.

3.3.4.2 Agriculture stakeholders

It is reported that the major land use in the area is for agriculture. Therefore it is a primary activity in a number of the affected communities. For example, in the focus group at Debe it was reported that 60-70% of the population depended on agriculture; at the second focus group held at the Fyzabad Regional Community Complex, it was reported that: "*in Fyzabad, 25% depend on agriculture, while in Avocat and Siparia, 10% of the population use agriculture as a means of income. In San Francique 30% of the population depend on agriculture*." At the third meeting at the Delhi Road Hindu School, only 25 to 30% of the population depend on agriculture for a livelihood.

Despite the continued importance of agriculture to these communities, the fact that the majority of the highway alignment passes through agricultural lands; and that that there are 119 parcels of private agricultural land to be acquired for the highway development; there was no focus group or any separate meeting with the stakeholders engaged in agriculture. In fact at the public consultation meeting held at the Fyzabad Regional Complex on 8 February 2008, there was mention of agriculture research with regional implications that could be lost.

In response to a query about the fact that the agriculture sector had not been properly consulted, the EIA consultant at the public meeting stated that "*the emphasis was put on the residences and businesses to be acquired, so only now are the searches being done for persons who own agricultural lands*." However, there was no requirement in the TOR for persons scheduled for relocation to be prioritised over other affected groups. The TOR stated that the consultants should "*identify occupants of parcels located in the project area subject to relocation/resettlement.....*" It also stated that they should "*identify and locate human settlements (including ribbon development) impacted by the proposed project as well as support activities...*" Therefore, if there was a decision to prioritise the stakeholders scheduled for relocation, then the rationale for that decision should be made explicit in the report. As such the report contains no substantive data and analysis of the agriculture in the affected area.

3.3.4.3 The business sector

Based on the data collected from the focus group participants and the surveys, a picture emerges that local business is important for the communities in the area. For example, at the focus group meeting held at the Debe Community Centre on 29 July 2006, it was reported that "*Local area businesses were extremely important in Debe since many people in the area patronize the groceries, tyre shops, bars, market, variety stores and parlours located in Debe.*" At the one held at the Fyzabad Regional Community Complex on 12 August 2006, it was stated that "*the residents depend heavily on local businesses like the groceries because they help lessen traffic congestion. People do not have to travel outside of the community*." Only in Delhi Road Hindu School on 19th August 2006 was it stated that "*most of the residents tend to go out of the area to seek employment*." Among the residents who will be relocated, the respondents reported that in 23% of instances, their properties are also used for commercial purposes reported. However, only the 13 businesses that are scheduled to be relocated were interviewed.

In the Final Report on Feasibility Investigations: Volume 3 - Potential Socio-economic Impact, mention is made of "*the potential impact of changing the traditional south western flow of traffic upon own account workers and micro-enterprises; the "roadside vendors" who depend heavily on the patronage of the travelling public and who would be adversely affected when commuters use alternative routes*." In Volume 1 of the EIA report it states that: "*In all the communities mentioned, there are small commercial establishments along the main roads. These serve the host communities, but also cater to motorists passing through for some of their trade. A few of these establishments rely heavily on passing motorists*

and are unlikely to be viable without this source of income." However there is no discussion of how the highway will impact on these enterprises. The report has not provided analytical discussion of the range of businesses that are likely to be positively or negatively affected by the development. In fact one of the objectives of the highway development is: "*To stimulate social and economic development in the South west Region. This would be achieved by the increased distribution of economic activities, the improvement in services to the area, and increased employment and income levels*." Hence more focus on business was required in the report.

3.3.4.4 Handouts

The hand outs were a good public consultation tool, though they were insufficient to distribute at the public meetings. Some of the information in the handout was also misleading. In the handout it claims on page 4 that: "*the majority agreed that the new highway would improve the quality of life in the area*." However, a thorough read of the results of the focus group sessions, the surveys and the meetings suggests quite the opposite. The half of each focus group that was asked to comment on who the road would benefit and who would suffer adverse effects stated:

> Debe Community Center - "*The main benefactors of the proposed highway were expected to be people from Point Fortin and Siparia who are travelling to San Fernando. Those adversely affected were thought to be the villagers as they see this highway as an avenue for criminal elements outside of the community. They see the highway providing an easy access into their community for these criminal elements. They also believe that the people of the Debe community will be adversely affected, in that some of them may have to vacate their houses. They also believe that there cannot be a dollar value assigned to people's livelihoods, houses and the environment."*
>
> Fyzabad Regional Community Complex – "*The main benefactors would be the commuters. Those being adversely affected include those who have to be moved out of their homes. Crime infiltration was a concern*."

Only the participants at the Delhi Road Hindu School had different a opinion (4 respondents) - *The owners of the land and the people living around the area would be the main benefactors*. *The respondents believe that no one would be adversely affected*.

3.3.4.5 The discussion of relocation

Comments made by persons in the public consultations suggest that there had been little communication to them by the relevant government departments about the relocation. It is therefore of concern that the consultants were required to obtain the stakeholders' views on issues pertaining to relocation such as form of negotiation and type of compensation, prior to communication between the government and the parties earmarked for relocation. Clearly the responses made cannot be considered to be informed comments, when individuals had not yet been properly informed and educated about the process and procedures.

3.3.4.6 Emergency resources

The consultant did not receive, and therefore did not review Appendix R, the Emergency Response Plan. The EIA was required to determine the whether the existing emergency resources could adequately respond to a potential increase in emergencies. The information contained in Vol. 1 only reflected the perspectives of the focus group participants and the survey respondents, many of the latter admitting that they had limited knowledge/use of these services. A brief summary of the assessment of the emergency

resources, which would have been undertaken by the qualified member of the EIA team, should be included in Vol.1.

3.3.5 Equity issues

The impact assessment must identify who will win and who will lose, and emphasise the vulnerability of under -represented groups. The presentation of the report definitely emphasises the adverse impacts on the residents, businesses and institutions that will be relocated. However, there is far less analysis and discussion of the benefits that could accrue from this project. More discussion of the benefits would provide a more balanced report.

3.3.6 Characterisation of the social impacts

All of the characteristics of the potential impacts (i.e. nature, magnitude, extent, timing, duration and likelihood) must be described. The significance must also be determined (i.e. compliance with existing standards or criteria).

In this study impacts were characterised based on extent, intensity and duration, and they were given a classification of low, moderate, high or extreme. However, there is no economic or financial assessment of these impacts. There are a number of areas of the report that would be enhanced by an economic analysis. For example:

1. A number of statements are made in the report that suggests that benefits will accrue from the highway, for example:

   > "*It is expected that the highway will bring about social and economic development and progress in southwest Trinidad."*
   > *"There would be increase in potential for agricultural production and distribution."*
   > *"There would be increase in residential, industrial, and domestic and foreign tourism development*."

   While it is accepted that projects of this nature create opportunities, it would be advantageous to the decision makers to have access to economic projections of the jobs, revenue, taxes etc., which the project could realise.

2. In the discussion of the impacts on the human environment during the site preparation and construction phase, the loss of agricultural livelihoods is assessed as follows in subsection 5.3.3.3 that: "*However, the permanent loss of this agricultural land is an unavoidable consequence of this highway extension and it would be inappropriate to classify this impact "with mitigation*." However, there should be an economic assessment of the acreage of lands loss; the level of productivity loss at the national level and the economic impact this portends.

3. The discussion of human impacts in section 5.4 – operations phase, focuses on issues such as squatting and severing communities, and loss of agricultural land. There is no discussion of the potential economic opportunities or any of the other concerns that were raised by the Village Councils such as the possibility for an increase in crime.

3.3.7 Risk assessment

Risk assessments are usually a requirement for large infrastructural developments such as highways. Although Appendix O was not received and therefore not reviewed by the consultant, the summery provided in Vol. 1 suggested that a thorough risk assessment was undertaken.

3.3.8 Alternatives

A critical aspect of the justification for the project in the decision making process is whether it is more or less beneficial to implement it as opposed to doing nothing or something else. Based on the discussion on Vol. 1, a good range of alternatives were considered, including the "no project" option. However, the analysis of the alternatives would have been greatly enhanced with the inclusion of economic and financial comparisons of the options.

3.3.9 Environmental management plan

Appendix Q was not received and therefore not reviewed by the consultant. Therefore no comment can be made regarding how the projected impacts will be mitigated as well as contingency plans should the impacts exceed the expectations or the mitigation fail. In particular, no comments can be made on the proposed resettlement plan.

3.3.10 Monitoring

The most critical aspect of the impact assessment process is implementation. If the conditions that are set for the operation of the project are not undertaken, then the likelihood of negative impacts increases. However, Appendix Q was not received and therefore not reviewed by the consultant.

3.3.11 Decision relevance of the data

The purpose of the impact assessment is to provide information that would facilitate a decision about the proposed development. It is therefore critical that the information contained in the report not only be accurate but decision relevant, i.e. the report must present information that would facilitate the choice between alternate courses of action. Therefore there are three criteria that the report must meet:

1. Are key findings complete and satisfactory?
2. Is the information clearly presented and understandable by decision makers and the public?
3. Is the information relevant and sufficient for the purpose of decision making and condition setting?

Of utmost importance is the Executive Summary, which must convey the rationale for the project, the major impacts, the major benefits and the recommended mitigation measures. From a social perspective, the Executive Summary must also reflect the range of viewpoints expressed by the varied stakeholders. In this regard there is a wealth of information contained in the notes of the public meeting in Appendix T that is not adequately reflected in the summaries provided in the main body of the report. There are also other instances where the presentation of the data could be enhanced, for example:

1. On page ES-32 in the list of issues raised at the public consultations, agriculture is not included. Neither is the summary of the concerns raised by the participants of the focus groups reported on pages ES-27 and ES-28 a complete sharing of the issues that were identified. For example, there is no reflection of the perspective that the communities feel that they are paying a price for the benefit of others. Nor is there mention of concerns such as the possibility of the increase of crime.

2. The items listed in the executive summary of the comments attributed to the Regional Councils need to be expanded so that the meaning is clear (See also section 4.4.3.2 where the list is repeated). For example:

   "*Employment of small local contractors."* Were they asking for the employment of small contractors?
   "Construction (pavement, disruption of water supply)." What does this refer to?
   "Operation (travel time)." What does this refer to?
   "Present bottleneck at Mosquito Creek." Are they asking if the highway would alleviate this?

3. There is some laxity in the use of language in the reporting of the survey data. No percentages under 50% should be described as "most" or "the majority"; they may represent the largest proportion who gave a particular response. The use of the words "majority", "most", "some of"... are not sufficiently precise, especially when the data is available: The following extracts from Section 4.4.3.3.2 of Vol 1 of the EIA illustrate the point:

   Overall, adults (ages 30 to 59) represented the largest cadre in both years, with a larger percentage in 2008 than in 2006. The next largest cadre in both years was young adults (ages 18 to 29). Children (ages 0 to 17) accounted for about a quarter of the population in 2006, and about one-fifth in 2008. Finally, persons of retirement age (over 60) accounted for 9% of the population in both surveys.

   Based on this there is really no comprehension of the distribution of the sample by age group.

   The majority of persons were employed at their present jobs for less than 5 years, mainly within their respective communities or in the surrounding areas, while some of them worked in San Fernando and Port of Spain. Most of the respondents had occupations other than those listed in Table L-15 in Appendix L in Volume 2, while construction (9%) and unskilled labourers (8%) were the next most popular occupations. In this survey, students in kindergarten, primary or secondary schools tended to attend schools fairly close to their villages. However, those who were in tertiary institutions or vocational schools attended schools some distance away.

   Again there is no way to be sure what the status of employment is based on this paragraph. Also the students who are studying "some distance away" could be in Port of Spain or elsewhere. Therefore, the survey results should be edited to address these ambiguous comments.

- The data listed in 4.4.3.1.3 based on the 2006 and 2008 responses from the Village Councils: there is a listing of the issues raised at the meetings. However, there is no analysis of the list. For example the list should be sorted by topics/issues; it should separate the positive from the negative perspectives. The issues listed from 2008 also require analysis as mentioned in the previous point.

The greatest concern about the report is that in focusing heavily on the stakeholders that will be relocated there is limited discussion of the effects of the proposed highway on other stakeholder groups and of the wider social and economic benefits of the project. Therefore, the reader/decision maker will be well informed of the plight of those who are to be relocated, but somewhat challenged to assess this in the wider context of: who else is adversely impacted and what is the full range of benefits.

SUMMARY OF THE REVIEW OF THE SOCIAL COMPONENTS

The following statement was made at one of the public consultations:

"Dislocating people far outweighs any benefits of a highway."

The development of a highway is a major undertaking and requires a full comprehensive EIA. The fact that persons are to be relocated adds an emotional and potentially politically polarising dimension that requires careful attention to the social issues. Ideally, in a case such as this, a separate social impact assessment should have been required, with the instruction that personnel with qualifications and expertise in social impact projects be a part of the wider EIA team. This was only one of two gaps in the otherwise very thorough terms of reference set for the EIA. The other gap was not requesting an economic analysis of the impacts and benefits.

Overall the social components of the EIA were compliant with the terms of reference. Areas that were not addressed were:

- There is limited discussion of the range of opportunities for employment generation beyond what will be provided during the construction phase
- The focus was on the communities closest to the highway development. Therefore the perspectives of the wider range of stakeholders who use the area were not fully reflected in the report and there was no indication that this was used as part of the baseline.
- There was limited assessment of the impacts of:
    - Disruption of traditional access routes and uses of the area during and subsequent to the project such as agriculture, fishing, recreation, community facilities and institutions;
    - Disruption to life of stakeholders other than those being relocated;
- There was no assessment of:
    - Suitability of the use of pesticides, fertilizers and other project-related chemicals for use near human settlements;
    - Loss of crops and livestock due to possible flooding resulting from project-based activities

Given the sensitive nature of relocation, it is not surprising that the EIA team focused heavily on the residents, institutions and businesses that were scheduled for relocation. The information that has been provided on these groups in the report is more than adequate. However, at the same time, there was a need to also address the agriculture stakeholders who would also be affected by the loss of their lands; the non-relocated business people who would be affected by the highway; as well the impacts on the wider stakeholders who would either benefit or be adversely affected by the project. The report does not place sufficient emphasis on these other groups. Indeed the definition of the study area was focused on those communities in closest proximity to the proposed highway, as opposed to reflecting the wider impacts that would occur across the south west region.

The methods used, i.e. surveys, focus groups and interviews are standard SIA approaches. The only area of weakness was in the implementation of the focus groups. The decision to split already limited numbers of people into two groups and give them separate questions to answer was not prudent. The focus group attempted to cover too many questions and the list of questions, in the case of road conditions was not

objectively designed or sequenced. Given the limited numbers, especially at the third group and the quality of the questions, it is felt that this data was not as reliable and valid as it could be.

Good alternatives were compared, and a risk assessment was conducted, in keeping with the nature of the project. In characterising the impacts, the study focused on the criteria of extent, intensity and duration, and they gave a classification of low, moderate, high or extreme. However, the analysis of the impacts and the benefits would have been greatly enhanced with an economic or financial assessment.
The report as presented contains a wealth of data, but it requires some editing to improve its comprehensibility and usefulness for decision making purposes. Foremost is the need to provide a more accurate and thorough representation of the summaries of the views of the stakeholders in the Executive Summary; to make the presentation of findings more precise by eliminating the use of words such as "majority", "most of", "some of" etc., and replacing them with the actual statistics; and most importantly, to give a better reflection of the wider adverse effect and benefits that will accrue from this project, beyond the impacts on those scheduled to be relocated.

Specific recommendations for edits/amendments to the report are as follows:

1. Amend the terms of reference to require an economic assessment as follows:
    a. A cost-benefit analysis, comparing the economic costs of the various alignment alternatives that were assessed.
    b. A more detailed and updated economic assessment of the development of the highway beyond what was contained in the 2006 feasibility study.
    c. An economic assessment of the adverse effects to provide a comparison against the economic benefits of the highway development.
2. Edit the sections of the report that list the EIA preparers to clearly identify the members of the team who possess the social and economic qualifications and experience.
3. Edit the description of the study area and affected population to acknowledge the wider range of stakeholders who will be affected by the project.
4. Use existing data collected for the study as well as other secondary sources to provide information on the commuter patterns in the most affected communities; as well as information on the wider range of stakeholders, in particular the agriculture and business sectors.
5. Resolve the inconsistent reports of the number of houses that participated in the household survey as well as the number of houses to be acquired.
6. Edit Vol. 1 of the EIA to enhance the summary provided on the emergency resources.
7. Enhance the discussion of the benefits that will accrue from the development of the highway. In particular, include an economic assessment to demonstrate the costs of the adverse effects compared to the projected benefits.
8. Edit the report to better reflect the range of issues raised by the varied stakeholder groups.
9. Enhance the report to make the presentation of findings more precise by eliminating the use of words such as "majority", "most of", "some of" etc., and replacing them with the actual statistics.

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Extension of the Solomon Hochoy Highway – San Fernando to Point Fortin

Technical review of Terms of Reference for Environmental Assessment - Debe to Mt Desir
Submitted by

Eleanor Jones
Environmental Resource Consultant

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1 Background

The Government of Trinidad and Tobago has embarked on the construction of a 50 km extension of the Solomon Hochoy Highway from San Fernando to Point Fortin. Detailed designs were completed between 2005-07, and tenders invited for a design build approach in February 2010. The contract was awarded and construction began inSeptember 2011. The proposed 15.2 km alignment of the segment from Debe to Mt Desir became the subject of strong opposition , andthere has been a call for realignment based on social, economic and environmental concerns as follows: too costly,is conceptually flawed,will cause undue flooding, will destroy agricultural lands and have other negative environmental impacts,will displace households in well-established communities, including places of worship and businesses, and thereby have negative socio-cultural impacts. A Highway Review Committee (HRC) comprising a multi-disciplinary team of consultant professionals has been established to conduct *inter alia* a qualitative review and analysis of selected technical elements of the disputed Mon Desir to Debe segmentusing the benchmark of international best practice. The Committee is charged to provide a report, including recommendations, for consideration.

2 Consultant's Terms of Reference

Under Contract with the Joint Consultative Committee the Environmental Resource Consultant was contracted to serve as an environmental resource and to undertake the following tasks in four days over a two month period :

5. Review the Terms of Reference for the CEC/EIA Report in relation to the Highway Extension Project, particularly the Mon Desir to Debe segment.
6. Consider the extent to which the EIA may be adequate for a project of this magnitude, or ways in which aspects of such assessments might be improved to meet international best practice, also drawing on any informative experiences in Jamaica.
7. Provide technical backstopping advice/comments to the Chairman, as an external reviewer, on the findings/conclusions of the Final Draft Report of the Highway Review Committee.

Further discussion with the Chairman of the committee highlighted the following specific needs of the committee:

- Technical impressions on the comparative adequacy of the TOR in relation to known best practice.
- Do the terms of reference address the range of sectoral requirements for a project of this type?
- Do the statutory arrangements as set out by the EMA meet the needs for assessing such a project?
- How do these TOR compare to the experience of Jamaica?

- Any consideration which might enhance the practice in Trinidad and Tobago as a neighbouring Caribbean Small Island Developing State

This document presents a professional opinion on the adequacy of the Terms of reference for the CEC/EIA Report in relation to the Highway Extension Project, particularly the Mon Desir to Debe segment.

3 Approach

JCC provided the consultant with some project docs relevant to the task assignment. These were reviewed to ascertain the details of the project, the environmental setting and the issues to be handled. In the interest of best practice review, the consultant examined the environmental and social safeguard policies of the World Bank and the IADB, the addition of Strategic environmental and social Assessment to the tools of the Multilateral Banks, studies for major internationally funded highway development , and the statutory context for environmental assessments in Jamaica. Reports on the environmental management framework in TT and in Jamaica were also reviewed.

3.1 Documents reviewed

The consultant reviewed the following documents provided by JCC/HRC:

- ✓ Application submitted to EMA for Certificate of environmental Clearance
- ✓ Terms of reference for the EIA provided by the EMA to the applicant
- ✓ Land Acquisition Act Ch 58 01_28 (1994. Amended 2000)
- ✓ EIA Vol I - Highway Extension To Point Fortin: Debe To Mon Desir
- ✓ JCC Committee For Review of The Extension of The Solomon Hochoy Highway - TOR

Other documents consulted to help inform opinion

- ✓ Environmental and Social Safeguard Policy - Road construction - World Bank
- ✓ Environmental and Social Safeguard Policy - Road construction - Inter American Development Bank
- ✓ Strategic Environmental Assessment Highway 2000 Toll road, Jamaica
- ✓ Environmental Impact Assessments of Segments of Highway 2000, Jamaica
- ✓ Environmental assessment s and Resettlement program north Coast Highway Improvement Project , Jamaica
- ✓ NRCA Act, Jamaica

4 Observations

4.1 Application for Certificate of Environmental Clearance (CEC)

The application form for the CEC was submitted to the EMA in February 2006 by the Highways Division, Project Implementation Unit, Ministry of Works and Transport. The form is in keeping with that of other jurisdictions in terms of request for information to guide decision-making with respect to environmental studies required to support issuance of a CEC. The sections included:

1. General Information which outlined activities of project by designated categories– these were three in number : Clearing, Excavation, Grading and Filling; Infrastructure for land transport; and Drainage and Irrigation. The Purpose of Development was stated and a Description of the site presented.
2. The second section provided a more detailed description of Intended Activity with attachments to support.
3. The third section addressed issues of confidentiality.

On the basis of the application the EMA determined that an EIA would be required as there were significant potential environmental impacts. Terms of Reference were therefore provided for the conduct of the EIA.

4.2 Statutory context

The EIA is being conducted in the framework of the Environmental Management Act, the Rules for Certificate of Environmental Clearance, (CEC Rules 2001), and other policies, standards and guidelines as stated in the TORs "Requirements for EIA"

- Water Quality guidelines
- Air quality Guidelines
- Environmentally Sensitive Areas Rules. 2001
- Environmentally Sensitive Species Rules. 2001
- Noise Pollution Control Rules. 2001
- National Environmental Policy
- National Wetlands Policy

It should be noted that with reference to the above the EMA published six pieces of that subsidiary legislation and these were enacted under theEnvironmental Management Act aimed at environmental protection in Trinidad and Tobago

i. Certificate of Environmental Clearance Rules, 2001
ii. Environmentally Sensitive Areas Rules, 2001
iii. Environmentally Sensitive Species Rules, 2001
iv. Noise Pollution Control Rules, 2001
v. Draft Air Pollution Rules, 2005
vi. Draft Water Pollution Rules, 2005

The TORs suggested that international standards should also be consulted.
In the section on legislative and regulatory requirements there is further reference to a list of partner agencies who may play a role in permitting. It was noted that the requirements should be ascertained and these included in the report. The statutory framework for interrelatedness of agencies is unclear and perhaps reflects the compartmentalization of environmental management. Such compartment-talization limits best output, and collaboration toward sustainable development.

It is useful to note that two specific challenges regarding environmental management and relevant to this project were noted in a recent report (ESL, 2011) :

Environmental Management Act

- To date only Matura Forest has been declared environmentally sensitive but the Environmental Management Authority has taken steps to declare Aripo Savannahs, Nariva Swamp and Buccoo Reef as environmentally sensitive.

- This Act requires the establishment of disposal design and operating norms and emission standards, as well as the **establishment of necessary licensing and permitting systems.**

Forest Act

- The Forest Act enables the designation of Forest Reserves and Prohibited Areas, and for the regulation of the exploitation of timber and non-wood forest products from state lands. The **designation of areas as Forest Reserves does not impose any restrictions on access** to these areas. Restricted access is imposed on areas designated *Prohibited Areas* under the Act. The following areas have been designated prohibited areas under the Forests Act: Aripo Savannahs; Northern Range, Bush and Trinity Hills Wildlife Sanctuaries; Matura, Fishing Pond and Grande Riviere Beaches. It is to be noted that access to Matura, Fishing Pond and Grande Riviere Beaches is prohibited only during the turtle nesting period.

The Land Acquisition Act is important to construction of roadways. A comparative review with the corresponding legislation in Jamaica revealed no substantive variance. The issue of relocation and resettlement remains a challenge in both countries and for this project where a substantial change of use is suggested, these issues loom large. In Jamaica as well as other places the matter of identifying parcels required and negotiated for acquisition through purchase or otherwise is often a vexed issue as it is left too late in the process. Project development is often delayed as a result.

4.3 Reference to Selected Other Jurisdictions

- **Canadian Environment Protection Act** - The Canadian Environmental Protection Act 1999 seeks to contribute to sustainable development through pollution prevention and to protect the environment home life and health from risks associated with toxic substances.
- **Victoria, Australia Environment Protection Act 1970** - was at its inception only the second Act in the world to deal with the whole of the environment in a systematic and integrated way. The Act is outcome oriented, with a basic philosophy of preventing pollution and environmental damage by setting environmental quality objectives and establishing programs to meet them. Over the years the Act has evolved to keep pace with the world's best practice in environment protection regulation and to meet the needs of the community.
- **The Victorian Government's Environment Protection (Amendment) Act 2006** - This amendment brings in a range of changes to the Environment Protection Act 1970. These changes strengthen EPA's role in helping Victorians to live sustainably, and help the Environmental Protection Authority (EPA) achieve its purpose of protecting, caring for and improving the environment. In addition, the legislative changes make some key reforms to waste management to keep Victoria at the forefront of resource efficiency.

- **The Environment Protection and Biodiversity Conservation Act 1999 (EPBC Act)** - is the Australian Government's key piece of environmental legislation which commenced 16 July 2000. This Act enables the Australian Government to join with the states and territories in providing a truly national scheme of environment and heritage protection and biodiversity conservation. The EPBC Act focuses Australian Government interests on the protection of matters of national environmental significance, with the states and territories having responsibility for matters of state and local significance.
- **New Zealand Environment Act 1986** - established the Ministry for the Environment and the Office of the Parliamentary Commissioner for the Environment. The Commissioner is an officer of Parliament appointed for a five-year term to provide an independent check on the system of environmental management and the performance of public authorities on environmental matters. The functions of the Ministry for the Environment, as set out in the Environment Act 1986, are:
    - To advise the Minister on all aspects of environmental administration,
    - To obtain information, and to conduct and supervise research, so it may advise the Government on environmental policies.
    - To provide the Government, its agencies, and other public authorities with advice
    - To facilitate and encourage the resolution of conflict in relation to policies and proposals which may affect the environment.
    - To provide and disseminate information and services to promote environmental policies, including environmental education and effective public participation in environmental planning.
    - Generally to provide advice on matters relating to the environment.
    - To carry out functions specified under any other enactment (this includes for example the Ministry's functions under the Resource Management Act (RMA).
- **New Zealand Resource Management Act (RMA)1991** - The RMA regulates access to natural and physical resources such as land, air and water, with sustainable management of these resources being the overriding goal. New Zealand's Ministry for the Environment describes the RMA as New Zealand's principal legislation for environmental management. Under the RMA virtually all significant uses of land, air, coastal, or water-related resources are regulated by provisions of the RMA or by rules in regional or district plans or by decisions on consent applications. Plans are to achieve the purpose of the RMA which is 'sustainable management' of natural and physical resources.

5 Terms of Reference (TOR) for the EIA – Debe to Mt Desir

The TOR as presented is an exhaustive document with respect to what is required for study. It was noted in the introductory statement that the TORs are intended to guide the conduct of the EIA and preparation of an EIA report that will outline the scope of the project, potential impacts and suggested mitigation measures.

The Background spoke to the proposed alignment as occupying 160 ha including an impervious surface of approximately 37 ha. It was noted that there were spurs and additional routes being contemplated and that these would intersect the Debe to Mt Desir segment. The alignment of the Debe to Mt Desir segment it was noted passes through an ecologically sensitive area, crosses forested lands, oil fields, a major

pipeline corridor,(runs parallel for most of way) , industrial sites, water courses , agricultural lands and human settlements. The phases of the project include site preparation, construction and operation. The associated works are listed below , and it is assumed that this information was taken from the project documents that supported the application:

- Pre-construction clearing and site preparation
- Removal of contaminated soils for remediation
- Plugging of 61 oil wells
- Cut and fill
- Bridge construction – 9 river crossings
- 15 culverts
- Grade separated intersections
- Abstraction of water from 3 rivers
- Diversion of rivers – use of coffer dams
- Pile drivers

The objectives of the EIA as stated include not only assessment of impact and mitigation measures, but also cumulative impacts from on-going or planned developments in southwest Trinidad. A management plan, monitoring plan and hazard risk analysis should form part of the EIA submission.

The contents of the EIA assessment and report are laid out in keeping with standard practice :*Description of Study area* - an exhaustive list of approaches is presented

Project Description- land use, land use planning policy, site and situation and full description of project components . Some of the criteria are somewhat misplaced and lead to repetition in other sections.

Description of the environment -this section describes the existing physical, biological and sociocultural parameters. Details with respect to methodology are included here.

Legislative and Regulatory context -list of partner agencies provided and reference to the need to consult and to determine requirements for permitting.

Determination of Potential Impacts of the Proposed Project- These form the core of the report and set the stage for subsequent action. The impacts are categorized and several issues listed. There is no need for this elaborate listing under each category. It would have been sufficient to highlight the headings and to allow for the professional EIA specialist to determine what the potential impacts were. Hazard analysis is included in this section.

Analysis of alternatives

Development of Management Plan to Mitigate Negative Impacts – this is a limited perspective in that the management Plans should guide optimal performance of the project. For example the Environmental Management Plan should establish Environmental Quality Objectives and actions to achieve the proposed outcome. The Emergency Response Plan, Rehabilitation Plan, Sediment and Drainage Plan are other components. A Resettlement Plan is a key consideration for this and any other project that disrupts settlements and livelihoods.

Monitoring Plan

Consultation and Public Participation - this section is highly contradictory in that whereas it is suggested that consultations can be important to the data gathering phase it is placed in bold that consultations should take place only after the study has been completed. This is not best practice.

The EIA Report- The Table of contents provided is aligned with best practice and is similar to the requirements in Jamaica.The requirement for 25 hard copies is excessive and contrary to resource efficiency.

5.1 In summary

The Terms of Reference are detailed, repetitious in part and could have been more succinct with respect to requirements. Reference to methodology is dispersed throughout. The consultant could have benefitted from a focus on methodology required. Some of the approaches would have needed to be discussed in terms of practicality and resources. This project is major and multi-dimensional with respect to the environmental aspects and potential impacts. A strategic approach would have been beneficial to identification of issues, cumulative impacts, stakeholder consultations and development guidelines. This approach is discussed below

6 Approach to the Environmental Assessment

It is interesting to note that the World Bank and the IADB have introduced Strategic Environmental and Social Assessments as a tool for early analysis of Category A projects, which are those that have significant potential impacts. This SESA can be integrated into the road planning cycle so that the issues are identified as part of the project identification and pre-feasibility stages and levels of analysis scoped for detailed assessment. Road alignment could benefit from what has been termed "least constraining methodology" where the many challenges are identified and minimized through changes in routes. This can be a detailed process and should include a multi-disciplinary team of not only engineers and highway designers but all the relevant professionals including the environmental and planning team.

Design of the 230km Toll road referred to as Highway 2000 in Jamaica benefitted from this approach and where there was deviation considerable challenges arose. The environmental specialists and engineers engaged in an iterative process that examined the physical, biological and sociocultural/economic parameters of the proposed routes. The SEA served as a guide as development guidelines were presented. Where issues were deemed to require more detailed analysis , they were referred to an EIA process. Extensive stakeholder consultations were beneficial as part of the data gathering exercise, and they served to provide information on the project that helped to increase understanding and to answer questions.

The focus on environmental clearance militates against achieving environmental quality and sustainable development. For example, hazard risk and vulnerability analysis is germane to construction projects in the Caribbean and indeed in Trinidad and Tobago. The hazards attendant on this project are both natural and built and therefore greater emphasis could have been placed on these considerations during the design phase.

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REVIEW OF THE EIA
FOR
THE ESTABLISHMENT OF A HIGHWAY ALIGNMENT
FROM
DEBE TO MON DESIR

January 2013

By

Eden A. Shand
Resource Consultant

A. INTRODUCTION

As a result of demands for an independent technical review of the SHHE Project, this writer was tasked with reviewing the CEC/EIA documentation of the subject project with a view to advising on the relevant salient issues. Although the review represents an input into the decision making process, it is not meant to include the decision itself nor give direction on the decision as to whether a project should proceed. Two reports were generated as a result of the documentation review. Report 1 concerns itself with a review of the EIA Report, while Report 2 is concerned with a review of the CEC/EIA process. This instant report is Report 1.

This review of the EIA Report took the form of an appraisal of the document for its accuracy and coverage of the key issues. The appraisal was conducted with reference to relevant documents other than the EIA Report and they are all catalogued in the list of references.

The review methodology is adapted from the Manchester review package (Lee and Colley, 1990). It is based on a system of review criteria which provide a framework for undertaking the review and grading the most salient sections of the EIA Report on the basis of three quality gradings. Although the gradings represent a continuum in value, order of magnitude words are used rather than numbers to discourage crude aggregation of the assessment criteria.

The report hereunder presents the assessment framework, the grading of salient issues and comments on these issues.

B. ASSESSMENT FRAMEWORK

The framework for the review is presented in the form of a matrix shown at Appendix 1. The first column lists the assessment criteria in uppercase and bold type with the salient issues in lower case. These criteria are generic and apply to all reviews of EIA Reports. The salient issues are also largely generic, but there is some specific tailoring to the instant project based on the literature cited.. The next three columns show the quality gradings resulting from the appraisal. The final column provides a reference number for comments on the salient issues where a fuller explanation of the grading seemed requisite. These comments are detailed in the following section.

C. COMMENTS ON SALIENT ISSUES

1. Titling of EIA Report

The EIA Report Title should be consistent with the titling of other reports on the development. Although the title of the EIA Report is clear that the development concerns the extension of an existing highway to a named destination, it should give the name of the existing highway, namely the Solomon Hochoy

Highway. Precision in titling eliminates confusion on the purpose and intent of the development. NIDCO, the proponent of the development, created problems for itself when, in a document created by its Community Outreach Centre, entitled the project the San Fernando to Point Fortin Highway. The Press, given to abbreviation, has seized upon this nomenclature. Critics of the route for the proposed highway can be forgiven for asking why a highway so named does not take the most direct route that avoids the problems associated with road construction in wetlands.

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2. Explanation of Purpose and Objectives

Although the body of the Report contains sufficient detail about the purpose and objectives of the development, this is not reflected in the Executive Summary. Here the language used is "accessibility to the Counties of Victoria and St. Patrick". The Executive Summary is all that some decision-makers read and, therefore, vital information must not be omitted. More specific language mentioning accessibility to the settlements of Debe, Penal, Siparia and Fyzabad was required, since this was key to assessment of alternative routes and alignments..

3. Quantification of needed materials

This was not done, for the EIA Terms of Reference did not require this. However, for a highway construction project, it is important to assess how the demand for, say, aggregate would impact on areas far removed from the Project Area or the Study Area, e.g. the northern quarries.

4. Quantification and treatment of waste matter and residual materials

Quantification was only done for contaminated soil. Description of the treatment of waste matter and residual materials did not go beyond where they would be stored.

5. Importance of area relative to surroundings

Data gathering was not comprehensive enough to facilitate an assessment of the importance of the Study Area with respect to the surroundings and the region as a whole.

6. Analysis of ecosystem dynamics

Under the rubric of "Ecology", a comprehensive listing of all the species in the various biological categories was done, but that was as far as it went. Ecology, however, is about species relationships, but there was no analysis of the relationships and the overall dynamics of the ecosystem.

7. Analysis of hydrological issues

A good map of the flood-prone areas was reproduced, though the EMA reviewers were of the opinion that flood-prone areas, not directly situated in the proposed highway alignment were considered. A WASA comment in a letter to the EMA, signed by Marilyn Crichlow, noted that the map identified as Figure 4.2 did not show all areas prone to flooding. WASA also commented on the inadequate evaluation of the

impact of routing the road through the Oropouche Lagoon, a view which is shared by the EMA and this reviewer. There is also insufficient treatment of the wetland ecology.
MOWT was very dismissive of the above observations, countering that the information provided was adequate for the purposes of an EIA. It is noteworthy that the successor proponent to MOWT, the special purpose State company, NIDCO, *pari passu* with highway construction, is in the process of undertaking detailed engineering studies of the South Oropouche River Basin, during which detailed designs for mitigation of flooding will be addressed. It would appear that MOWT/NIDCO, with the concurrence of the EMA, has proceeded with confidence in post-EIA engineering feasibility of flood mitigation measures. Whether or not this confidence is well-placed is better answered by the engineers on the Technical Review Team.

8. Significance to human well-being

A lifeless listing of socio-cultural data was presented with no analysis of how the environment shaped the way of life of the people. Agricultural activity as a way of life amounted to a mere cursory description of agriculture in overall land use. The traditional uses of the area by the local population deserve analysis and discussion as opposed to a bullet-point listing.

9. Consideration of impacts on human well-being

There was insufficient discussion on the effects of the development on the way of life of the affected population.

10. Consideration of ecosystem changes

A lack of consideration of ecosystem changes followed from the paucity of analysis of ecosystem dynamics.

11. Methodology and prediction of impact size

As is the custom in the Trinidad and Tobago EIA culture, impacts are rarely quantified, so that in this instance there is no methodology to assess. Qualitative description of impacts, often subjective, is the norm.

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12. Assessment of impact significance

Qualitative descriptions of impact significance were good, but there is room for making quantitative references to qualitative descriptions (e.g. flooding impacts will be insignificant, where insignificant means no more than a one foot rise in average water levels). This was somewhat absent from the EIA Report.

13. Assessment of alternatives

Consideration of advantages and disadvantages of alternative routes and alignments was competently done. A clear case was made for the route and alignment finally selected. The justification for the chosen route on the grounds of accessibility for the settlements of Debe, Penal, Siparia and Fyzabad was indisputable.

14. Stakeholder consultation mechanisms

The post-EIA structure and number of consultations prescribed in the EIA Terms of Reference were strictly observed. However, although there was wide and serious consultation, a significant segment of the affected population appeared to have been insufficiently consulted. This is evidenced by the birth of the Highway Reroute Movement. When prescribed consultations run the risk of excluding stakeholders of consequence, it is incumbent on the EIA preparers to devise alternative, perhaps unorthodox methods of communication (e.g. establishing temporary focal points in remote settlements during the EIA preparation) to take their views on board and offer explanations. The post-decision establishment of a Community Outreach Centre by NIDCO might be a model worth examining.

15. Style of EIA Report

The style of the EIA Report is cumbersome, in that it violates one of the cardinal rules of EIA Report writing, namely, the avoidance of encyclopedic documents. Much of the baseline information is either irrelevant or superfluous. This sort of content bears little relationship to the needs of the decision-maker. However, preparers could mount a vigorous defense by pointing to the burdensome requirements of the EIA Terms of Reference. Such a defense, however, will not absolve them from the essential task of writing a concise readable summary.

16. Non-technical summary

The preparers failed to rise to the challenge of writing a readable non-technical summary. Instead, one got a technical Executive Summary, almost as encyclopedic as the main Report. Given that decision-makers are often lay policy-crafters with busy schedules, they are not likely to ready beyond the summary. Therefore, it is imperative that a brief, though complete, non-technical summary of a page or two be written with the succinctness one can find in a Note for Cabinet. Whether or not the Terms of Reference call for this, the preparers owe it to themselves and to their readers to observe this standard.

D. CONCLUSIONS AND RECOMMENDATIONS

Notwithstanding the above deficiencies, the EIA is acceptable insofar that it contains enough information, though deeply buried, to enable a decision on the project. This was indeed done on the strength of a CEC granted by the EMA in April 2010.The MOWT held a Public Consultation in October 2010 and announced its decision to proceed. Given this *fait accompli* it is imperative that the impending presentation of detailed designs for drainage and flood mitigation be meticulously scrutinized by the authorities named in the CEC and that monitoring plans be adjusted to take these new measures into consideration.

Also given this *fait accompli,* it is now inevitable that some people's lives will be disrupted, even to the extent of having to pull up roots and move elsewhere. It is imperative that such disruption be mitigated in a manner that leaves the affected persons no worse of than before the arrival of the highway. Ideally, the lives of such affected persons should be of higher quality after mitigation interventions.

EIA REVIEW MATRIX SALIENT ISSUES

ASSESSMENT CRITERIA AND SALIENT ISSUES	QUALITY GRADING			COMMENT #
	HIGH	MEDIUM	LOW	
DESCRIPTION OF DEVELOPMENT				
1.Titling of EIA Report		X		1
2. Explanation of purpose and objectives		X		2
3. Quantification of needed materials			X	3
SITE DESCRIPTION				
1. Quality of mapping	X			
2. Delineation of Project and Affected area	X			
RESIDUALS				
1. Quantification of waste matter and residual materials		X		4
2. Treatment prescriptions for waste and residuals		X		4
BASELINE DESCRIPTION				
1. Importance of area relative to surroundings addressed			X	5
2. Analysis of ecosystem dynamics			X	6
3. Adequacy of analysis of hydrological issues			X	7
4.Significance to human well-being			X	8
IDENTIFICATION OF IMPACTS				
1. Appropriateness of methods used	X			
2. Classification of impacts	X			
3. Consideration of impacts on human well-being		X		9
4. Consideration of ecosystem changes			X	10
5. Consideration of archaelogical impacts	X			
PREDICTION OF IMPACT MAGNITUTE				
1. Prediction of impact size as deviation from baseline			X	11
2. Adequacy of quantification methodology			X	11
3. Assessment of impact significance		X		12
ASSESSMENT OF ALTERNATIVES				
1. Consideration of advantages and disadvantages	X			13
2. Justification of final choice	X			13
MITIGATION				
1. Completeness of proposed measures	X			
2. Effectiveness of proposed measures	X			
3. Scheduling of measures	X			
4. Monitoring of mitigation effectiveness	X			
STAKEHOLDER CONSULTATIONS				

1. Execution of prescribed consultations	X			
2. Use of other mechanisms		X		14
COMMUNICATION OF RESULTS				
1. Style			X	15
2. Balance between positive and negative impacts	X			
3. Provision of Glossary	X			
4. Non-technical summary			X	16

IV. REFERENCES

SECTION 7: Hydrology and Hydraulics

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- [1b] Volume 2 - Environmental Feasibility
- [1c] Volume 3 – Potential Socio-Economic Impact
- [1d] Volume 4 – Institutional and Maintenance Assessment

[2] **LEA Trintoplan Oct 2007** – *H1-H7 Hydraulic and Hydrology Reports*
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- [2a] Prof. G.S. **Shrivastava - May 2005** – *H1 Hydrologic and Hydraulic Engineering* Feasibility Study
- [2b] Dr. Vincent **Cooper - Jan 2007** – *H2 Silver Stream Bridge Crossing*
- [2c] Dr. Vincent **Cooper - Feb 2007** – *H3 Tarouba River Crossing*
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- [2d] Dr. Vincent **Cooper - Mar 2007** – *H5 Oropouche River Crossing*
- [2e] Dr. Vincent **Cooper - Sept 2007** – *H6 Godineau River and Mosquito Creek Crossings Estimations*
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[3] **EcoEngineering** – LEA Trintoplan – **June 2009** – *Environmental Impact Assessment Highway Extension to Point Fortin: Debe to Mon Desir*
- [3a] *Appendix A - CEC Appl. & TOR*
- [3b] *Appendix B- Aerial Survey-Photography*
- [3c] *Appendix F - Climate*
- [3d] *Appendix G - Water Quality*
- [3e] *Appendix J - Ecology*
- [3f] *Appendix K - IMA Wetland Report*
- [3g] *Appendix M - Potential Impacts*
- [3h] *Appendix Q - Environmental Management Plan*

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[6] **NIDCO June 2012** – *Report on the Debe to Mon Desir Segment Sir Solomon Hochoy Highway*
- [5a] App 1.1 – Certificate of Environmental Clearance 1143/2005 – Golconda to Debe
- [5b] App 1.2 – Certificate of Environmental Clearance 1372/2006 – Debe to Mon Desir

[7] **MOWT 2005** - *Terms of Reference for the Feasibility Studies and Design Consultancy Services* for the Trunk Road Expansion Component, IDB Loan No 932/OC-TT including the Extension of the Solomon Hochoy Highway (Golconda to Point Fortin)

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NIDCO. *Report on the Debe to Mon Desir Segment of the SHHE.* June 2012

WASA. *Letter from Marilyn Crichlow to EMA commenting on EIA for the establishment of a Highway Alignment fro Debe to Mon Desir.* November 2009

ABBREVIATIONS

SECTION 7: Hydrology and Hydraulics

AASHTO	American Association of State Highway and Transportations Officials (AASHTO)
CEC	Certificate of Environmental Clearance
DD	Drainage Division (part of MOEWR, formerly part of MOWI)
EIA	Environmental Impact Assessment
EMA	Environmental Management Agency
HRM	Highway Reroute Movement
HRC	Highway Review Committee
MOWI	Ministry of Works and Infrastructure (formerly also known as MOWT)
MOEWR	Ministry of Environment and Water Resources (includes DD)
NIDCO	National Infrastructure Development Company
PN	Dr. Pramenath Narinesingh
RAR	Review and Assessment Report
SMP	Stormwater Management Plan
TOR	Terms of Reference
WASA	Water and Sewerage Authority
WMP	Water Management Plan
WRA	Water Resources Agency

V. APPENDICES

APPENDIX 1

Independent Review Committee Members - *Technical Staff*

COMMITTEE MEMBER NAME	DESIGNATION
James Armstrong	Chairman
Louis Bertrand	Social Impact Assessment Specialist
Marilyn Crichlow	Water Resources Specialist
Nico Kersting	Water Resources Specialist
Marlene Attz	Cost/Benefit Consultant
Frances Hanson Lewis	Environmental Consultant
Ken Subran	Senior Property Valuation / Acquisition Adviser
Grace Les Fouris	Senior Urban-Regional Consultant
Peter Harris	Archaeologist
Trevor Townsend	Traffic/Transportation Planning Specialist
Philbert Morris	Traffic/Transportation Planning Specialist
William Agard	Chair – Engineering Design and Hydrology/ Hydraulics Group
Ivan Laughlin	Housing/Settlements Specialist
Carla Herbert	Legal Advisor
Eleanor Jones	Environment Resource Consultant
Eden Shand	Environmental Impacts Assessment Resource Consultant
Janice Cumberbatch	Social Impact Assessment Resource Consultant

APPENDIX 1

Independent Review Committee Members - *Support Staff*

COMMITTEE MEMBER NAME	DESIGNATION
Valerie Taylor	Executive Documentation Officer
Sunity Maharaj	Communications Advisor
Kieron Prince	Administrator
Kerneisha Prince	Senior Administrator

APPENDIX 1

Independent Review Committee Members - *Biographies*

James Armstrong

James Armstrong, M. Sc., Ph. D. in Urban and Regional Planning has had a distinguished career in development planning as a Chief Technical Advisor at the United Nations Centre for Human Settlements based in Nairobi, Kenya, where he resided for 12 of his 25 years with the UN. He has worked in numerous countries around the world providing technical advisory services to governments. Since his return to Trinidad and Tobago in 2001 he has worked as an independent consultant in the area of planning and development. He has been an Independent Senator in the Parliament of Trinidad and Tobago since March 2010.

Grace Les Fouris

Grace Les Fouris, BSc. (Hons), has served as the Assistant Director of the Town and Country Division of Trinidad and Tobago and has held similar portfolios within the Caribbean region; serving as the Director of Physical Planning – Turks and Caicos Islands and Manager/Planner responsible for the preparation of a National Physical Development Plan for St. Vincent and the Grenadines. Locally, Grace has worked as a consultant for the Ministry of Works and Transport, Ministry of Local Government, and the Ministry of Planning and Sustainable Development

Frances Hanson-Lewis

Frances is a Geologist with 17 years professional experience. During that time she has worked at the Water Resources Agency, the Institute of Marine Affairs, the Environmental Management Authority and BG Trinidad and Tobago Ltd. She has done free-lance consulting since 2005 and has worked on a number of significant projects in both the construction and energy sectors, particularly as they pertain to Environmental Impact Assessment and Certificates of Environmental Clearance.

Louis Bertrand

Mr Bertrand BSc. (Management), MBA (Marketing) has conducted quantitative and qualitative studies for a number of national and international organizations. As part of his social research assignments he has project managed a variety of studies; some very large scale (A sample size of over 50,000); studies on very sensitive issues (AIDS in St. Lucia and condom use in T&T); and studies utilizing sophisticated analytical techniques (conjoint measurement, multi-dimensional scaling, factor analysis). Mr Bertrand has also been responsible for the design and implementation of the ACT Computerised Agricultural Information System, the development of forecasting models and for conducting feasibility studies in the Agricultural sector throughout the Caribbean.

Ivan Laughlin

Ivan Laughlin is a Human Settlement Consultant and Practitioner and Land Surveyor. These practices constitute a field of development activity related to the living environment – land and people, village and town, community and work. They involve an all-embracing approach to physical, social and economic development and therefore incorporate a wide range of the living environment activities – land ownership, land use, land development – "how you shape the land so will you shape the civilization" -

productive economic activity, the quality of relationships within the community - either existing or to be established - the development of infrastructure and the provision of social and communal services. It is an approach which requires integration, co-ordination and co-operation and which makes paramount the need for community assessment, participation and viability.

Marlene Attzs

Marlene Attzs, PhD, is the Ag. Coordinator of the Sustainable Economic Development Unit (SEDU), a specialized research Unit in the Department of Economics, at the University of the West Indies (UWI), Trinidad and Tobago. She also is a Lecturer in the Economics. Dr Attzs' primary research interest is in the area of economic development, particularly in the context of Caribbean Island states. The impetus for her research interest lies in the challenge faced by so many island states, that is, how to achieve economic growth in a way that simultaneously focuses on improving the wellbeing of our societies. Dr Attzs has served as a local, regional and international Consultant in the aforementioned areas having worked with Governmental and Non-Governmental agencies in Trinidad and Tobago, regional institutions such as the Caribbean Development Bank and internationally with the Inter American Development Bank (IDB), Washington, and the UK Department for International Development (DFID).

Trevor Townsend

Dr Trevor Townsend BSc., M.Sc. Civil Engineering majoring in Transportation Engineering and Ph.D. in Transportation Systems Engineering, is a Registered Engineer and a Fellow of the Association of Professional Engineers of Trinidad and Tobago as well as a Member of the Institute of Transportation Engineers. He worked for twenty years in the public sector in both the central government, where he rose to the position of Chief Traffic Engineer in 1981, and in the P.T.S.C. where he was General Manager for the period 1988 – 1998. He has worked extensively in the areas of traffic, public transportation and public policy with regard to infrastructural development. Dr Townsend has been engaged as a private consultant on a number of transportation policy, transportation planning and traffic impact assessment studies.

Philbert Morris

Philbert Morris is a mathematician working in combinatorics and optimization. Since the 70s he has been applying his methods to a variety of areas, notably traffic and transportation. He has worked on software to balance judges' case- loads in the Supreme Court, as part of a team to co-ordinate the procurement of drugs in Trinidad & Tobago, to optimize the production of blocks in a clay-block factory. Dr Morris was at one time Head of the department of Mathematics and also Vice Dean of the Faculty of Natural Sciences at the University of the West Indies, St Augustine. In 1996 he left the university, as a Senior Lecturer, to work fulltime on his consulting. He has been Chairman of the Public Transport Service Corporation, and was responsible for the traffic design of CityGate. He has presented papers on this topic, where the problem is to design a facility for random arrivals. Since the nineties he has worked on a range of transportation projects, mainly in Trinidad & Tobago, but also in Antigua and Tortola, with Dr Trevor Townsend.

Nicolaas Kersting

Mr Nicolaas Kersting holds a Master's Degree in Civil Engineering with almost 20 years' experience in engineering and project management of infrastructural projects including coastal and river projects, drainage, and highway design with additional specialization and professional training in Integrated River Basin Management, Sediment Management and Flood Management. Mr Kersting has work experience in several countries, including The Netherlands, Trinidad and Tobago, Suriname, Barbados, Belize, Guyana, Dominica, India, Morocco, Antigua and Grenada. He is a member of the Royal Dutch Institute of

Engineers and member of the Association of Professional Engineers of Trinidad and Tobago. Project experience in Trinidad, since 2000, includes responsibility for hydrology & hydraulics for stormwater and river engineering projects (e.g. Caroni River, Caparo River, Mamoral Dam, St Ann's River, South Oropouche River, Port-of-Spain Flood Alleviation Project) and for several major infrastructural projects (Highway Designs and Trinidad Rapid Rail Project) as well as civil engineering & project management projects.

Marilyn Crichlow

Mrs. Marilyn Crichlow, Hydrologist and Water Resources Specialist, has thirty (30) years' experience in the Water Sector of which twenty-two (22) years are at Senior and Executive Management levels.Mrs. Crichlow has operated at the highest policy, operational and regulatory levels, with organizations such as; the World Water Council Project, the Global Water Partnership, the World Meteorological Organization for Trinidad & Tobago, the Water and Sewerage Authority of Trinidad and Tobago, the Water Resources Agency, and the Ministry of Public Utilities. Some of Mrs. Crichlow's qualifications include a Master of Philosophy (MPhil.) in Physics, a Master of Science in Hydrological Engineering (Holland), a Bachelor of Science (Honours) in Physics, Applied/Environmental Physics and Mathematics, a Postgraduate Diploma in Computer Systems Analysis and Design, a Certificate in Planning and Project Management, and a Certificate in Advanced Leadership Skills. Mrs. Crichlow has extensive experience in integrated water resources management and studies pertaining to water resources (surface water and groundwater) monitoring and assessment and environmental impact assessment in Trinidad and Tobago. At present, Mrs. Crichlow operates as a Consultant supporting local and regional clients.

William Agard

William Agard is a Civil Engineer. Who holds a Bsc. from Dlc - Loughborough University. He is a member of the Fellow Association of professional Engineers of Trinidad and Tobago and is also a Registered Engineer. He has worked in the United Kingdom with experience in the design of Dams, Spillways, Reservoirs, and Pipelines etc. In Trinidad he has been involved in projects such as the Port of Spain B Power station, Dualling of Princess Margaret Highway (Now Butler Highway) including river crossings and over passes, the development of roads drainage, water supply and sewerage works for various land development schemes in Trinidad, Tobago, Grenada and Barbados. He has also prepared Flood analyses and reports for the Barataria Roundabout-Fernandez Compound areas, La Pai Settlement-Caroni, preliminary drainage designs for the new Piarco Airport Hydrological and hydraulic analysis and designs for repairing the banks due to scour of the Roseau River in Dominica and for the Leyou River restoration after massive hill slide which severely blocked the river bed.

Peter Harris

Peter Harris is a professional archaeologist with over 40 years' field experience in Trinidad and Tobago. He holds an MA in Anthropology and Archaeology from University of Gainesville, Florida (1994). He currently works with UTT as Senior Research Fellow in First Peoples Studies and has a long relationship with Banwari, the oldest human settlement in the Caribbean. In 1969-70 he led an excavation with the Trinidad and Tobago Historical Society (South Section) and in 1971 was co-leader of a joint Historical Society and Museo del Hombre Dominicano team which excavated the Banwari burial site, (one of earliest in the Caribbean). In 2005-6 he co-led a UWI excavation to upgrade data quality, with most of the material collected still awaiting overseas analysis.

Kenneth Subran

Land Acquisition consultant Kenneth Subran entered the Valuation Division as Valuation Assistant I Trainee in 1976 and retired as in 2003 as Commissioner of Valuations. During this time he obtained a Diploma in Rural Estate Management in 1972 and a Professional Associate of the Royal Institution of Chartered Surveyors (General Practice) in the late 70's. He was a member of the former Professional Valuation and Land Economy Surveyors of T&T and served later as an Executive Member of the Institute of Surveyors Of Trinidad and Tobago (ISTT) until he retired in 2003. He served on a number of Multidisciplinary Standing Committees such as the Highways, Lands, Reclamation (land), Central Administrative Services Tobago (CAST) Heads of Sections, and a number of ad hoc Committees dealing with revision of Land laws, revision of Cabinet (land) policies, Large Acquisition projects etc. He advised the San Fernando Corporation on Property Taxation and also performed as an expert witness on Estate Management and Property Taxation matters before the courts. He has made submissions to Public Commissions dealing with Estate Management and Property Taxation matters.

APPENDIX 2

TOR of the Independent Review Committee

Position: Administrative Support Services

JOINT CONSULTATIVE COUNCIL

COMMITTEE FOR REVIEW OF THE EXTENSION OF
THE SOLOMON HOCHOY HIGHWAY

TERMS OF REFERENCE

Position: Administrative Support Services

Duration: Seven Weeks (With possibility of extension of selected services)

Commencement: 10 December 2012

Duty Station: To be Determined.

Background: The Joint Consultative Council has established a Committee to undertake a technical review of aspects of the extension of the Solomon Hochoy Highway as set out in separate Terms of Reference. In this connection, the Committee needs to engage Administrative Support Services for a period of seven weeks.

Duties: Under the direction of the Chairman of the Committee, the Services will include:

1. A principal administrative officer providing general administrative support to the Committee at the office location on a full time basis, but also being able to respond to ad-hoc support requirements which may be delegated to other officers within an installed service provider capability on an as needed basis.
2. Set up an office for the operations of the Committee, including arrangements for furnishings, stationary supplies, fax and photo-copying services, delivery/collection service.
3. Arrange for meetings, interviews and field visits.
4. Record all oral submissions and interviews and transcribe the information received.
5. Format all reports submitted by consultants and stakeholders; prepare interim reports after editing and approval, and disseminate as instructed.

APPENDIX 2

TOR of the Independent Review Committee

Position: Administrative Support Services (Cont'd)

6. Undertake word-processing for the compilation of a combined final Report of the Committee.
7. Create an e-mail address; establish and manage cell phone account/s and or land phone lines.
8. Maintain day-to-day accounting of revenue and expenditure.
9. Prepare press releases and advertisements as directed and undertake delivery to respective media outlets.
10. Provide related administrative services to facilitate the smooth running of an office and the operations/work of the Committee.

Qualifications and Experience: The principal administrative officer will have professional qualifications related to administrative support services and have charge of an installed administrative service delivery capability. Basic accounting will be required.

APPENDIX 2

TOR of the Independent Review Committee

Position: Archaeologist

JOINT CONSULTATIVE COUNCIL

COMMITTEE FOR REVIEW OF THE EXTENSION OF
THE SOLOMON HOCHOY HIGHWAY

TERMS OF REFERENCE

Position: Archaeologist

Duration: Five Working Days over a Two-month Period

Commencement: 10 December 2012

Duty Station: At the consultant's base, with attendance at consultations as may be required.

Background: The Joint Consultative Council has established a Committee to undertake a technical review of aspects of the extension of the Solomon Hochoy Highway as set out in separate Terms of Reference. An inter-disciplinary team comprising, *inter alia*, hydrology, transportation, planning and land management, ecology, archaeology, etc., has been established to review specific components of the Highway Project and to collaborate in the compilation of a Technical Review Report within two months. In this connection, the JCC wishes to engage the services of an Archaeologist.

Duties: Under the coordination of the Chairman of the Committee, the Archaeologist will:

1. Review any paleoecological information of relevance to the area.
2. Based on knowledge of the area, list an inventory of archaeological assets and also advise on prospective implications for mitigation measures in relation to construction of the Highway.
3. Based on the knowledge of ethnographic records advise on implications and procedures which should be observed.
4. Comment on implications in respect of the Banwari site and any other sites/monuments of interest in relation to the specified alignment for the Highway, in relation to and consideration for alternative routing which might enhance mitigation measures.

APPENDIX 2

TOR of the Independent Review Committee

Position: Archaeologist (Cont'd)

5. Participate in inter-disciplinary meetings to consider and advise on related engineering/hydrological implications of the project.
6. Provide specialist advice to the other consultants within the group
7. Prepare an objective technical assessment of findings and recommendations for inclusion in the Final Report of the Committee.
8. Review the Final Report to ensure that the archaeological issues are adequately reflected.

Qualifications and Experience: The Archaeologist will have professional qualifications in the field and extensive experience in the Trinidad and Tobago environment.

Deliverables: The Archaeologist will provide interim written findings and advice. He/she will deliver ten hard copies of his/her report and an electronic copy for inclusion in the final Report. The submission may be edited, without omission of the substantive issues, to fit into the overall Report.

Organisation of the Exercise: While the Archaeologist will work from his/her base, attendance at technical meetings in Port of Spain will be required. Where appropriate, documents will be circulated electronically. However, it might become necessary to review selected documents and large scale maps at the project-office. Confidentiality is essential and no unauthorised information is to be released prematurely or interviews granted without the expressed knowledge of the Chairman.

APPENDIX 2

TOR of the Independent Review Committee

Position: Chairman – Highway Review Committee

JOINT CONSULTATIVE COUNCIL

COMMITTEE FOR REVIEW OF THE EXTENSION OF
THE SOLOMON HOCHOY HIGHWAY

TERMS OF REFERENCE

Position: Chairman – Highway Review Committee

Duration: Thirty-five Working Days, within a Two-month Period

Commencement: 10 December 2012

Duty Station: At the consultant's base, with attendance at consultations as may be required.

Background: The Joint Consultative Council (JCC) has established a Committee to undertake a technical review of aspects of the extension of the Solomon Hochoy Highway as set out in separate Terms of Reference. An inter-disciplinary team comprising, *inter alia*, hydrology, transportation, planning and land management, ecology, archaeology, etc., has been established to review specific components of the Highway Project and to collaborate in the compilation of a Technical Review Report within two months. In this connection, the JCC wishes to engage the services of a Chairman of the Committee.

Duties: Reporting to the JCC and related Civil Society Groups, the Chairman will:

1. Identify, interview and engage, on behalf of the JCC, an interdisciplinary team of specialists consultants and support staff to undertake the required Review of the Debe to Mon Desir segment of the Solomon Hochoy Highway.
2. Identify and engage off-shore resource consultants in specific areas to provide advice and technical backstopping on critical issues.
3. Prepare terms of reference and contracts for the Committee-members and supervise their individual contributions to the exercise.

APPENDIX 2

TOR of the Independent Review Committee

Position: Chairman – Highway Review Committee (Cont'd)

4. Chair meetings of the Committee with principal focal points in the Government, such as the executing agency – NIDCO – and on the other hand, the Highway Reroute Movement.
5. Chair meetings of the Committee and direct the intersectoral deliberations as set out in the Terms-of-Reference for the HRC.
6. Vet submissions to the HRC from the public and direct same to the respective consultants for consideration.
7. Supervise the compilation of an integrated Final Report to reflect the findings and recommendations of the Committee.

Qualifications and Experience: The Chairman should have an advanced degree in a development related discipline and extensive experience at the technical management level. He/she must be able to exercise independent judgement.

Deliverables: The Chairman will deliver to the JCC and related civil society groups an electronic copy of the Final Report, along with ten hard copies within 60 days of commencement of the exercise.

APPENDIX 2

TOR of the Independent Review Committee

Position: Communications Advisor

JOINT CONSULTATIVE COUNCIL

COMMITTEE FOR REVIEW OF THE EXTENSION OF
THE SOLOMON HOCHOY HIGHWAY

TERMS OF REFERENCE

Position: Communications Advisor

Duration: Six Working Days within a Two-month Period

Commencement: 10 December 2012

Duty Station: At the consultant's base, with attendance at consultations as may be required.

Background: The Joint Consultative Council (JCC) has established a Committee to undertake a technical review of aspects of the extension of the Solomon Hochoy Highway as set out in separate Terms of Reference. An inter-disciplinary team comprising, *inter alia*, hydrology, transportation, planning and land management, ecology, archaeology, etc., has been established to review specific components of the Highway Project and to collaborate in the compilation of a Technical Review Report within two months. In this connection, the JCC wishes to engage the services of a Communications Advisor.

Duties: Under the coordination of the Chairman of the Committee, Communications Advisor will:

1. Advise on communications strategies in relation to the various media houses.
2. Prepare Press Releases for public information, as may be requested/ required.
3. Arrange for press conferences.
4. Arrange for public consultations to solicit information from stake holders.
5. Undertake related information dissemination and gathering as may be required, including advertisements to invite oral and written submissions to the Committee.

Qualifications and Experience: The Communications Officer will have appropriate qualifications in the communications field and extensive experience in dealing with the media.

APPENDIX 2

TOR of the Independent Review Committee

Position: Communications Advisor (cont'd)

Organisation of the Exercise: While the Communications Officer/Editor will work from his/her base, attendance at briefing meetings will be required. Where appropriate, much of the communication requirements in this regard could be done electronically.

APPENDIX 2

TOR of the Independent Review Committee

Position: Cost/ Benefit Analysis - Economist

JOINT CONSULTATIVE COUNCIL

COMMITTEE FOR REVIEW OF THE EXTENSION OF
THE SOLOMON HOCHOY HIGHWAY

TERMS OF REFERENCE

Position: Cost/Benefit Analysis - Economist

Duration: Six Working Days, within a Two-month Period

Commencement: 10 December 2012

Duty Station: At the consultant's base, with attendance at consultations as may be required.

Background: The Joint Consultative Council has established a Committee to undertake a technical review of aspects of the extension of the Solomon Hochoy Highway as set out in separate Terms of Reference. An inter-disciplinary team comprising, *inter alia*, hydrology, transportation, planning and land management, ecology, archaeology, etc., has been established to review specific components of the Highway Project and to collaborate in the compilation of a Technical Review Report within two months. In this connection, the JCC wishes to engage the services of an economist to consider the cost/benefit implications.

Duties: Under the direction of the Chairman of the Committee, the economist will:

1. Set out a listing of criteria/indicators and methodology normally employed in the consideration of major infrastructure projects.
2. Review documentation for any available cost/benefit considerations in respect of the Solomon Hochoy Highway extension to Pt. Fortin, or with respect to the Mon Desir to Debe segment.
3. Review relevant oral/written submissions to further inform the Review.
4. Comment on the process employed in any cost/benefit analysis.

APPENDIX 2

TOR of the Independent Review Committee

Position: Cost/ Benefit Analysis – Economist (Cont'd)

5. Consider the cost/benefit implications and any mitigation measures for the Mon Desir to Debe segment, taking into consideration the following:
    - Overall assessment of the direct/indirect and cumulative costs and impacts of the project.
    - A contract has already been awarded for the entire project.
    - Implications for consideration of any realignment.
6. Prepare an objective technical assessment of findings and recommendations for inclusion in the Final Report of the Committee

Qualifications and Experience: An advanced degree in economics with extensive experience in cost/benefit analyses of sustainable development and projects of the type under consideration.

Deliverables: The Economist will provide interim written findings and advice. He/she will deliver ten hard copies of his/her report and an electronic copy for inclusion in the final Report. The submission may be edited, without omission of the substantive issues, to fit into the overall Report.

Organisation of the Exercise: While the economist will work from his/her base, attendance at technical meetings of the group will be required. Where appropriate, documents will be circulated electronically. However, it might become necessary to review selected documents and maps at the project office. Confidentiality is essential and no unauthorised information is to be released or interviews granted without the expressed consent of the Chairman.

APPENDIX 2

TOR of the Independent Review Committee

Position: EIA Resource Consultant

JOINT CONSULTATIVE COUNCIL

COMMITTEE FOR REVIEW OF THE EXTENSION OF
THE SOLOMON HOCHOY HIGHWAY

TERMS OF REFERENCE

Position: EIA Resource Consultant

Duration: Four Working Days within a Two-month Period

Commencement: 10 December 2012

Duty Station: At the consultant's base.

Background: The Joint Consultative Council (JCC) has established a Committee to undertake a technical review of aspects of the extension of the Solomon Hochoy Highway as set out in separate Terms of Reference. An inter-disciplinary team comprising, *inter alia*, hydrology, transportation, planning and land management, ecology, archaeology, etc., has been established to review specific components of the Highway Project and to collaborate in the compilation of a Technical Review Report within two months. In this connection, the JCC wishes to engage the services of an EIA Resource Consultant.

Duties: Under the coordination of the Chairman of the Committee, EIA Resource Consultant will:

1. Review the CEC/EIA documentation in relation to the Highway Extension Project, particularly the Mon Desir to Debe segment.
2. Advise the Chairman on the salient issues of relevance to the Review.
3. Advise the Chairman from time to time on findings and recommendations of principal consultants, which should also serve to generally improve/inform similar exercises in the future.
4. Provide a summary report of recommendations.

APPENDIX 2

TOR of the Independent Review Committee

Position: EIA Resource Consultant (Cont'd)

Qualifications and Experience: The EIA Resource Consultant will have advanced degree qualifications in a natural science field and extensive experience in the conduct of EIAs, with knowledge of the environment under consideration.

APPENDIX 2

TOR of the Independent Review Committee

Position: Engineering Design and Hydrology/Hydraulics Group

JOINT CONSULTATIVE COUNCIL

COMMITTEE FOR REVIEW OF THE EXTENSION OF
THE SOLOMON HOCHOY HIGHWAY

TERMS OF REFERENCE

Post: Engineering Design and Hydrology/Hydraulics Group (Comprising three consultants)
Duration: Thirty-five Working Days (Collectively) within a Two-month Period
Commencement: 10 December 2012
Duty Station: At the consultants' base, with attendance at consultations as may be required.
Background: The Joint Consultative Council has established a Committee to undertake a technical review of aspects of the extension of the Solomon Hochoy Highway as set out in separate Terms of Reference. An inter-disciplinary team comprising, *inter alia*, hydrology, transportation, planning and land management, ecology, archaeology, etc., has been established to review specific components of the Highway Project and to collaborate in the compilation of a Technical Review Report within two months. In this connection, the JCC wishes to engage the services of a Water Resources Management Team.
Duties: Under the direction of the Chairman of the Committee, the WRM Sub-committee (Team) will include expertise in hydrology, drainage and environmental issues related to water management, and will be coordinated by a specialist of the Team. The Sub-committee will:

1. Review all relevant documentation including survey data, maps, engineering designs, particularly the Terms of Reference for the Environmental Impact Assessment as prescribed by the EMA, as well as the resulting EIA, to glean an appreciation of all water management issues.

APPENDIX 2

TOR of the Independent Review Committee

Position: Engineering Design and Hydrology/Hydraulics Group (Cont'd)

Specifically, this will include:

Water Management

- Determination of the Integrated Water Management (IWM) issues of the present route and design, compared to the alternative proposed alignment.
- Assessment of whether the IWM concerns of the present route and design were sufficiently addressed during successive stages (preliminary design, EIA and detailed design).
- Recommendations in respect of the route selection, design and mitigation measures
- Assessment of the roles of the different stakeholders, including (e.g.), Drainage Division, EMA, in consideration of the route selection and design process.

Original Design:

- Identify the required and used standards (and considerations) for Hydrology and Hydraulics H&H) and IWM.
- Review the pros and cons of the standards and their impact on routes and design.
- Review the design approach (methodology).
- Review the impact of IWM considerations on the routes and design.
- Consider sensitivity analysis of IWM ASSUMPTIONS AND DATA ON THE ROUTES AND DESIGN.
- Consider route design options and mitigation options accordingly.
- Consider and advise on route design options, likely impacts and mitigation measures as may be required.
- Consider best route design options based solely on IWM considerations.
- Assess the role/influence of IWM stake holders.

EIA Review

- Assess the IWM scope of works as set out in the by the EMA for the EIA.
- Assess the weight of IWM considerations compared to other elements (social, economic, etc.)
- Assess the suitability of proposed EIA mitigation in respect of IWM.
- Consider sensitivity analysis and assumptions and their impacts on the route.
- Assess the role/influence of the EMA on the decision process and quality.

APPENDIX 2

TOR of the Independent Review Committee

Position: Engineering Design and Hydrology/Hydraulics Group (Cont'd)

OAS/Halcrow Design

- Assess the appropriateness of the design requirements set out by NIDCO (suitability, comprehensiveness, impact)
- Consider possible modifications, particularly in respect of the Mon Desir/Debe segment, as compared to current alignment/design.
- Advice on mitigation measures in respect of the recommendations.

Summary of Issues to be Addressed

- Was IWM taken into consideration at a sufficient level?
- What are the IWM impact assessments of the alternative feasible routes?
- Are the mitigation measures for the present route adequate?
- Are there any shortcomings of the EIA terms of reference and the EIA itself and what could be the implications?
- Does the detailed design by Halcrow sufficiently address IWM concerns of the present route?
- What are the present IWM recommendations for the present route/design and any alternative?
- Does the present route/design require changes to implement mitigation measures, or should an alternative route for the segment in question be considered?
- What are the recommendations to improve IWM consideration in the present design process?

Qualifications and Experience: The Water Resources Management Sub-committee will consist of professionally qualified specialists with extensive experience in hydrology, drainage and related engineering and EIA experience.

Deliverables: The Subcommittee, through its coordinator, will provide interim written findings and advice. He/she will deliver ten hard copies of his/her report and an electronic copy for inclusion in the final Report. The submission may be edited, without omission of the substantive issues, to fit into the overall Report.

APPENDIX 2

TOR of the Independent Review Committee

Position: Engineering Design and Hydrology/Hydraulics Group(Cont'd)

Organisation of the Exercise: While the members of the team will work from their respective offices, attendance of members will be expected at technical meetings in Port of Spain as may be required. Where appropriate, documents will be circulated electronically. However, it might become necessary to review selected documents and large scale maps at the project-office. Confidentiality is essential and no unauthorised information is to be released or interviews granted without the expressed consent of the Chairman.

APPENDIX 2

TOR of the Independent Review Committee

Position: Environmental Consultant

JOINT CONSULTATIVE COUNCIL

COMMITTEE FOR REVIEW OF THE EXTENSION OF
THE SOLOMON HOCHOY HIGHWAY

TERMS OF REFERENCE

Position: Environmental Consultant

Duration: Fifteen Working Days within a Two-month Period

Commencement: 10 December 2012

Duty Station: At the consultant's base, with attendance at consultations as may be required.

Background: The Joint Consultative Council (JCC) has established a Committee to undertake a technical review of aspects of the extension of the Solomon Hochoy Highway as set out in separate Terms of Reference. An inter-disciplinary team comprising, *inter alia*, hydrology, transportation, planning and land management, ecology, archaeology, etc., has been established to review specific components of the Highway Project and to collaborate in the compilation of a Technical Review Report within two months. In this connection, the JCC wishes to engage the services of an environmental specialist.

Duties: Under the direction of the Chairman of the Committee, the EIA consultant will:

1. Review any related CEC; the Terms of Reference for the Environmental Impact Assessment as prescribed by the EMA, as well as the resulting EIA, to glean an appreciation of the various environmental issues as may be applicable to the extension of the Sir Solomon Highway, particularly the Mon Desir to Debe segment, and advise on any points of interest for the Review.
2. Obtain from the EMA the Administrative Record for each CEC granted for the SHHE and provide written advise on any points of interest.
3. Comment on the extent to which the EIA has addressed the various environmental issues, particularly noting that it was completed some years ago.

APPENDIX 2

TOR of the Independent Review Committee

Position: Environmental Consultant (Cont'd)

4. Consider likely environmental impacts of the Mon Desir-Debe segment of the Highway and advise on the adequacy of mitigation measures as may be prescribed in the EIA.
5. Examine and comment on the compliance with statutory requirements.
6. Comment on any environmental issues or mitigation measures yet to be addressed.
7. Liaise with the engineer and transportation consultants to advise on likely impacts of any considered realignment of the route.
8. Consider written and oral submissions on environmental issues.
9. Prepare a report of findings and recommendations, segments of which will be included in the Final Report.
10. Undertake any related review of environmental concerns.

Qualifications and Experience: The Environmental Consultant will have an advanced degree in the required discipline and extensive experience in the conduct of EIAs.

Deliverables: The Environmental Consultant will provide interim written findings and advice. He/she will deliver ten hard copies of his/her report and an electronic copy to inform the Final Report. The submissions may be edited, without omission of the substantive issues, to fit into the overall Report.

Organisation of the Exercise: While the Environmental Consultant will work from his/her base, attendance at technical meetings at the HRC office will be required. Where appropriate, documents will be circulated electronically. However, it might become necessary to review selected documents and large scale maps at the project-office. Confidentiality is essential and no unauthorised information is to be released or interviews granted without the expressed consent of the Chairman.

APPENDIX 2

TOR of the Independent Review Committee

Position: Environmental Resource Consultant

JOINT CONSULTATIVE COUNCIL

COMMITTEE FOR REVIEW OF THE EXTENSION OF
THE SOLOMON HOCHOY HIGHWAY

TERMS OF REFERENCE

Position: Environmental Resource Consultant

Duration: Four Working Days, within a two-month Period

Commencement: 10 December 2012

Duty Station: At the consultant's base.

Background: The Joint Consultative Council (JCC) has established a Committee to undertake a technical review of aspects of the extension of the Solomon Hochoy Highway as set out in separate Terms of Reference. An inter-disciplinary team comprising, *inter alia*, hydrology, transportation, planning and land management, ecology, archaeology, etc., has been established to review specific components of the Highway Project and to collaborate in the compilation of a Technical Review Report within two months. In this connection, the JCC wishes to engage the services of an Environment Resource Consultant.

Duties: Under the coordination of the Chairman of the Committee, Enviroment Resource Consultant will:

1. Review the Terms of Reference for the CEC/EIA Report in relation to the Highway Extension Project, particularly the Mon Desir to Dede segment.
2. Consider the extent to which the EIA may be adequate for a project of this magnitude, or ways in which aspects of such assessments might be improved to meet international best practice, also drawing on any informative experiences in Jamaica.

APPENDIX 2

TOR of the Independent Review Committee

Position: Environmental Resource Consultant (Cont'd)

3. Provide technical backstopping advice/comments to the Chairman, as an external reviewer, on the findings/conclusions of the Final Draft Report of the Highway Review Committee.

Qualifications and Experience: The Environment Resource Consultant will have advanced degree qualifications in a natural science field and extensive experience in the conduct of EIAs in Small Island Developing States.

APPENDIX 2

TOR of the Independent Review Committee

Position: Executive Documentation Officer

JOINT CONSULTATIVE COUNCIL

COMMITTEE FOR REVIEW OF THE EXTENSION OF
THE SOLOMON HOCHOY HIGHWAY

TERMS OF REFERENCE

Position: Executive Documentation Officer

Duration: Ten Working Days within a Two-month Period

Commencement: 10 December 2012

Duty Station: At the consultant's base, with attendance at consultations as may be required.

Background: The Joint Consultative Council (JCC) has established a Committee to undertake a technical review of aspects of the extension of the Solomon Hochoy Highway as set out in separate Terms of Reference. An inter-disciplinary team comprising, *inter alia*, hydrology, transportation, planning and land management, ecology, archaeology, etc., has been established to review specific components of the Highway Project and to collaborate in the compilation of a Technical Review Report within two months. In this connection, the JCC wishes to engage the services of an Executive Documentation Officer.

Duties: Under the coordination of the Chairman of the Committee, Executive Documentation Officer will:

1. Research and appreciate the various articles/comments published by media houses in relation to the Highway extension.
2. Review public participation video material on file in relation to the Highway extension.
3. Participate in selected meetings and prepare summary reports of the substantive issues, particularly as they may pertain to the inter-sectoral/inter-disciplinary nature of the Review and the need to rationalise the compilation of the Report.
4. Analyse and summarise selected written submissions.
5. Assist in the editing of documents and the structuring of the findings and recommendations to be summarised in the Final Report.

APPENDIX 2

TOR of the Independent Review Committee

Position: Executive Documentation Officer (Cont'd)

6. Assist in the publishing of documents developed by the Review Committee.
7. Provide advisory editorial support to consultants for consistency in the preparation of documentation.
8. Advise office staff on all matters related to the compilation of the overall document.
9. Provide related editorial assistance as may be required.

Qualifications and Experience: The Executive Documentation Officer will have strong analytical skills and an advanced degree demonstrating research and writing skills. Extensive executive level experience and report writing are required.

Organisation of the Exercise: While the Executive Documentation Officer will work from his/her base, attendance at technical meetings in Port of Spain will be required. Where appropriate, documents will be circulated electronically. However, it might become necessary to review selected documents and large scale maps at the project-office. Confidentiality is essential and no unauthorised information is to be released or interviews granted without the expressed consent of the Chairman.

APPENDIX 2

TOR of the Independent Review Committee

Position: Housing/ Settlements Specialist

JOINT CONSULTATIVE COUNCIL

COMMITTEE FOR REVIEW OF THE EXTENSION OF
THE SOLOMON HOCHOY HIGHWAY

TERMS OF REFERENCE

Position: Housing/Settlements Specialist

Duration: Five Working Days within a Two-month Period

Commencement: 20 December 2012

Duty Station: At the consultant's base, with attendance at consultations as may be required.

Background: The Joint Consultative Council (JCC) has established a Committee to undertake a technical review of aspects of the extension of the Solomon Hochoy Highway as set out in separate Terms of Reference. An inter-disciplinary team comprising, *inter alia*, hydrology, transportation, planning and land management, ecology, archaeology, etc., has been established to review specific components of the Highway Project and to collaborate in the compilation of a Technical Review Report within two months. In this connection, the JCC wishes to engage the services of a Housing/Human Settlements Specialist.

Duties: Under the coordination of the Chairman of the Committee, Housing/Human Settlements Specialist will:

1. Review the human settlements structure of the communities within the Debe to Mon Desir segment of the highway alignment.
2. Consider the tradeoffs of resettlement of displaced families in the proposed Petit Morne settlement, or other designated areas.
3. Prepare an advisory report of findings and recommendations, with the implications and any options.
4. Provide advice to other consultants, in this connection, as may be appropriate.

APPENDIX 2

TOR of the Independent Review Committee

Position: Housing/ Settlements Specialist (Cont'd)

Qualifications and Experience: The Housing/Human Settlements Specialist will have advanced qualifications in a human settlements related field, with considerable experience in housing and settlements planning and development.

Organisation of the Exercise: While the Housing/Human Settlements Specialist will work from his/her base, attendance at technical meetings at the project office will be required. Where appropriate, documents will be circulated electronically. However, it might become necessary to review selected documents and large scale maps at the project-office. Confidentiality is essential and no unauthorised information is to be released or interviews granted without the expressed consent of the Chairman.

APPENDIX 2

TOR of the Independent Review Committee

Position: Legal Advisor

JOINT CONSULTATIVE COUNCIL
for the
CONSTRUCTION INDUSTRY

COMMITTEE FOR REVIEW OF the Debe/Mon Desir Segment of
THE SOLOMON HOCHOY HIGHWAY Extension

TERMS OF REFERENCE

Position: Legal Advisor

Duration: Four Working Days, within a Two-month Period

Commencement: 10 December 2012

Duty Station: At the consultant's base, with attendance at consultations as may be required.

Background: The Joint Consultative Council (JCC) has established a Committee to undertake a technical review of aspects of the extension of the Solomon Hochoy Highway as set out in separate Terms of Reference. An inter-disciplinary team comprising, *inter alia*, hydrology, transportation, planning and land management, ecology, archaeology, etc., has been established to review specific components of the Highway Project and to collaborate in the compilation of a Technical Review Report within two months. In this connection, the JCC wishes to engage the services of a Legal Advisor:

Duties: Under the coordination of the Chairman of the Committee, the Legal Advisor will:

1. Consider issues raised by consultants in relation to property valuation and acquisition and advise on compliance procedures as may apply to the Mon Desir to Debe segment of the Highway.

2. Advise on statutory requirements in respect of any legislation which may pertain to approvals for development.

APPENDIX 2

TOR of the Independent Review Committee

Position: Legal Advisor (Cont'd)

3.Provide advice to the Chairman on related matters.

4.Provide any written legal observation which should be included in the Final Report.

Qualifications and Experience: The Legal Advisor will be registered to practice law in Trinidad and Tobago and will be familiar with legislation pertaining to environment and land/property transactions.

Deliverables: The Legal Advisor will provide interim written advice and any final notation as may b e required.

Organisation of the Exercise: While the Legal Advisor will work from his/her base, attendance at technical meetings may be required.

APPENDIX 2

TOR of the Independent Review Committee

Position: Senior Property Valuation/Acquisition Adviser

JOINT CONSULTATIVE COUNCIL
for the
CONSTRUCTION INDUSTRY

COMMITTEE FOR REVIEW OF the Debe/Mon Desir Segment of
THE SOLOMON HOCHOY HIGHWAY Extension

TERMS OF REFERENCE

Position: Senior Property Valuation/Acquisition Adviser

Duration: Twelve Working Days within a Two-month Period

Commencement: 10 December 2012

Duty Station: At the consultant's base, with attendance at consultations as may be required.

Background: The Joint Consultative Council (JCC) has established a Committee to undertake a technical review of aspects of the extension of the Solomon Hochoy Highway as set out in separate Terms of Reference. An inter-disciplinary team comprising, *inter alia*, hydrology, transportation, planning and land management, ecology, archaeology, etc., has been established to review specific components of the Highway Project and to collaborate in the compilation of a Technical Review Report within two months. In this connection, the JCC wishes to engage the services of a Senior Property Valuation/Acquisition Adviser.

Duties: Under the coordination of the Chairman of the Committee, the Senior Property Valuation/Acquisition Adviser will:

1. Review the Terms of Reference for the property valuations carried out by or on behalf of NIDCO in relation to this segment of the project.

APPENDIX 2

TOR of the Independent Review Committee

Position: Senior Property Valuation/Acquisition Adviser (Cont'd)

2. Review the application of the Land Acquisition Act 1994 to the acquisition of private property for the execution of this segment of the project and related works. That review to include the service of notices, conduct of surveys and settlement of compensation claims. Particular reference to a comparison of the ranges of values with the actual settlements.

3. Review the private treaty acquisition of private property in relation to this segment of this project. Particular reference to a comparison of the ranges of values with the actual settlements.

4. Prepare a Report on the overall land acquisition implications as referenced above, components of which are to be included in the Final Report.

5. Assist in the conduct of interviews and assessment of written submissions.

6. Assist in compiling the overall Final Review Report.

7. Review the Final Report to ensure that land tenure issues are adequately addressed.

8. Undertake related tasks as required to support the interdisciplinary teamwork.

Qualifications and Experience: The Property Valuation/Acquisition Adviser will have professional qualifications as a valuer and be a member of the Institute of Surveyors of Trinidad and Tobago. He/she will have extensive experience in property valuation and land acquisition practice in Trinidad and Tobago.

Deliverables: The Property Valuation/Acquisition Adviser will provide interim written findings and advice. He/she will deliver ten hard copies of his/her report and an electronic copy to inform the Final Report. The submissions may be edited, without omission of the substantive issues, to fit into the overall Report.

Organisation of the Exercise: While the Property Valuation/Acquisition Adviser will work from his/her base, attendance at technical meetings in Port of Spain will be required. Where appropriate, documents will be circulated electronically. However, it might become necessary to review selected documents, maps or plans at the project-office. Confidentiality is essential and no unauthorised information is to be released or interviews granted without the prior written consent of the Chairman.

APPENDIX 2

TOR of the Independent Review Committee

Position: Senior Urban-Regional Planner Consultant

JOINT CONSULTATIVE COUNCIL

COMMITTEE FOR REVIEW OF THE EXTENSION OF
THE SOLOMON HOCHOY HIGHWAY

TERMS OF REFERENCE

Position: Senior Urban-Regional Planner Consultant

Duration: Fifteen Working Days within a Two-month Period

Commencement: 10 December 2012

Duty Station: At the consultant's base, with attendance at consultations as may be required.

Background: The Joint Consultative Council (JCC) has established a Committee to undertake a technical review of aspects of the extension of the Solomon Hochoy Highway as set out in separate Terms of Reference. An inter-disciplinary team comprising, *inter alia*, hydrology, transportation, planning and land management, ecology, archaeology, etc., has been established to review specific components of the Highway Project and to collaborate in the compilation of a Technical Review Report within two months. In this connection, the JCC wishes to engage the services of an A Senior Urban-Regional Planner.

Duties: Under the coordination of the Chairman of the Committee, the Senior Urban-Regional Planner will:

1. Review the Terms of Reference for the Environmental Impact Assessment as prescribed by the EMA, as well as the resulting EIA, to glean an appreciation of the spatial development implications of the proposed Highway extension, within the context of National Human Settlements Development.
2. Review the National Physical Development Plan of 1984, which, although dated, would still have implications in relation to the earlier decision to extend the Solomon Hochoy Highway.

APPENDIX 2

TOR of the Independent Review Committee

Position: Senior Urban-Regional Planner Consultant (Cont'd)

3. Review the relevant municipal level Regional Plans for implications/consistency with ongoing/proposed spatial development projects.
4. Review implications of the resettlement requirements resulting from the current alignment of the Highway extension, with consideration of any alternative, and land use implications thereto.
5. Ascertain the compliance of ongoing/proposed land use, including the resettlement schemes, with statutory requirements.
6. Consider the extent to which public participation/consultation techniques might have been employed in the decision to extend the Highway, with recognition of any best practice, or recommendations for improvements in this and other similar major developments.
7. Prepare a Report on the overall land use implications as referenced above, components of which are to be included in the Final Report.
8. Assist in the conduct of interviews and assessment of written submissions.
9. Assist in compiling the overall Final Review Report.
10. Review the Final Report to ensure that land use issues are adequately addressed.
11. Undertake related tasks as required to support the interdisciplinary teamwork.

Qualifications and Experience: The Urban/Regional Planner will have professional qualifications in planning and be a member of the Trinidad and Tobago Society of Planners. He/she will have extensive experience in land use planning and human settlements development practice in Trinidad and Tobago.

Deliverables: The Urban/Regional Planner will provide interim written findings and advice. He/she will deliver ten hard copies of his/her report and an electronic copy to inform the Final Report. The submissions may be edited, without omission of the substantive issues, to fit into the overall Report.

Organisation of the Exercise: While the Hydrologist will work from his/her base, attendance at technical meetings in Port of Spain will be required. Where appropriate, documents will be circulated electronically. However, it might become necessary to review selected documents and large scale maps at the project-office. Confidentiality is essential and no unauthorised information is to be released or interviews granted without the expressed consent of the Chairman.

APPENDIX 2

TOR of the Independent Review Committee

Position: Social Impacts Assessment Resource Consultant

JOINT CONSULTATIVE COUNCIL

COMMITTEE FOR REVIEW OF THE EXTENSION OF
THE SOLOMON HOCHOY HIGHWAY

TERMS OF REFERENCE

Position: Social Impacts Assessment Resource Consultant

Duration: Four Working Days within a Two-month Period

Commencement: 10 December 2012

Duty Station: At the consultant's base.

Background: The Joint Consultative Council has established a Committee to undertake a technical review of aspects of the extension of the Solomon Hochoy Highway as set out in attached Terms of Reference. An inter-disciplinary team comprising, *inter alia*, hydrology, transportation, planning and land management, ecology, archaeology, etc., has been established to review specific components of the Highway Project and to collaborate in the compilation of a Technical Review Report within two months. In this connection, the JCC wishes to engage the services of a Social Impact Assessment Resource Consultant to provide technical backstopping and advisory services to the Chairman of the Committee.

Duties: Under the direction of the Chairman of the Committee, the SIA Resource Consultant will:

1. Set out a brief of critical baseline indicators pertaining to social impact assessments within the context of major infrastructure works and human settlements development projects, along with processes for the conduct of an SIA accordingly.
2. Review the Environmental Impact Assessment for the Mon Desir to Debe segment of the Highway, particularly the Terms of Reference prescribed by the EMA, to determine the procedures and treatment of social impact considerations and mitigation of impacts.
3. Provide advisory briefs to the Chairman on any issues pertaining to the SIA process.

APPENDIX 2

TOR of the Independent Review Committee

Position: Social Impacts Assessment Resource Consultant (Cont'd)

4. Review the findings on the SIA review by local personnel and advise the Chairman on implications for inclusion in the Final Report.

Qualifications and Experience: The Social Impact Assessment Resource Consultant will have an advanced degree in a social science related field and at least five years' experience directly related to Social Impact Assessments outside of Trinidad and Tobago

Deliverables: The Resource Consultant will provide written observations to the Chairman as required and submit a final overview of findings and recommendations electronically.

Organisation of the Exercise: While the Resource Consultant will work from his/her base, attendance at a technical meetings in Port of Spain may be considered. Confidentiality is essential and no unauthorised information is to be released or interviews granted without the expressed consent of the Chairman.

APPENDIX 2

TOR of the Independent Review Committee

Position: Social Impacts Assessment - Review Specialist

JOINT CONSULTATIVE COUNCIL

COMMITTEE FOR REVIEW OF THE EXTENSION OF
THE SOLOMON HOCHOY HIGHWAY

TERMS OF REFERENCE

Position: Social Impacts Assessment - Review Specialist

Duration: Ten Working Days over a Two-month Period

Commencement: 10 December 2012

Duty Station: At the consultant's base, with attendance at consultations as may be required.

Background: The Joint Consultative Council has established a Committee to undertake a technical review of aspects of the extension of the Solomon Hochoy Highway as set out in separate Terms of Reference. An inter-disciplinary team comprising, *inter alia*, hydrology, transportation, planning and land management, ecology, archaeology, etc., has been established to review specific components of the Highway Project and to collaborate in the compilation of a Technical Review Report within two months. In this connection, the JCC wishes to engage the services of a Social Impact Assessment Specialist.

Duties: Under the direction of the Chairman of the Committee, the SIA Specialists will:

1. Set out a brief of critical baseline indicators pertaining to social impact assessments within the context of major infrastructure works and human settlements developments in Trinidad and Tobago, along with processes for the conduct of an SIA accordingly.
2. Review all relevant documentation/survey data, particularly the Terms of Reference for the Environmental Impact Assessment as prescribed by the EMA, as well as the resulting EIA, to determine the procedures and treatment of social impact considerations and consequences of Comment on implications of pros and cons of the social impacts of the current alignment in relation to proposed alternatives

APPENDIX 2

TOR of the Independent Review Committee

Position: Social Impacts Assessment - Review Specialist (Cont'd)

3. Evaluate written and oral submissions from interested parties with respect to social impact implications of the Highway Project, and in particular the section between Debe and Mon Desir.
4. Participate in inter-disciplinary meetings to consider and advise on social impact assessment implications of the project.
5. Provide specialist advice to the other consultants within the group
6. Prepare an objective technical assessment of findings and recommendations for inclusion in the Final Report of the Committee

Qualifications and Experience: The Social Impact Assessment Specialist will have an advanced degree in a social science related field and at least five years' experience directly related to Social Impact Assessments as independent exercises, or within the context of Environment Impact Assessments which require particular consideration of social consequences and mitigation measures.

Deliverables: The SIA Specialist will provide interim written findings and advice. He/she will deliver ten hard copies of his/her report and an electronic copy for inclusion in the final Report. The submission may be edited, without omission of the substantive issues, to fit into the overall Report.

Organisation of the Exercise: While the Specialist will work from his/her base, attendance at technical meetings in Port of Spain will be required. Where appropriate, documents will be circulated electronically. However, it might become necessary to review selected documents and maps at the project office. Confidentiality is essential and no unauthorised information is to be released or interviews granted without the expressed consent of the Chairman.

APPENDIX 2

TOR of the Independent Review Committee

Position: Transportation/Traffic Planning Specialists

JOINT CONSULTATIVE COUNCIL

COMMITTEE FOR REVIEW OF THE EXTENSION OF
THE SOLOMON HOCHOY HIGHWAY

TERMS OF REFERENCE

Position: Transportation/Traffic Planning Specialists (Two)

Duration: Twenty Working Days within a Two-month Period

Commencement: 10 December 2012

Duty Station: At the consultant's base, with attendance at consultations as may be required.

Background: The Joint Consultative Council (JCC) has established a Committee to undertake a technical review of aspects of the extension of the Solomon Hochoy Highway as set out in separate Terms of Reference. An inter-disciplinary team comprising, *inter alia*, hydrology, transportation, planning and land management, ecology, archaeology, etc., has been established to review specific components of the Highway Project and to collaborate in the compilation of a Technical Review Report within two months. In this connection, the JCC wishes to engage the services of two Transportation/Traffic Planning Specialists.

Under the coordination of the Chairman of the Committee, the Transportation/Traffic Planning Specialists shall:

1. Review the Terms of Reference for the Environmental Impact Assessment as prescribed by the EMA, as well as the resulting EIA, to glean an appreciation of the transportation/traffic management implications of the proposed Highway extension, within the framework of national transportation planning, road network development and settlement structure.
2. Liaise with the Project's Urban Regional Planner to consider transportation/traffic issues within the framework of regional and national spatial development, taking into consideration the

TOR of the Independent Review Committee
Position: Transportation/Traffic Planning Specialists (Cont'd)

current structure of the economy and stated investment opportunities and socio-economic development.

3. Consider and advise on the transportation/traffic implications of the route selection alternatives, particularly taking into consideration the segment between Mon Desir and Debe.
4. Consider and advise on connectivity issues in relation to existing and planned communities for displaced families.
5. Review the current alignment in relation to the existing settlements structure, land tenure and land acquisition issues, cost implications of alternatives, particularly in respect of the Debe to Mon Desir segment, taking into consideration investments to date and contractual obligations of the government.
6. Make recommendations on options which may be considered to mitigate any adverse consequences to the existing or alternative route/s.
7. Assist in the conduct of interviews and assessment of written submissions in relation to transportation/traffic.
8. Prepare a Report of findings and recommendations to inform the Final Report.
9. Review the Final Report to ensure that the transportation/traffic issues are adequately reflected.
10. Undertake related tasks as required to support the interdisciplinary teamwork.

Qualifications and Experience: The Transportation/Traffic Planning Specialists will have professional qualifications in transportation/traffic planning and management. They will have extensive experience in and knowledge of transportation/traffic conditions in Trinidad and Tobago.
Deliverables: The Transportation/Traffic Planning Specialist will provide interim written findings and advice. They will deliver ten hard copies of their report and an electronic copy to inform the Final Report. The submissions may be edited, without omission of the substantive issues, to fit into the overall Report.
Organisation of the Exercise: While the Transportation/Traffic Planning Specialists will work from their base(s), attendance at technical meetings in Port of Spain will be required. Where appropriate, documents will be circulated electronically. However, it might become necessary to review selected documents and large scale maps at the project-office. Confidentiality is essential and no unauthorised information is to be released or interviews granted without the expressed consent of the Chairman.

APPENDIX 3

Schedule of Meetings and Consultations held by the Independent Review Committee

MEETING DETAILS		ATTENDEES
MEETING:	**CHAIRMAN (HRC) AND DR. WAYNE KUBLALSINGH (HRM)**	Armstrong, James (Chairman)
DATE:	December 15, 2012	Arthur, Desiree
TIME:	-	Boodhai, Sheeren
LOCATION:	JCC Board Room, Fitzblackman Drive, Wrightson Road, Port of Spain	Kublalsingh, Wayne

MEETING DETAILS		ATTENDEES
MEETING:	**HIGHWAY REVIEW COMMITTEE (HRC)**	Armstrong, James (*Chairman*)
DATE:	December 20, 2012	Agard, William
TIME:	5:00-7:05pm	Attz, Marlene
LOCATION:	HRC Office, Edward Street, Port of Spain	Crichlow, Marilyn
		Hanson-Lewis, Frances
		Laughlin, Ivan
		Les Fouris, Grace
		Maharaj, Sunity
		Morris, Philbert
		Prince, Kerneisha
		Prince, Kieron
		Subran, Kenneth
		Taylor, Valerie
		Toney, Michael
		Townsend, Trevor

APPENDIX 3

Schedule of Meetings and Consultations held by the Independent Review Committee (Cont'd)

MEETING DETAILS		ATTENDEES
MEETING:	**HIGHWAY REVIEW COMMITTEE (HRC)**	Armstrong, James (*Chairman*)
DATE:	January 3, 2013	Bertrand, Louis
TIME:	5:00-7:30pm	Crichlow, Marilyn
LOCATION:	HRC Office, Edward Street, Port of Spain	Hanson-Lewis, Frances
		Harris, Peter
		Les Fouris , Grace
		Maharaj , Sunity
		Morris, Philbert
		Prince, Kerneisha
		Prince, Kieron
		Ramnath, Natasha
		Subran, Kenneth
		Townsend, Trevor

APPENDIX 3

Schedule of Meetings and Consultations held by the Independent Review Committee (Cont'd)

MEETING DETAILS		ATTENDEES
MEETING:	**HIGHWAY REVIEW COMMITTEE (HRC) AND NIDCO**	***Organization: HRC***
DATE:	January 9, 2013	Armstrong, James (*Chairman*)
TIME:	5:00-8:10pm	Agard, William
LOCATION	NIDCO, Melbourne Street, Port of Spain	Attz, Marlene
		Bertrand, Louis
		Crichlow, Marilyn
		Hanson-Lewis, Frances
		Harris, Peter
		Laughlin, Ivan
		Les Fouris , Grace
		Morris, Philbert
		Prince, Kieron
		Taylor, Valerie
		Organization: NIDCO
		Charles, Carson
		Furlonge, Rae
		Garibsingh, Steve
		Goodial, Helda
		Wilson, Earl
		Organization: MOWT
		Doolar Ramlal
		Wayne Quintal
		Organization: ECOENGINEERING
		Debbie Reyes
		George Sammy
		Organization: TRINTOPLAN
		Reynold Nurse

APPENDIX 3

Schedule of Meetings and Consultations held by the Independent Review Committee (Cont'd)

MEETING DETAILS		ATTENDEES
		Organization: Trintoplan
MEETING:	**HIGHWAY REVIEW COMMITTEE (HRC) AND TRINTOPLAN**	Abel, Andrea
DATE:	January 9, 2013	Cooper, Vincent
TIME:	1:30pm	Nurse, Ronald
LOCATION:	Trintoplan Offices	Shrivastava, Gyan
		Organization: HRC
		Agard, William
		Crichlow, Marilyn
		Harris, Peter
		Kersting, Nico
		Morris, Philbert
		Townsend, Trevor

APPENDIX 3

Schedule of Meetings and Consultations held by the Independent Review Committee (Cont'd)

MEETING DETAILS		ATTENDEES
MEETING:	**HIGHWAY REVIEW COMMITTEE (HRC) AND HIGHWAY REROUTE MOVEMENT**	
DATE:	January 10, 2013	***Organization: HRC***
TIME:	5:15-11:35pm	Armstrong, James (*Chairman*)
LOCATION:	JCC Board Room,Fitzblackman Drive, Wrightson Road, Port-of Spain	Agard, William
		Attz, Marlene
		Hanson-Lewis, Frances
		Laughlin, Ivan
		Les Fouris , Grace
		Maharaj , Sunity
		Morris, Philbert
		Prince, Kerneisha
		Prince, Kieron
		Subran, Kenneth
		Townsend, Trevor
		Organization: HRM
		Boodhai, Terrence
		Abrahim, Haniff
		Boodhai, Khemraj
		Boodhai, Leela
		Boodhai, Shereen
		Boodhai, Vandana
		Boodhai, Vanita
		Boodhai, Vishal
		Creese, Elton
		Dookie , Harripersad
		Kublalsingh, Wanye
		Rambharose, Elizabeth
		Sharma, Tara
		Siew, Baliram
		Suklal, Alfred

APPENDIX 3

Schedule of Meetings and Consultations held by the Independent Review Committee (Cont'd)

MEETING DETAILS		ATTENDEES
MEETING:	**HIGHWAY REVIEW COMMITTEE (HRC) AND HIGHWAY REROUTE MOVEMENT**	
DATE:	January 21, 2013	***Organization: HRC***
TIME:	5:00-9:00pm	Armstrong, James (*Chairman*)
LOCATION:	JCC Board Room,Fitzblackman Drive, Wrightson Road, Port-of Spain	Herbert, Carla
		Prince, Kieron
		Subran, Kenneth
		Organization: HRM
		Farmer, Rosanna
		Rambharose, Elizabeth
		Sankersingh, Lennox
		Sinanan, Jolynna
		Sudama, Trevor

MEETING DETAILS		ATTENDEES
		Organization: HRC
MEETING:	**HIGHWAY REVIEW COMMITTEE (HRC) AND NIDCO**	Armstrong, James (*Chairman*)
DATE:	January 25, 2013	Les Fouris , Grace
TIME:	11:00-1:35pm	Prince, Kieron
LOCATION:	NIDCO, Melbourne Street, Port of Spain	Taylor, Valerie
		Subran, Kenneth
		Organization: NIDCO
		Ramkissoon, Divanath
		Thompson, Mervyn

APPENDIX 3

Schedule of Meetings and Consultations held by the Independent Review Committee (Cont'd)

MEETING DETAILS		ATTENDEES
		Organization: HRC
MEETING:	**HIGHWAY REVIEW COMMITTEE (HRC) AND PENAL/ DEBE CORPORATION (PDC)**	Armstrong, James (*Chairman*)
DATE:	January 31, 2013	Herbert, Carla
TIME:	10:30-12:30am	Kersting, Nico
LOCATION:	JCC Board Room, Fitzblackman Drive, Wrightson Road, Port-of-Spain	Maharaj, Sunity
		Prince, Kerneisha
		Taylor, Valerie
		Organization: PDC
		Awardy, Skafte
		Jaimungal-Khan, Marsja
		Julien, Brian
		Rampersadsingh, Hyacinth
		Siew, Maleene
		Sookoo, Premchand
		Maharaj, Gowtam

MEETING DETAILS		ATTENDEES
MEETING:	**HIGHWAY REVIEW COMMITTEE (HRC)**	Armstrong, James (*Chairman*)
DATE:	January 31, 2013	Agard, William
TIME:	5:30-11:30pm	Attz, Marlene
LOCATION:	HRC Office, Edward Street, Port of Spain	Bertrand, Loius
		Kersting, Nico
		Harris, Peter
		Herbert, Carla
		Les Fouris, Grace
		Maharaj, Sunity
		Morris, Philbert
		Prince, Kerneisha
		Subran, Kenneth
		Taylor, Valerie
		Toney, Michael
		Townsend, Trevor

Schedule of Meetings and Consultations held by the Independent Review Committee (Cont'd)

MEETING DETAILS		ATTENDEES
MEETING:	**SUBMISSION – PATRICK BYNOE**	Armstrong, James (Chairman)
DATE:	January 31, 2013	Bynoe, Patrick
TIME:	-	Herbert, Carla
LOCATION:	HRC Office, Edward Street, Port-of-Spain	Prince, Kerneisha
		Taylor, Valerie

APPENDIX 4

List of Submission from the Public of the Independent Review Committee

4.1 ***Highway Reroute Movement (HRM)***

1. Affidavits:
    a. CV2012-03205 Affidavit of Harripersad Dookie
    b. CV2012-03205 Affidavit of Heidi W. Weiskel
    c. CV2012-03205 Affidavit of Dr Wayne Kublalsingh
    d. CV2012-03205 Pramenath Narinesingh

2. Claims:
    a. Fixed Date Claim Form/Originating Motion
    b. Affidavits of the Claimants

3. Articles:
    a. Reroute Revisited (part 1) by Trevor Sudama
    b. Reroute Revisited (part 2) by Trevor Sudama
    c. Reroute Revisited (part 3) by Trevor Sudama
    d. Reroute Revisited (part 4) by Trevor Sudama
    e. Reroute Revisited - Conclusion by Trevor Sudama
    f. Road Network Priority by Trevor Sudama
    g. Roads and Traffic Congestion by Trevor Sudama
    h. The Non-Priority Highway by Trevor Sudama

4. Maps:
    a. Portion of the New Highway Expansion

5. Other:
    a. A CHRONOLOGY
    b. Appendix 1 Siew's Statement on History
    c. Appendix 2 Moonilal's Hansard Statement
    d. Appendix 3 HRM position public consultation Feb 2007
    e. Appendix 4 Letter from Blackwater Village Council to Minister Warner
    f. Appendix 5 Letter between Blackwater Village Council and PM Kamla Persad Bissessar
    g. Appendix 6 Letter from Minister Warner to Dr Charles
    h. Appendix 7 Letter from Debe to San Francique HAG and Blackwater VC to MP Stacey Roopnarine
    i. Appendix 8 Letter from Blackwater Farmers to Minister Vasant Bharath
    j. Appendix 9 Second Letter from Blackwater farmers to Minister Bharath
    k. Appendix 10 Letter from Dookie to Minister Roopnarine critiquing NIDCO Report
    l.

APPENDIX 4

List of Submission from the Public of the Independent Review Committee

4.1 ***Highway Reroute Movement (HRM) (Cont'd)***

m. Appendix 11 Letter from Dookie to PM, stating adverse impacts of Highway
n. Appendix 12 Letter to R Maharaj from HRM requesting support
o. Appendix 13 Three Letters from HRM Mr Tancoo requesting meeting with PM
p. Appendix 14 Letters from HRM to Ministry officials requesting rationale for Highway
q. Appendix 15 Minister of Finance Dookeran tells of Highway Budget Reduction
r. Appendix 16 Letter and Report from HRM to Prakash Ramadhar
s. Appendix 17 B Cover Letter for Report and Letter
t. Appendix 17 HRM delivers Letter and Report to PM
u. Appendix 18 Three Hundred Castles Set for Demolition, Shereen Boodhai
v. Appendix 19 Letter from PM to HRM
w. Appendix 20 Press Conference Notice
x. Appendix 21 Letter to Joth Singh
y. Appendix 22 Emails from Merle Brown to HRM
z. Appendix 23 Freedom of Information Request and Reply
aa. Appendix 24 Letters from HRM to Lisa Ghany
bb. Appendix 25 Programme
cc. Appendix 26 Letter from Minister Warner Inviting HRM to Meeting
dd. Appendix 27 Letter from HRM to PM Reminding of Agreement to Review
ee. Appendix 28 Letter to Minister Warner requesting copy of NIDCO Report
ff. Appendix 29 Letter from HRM to PM Requesting Meeting with HRM Women
gg. Appendix 30 Press Release on Fyard Hosein
hh. Appendix 31 Letter to PM delivered to Office Reminding of Agreement to Review
ii. Appendix 32 Technical Review Agreement Documents

6. <u>Presentations:</u>
   a. Highway Reroute Movement Traffic Congestion Presentation
   b. Social Impact Assessment (Debe to Mon Desir) - Terrence Boodhai (HRM)
   c. Social Impact Assessment_10-Jan-2013
   d. Transportation Issues in the Debe to Mon Desir Area Final
   e. Debe Mon Desir Godineau Swamp Hydrology 2013 Narinesingh
   f. MonDesir Debe EIA 2012 Final Edited14th 4th Prame dec 2013
   g. Extract from, "The Land"
   h. Extract from Roads & Environment Handbook"
   i. Extract from Roads & Environment Handbook – Early Planning of the EA"
   j. Extract from "Laws of Trinidad and Tobago"

APPENDIX 4

List of Submission from the Public of the Independent Review Committee

4.1 ***Highway Reroute Movement (HRM) (Cont'd)***

k. Poetry extracts from Naipaul, V.S. Scott
l. AN ASSESSMENT OF THE IMPACT OF THE DEBE TO MON DESIR HIGHWAY PROJECT ON THE MENTAL HEALTH OF THE AFFECTED RESIDENTS
m. ANALYSIS FOR PROJECTED STRATEGIC CBA
n. cost and benefit inputs and solution, route, alternative
o. DSC_1122
p. DSC_1126

SIA and social factors_Jolynna Sinanan

APPENDIX 4

List of Submissions from:

4.2 ***Joint Consultative Council (JCC)***

1. Letter JCC to PM Bissessar Re Proposal to end HRM Impasse
2. Letter JCC To President Max Richards Re copy of Ltr to PM
3. Letter JCC to Min. Jack Warner re: Transport Sector
4. Letter JCC to PS MoWI re: Land Acquisition in Point Fortin
5. Letter MoWI to Institute of Surveyors of Trinidad and Tobago
6. Comments on the Request for Expressions of Interest requested by the National Infrastructure Development Company Limited for Design-Build Contracting Services for the Trinidad National Network of Highways Project (NNHP)

   Novation in Design Build in Trinidad and Tobago

APPENDIX 4

List of Submissions from:

4.3 *NIDCO*

1. Debe to Mon Desir Segment Report
2. Appendix 1.1 - Certificate of Environmental Clearance from EMA
3. Appendix 1.2 - Certificate of Environmental Clearance from EMA
4. Appendix 2 - Discontinuation of the Debe to Mon Desir Segment
5. Debe to Mon Desir EIA Volume 2 – Appendices:
    a. Prefatory Pages
    b. Appendix A- CEC Application & TOR
    c. Appendix B-Aerial Survey Photography
    d. Appendix C-Letters to Service & Utility Companies
    e. Appendix D-Landscaping
    f. Appendix E-Slope Gradient Analysis
    g. Appendix F-Climate
    h. Appendix G-Water Quality
    i. Appendix H-Air Quality
    j. Appendix I-Noise Monitoring & Modelling
    k. Appendix J-Ecology
    l. Appendix K-IMA Wetland Report
    m. Appendix L-Attitudes Survey
    n. Appendix M-Potential Impacts
    o. Appendix N-Classification of Impacts
    p. Appendix O-Risk Assessment
    q. Appendix P-Route Comparison
    r. Appendix Q-Environmental Management Plan
    s. Appendix R-Emergency Response Plan
    t. Appendix S-Acquisition Principles
    u. Appendix T-Public Consultation
6. Debe to Mon Desir Project Description
7. Debe to Mon Desir EIA Volume 1
8. Executive Summary
9. Response to Review & Assessment-CEC 1372_2006- EIA for Debe to Mon Desir
10. Claim Processing Flowchart

NIDCO Comprehensive Land Transport Program -San Fernando to Point Fortin

APPENDIX 4

List of Submissions from:

4.4 ***Trintoplan Consultants Limited***

1. Debe to San Francique Road Route Comparison Report
2. Terms of Reference for Feasibility Studies and Design Consultancy Services for the Trunk Road Expansion Component, IDB Loan No. 932/OC-TT – Ministry of Works and Transport
3. Solomon Hochoy Highway Extension to Point Fortin Project History
4. Final Report on Feas Invest Vol 1
5. Final Report on Feas Invest Vol 2
6. Final Report on Feas Invest Vol 3
7. Final Report on Feas Invest Vol 4

National Highway Programme Trunk Road Expansion Component Solomon Hochoy Highway Extension – H1-H7 Hydraulic and Hydrology Reports

APPENDIX 4

List of Submissions from:

4.4 *Halcrow*

1. Traffic Volumes and Operational Analysis
2. St. Mary's Interchange Comparison of Design Options
3. Golconda Interchange Verification of Design
4. Debe Interchange Comparison of Design Options
5. Penal Interchange Verification of Design
6. Siparia Interchange Verification of Design
7. Fyzabad Interchange Verification of Design
8. Mon Desir Interchange Verification of Design

APPENDIX 4

List of Submissions from:

4.6 *Rae Furlonge*

1. C-040-CROSS CROSSING INTERCHANGE
2. Traffic Feasibility Study and Urban Traffic Management Plan for Debe to Siparia and Surrounding Areas: Problem Diagnosis REVISED
3. Traffic Feasibility Study and Urban Traffic Management Plan for Debe to Siparia and Surrounding Areas: Traffic Assignment

   Optimal Route Analysis Using GIS

APPENDIX 4

List of Submissions from:

4.7 ***Ministry of Local Government***

1. Final Consultation Report Siparia
2. Final Situation Report 1 Siparia
3. Final Situation Report 2 Siparia
4. PDRC Municipal Investment Plan Town Regeneration and Branding – Penal-Debe
5. Municipal Investment Plan Upgrade of Recreational Facilities – Point Fortin
6. SRC Municipal Investment Plan – Urban Enhancement focused on Domestic Tourism
7. Siparia Draft Regional Development Plan Technical Report TR1
8. Siparia Draft Regional Development Plan Technical Report TR2
9. Siparia Draft Regional Development Plan Technical Report TR3
10. Siparia Draft Regional Development Plan Technical Report TR4
11. Siparia Draft Regional Development Plan Technical Report TR5
12. Siparia Final Draft Municipal Development Plan
13. Appendices for Supplemental Report
14. Situation Report 1 Appendix
15. Penal/Debe Draft Regional Development Plan Situation Report 1
16. Supplementary Report

    Letter to Dr James Armstrong

APPENDIX 4

List of Submissions from:

4.8 ***Public***

NAME	DOCUMENT SUBMITTED
• Tyrone Kalpee	1. Comments on the Environmental Impact Assessment for proposed highway from Debe to Mon Desir – updated
• Patrick Bynoe	1. Proposal for the select committee on the Sir Solomon Hochoy Highway extension 2. Letter to the Chairman of the Committee on the Debe to Mon Desir Leg of the Solomon Hochoy Highway 3. Maps of San Francisco Bay Bridge and surrounding areas
• David Bertrand/Kasso Dowlath	1. Letter the Chairman of the Highway Review Committee: "Submission for the Attention of the Highway Review Committee" 2. NIDCO Interview Sheet and Contact Form 3. Correspondence sent to Mr Moodie 4. Map Showing proposed Route of Highway as referenced in correspondence to Mr Moodie 5. Map referred to in correspondence

APPENDIX 5

List of Tables and Diagrams:

SECTION 1: URBAN AND REGIONAL PLANNING

Figure 1.1: National Physical Development Plan, Proposals Map
Figure 1.2: Point Fortin Development Strategy
Figure 1.3: Location of land at Petit Morne
Figure 1.4: Location of land at Golconda

SECTION 5: ECONOMIC COST BENEFIT CONSIDERATIONS

Figure 5.1: General Process of an ECBA
Figure 5.2: Table of Economic Analysis, and the Project Cycle
Figure 5.3: Choice of Valuation Technique

SECTION 6: TRAFFIC AND TRANSPORTATION

Figure 6.1: Golconda to Point Fortin Highway Segments
Figure 6.2: Golconda to Point Fortin Highway and Alternative Route Proposed by the HRM
Figure 6.3: Golconda to Point Fortin Highway, Possible Route Options

APPENDIX 6

Land Acquisition and Valuation References

I. LAWS AFFECTING LAND ACQUISITION

1. THE LAND ACQUISITION ACT (LAA) CH 58:01 governs compulsory Purchase (CP) of land for public purposes. It was completely revised in 1994 by Act #28 of 1994 after extensive consultation. (see Highways Act below).

SECTION 3 NOTICE. This is published when the acquiring authority is uncertain of the precise external boundaries of the lands it intend to acquire. It *gives permission to enter the lands described to conduct surveys, tests etc*. to determine the boundaries of the lands to be acquired. Payment is promptly made for damage on entry. If the lands are subsequently acquired then such sums MUST be deducted from total compensation for the property acquired in its UNDAMAGED state. Claimants will *not normally be compensated in respect of any improvements executed after the publication of a section 3 notice.* The Act indicates how this is to be administered. *It is important that the notice be published as soon as it is practical*.
AUTHORITY. The lands may be entered to *execute the project (as distinct from tests, surveys etc.)* before formal acquisition (Section 5 Notice) with the permission of the President under Section 4 of the Act. This authority is exercised by service on the owner of the lands. *Before the Act was revised in 1994 "owners" had no statutory right to compensation at this stage. In order to prevent hardship Cabinet would normally allow negotiations by "private treaty under the shadow of compulsory purchase". This meant in accordance with the provisions of the LAA* i.e. if properly administered, total payments will be no different to under CP
SECTION 5 NOTICE. Publication vested the lands in the State and all "rights to the land" are converted into the right to compensation under the Act.
COMPENSATION. All our CP legislation entitles claimants to be reimbursed the reasonable costs incurred in the preparation and submission of their claims under all admissible heads of claim.

2. THE HIGHWAYS ACT .Local Government bodies, some Utilities etc. have some CP powers but they are required to use the provisions of the LAA which they EXERCISED through the Sub-Intendent of State Lands (now Commissioner of State Lands). The major exception was The Highways Act (THA) Ch 48:01 which gave the Ministry of Works (MOW) power to acquire lands in respect of Highways. This Act had some more sophisticated land acquisition provisions than the pre 1994 LAA in respect of general acquisition in addition to other powers in special cases peculiar to highways (improvements to roads, up-grading of roads, adoption of roads etc.) The THA was never used to acquire lands for these purposes up to 2003 on the grounds that the MOW did not have the Land Economy (LE) expertise although they were advised of the procedure used by the other authorities. The revised LAA in 1994 incorporated the more sophisticated general acquisition provisions of the THA. The case for using the THA is now weaker but the usefulness of the other provisions remains high.

3. THE TOWN AND COUNTRY ACT (T&CPA) Ch 35:01. The LAA requires due consideration to the T&CPA as regards compensation. Section 5 (3) (c) of the T&CPA allows for lands to be designated as subject to compulsory acquisition. The T&PC Division's policy was not to allow improvements or sub division in respect of such lands. This designation was applicable to the proposed highway extension from Coagulants to Cedros.

4. THE SECURITY OF TENURE ACT (Squatters) (TSOTSQA) Ch 57: 05 ;

This only applies to lands used for residential purposes before 1st January 1998 in designated areas. In 1998 Government announced an official policy in respect of agricultural squatters who were in occupation for 5 years i.e. prior to 1st January 1993. If the policy has changed ISTT must be advised. *Other squatters do not qualify for regularisation.*

5. ACQUISITION PROCEDURE.

1. Pre legal steps (conceptualization) Administratively this was done by the acquiring authority by the use of expertise and resources available in all State agencies not needing authority to enter private lands.
2. The agency managing the project (could be changed later) consulted the DOS who controlled the Sub-Intendent of State Lands (the predecessor to the COSL), where they identified the lands needed for the project on available maps.
3. The acquiring authority arranged for the publication of the Section 3 Notice which was regarded as notice to the world that the lands described were likely to be acquired for a public purpose. The notice had to be served on owners but include affixing to the land; failure to comply with this aspect would not affect the legality of the published notice. The Notice under sub section " (5) allowed that the Commissioner may, after fourteen days, not including Saturdays, Sundays and public holidays, from the date of publication referred to in subsection (1)(a) have elapsed and whether or not a representation has been made under subsection (3), to enter upon the land for investigative purposes only and do all or any of the following things:*(a)* survey and take levels of any land in any locality to which the public purposes relate;*(b)* dig or bore into the subsoil of such land;*(c)* do all other acts necessary to ascertain whether the land is adaptable to the purposes for which it is required;*(d)* set out the boundaries of the land intended to be acquired and the intended line of the works, if any, proposed to be done thereon;*(e)* mark levels, boundaries and lines by placing marks and cutting trenches;
(f) cut down and clear away any standing crop, fence, tree or bush, where otherwise the survey cannot be completed, the levels taken or the boundaries or line of the works marked;*(g)* set up and maintain gauges in any stream or watercourse, and have access to the same from time to time for purposes of observation; and *(h)* do all such other acts as may be incidental to or necessary for any of the purposes aforesaid" and under subsection . "(6) The Commissioner shall not enter into any building, or into or upon any enclosed yard, court or garden attached to a dwelling house, except—*(a)* with the consent of the occupier thereof; or *(b)* after giving to the occupier at least twenty-four hours notice in writing of his intention to do so." And under sub section "(7) Compensation shall be paid to any person interested in the land so entered for any actual damage or injury resulting to him by reason of the exercise of the powers conferred by

this section and shall be assessed—*(a)* in so far as it relates to land, the acquisition of which is subsequently abandoned under section 8 or deemed to be abandoned under section 9, in the manner provided by this Act; or *(b)* in so far as it relates to land, the compulsory acquisition of which is completed under section 5, as though it were part of the compensation for the acquisition of the land"

Under this section the VD prepared a "Section 3" or preliminary Report and Valuation to assist in feasibility consideration which described the location, topography, shape, details of all improvements, cultivation, owner/occupier and related land data with photographs... This was critical as compensation is not normally payable for development or improvements carried out after the Section 3 date. Payment in respect of any damage caused on Section 3 entry required prompt payment. Full details was supplied to the acquiring authority who normally forward a copy to the COV as all such payments had to be taken into account in the assessment of final compensation payable i.e. deducted from the value of the "undamaged property". It is important to note that the unit value ascribed to a few plants is usually considerably higher than the unit value ascribed to the entire orchard or plantation. In addition where final compensation is assessed on a higher than existing use, the value of the undamaged property will not normally reflect any value attributable to the damaged items but any payment made must be deducted. It is exceptionally rare for large portions of cultivation or vegetation to *be damaged at the Section 3 stage (The consultant is not aware of any locally since 1967)* .The Section 3 valuation exercise was sometimes utilized to collect *basic data needed by other parties to minimise time and effort.*

4. ENTRY FOR EXECUTION OF THE PROJECT. If it becomes necessary to enter private lands to execute the project the President's Authority must be obtained under Section 4 of the LAA. which reads;

"4. (1) No earlier than two months after the date of publication of a Notice referred to in section 3(1) *(a)* the President may, if satisfied that the circumstances of the case justify such action, issue an Order authorising the Commissioner, without waiting for the formal vesting of the land in the State under section 5, to take possession of the land and apply it for any purpose connected with the use to which it is intended to be put on acquisition.

(2) An Order issued under subsection (1) shall—

(a) be under the hand of the Secretary to the Cabinet, or his authorised agent;

(b) be in the prescribed form;

(c) indicate the place where any person interested may obtain a more detailed description of the land to which the Order relates; and

(d) be published and served in the same manner as that required for a Notice referred to in section 3(1) and (2) respectively.

(3) Upon publication and service of an Order under subsection (2)—

(a) the Commissioner may proceed forthwith to carry out any works on the land connected with the use to which it is intended to be put on

acquisition; and*(b)* any person interested becomes entitled, as from

the date of the taking of possession referred to in subsection (1), to compensation upon the same basis as if a declaration had been made under section 5 on that date, and section 6(2)*(c)* and *(d)*apply *mutatis mutandis* to an Order issued under subsection (1).
(4) If the Commissioner fails to take possession of the land within six months of the publication of an Order issued under subsection (1)—
(a) the said Order lapses and the powers of the Commissioner thereupon cease to have any effect; and
(b) any person entitled to the land becomes entitled to repayment of all expenses reasonably incurred by him as a result of the publication of the Notice under section 3(1)*(a)*, up to the date of publication under subsection (2) of this section, but no compensation is payable in any such case for loss of bargain or for damages for breach of contract.'

To be effective, notice must be served on the owner (or the land). Before the 1994 Act the 'effective date of entry' set the date of entitlement for the head of claim ' "loss of use" which could only be legally submitted at the Section 5(vesting) stage. This was usually delayed for considerable periods (which was aggravated by another unexplained 'secret" amendment in 2000; this time to the State Lands Act. These amendments were passed in the Senate without formal debate. This clearly illustrate the need for technical justifications, feasibilities, pre feasibilities etc. before any "undue influence" ; to be made available to Parliament where relevant. The decision to up grade the northern route to freeway status is a classic example, which is one of major causes of the problems for the delays. The VD was advised when the authority was obtained. They revisited the site to determine their field report should be revised). Cabinet would accede to proceed by way Private Treaty (under the shadow of CP) on account of these.

5. SECTION 5 NOTICE**.** Delays (see Appendix III),

This vested the land in the State and all private interests in the lands were converted into rights to submit claims for compensation under the Act within 18 months or the right was lost. In consequence many lost the right to compensation. A Cabinet policy advised that in any such case it was prepared to make an *exgratia* award equal to the Commissioner of Valuation's estimate of the amount of compensation payable under all admissible heads of claim that would have been payable at the date of acquisition. No interest is payable as the delay was the fault of the claimant and assessment of the quantum could not be appealed. (See Appendix III)

6. COMPENSATION.

The various statements on compensation in NIDCO original documents are recommendations generally in conformity with the law. In practice there is ample leeway for differences in opinion even among experienced qualified valuers as in any discipline dealing mainly with opinion. The consultant is of the view that some of the statements he heard from Ministers and NIDCO on the airwaves could mislead. NIDCO has not provided access to valuations ,claims and settlements nor have they kept their word to submit a copy of their "offer to treat" form letter :; so the claims by the HRM and others in the media and included the HRC requests could not be investigated . It is therefore difficult to place reasonable reliance upon NIDCO's position. Some of the

HRRM's claims are that (i) NIDCO reneged on oral agreements,(ii) NIDCO changed the terms of offers with no reason provided,(ii) NIDCO offered (and delivered) improper inducements for protestors to change sides. (iv) They refused to reduce their claims (on no proper basis) and NIDCO caved in (v) NIDCO had un pressure exerted on the VD, to accept "questionable settlements as arms length evidence, assessment principles inconsistent with the law,official policy or LE principles, inappropriate principles for determining the appropriate planning assumptions, unlawful criteria for determining "payments" to squatters, trespassers and unauthorized development contrary to law,official policy or LE principles."

II . Private Treaty

Although the State is free to purchase land by private treaty (PT), it is foolhardy to rely solely on *normal* Private Treaty when one needs a specific property or where time is of the essence as the owner may not be prepared to settle at a reasonable price, resulting in delay. It would be detrimental to depend on it for strips of land comprising multiple ownership as the MOWI has been doing for some time. Prior to the 1994 Act it was normal for Cabinet to grant permission for the use of PT after Section 3 notice (lands may be required) but before the Section 5 notice (vesting date) to minimize hardship in cases where the section 5 notice is delayed and the State was reasonably certain of the lands needed as there was *no legal right to make a claim before publication of the Section 5 notice*. The relevant procedure was termed "*Private Treaty under the shadow of Compulsory Purchase"(PTSCP)* as these negotiations were *always conducted in strict accordance with the LAA.* If the negotiations succeeded, the transaction was completed as any other PT transaction. If not CP procedure completed the matter. The 1994 LAA now allow for claims to be submitted at the Section 4 stage (entry to execute the project) so there is no longer any need for PT in these cases and *PT not in accordance the LAA.*

Pure PT can sometimes expedite matters where a specific site is not critical, but in matters like the highway , CP procedure is by far quicker if under the control of competent persons qualified in Estate Management(EM) ; this has not been the case for at least half a century.

III LEGAL NOTICE NO.15

REPUBLIC OF TRINIDAD AND TOBAGO [Section 3(1)] THE LAND ACQUISITION ACT, CHAP. 58:01

NOTICE OF LANDS LIKELY TO BE REQUIRED FOR A PUBLIC PURPOSE

NOTICE is hereby given that it appears to the President that the parcels of land described in the Schedule and situate in the Counties of Victoria and St. Patrick are lands likely to be needed for a purpose which, in the opinion of the President, is a public purpose, namely the expansion of the trunk road network of Trinidad and Tobago by the construction of a highway between San Fernando and Point Fortin.

APPENDIX 7

Note on the Archaeological Significance of the Oropouche Lagoon

I. The Oropouche Lagoon in Historical Context

1.1 The Lagoon has a long human history, which dates back to est. 7000 BC. Three surface scatters of chert flakes and cores in southwest coastal Trinidad (Pitch Lake, Fyzabad, Savaneta near Claxton Bay) suggest pre-settlement visits from outside the island.

Two hilltop shell deposits on the south shore of the Lagoon (St John, Banwari) represent Trinidad's first human settlements. The Banwari excavation shows 3 strata. Shell food remains suggest the Lagoon is freshwater during the Early occupation (BC 6000-5580). The second stratum suggests abandonment: 75 cm of excavation with the same date (BC 5100), presumably while rising sea level following the Last Glacial is reaching its maximum. The shell remains in Late Banwari (BC 5100-est 4350) suggest a mangrove lagoon.

The Lagoon's location in southwest Trinidad and an absence of earlier mainland remains, suggest the people came from the previously undocumented Warao nation of the Orinoco Delta. According to Warao mythology, Haburi, the ancestral Maker of the First Canoe fled in time immemorial, via the Caño Macareo to Trinidad in time with his two mothers; and their spirits still reside on Naparima Hill in San Fernando. The Warao name of this hill is Naba Rima, *Guardian of the Coastal Waters*.

Typical Banwarian stone artifacts include a probable canoe-maker's adze as well as pestles made from Lesser Antilles rock.These probably attest to the navigational knowledge and skills of early Warao leaders. Any of our early sites near or in the Lagoon could be the factual basis of the Haburi myth.

1.2. The Grand Lagoon was first mapped in 1797 (Mallet 1802). Its waters almost fill the Oropouche drainage, and extend around 27 km inland as far as the present-day Moruga Road. Its swampy soils preserve a subsurface image of the Lagoon, which requires interpretation by a Civil Engineer.

2. Treatment of Cultural Heritage by the EMA

It would appear that the EMA is set up for Environmental Heritage only. However the meaningful management of Cultural Heritage is sadly lacking at this time in Trinidad and Tobago. In theory this is the responsibility of the National Trust. However the Development plans for Siparia, Point Fortin and Penal circulated to HRC suggest that the development of cultural heritage sites fit within the Local Government framework, and that GORTT policy appears to tacitly endorse this approach. The Corporations obviously each require a Heritage Officer, but at the moment this work is being supplied by consultants.

The National Trust clearly needs to interview for a panel of resource persons with recognised knowledge of our Cultural Sectors. Equally the position of National Trust Chairman should be filled by interview, not as at present by political appointment.

All this work falls within the portfolio of the Minister of National Diversity and Social Integration. Ideally a small Planning Committee should be established to recommend long term establishment of a National Cultural Institute, which would coordinate the views of Cultural Sector leaders, scholars, and selected Government representatives.

National Infrastructure Development Company Limited

No. 5 Melbourne Street
Port of Spain, Trinidad, West Indies
Tel: 624-9474/5593
Fax: 624-5512

Partnering to build Modern Infrastructure

RECEIVED APR 19 2013

17 April, 2013

Mr. Afra Raymond
President
Joint Consultative Council
Professional Centre Building
11-13 Fitzblackman Drive
Wrightson Road
Port of Spain

Re: Report of the Highway Review Committee

Dear Mr. Raymond

Further to your letter dated 24 January, 2013 requesting a contribution from NIDCO in the sum of Seven Hundred and Forty Two Thousand, Four Hundred Dollars ($742,400.00) for offsetting expenses for conducting the technical review of the Debe/Mon Desir Segment of the Sir Solomon Hochoy Highway Extention to Point Fortin, please find attached cheque #0001057 in the sum of $742,400.00 for your attention.

Yours faithfully

Dr. Carson Charles
President

cc: Senator, the Honourable Emmanuel George, Minister of Works and Infrastructure – Ministry of Works and Infrastructure

Board of Directors: Mr. Krishendath Ramoutar (Chairman)
Professor Winston Suite (Deputy Chairman), Mrs. Mandavi Tiwary, Mr. Hollis J. Eversley, Mr. Rabindra H. Outar, Ms. Reneelise Khan

from: JCC jcctt1@gmail.com
to: ps@flma.gov.tt
date:16 March 2012 14:52
subject: FOI REQUEST- Ministry of Food Production, Land and Marine Affair
mailed-by:gmail.com

16th March, 2012
Edwina Leacock
Permanent Secretary
Ministry of Food Production, Land and Marine Affairs
St. Clair Circle, St. Clair,
Port of Spain

Dear Ms. Leacock,

Re Request for Access to Official Documents

The subject at caption refers. I am writing seeking your assistance in ascertaining the status of the Joint Consultative Council for the Construction Industry) (JCC) request to your office on 2ndFebruary, 2012. On that date, we wrote asking for a copy of the lease or agreement of the property namely: 28 hectares / 30.5 hectares at Invader's Bay as per the Ministry of Planning and the Economy Request For Proposals (RFP) published31ST August, 2011,
http://www.jcc.org.tt/invadersbay/MPE_InvadersBay_RFP_Notice.pdf. (See copy attached).

To date, we are not in receipt of a formal response to our request from your good office. Consequently, as stated above, we are respectfully inquiring into its status and would appreciate your timely response.

Respectfully submitted,

Gerard Commissiong
For and on behalf of
Afra Raymond, BSc, FRICS
President

--

JOINT CONSULTATIVE COUNCIL FOR THE CONSTRUCTION INDUSTRY
The Professional Centre Building
Unit 202, Fitzblackman Drive, Wrightson Road Extension, Port of Spain,
Trinidad, West Indies.
Tel: 868-623-9396 or 622-2722
Fax: 628-2563 or 625-5749
Email: jcctt1@gmail.com

from: JCC jcctt1@gmail.com
to: ps@fplma.gov.tt
bcc: Afra Raymond <afraraymond@gmail.com>
date:27 October 2011 12:13
subject :Re: Enquiry Regarding Lease of Lands and Invaders Bay
mailed-by:gmail.com

Ms. Edwina Leacock
Permanent Secretary
Ministry of Food Production
Land and Marine Affairs
St. Clair Circle
St. Clair

Dear Ms. Leacock,

Reference is made to the captioned subject. Would you please confirm whether there has been either an Agreement to Lease or execution of a lease in respect of these lands?

We are also requesting a copy of those documents, if either of those is the case.

Thank you.

Afra Raymond, B.Sc., FRICS
President

--

JOINT CONSULTATIVE COUNCIL FOR THE CONSTRUCTION INDUSTRY
The Professional Centre Building
Unit 202, Fitzblackman Drive, Wrightson Road Extension, Port of Spain,
Trinidad, West Indies.
Tel: 868-623-9396 or 622-2722
Fax: 628-2563 or 625-5749
Email: jcctt1@gmail.com

from: JCC jcctt1@gmail.com
to: kkoonoolal@hotmail.com
date:16 March 2012 14:54
subject: FOIA REQUEST-Commissioner of State Lands
mailed-by:gmail.com

The Commissioner of State Lands
Kumar Koonoolal
Roosevelt Place, Numbers. 1 and 2C
Corner El Socorro Road and Jattan Trace
El Socorro Road, San Juan

Re Request for Access to Official Documents

The subject at caption refers. I am writing seeking your assistance in ascertaining the status of the Joint Consultative Council for the Construction Industry) (JCC) request to your office on 2ndFebruary, 2012. On that date, we wrote under the Freedom of Information Act (FOIA) asking for a copy of the lease or agreement of the property namely: 28 hectares / 30.5 hectares at Invader's Bay as per the Ministry of Planning and the Economy Request For Proposals (RFP) published31ST August, 2011, http://www.jcc.org.tt/invadersbay/MPE_InvadersBay_RFP_Notice.pdf. (See copy attached).

We note that some effort was made on your part to satisfy our prior requests in the form of correspondence on 24th November, 2011 from Mr. Asif Khan, Senior Land Officer, (see attached copy). Mr. Khan informed us that the report was completed and awaiting your vetting and approval. To date we have not been furnished with the said report nor have we had a reply to our Freedom of Information request.

Consequently, as stated above we are respectfully inquiring into the status of the report and or a formal reply to the FOIA request and would appreciate your timely response.

Respectfully submitted,

Gerard Commissiong
For and on behalf of
Afra Raymond, BSc, FRICS
President

from: Asif Khan asifkhantt@gmail.com

to: jcctt1@gmail.com
date: 24 November 2011 16:36
subject: Re: Enquiry Regarding Lease of Lands and Invaders Bay
mailed-by: gmail.com
Signed by: gmail.com: Important mainly because of the words in the message.

Mr. Raymond;

I wish to inform you that I have completed a response to your request, it is however awaiting vetting and approval from the Commissioner. When this is done, I will dispatch a copy to you.

Cordially;
--
Asif Khan
Senior Land Officer
Land Management Division
Ministry of Food Production, Land and Marine Affairs

--

On Mon, Nov 21, 2011 at 2:04 PM, Asif Khan <asifkhantt@gmail.com> wrote:
Mr. Raymond;

The Commissioner of State Lands has requested that I follow up this matter with you. I am the officer at the Land Management Division that coordinates land reclamation matters. Please note, i just wish to confirm receipt of you message, I will officially respond to your request later this week (Wednesday). Please contact me at the LMD @ 638-5233 ext 213.

Cordially;

--
Asif Khan
Senior Land Officer
Land Management Division
Ministry of Food Production, Land and Marine Affairs

from: JCC jcctt1@gmail.com
to: kkoonoolal@hotmail.com
date: 18 November 2011 11:47
subject: Re: Enquiry Regarding Lease of Lands and Invaders Bay
mailed-by: gmail.com

Mr. Koonoolal, Good Morning,

I'm writing with respect to my correspondence below, where I was seeking to confirm whether there has been either an Agreement to Lease or execution of a lease in respect of these lands?

It would be appreciated if I could have a timely response to the question and a copy of those documents, if either of those is the case.

Thank you.

Afra Raymond, BSc, FRICS
President

from: JCC jcctt1@gmail.com
to: kkoonoolal@hotmail.com
bcc: Afra Raymond <afraraymond@gmail.com>
date: 27 October 2011 12:35
subject: Re: Enquiry Regarding Lease of Lands and Invaders Bay
mailed-by: gmail.com

The Commissioner of State Lands
Kumar Koonoolal
Roosevelt Place
Numbers. 1 and 2C
Corner El Socorro Road and Jattan Trace
El Socorro Road
San Juan

Dear Mr. Koonoolal,

Reference is made to the captioned subject. Would you please confirm whether there has been either an Agreement to Lease or execution of a lease in respect of these lands?

We are also requesting a copy of those documents, if either of those is the case.

Thank you.

Afra Raymond, B.Sc., FRICS
President

SCHEDULE

(Section 13)

THE FREEDOM OF INFORMATION ACT. 1999

Request for Access to Official Document(s)

(pursuant to section 13)

1. Name of Public. Authority MINISTRY OF FOOD PRODUCTION, LAND & MARINE AFFAIRS.....

2. Name of Applicant JOINT CONSULTATIVE COUNCIL FOR THE CONSTRUCTION INDUSTRY .....

3. Address of Applicant PROFESSIONAL CENTRE, 11-13 FITZBLACKMAN DRIVE, PORT OF SPAIN .....

4. Telephone Number of Applicant 623-9396; 627-2522 .....

5.	Doc. No.	Description of Document Requested	Form of Access
	1.	A COPY OF THE LEASE OR AGREEMENT FOR	COPY
		LEASE OF THE PROPERTY NAMELY; 28HECTARES	
		AT INVADER'S BAY AS PER THE MINISTRY O□	
		PLANNING AND THE ECONOMY, REQUEST FOR	
		PROPOSALS (RFP) PUBLISHED ON 31ST AUGUST,2011	
		http://www.jcc.org.tt/invadersbay/MPE_InvadersBay_RFP_Notice.pd□	
	2.		
	3.		

[Note: Applications Shall identify the document(s), or provide sufficient information to enable an officer/employee of the public authority who is familiar with the relevant documents, to identify the documents, to identify the document(s) with reasonable effort.

Continue on a Separate Page if necessary.

Subject to the provisions of the Act access to a document ay be granted by supplying a printed copy of it or by making it available for inspection or, if appropriate, by supplying a copy of a tape, disk, film or other material containing the information, by supplying a transcript of such tape, film or other material or by making arrangements for the hearing or viewing the such tape, disk, film or other material].

6. Assuming that all documents requested are exempt documents, give the Document Number of the documents described above of which you would like to have access to an edited version, if possible.

The making of this request is free of charge, but where access to a document is to be given in the form of a copy (printed or otherwise), the applicant shall be required to pay the prescribed fee.

Date of Application 2nd February 2012

Signature of Applican□ .....

SCHEDULE

(Section 13)

THE FREEDOM OF INFORMATION ACT. 1999

Request for Access to Official Document(s)

(pursuant to section 13)

1. Name of Public. Authority MINISTRY OF FOOD PRODUCTION, LAND & MARINE AFFAIRS.....

2. Name of Applicant JOINT CONSULTATIVE COUNCIL FOR THE CONSTRUCTION INDUSTRY .....

3. Address of Applicant PROFESSIONAL CENTRE, 11-13 FITZBLACKMAN DRIVE, PORT OF SPAIN .....

4. Telephone Number of Applicant 623-9396; 627-2522 .....

5.	Doc. No.	Description of Document Requested	Form of Access
	1.	A COPY OF THE LEASE OR AGREEMENT FOR	COPY
		LEASE OF THE PROPERTY NAMELY; 30.5 HECTARES	
		AT INVADER'S BAY AS PER THE MINISTRY O□	
		PLANNING AND THE ECONOMY, REQUEST FOR	
		PROPOSALS (RFP) PUBLISHED ON 31ST AUGUST,2011	
		http://www.jcc.org.tt/invadersbay/MPE_InvadersBay_RFP_Notice.pd□	
	2.		
	3.		

[Note: Applications Shall identify the document(s), or provide sufficient information to enable an officer/employee of the public authority who is familiar with the relevant documents, to identify the documents, to identify the document(s) with reasonable effort.

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Date of Application 2nd February 2012

Signature of Applican□.....

SCHEDULE

(Section 13)

THE FREEDOM OF INFORMATION ACT. 1999

Request for Access to Official Document(s)

(pursuant to section 13)

1. Name of Public. Authority COMMISSIONER OF STATE LANDS .....

2. Name of Applicant JOINT CONSULTATIVE COUNCIL FOR THE CONSTRUCTION INDUSTRY .....

3. Address of Applicant PROFESSIONAL CENTRE, 11-13 FITZBLACKMAN DRIVE, PORT OF SPAIN .....

4. Telephone Number of Applicant 623-9396 OR 627-2522 .....

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	1.	A COPY OF THE LEASE OR AGREEMENT FOR	COPY
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		PLANNING AND THE ECONOMY, REQUEST FOR	
		PROPOSALS (RFP) PUBLISHED ON 31ST AUGUST,2011	
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Date of Application 2nd February 2012

Signature of Applican□ .....

SCHEDULE

(Section 13)

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Date of Application... 2nd February 2012

Signature of Applican□.....

MINISTRY OF FOOD PRODUCTION, LAND AND MARINE AFFAIRS

ST. CLAIR CIRCLE, PORT OF SPAIN, TRINIDAD AND TOBAGO, WEST INDIES
Tel: 622-1221-5 Ext 2014 Fax 622 – 4246
www.minagriculture.gov.tt @ tstt.net.tt

RECEIVED
16 APR 2012

April 12, 2012

AGR 34/1/10 Vol. V

Joint Consultative Council
For the Construction Industry
Professional Centre
11 – 13, Fitzblackman Drive
Port of Spain

Dear Sir/Madam,

Re: - Request for access to Official Document (s) pursuant to Section 13 of the Freedom of Information Act, 1999

I refer to your application dated February 2, 2012 and subsequent discussion via telephone on March 29, 2012 with respect to your request for the following information under the Freedom of Information Act.

(i) A copy of the Lease or Agreement for Lease of the Property namely; 28 hectares at Invader's Bay as per the Ministry Planning and the Economy, request for Proposal (RFP), Published on August 31, 2011.
http://www.jcc.org.tt/invadersbay/MPE_InvaderBay_RFP_Notice.pd

Please be informed that the Commissioner of State Lands has advised that the Ministry of Food Production Land and Marine Affairs has not granted any lease for the 28 hectares of reclaimed lands at Invaders Bay.

For further information you are advised to contact the Senior Land Officer, Land Management Division at **Telephone No. 638 – 5233 Ext. 213**.

Yours sincerely,

.....
/f/Permanent Secretary

MINISTRY OF FOOD PRODUCTION, LAND AND MARINE AFFAIRS

ST. CLAIR CIRCLE, PORT OF SPAIN, TRINIDAD AND TOBAGO, WEST INDIES
Tel: 622-1221-5 Ext 2014 Fax 622 – 4246
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For the Construction Industry
Professional Centre
11 – 13, Fitzblackman Drive
Port of Spain

Dear Sir/Madam,

Re: - Request for access to Official Document (s) pursuant to Section 13 of the Freedom of Information Act, 1999

I refer to your application dated February 2, 2012 and subsequent discussion via telephone on March 29, 2012 with respect to your request for the following information under the Freedom of Information Act.

(i) A copy of the Lease or Agreement for Lease of the Property namely; 30.5 hectares at Invaders Bay as per the Ministry Planning and the Economy, request for proposals (RFP) Published on August 31, 2011.
http://www.jcc.org.tt/invadersbay/MPE_InvaderBay_RFP_Notice.pd

Please be informed that the Commissioner of State Lands has advised that the Ministry of Food Production Land and Marine Affairs has not granted any lease for the 30.5 hectares of reclaimed lands at Invaders Bay.

For further information you are advised to contact the Senior Land Officer, Land Management Division at **Telephone No. 638 – 5233 Ext. 213**.

Yours sincerely,

.....
/f/Permanent Secretary

JOINT CONSULTATIVE COUNCIL FOR THE CONSTRUCTION INDUSTRY
The Professional Centre Building
1st Floor Unit B202, 11-13 Fitzblackman Drive, Wrightson Rd. South, Port of Spain
Tel: (868) 623-9396 Fax: (868) 628-2563/ 625-5749
jcctt1@gmail.com www.jcc.org.tt

18th April, 2012

Edwina Leacock
Permanent Secretary
Ministry of Food Production, Land and Marine Affairs
St. Clair Circle,
Port of Spain

Dear Ms. Leacock,

Your letters of 12th April, 2012 confirmed, in response to our Freedom of Information (FoI) application *"...that the Commissioner of State Lands (CoSL) has advised that the Ministry of Food Production, Land and Marine Affairs (MFPLMA) has not granted any lease for the...reclaimed lands at Invader's Bay..."*

Your letters are an incomplete response to the Joint Consultative Council for the Construction Industry (JCC) query of 2nd February, 2012, since they are silent as to whether there is any Agreement for Lease in respect of those Invader's Bay Lands.

We also take the opportunity to enquire as to the identity of the Public Body which holds those lands and via what instrument. Our FoI application in that regard is attached for your early attention please.

The JCC sent written queries to both the Permanent Secretary in the MFPLMA and the CoSL on 27th October 2011, but in the absence of any reply, we were forced to invoke the FoI Act on 2nd February 2012. According to S. 15 of the FoI Act, public authorities are mandated to reply to requests"... *in any case not later than 30 days after the day on which the request is duly made..."* Your letters were sent to us ten (10) weeks after our FoI; in any case, our earlier enquiry meant that you were aware of its subject. That unexplained delay in replying is a breach of the provisions of the FoI Act and what is more, your belated reply was incomplete. It has essentially taken us in excess of five months to obtain only a partial response to a straightforward query as to the status of these 'State-owned' lands.

The JCC is detailing this chain of events for the guidance of any Court or Tribunal which may have to adjudicate on this Invader's Bay matter.

We trust that our enquiries will be expeditiously and fully answered.

Yours sincerely,
JOINT CONSULTATIVE COUNCIL
FOR THE CONSTRUCTION INDUSTRY

Afra Raymond, BSc, FRICS
President

SCHEDULE

(Section 13)

THE FREEDOM OF INFORM.A.TION ACT. 1999

Request for Access to Official Document(s)

(pursuant to section 13)

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4. Telephone Number of Applicant 623-9396; 627-2522 .....

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		AND THE ECONOMY REQUEST FOR PROPOSALS (RFP)	
		PUBLISHED ON 31ST AUGUST, 2011	
		http://www.jcc.org.tt/invadersbay/MPE_InvadersBay_RFP_Notice.pdf	
	2.	PURSUANT TO (1) ABOVE THE PUBLIC BODY WHICH	COPY
		HOLDS THIS PARCEL OF LAND AND VIA WHAT	
		INSTRUMENT DOES THE PUBLIC BODY HOLD SAID PROPERTY NAMELY; 28 HECTARES AT INVADER'S BAY.	
	3.		

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Continue on a Separate Page if necessary.

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6. Assuming that all documents requested are exempt documents, give the Document Number of the documents described above of which you would like to have access to an edited version, if possible.

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Date of Application....18TH APRIL 2012

Signature of Applicant.....

SCHEDULE

(Section 13)

THE FREEDOM OF INFORM.A.TION ACT. 1999

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(pursuant to section 13)

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Date of Application..... 13TH APRIL 2012

Signature of Applicant.....

JOINT CONSULTATIVE COUNCILFOR THE CONSTRUCTION INDUSTRY

The Professional Centre Building
1st Floor Unit B202, 11-13 Fitzblackman Drive, Wrightson Rd. South, Port of Spain
Tel: (868) 623-9396 Fax: (868) 628-2563/ 625-5749
jcctt1@gmail.com www.jcc.org.tt

20th April, 2012

Ms. Cheryl Haynes
Permanent Secretary (Ag)
Ministry of Planning & the Economy
Level 14 Eric Williams Financial Complex
Independence Square
Port of Spain

Dear Ms. Haynes,

Re: Freedom of Information application in respect of Legal advice obtained on Invader's Bay Request for Proposal (RFP) process.

The Joint Consultative Council for the Construction Industry (JCC) is now applying under the Freedom of Information Act for copies of the legal advice upon which Minister Tewarie is relying in his claims on this matter.

According to Hansard, Minister Tewarie replied on 28th February, 2012 to Senator's Armstrong's question as to whether the publication of this RFP conforms to the Central Tenders Board Act, by saying "....*the publication of the request for proposals was not the subject of nor required to be in conformity with the Central Tenders Board Act. Advice to this effect was received from the Legal Unit of the Ministry of Planning and the Economy, and subsequent from the Office of the Attorney General....*"

In addition, the Private Sector/Civil Society group, of which the JCC is part, wrote to the Ministry of Planning & the Economy (MPE) on 14th December to point out that this RFP process was not in conformity with the Central Tenders Board Act. The Ministry's reply on 1st March 2012 also confirmed that the AG had advised that the publication of the RFP was not required to be in conformity with the Central Tenders Board Act.

The JCC is now making further enquiries as follows;-

1. Para 3.5 of the RFP, at Project Assessment, states- "Proposals will be scored using the "*Invader's Bay Development Matrix and Criteria Description*." Were those evaluation criteria made available to proposers before the closing-date of the RFP? The JCC is requesting a copy of that document.
2. What public consultation has MPE undertaken in relation to this proposed development? What public meetings has MPE undertaken in relation to this proposed development? Has MPE invited public or stakeholder comment in relation to this proposed development
3. Does this RFP process conform to the Central Tenders Board Act? Please note that the JCC is not querying the legality of the publication of the RFP, we are querying the legality of this RFP process. Has MPE had legal advice on the applicability of the CTB Act to this RFP process? When did MPE request that legal advice? To which adviser has MPE made that request? We are requesting copies of the written instructions and the legal advices, both from the Legal Unit of MPE and the Office of the Attorney General.

4. What is the weight given in the *'Invader's Bay Development Matrix and Criteria Description'* to the conformity of proposals with the existing strategic and regional plans?

The JCC is relying on the Public Interest Test in this matter and cite for your consideration from page 19 of the official Freedom of Information Act Handbook.
"...5.2 giving access to exempt documents (Public Interest Test). The public interest has been described as a term embracing matters, among others, of standards of human conduct and of the functioning of government and government instrumentalities tacitly accepted and acknowledged to be for the good order of society and for the well being of its members. ***The interest is therefore the interest of the public as distinct from the interest of an individual or individuals.***

An important thing to note about this test is that it has a presumption in favour of disclosure. ***The burden is on the public authority to show that the public interest in withholding the information is greater that the public interest in disclosure****. In addition, there may be factors that make the public interest in disclosing the particular information requested, for example;*

- *The information relates to an issue that affects a large number of people;*
- *It sheds light on how public funds are being spent;*
- *It deals with a matter that is a subject of public controversy*
- *Disclosure would help individuals to make more informed choices on important matters...."*

This matter satisfies every one of the tests laid down for the Public Interest Test and we anticipate your full response within thirty-day timetable stipulated by S.15 of the Act.

Yours faithfully,
JOINT CONSULTATIVE COUNCIL
FOR THE CONSTRUCTION INDUSTRY

Afra Raymond, BSc, FRICS
President

SCHEDULE

(Section 13)

THE FREEDOM OF INFORM.A.TION ACT. 1999

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(pursuant to section 13)

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3. Address of Applicant PROFESSIONAL CENTRE, 11-13 FITZBLACKMAN DRIVE, PORT OF SPAIN..... .....

4. Telephone Number of Applicant 623-9396; 627-2522 .....

5.	Doc. No.	Description of Document Requested	Form of Access
	1.	A COPY OF THE INVADER'S BAY DEVELOPMENT MATRIX AND CRITERIA DESCRIPTION	COPY
	2.	PURSUANT TO (1) ABOVE-WHAT IS THE WEIGHT GIVEN IN THE 'INVADER'S BAY DEVELOPMENT	COPY
		MATRIX AND CRITERIA DESCRIPTION' TO THE CONFORMITY OF PROPOSALS WITH THE EXISTING	
		STRATEGIC AND REGIONAL PLANS?	
	3.	WHAT PUBLIC CONSULTATION HAS MPE UNDERTAKEN IN RELATION TO THIS PROPOSED DEVELOPMENT?	COPY
		WHAT PUBLIC MEETINGS HAS MPE UNDERTAKEN IN RELATION TO THIS PROPOSED DEVELOPMENT?	
		HAS MPE INVITED PUBLIC OR STAKEHOLDER COMMENT IN RELATION TO THIS PROPOSED DEVELOPMENT?	
	4.	HAS MPE HAD LEGAL ADVICE ON THE APPLICABILITY OF THE CTB ACT TO THIS RFP PROCESS?	COPY
		WHEN DID MPE REQUEST THAT LEGAL ADVICE? TO WHICH LEGAL ADVISER DID MPE MAKE THAT REQUEST?	
		WE ARE REQUESTING COPIES OF THE WRITTEN INSTRUCTIONS AND THE LEGAL ADVICES,	
		BOTH FROM THE LEGAL UNIT OF MPE AND THE OFFICE OF THE ATTORNEY GENERAL	

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Date of Application..... 20th APRIL 2012

Signature of Applicant.....

JOINT CONSULTATIVE COUNCILFOR THE CONSTRUCTION INDUSTRY

The Professional Centre Building
1st Floor Unit B202, 11-13 Fitzblackman Drive, Wrightson Rd. South, Port of Spain
Tel: (868) 623-9396 Fax: (868) 628-2563/ 625-5749
jcctt1@gmail.com www.jcc.org.tt

27th June, 2012

Ms. Sheryl Anne Haynes
Permanent Secretary (Ag)
Ministry of Planning
Level #14
Eric Williams Financial Building
Independence Square
Port of Spain

Dear Ms. Haynes,

Re – Freedom of Information application in respect of Legal advice obtained on Invader's Bay RFP process

Our letter of 20th April 2012 on this matter has not been acknowledged, hence this request for a proper response to our enquiry, as you are required to provide under the provisions of the Freedom of Information Act.

The JCC's queries on this matter are entirely factual, with the exception of our request for the legal advice upon which Minister Tewarie was relying when he spoke in the Parliament on 28th February.

According to S. 15 of the FoI Act, public authorities are mandated to reply to requests "*...in any case not later than 30 days after the day on which the request is duly made...*"

Prior to our letter of 20th April, the Private Sector/Civil Society group, of which the JCC is a member, wrote to Minister Tewarie on 29th March –copy attached for ease of reference– to request a copy of the same legal advice. This letter is being written a full two months after our request, which in any case was known to you due to that earlier enquiry.

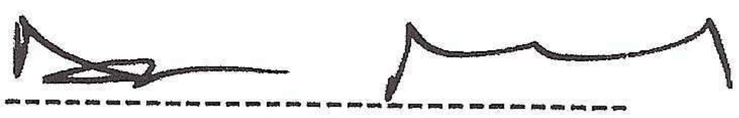
That unexplained delay in replying is in breach of the provisions of the FoI Act. The JCC is seeking a response to our straightforward queries as to the development process being used for these State-owned lands.

//2...The JCC is detailing

The JCC is detailing this chain of events for the guidance of any Court or Tribunal which may have to adjudicate on this Invader's Bay matter.

We trust that our enquiries will be expeditiously and fully answered.

Yours sincerely,
JOINT CONSULTATIVE COUNCIL
FOR THE CONSTRUCTION INDUSTRY



Afra Raymond, BSc, FRICS
President

RECEIVED
06 JUL 2012

Ministry of Planning and the Economy

Telephone: 1-868-627-9700
Fax: 1-868-623-8123
E-mail: pspdmfpd@tstt.net.tt

Eric Williams Financial Complex
Finance Tower, Level 14,
Eric Williams Plaza, Independence Square,
Port of Spain, Republic of Trinidad & Tobago

P&E: 6/10/1 Vol. I

July 5, 2012

Mr. Afra Raymond
President Joint Consultative Council for
The Construction Industry
The Professional Centre Building
1st Floor Unit B202
11-13 Fitzblackman Drive
Wrightson Road South
Port of Spain

Dear Mr. Raymond

Request for information under the Freedom of Information Act 22:02.
Re Invader's Bay R.F.P.

I acknowledge receipt of your letter dated June 27, 2012 on the subject above. I would like to advise that the matter is receiving attention.

The delay in responding is deeply regretted.

Yours respectfully

C.P. Seebaran.
.....

/f/Permanent Secretary
Ministry of Planning and the Economy

PERMANENT SECRETARY
MINISTRY OF PLANNING AND THE ECONOMY

THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Claim No. CV 2012-04538

BETWEEN

THE JOINT CONSULTATIVE COUNCIL FOR THE CONSTRUCTION INDUSTRY

Applicant/Intended Claimant

AND

THE MINISTER OF PLANNING AND SUSTAINABLE DEVELOPMENT

Respondent/Intended Defendant

Before the Honourable Justice Frank Seepersad

Appearances

1. Ms Kingsley Walesby for the Applicant
2. Mr Russell Martineau S.C and Mr Shiv Sharma, Deowattee Dilraj- Batoosingh for the Respondent.

Date of Decision: October 1, 2013

Decision

Introduction

1 In the proceedings before the court, the Applicant/Intended Claimant is seeking leave to institute Judicial Review in order to challenge the decision of the Respondent/Intended Defendant to refuse to disclose copies of the written instructions, the legal advices and the identity of the authors of such legal advices it received from the Legal Unit of the Respondent and the Office of the Attorney General.

2 The refusal was primarily on the basis that the documents were exempted under the Freedom of Information Act (Chap 22 02)

3. The application was filed with notice on the 31st October, 2012 and it was later amended and re-filed without notice on the 11th January, 2013.

4. The relief sought included *inter alia*:

i A declaration that the continuing decision of the Respondent by letter dated the 16th August, 2012 to refuse to provide the said information which was requested by the Applicant in its Freedom of Information application dated the 20th April, 2012 is illegal, null and void and of no effect,

ii A declaration that the Respondent is not entitled to rely upon the additional reasons for its refusal to provide the said information as set out in its letter dated the 4th December, 2012 as a ground for its refusal to provide the said information,

iii A declaration that the Applicant is entitled to the said information; and

iv An order of Mandamus compelling the Respondent to provide the said information.

Background Information

5. The Ministry of Planning and Sustainable Development was formerly known as the Ministry of Planning and the Economy until the year 2012. Senator the Honourable Minister Dr Bhoendrat Tewarie while functioning under the Ministry of Planning and the Economy initiated a Request for Proposal process to select a developer or developers for state lands located at Invader's Bay

6 The Applicant/Intended Claimant contends that the request for proposal process amounted to a tender process and by letter dated 14th December, 2011 called upon the Minister to explain how this was possible under the Ministry when the Central Tenders Board has the sole and exclusive authority to act for and on behalf of the government subject to limited exceptions which did not apply in this case.

7 The Applicant/Intended Claimant requested a response from the Ministry on this apparent circumvention of the Central Tenders Board and described same as a 'matter of grave public concern'

8 By letter dated the 21st December, 2011, the Minister informed the Applicant that with respect to its query advice was being sought from the Attorney General on the matter.

9 By letter dated the 1st March, 2012, the Minister wrote to the Applicant indicating *inter alia* that based upon advice received from the Office of the Attorney General the Request for Proposals process was not required to be in conformity with the Central Tenders Board Act (Chap. 71:91)

10 By letter dated the 29th March, 2012, the Applicant called upon the Minister to publish the legal advice received with respect to the Central Tenders Board Act.

11 By letter dated the 20th April, 2012 the Applicant wrote to the Ministry pursuant to the Freedom of Information Act requesting access to various information including a printed copy of the following documents and information -

i *"Has MPE had legal advice on the applicability of the CTB Act to this RFP process?*

ii *When did MPE request that legal advice? To which legal adviser did MPE make that request?*

iii *We are requesting copies of the written instructions and the legal advices both from the Legal Unit of MPE and the office of the Attorney General "*

12 Having regard to the lack of acknowledgement or a substantive response to the said letter the Applicant wrote to the Ministry again indicating that its previous letter had not been acknowledged by the Ministry and that the Ministry was in breach of section 15 of the Freedom of Information Act by failing to indicate within thirty (30) days whether it was acceding to or refusing the Applicant's request for the requested documents

13. By letter dated 5th July, 2012 the Ministry acknowledged receipt of the Applicant's letter dated the 27th June, 2012 and in which it apologized for the delay and informed the Applicant that the matter was receiving its attention

14 By letter dated the 13th July, 2012 the Applicant wrote to the Respondent referring to its letter dated the 29th March, 2012 and indicated that it was still awaiting a copy of the said information.

15. By letter dated the 10th August, 2012 the Applicant through its Attorneys at law sent a pre-action protocol letter to the Respondent indicating that the Ministry in failing to indicate whether it was approving or refusing to grant the information requested by the Applicant was in direct and continuing breach of Section 15 of the Freedom of Information Act The Respondent was requested to provide its substantive response on or before the 24th August, 2012 failing which it was indicated that the Applicant would apply for judicial review of the said continuing refusal and/or failure of the Ministry to provide its substantive response to the request

16 By letter dated the 16th August, 2012, the Permanent Secretary, Ministry of Planning and Sustainable Development refused to provide the legal advice obtained on the matter and informed the Applicant as follows

"The instructions for the provision of the legal advice, the advice and its author are however considered exempt according to Section 27(1) of the Freedom of Information Act The revelation of same cannot be seen to be justified in the public interest since relevant information surrounding process is now provided Further the decision to move forward with the process and the selection of the three (3) chosen investors was agreed by cabinet "

17 Further by Letter dated the 4th December, 2012 the Respondent indicated that the information requested by the Applicant is exempt under section 29(1) of the Freedom of Information Act on the ground of legal professional privilege and therefore could not be made available to the Applicant.

Attorneys' Submissions

18. By submission dated the 7th February, 2013 the Applicant/Intended Claimant's attorney submitted as follows:

i The test to be applied when considering whether leave for Judicial Review should to be granted is whether the Applicant has an arguable ground for judicial review with a realistic prospect of success and not subject to a discretionary bar such as delay or an alternative remedy. The case of *Sharma v Antoine [2006] UKPC 57* was relied upon,

ii There has been no unreasonable delay in the filing of this application and that the Applicant has no alternative remedy or means of obtaining the requested information having regard to the refusal of the Respondent to provide same,

iii. The Request for Proposals process adopted by the Ministry was illegal given that it was not in conformity with the Central Tender Boards Act,

iv. Section 27 (1) (b) of the Freedom of Information Act does not apply to the requested information as it would not be contrary to the public interest for the requested information to be provided to the Applicant,

v Neither of the explanations provided by the Respondent/Intended Defendant for withholding the information is a credible explanation,

vi The Respondent/Intended Defendant's refusal to provide the requested information on the ground that the documents are exempted on the ground of legal professional privilege under Section 29 (1) of the Freedom of Information Act was not an original reason relied upon by the Respondent in its letter date 16th August, 2012 and therefore the court should refuse or be reluctant or at least highly circumspect in accepting reasons provided by the decision maker that were not advanced at the time that the decision was made

vii. Even if the court accepts the additional reason provided by the Respondent/Intended Defendant in its letter dated 4th December, 2012, that is, that the requested information is also exempted on the grounds of legal professional privilege, the action of the Respondent/Intended Defendant in requesting advice on an issue that was raised by the Applicant as a matter of public interest and the subsequent actions of the Respondent in referring to the said advice and voluntarily relying upon the contents of same in the Senate on the 28th February, 2012 amounted to a publication and disclosure of the substance of the advices received and constituted an act of waiver or loss of legal professional privilege

viii Even if the requested information is exempted under Section 27 and/or Section 29, the Respondent/Intended Defendant is in breach of its statutory duty as it has refused to provide same without first conducting the section 35 assessment, analysis and determination and communicating this in its reasons to the Applicant.

19 By submission dated the 11th March, 2013 the Respondent/Intended Defendant's attorney submitted as follows:

i. In deciding whether or not leave should be granted the Court should apply the elevated threshold test, that is, whether the applicant has a reasonably good chance of success, as outlined in the case of *R v Cotswold District Council ex parte Barrington [1998] 75 P &CR 515.*

ii. The Respondent/Intended Defendant should be allowed to rely on section 29(1) because it raises a substantive issue of law and having regard to the clear nature of the information sought the Respondent should be allowed to rely on the exemption especially since no new evidence is required

iii. There has been no waiver in the circumstances of this case of the legal professional privilege provided under section 29(1).

iv The Respondent/Intended Defendant was under no obligation in this instance to set out reasons relating to the overriding section 35 provision in the public interest as the Applicant placed no evidence before it to consider

20. The primary issue that the Court is required to determine at this stage is

i Whether or not the Applicant/ Intended Claimant has an arguable case so as to justify a review of the Respondent's decision to refuse to provide copies of written instructions, legal advice and the identity of the author(s) of same received by the Respondent from their legal unit and the office of the Attorney General

Test for granting leave

21 The Applicant and the Respondent are at odds with respect to the test that should be applied when determining whether leave for judicial review should be granted

22. The Applicant/Intended Claimant relied on the case of *Sharma v Antoine [2006] UKPC 57* for its position that the test is 'whether the applicant has an arguable ground for judicial review with a realistic prospect of success '

23. The Respondent/Intended Defendant submitted that the threshold test as outlined in *Sharma* is not the only test and relied on the case of *R v Cotswold District Council ex parte Barrington [1998] 75 P&CR 515* in support of its position that the elevated test, that is, 'whether the applicant have a reasonably good chance of success with its claim for judicial review as amended,' should be applied in these circumstances

24 Before determining which test is to be proffered it is important to understand the reason(s) why leave is required for judicial review The entire law was analysed in Mitchell v Georges by Rawlins JA (as he then was) at paragraphs 46 to 49 in these terms

> *"[46] An applicant for leave is required to show that there is an arguable case, one that is not frivolous This is to prevent busy-bodies from wasting the court's time with misguided or trivial complaints Thus in Inland Revenue Comrs v National Federation of Self-Employed and Small Business Ltd Lord Diplock stated as follows*
>
> > *'The whole purpose of requiring that leave should first be obtained to make the application for judicial review would be defeated if the court were to go into the matter in any depth at that stage If, on a quick perusal of the material then available, the court thinks that it discloses what might on further consideration turn out to be an arguable case in favour of granting to the applicant the relief claimed, it ought, in the exercise of a judicial discretion, to give him leave to apply for that relief The discretion that the court is exercising at this stage is not the same as that which it is called on to exercise when all the evidence is in and the matter has been fully argued at the hearing of the application.'*
>
> *[47] In Sharma v Browne-Antoine, the appellant, the then Chief Justice of Trinidad and Tobago, allegedly attempted to influence the course of a trial conducted by the Chief Magistrate The Chief Justice denied the allegations and maintained that proceedings against him were influenced by political pressure He applied for judicial review of the decision to prosecute him, and for a stay of the criminal proceedings against him pending the determination of the application The judge granted leave and stayed the proceedings In affirming the decision by the Court of Appeal to set aside the judge's order, the Privy Council held that the challenge to the decision to prosecute was in principle susceptible to judicial review but in extremely rare cases Their Lordships were satisfied that the judge had failed, inter alia, to look at the evidence overall and to identify the grounds on which the appellant's challenge was arguable Their Lordships therefore held that the Court of Appeal was justified in making its own analysis of the facts and circumstances*

[48] In arriving at its decision in Sharma's case, Lords Bingham and Walker elucidated the test for the grant of leave in the following terms (2006) 69 WIR 379 at 387-388)

> *'The ordinary rule now is that the court will refuse leave to claim judicial review unless satisfied that there is an arguable ground for judicial review having a realistic prospect of success and not subject to a discretionary bar such as delay or an alternative remedy But arguability cannot be judged without reference to the nature and gravity of the issue to be argued. It is a test which is flexible in its application. As the English Court of Appeal recently said with reference to the civil standard of proof in R (on the application of N) v Mental Health Review Tribunal (Northern Region) [2005] EWCA Civ 1605, [2006] QB 468, at para [62], in a passage applicable mutatis mutandis to arguability*
>
> > *' the more serious the allegation or the more serious the consequences if the allegation is proved, the stronger must be the evidence before a court will find the allegation proved on the balance of probabilities Thus the flexibility of the standard lies not in any adjustment to the degree of probability required for an allegation to be proved (such that a more serious allegation has to be proved to a higher degree of probability), but in the strength or quality of the evidence that will in practice be required for an allegation to be proved on the balance of probabilities '*

It is not enough that a case is potentially arguable, an applicant cannot plead potential arguability to 'justify the grant of leave to issue proceedings upon a speculative basis which it is hoped the interlocutory process of the court may strengthen', Matalulu v Director of Public Prosecutions [2003] 4 LRC 712 at 733 '

[49] In my view this statement did not change the 'arguable case' standard for leave laid down in the Inland Revenue Comrs case It merely qualifies arguable to require a greater degree of arguability The quotation from R (on the application of N) v Mental Health Review Tribunal (Northern Region) seems merely to suggest that arguability cannot be supported on a speculative basis from evidence that may emerge during the course of the interlocutory process It is also indicating that the nature and gravity of the issues must be taken into consideration in determining the sufficiency and cogency of the evidence which will be taken into consideration to justify the grant of leave Thus the court must bear in mind that 'a more serious allegation has to be proved to a higher degree of probability' While the 'balance of probability' remains the test, the strength and quality of the evidence required to prove a serious allegation on the balance of probability will, 'in practice', be higher than that required to prove an allegation of trivial nature This explains the statement 'thus the flexibility of the standard lies not in any adjustment to the degree of probability but in the strength or quality of the evidence' It is on this basis that I do not agree with Mr Astaphan's contention, for which he cited Mass Energy Ltd v Birmingham City

Council, R (on the application of the Noble Organisation) v Thanet District Council and Tanfern Ltd v Cameron-MacDonald as authority, that there are special circumstances in the present case, which require the standard of proof on this application for leave to be more than just an arguable case "

25 Having considered both cases referred to by the respective parties and the principles outlined in *Mitchell* the overriding factor in the court's view is arguability In the Oxford Concise Dictionary 'arguable' is defined to mean, "capable of being supported or sustained by argument." This must necessarily come from the affidavit evidence, by the authorities cited and the Freedom of Information Act.

26 The local authorities which dealt with leave for judicial review generally have relied on the test as outlined in *Sharma,* and the court is of the view that there is no need in these circumstances to depart from same Accordingly the relevant test is whether the "applicant has an arguable ground for judicial review with a realistic prospect of success and not subject to any discretionary bar such as delay or an alternative remedy "

27 At this stage therefore the Court is not concerned with facts but rather with the nature of the evidence for the purpose of arguability and with a view of determining whether any of the arguments advanced reveal arguable grounds which have a realistic prospect of success

28. In order to determine whether there are arguable grounds for judicial review the court considered the purport and effect of the Freedom of Information Act and also consider the arguments advanced as to whether in all the circumstances disclosure would be contrary to the public interest.

29 The Applicant/Intended Claimant in this case says that it requested the information because it had concerns about the legality of the request for proposals process for screening for potential investors initiated by the Minister. The Applicant/Intended Claimant was of the view that the process by-passed the Central Tenders Board Act and thus might not have been in conformity with the law

30 The Respondent/Intended Defendant in its Notice of Refusal dated 16th August, 2013 relied on section 27 of the Freedom of Information Act as the basis for refusing the requested documents.

31 Section 27 (1) provides as follows

> *"Subject to this section, a document is an exempt document if it is a document the disclosure of which under this Act -*
>
> *(a) Would disclose matter in the nature of an opinion, advice or recommendation prepared by an officer or Minister of Government, or consultation or deliberation that has taken place between officers, Minister of Government, or an officer and a Minister of Government, in the course of, or for the purpose of, the deliberative processes involved in the function of a public authority, and*
>
> *(b) Would be contrary to the public interest "*

32. By the said Notice the Respondent/Intended Defendant relying on section 27 informed the Applicant/Intended Claimant that the documents were exempted and gave the following two reasons for this position:

i That since relevant information surrounding the process is now provided disclosure was not justified in the public interest; and

ii. That the decision to move forward with the process and the selection of the three (3) chosen investors were agreed to by Cabinet.

33 By Submissions dated the 7th February, 2013 the Applicant/Intended Claimant submitted that the reasons provided by the Respondent in its letter dated the 16th August, 2012 when carefully scrutinized, are untenable and the Respondent on whose shoulders the burden

lies to demonstrate why the granting of access would be contrary to the public interest has wholly failed to provide compelling reason as to why such access should be withheld

34. The Applicant/Intended Claimant further submitted that it's reasonable and legitimate expectation to gain access to the said document under the Freedom of Information Act far outweighed the explanations that have been provided by the Respondent in its letter dated 16th August, 2012 as to the public interest considerations for withholding such information.

35 The Applicant/Intended Claimant further submitted that the clear intention of the legislation is for information requested under the Act to be supplied save and except in limited exceptions and circumstances which are necessary to protect essential public interests and private business affairs and in this case the public interest exception in withholding the requested information does not apply.

36. In order to determine whether disclosure of the requested document is contrary to public interest a careful examination of the intent and purport of the Freedom of Information must be carried out. The approach to the Freedom of Information Act is set out comprehensively in the decision of the Honourable Justice Moosai in *Ashford Sankar v Public Service Commission Claim No CV2006-00037*, delivered April 2 2007

37 The Freedom of Information Act allows public authorities to refuse disclosure of information requested if one or more of the exemptions contained in the Act are applicable Some of these exemptions are absolute, while others are qualified

38. The exemption provided for under section 27 appears to be qualified In *Ashford Sankar v Public Service Commission CV 2006/ 00037* Moosai J stated as follows:

> *"As is immediately apparent, the requirements of section 27 (1) are twofold, so that a document falling within the definition of s-27 (1) (a) must also be shown to be such that its disclosure would be contrary to the public interest s 27 (1) (b) "*

39 The Applicant/Intended Claimant advanced that the Respondent/Intended Defendant in this case does not have an automatic right to non-disclosure, and that the Intended Defendant must have considered whether the public interest in keeping the information confidential was of greater importance, than the public interest in disclosing the said information

40 The argument is that the onus is on the Respondent/Intended Defendant to show that it is entitled reasonably to rely on an exemption claimed and to not grant access to the documents requested In *Nimmo v Alexander Couran and Sons Ltd. [1968] A.C 107 at 130* Lord Wilberforce stated:

> *"the orthodox principle (common to both the criminal and the civil law) that exceptions etc , are to be set up by those who rely on them "*

41 Additionally, the Applicant/Intended Claimant contends that the Respondent having decided that the document was exempt was required to carry out a section 35 public interest override assessment and analysis to determine whether disclosure was necessary notwithstanding that it may have been exempt

42 Section 35 of the Freedom of Information Act provides

> *"Notwithstanding any law to the contrary, a public authority shall give access to an exempt document where there is reasonable evidence that significant (a) abuse of authority or neglect of performance or official duty or (b) injustice to an individual, has or is likely to have occurred or in the circumstances of giving access of the document is justified in the public interest having regard both to any benefit and to any damage that may arise from doing so "*

43 The Respondent/Intended Defendant submitted that it was under no obligation in this instance to set out reasons relating to the overriding section 35 provision in the public interest as the Applicant/Intended Claimant placed no evidence before it to consider Whether the Applicant/Intended Claimant had an obligation to place evidence before the Respondent/Intended Defendant is an issue that the Court would have to determine on a

substantive hearing At this stage however, it appears to this Court that position advanced that the Respondent/Intended Defendant ought to have undertaken a public interest assessment is an argument that is arguable and has a realistic prospect of success

44 The Respondent/Intended Defendant has also sought to rely on section 29 of the Act and the Court must consider the argument as whether the Respondent/Intended Defendant can rely on section 29 of the Freedom of Information Act as a ground for denying access to the requested information and whether the said position ought not to be considered given the fact that it was raised after the commencement of these proceedings and whether there has been any waiver of privilege

45 The Applicant/Intended Claimant contends that the Respondent/Intended Defendant is not entitled to rely on section 29 of the Freedom of Information Act as a ground for refusal to provide the requested information given that same was not advanced at the time that the decision was made and conveyed to the Applicant in the Respondent's letter of refusal dated 16th August, 2012

46 The Applicant/Intended Claimant also contends that the Respondent/Intended Defendant in this case was statutorily bound to provide reasons for its decision and by its letter of refusal dated the 16th August, 2012 the Respondent refused to disclose the requested information on the basis that same was considered exempt under 27(1) of the Act and disclosed that the revelation of same could not be justified in the public interest since relevant information surrounding the process was now provided and further the decision to move forward with the process and the selection of the three (3) chosen investors was agreed by Cabinet

47. The Applicant/Intended Claimant stated that the reasons outlined in its letter of refusal dated the 16th August, 2012 did not advance the reason that the requested documents are exempted on the ground of legal professional privilege under section 29 (1) of the Act and given that there are no exceptional circumstanced to justify the court accepting any subsequent reason for the Respondent refusing to provide the requested information, as

outlined in its 4th December, 2012 letter, it is just, in all the circumstances of the case for the court to refuse to consider the subsequent reason of the Respondent as contained in its letter dated 4th December, 2012

48 The Applicant/Intended Claimant further contends that the Respondent/Intended Defendant had ample time during the three months limitation period to rely on section 29 as a ground for refusal but failed to do so. It was not until after the application for leave had been filed and served on the Office of the Attorney General on the 16th November, 2012 and re-served on the 23rd November, 2012 that the Respondent/Intended Defendant by letter dated 4th December, 2012 for the first time indicated that its refusal was also based on the ground that the documents are exempted on the ground of legal professional privilege under section 29(1) of the Act

49 In support of its position the Applicant/Intended Claimant relied on the following authorities.

(a) *R (s) v London Borough of Brent [2002] EWCA Civ 693*, in which it was stated that *"it is not ordinarily open to a decision maker who is required to give reasons to respond to a challenge by giving different or better reason;"*

(b) *R v (Goldsmith) v London Borough of Wandsworth [2004] EWCA Civ 1170 (2004) 7 CCLR 472 AT [91]* *"The court has to look at the decision at the time it was made and at the manner in which it was communicated to the person or persons affected by it,"*

(c) *R (D) v Secretary of State for the Home Department [2003]EWHC 155(Admin)* *"it is well established that the court should exercise caution before accepting reasons for a decision which were not articulated at the time of the decision but were only expressed later, in particular after the commencement of proceedings,"*

(d) *R v Secretary of State for the Environment ex p Kingston upon Hull City Council [1996] Env LR 248 at 262* in which the court preferred contemporaneous letters to letters written after the event in response to the application for judicial review,

(e) *R v (Nash) v Chelsea College of Art and Design [2001] EWHC (Admin) 538 at 34* in which Stanley Burnton J held, *inter alia,* that: "*where there is a statutory duty to give reasons as part of the notification of the decision, so that the adequacy of the reasons is itself made a condition of the legality of the decision, only in exceptional circumstances it at all will the Court accept subsequent evidence of the reasons.*"

(f) *R v Westminster City Council, ex p Ermakov [1996] 2 All ER 302* in which the court held, inter alia that there is a statutory duty to give reasons and where there is a failure on the part of the Respondent to provide accurate reasons at the time of the decision a Claimant is prima facie entitled to have the decision quashed

50 The Applicant/ Intended Claimant advocated that even if the court accepts the additional reason provided by the Respondent/Intended Defendant in its letter dated 4th December, 2012, that is, that the requested information is also exempted on the grounds of legal professional privilege, that the action of the Respondent/Intended Defendant in requesting advice on an issue that was raised by the Applicant as a matter of public interest and the subsequent actions of the Respondent in referring to the said advice and voluntarily relying upon the contents of same in the Senate on the 28th February, 2012 amounted to a publication and disclosure of the substance of the advice received and constituted an act of waiver and resulted in the loss of legal professional privilege.

51. The Respondent/Intended Defendant contended that it should be allowed to rely on section 29(1) because it raises a substantive issue of law and having regard to the clear nature of the information sought, the Respondent should be allowed to rely on the exemption especially since no new evidence is required

52 In support of its position the Respondent/Intended Defendant relied on the case of *Birkett v Department for Environment Food and Rural Affairs [2012] Env L R. 24* In that case, the applicant's initial request was refused by the public body on a particular exception After a reversal by the Information Commissioner, the public body appealed to the Information Tribunal seeking to rely on two further exceptions. The issue for the court of appeal to decide was whether the authority could rely on exceptions not previously relied on, "as of right" or only in circumstances where there was "reasonable justification" for allowing them so to do. The Court of Appeal found itself unable to accept the applicant's submission that permitting a public authority to rely on a new exception in the administrative and legal review process deprived the person seeking the information of any effective judicial control and thereby destroying the effectiveness of the process

53. At paragraph 24 of Birkett's case Sullivan LJ stated

> *"suppose a public authority mistakenly fails to rely in its refusal notification upon an adverse effect upon public security or national defence because it did not realize the significance of the information, or it fails to rely on an adverse effect upon a criminal inquiry or upon the ability of a person to receive a fair trial because it is unaware of the inquiry or the impending trial, or if it fails to rely on the commercial confidentiality or information which is only raised as an issue by a third party during the review process, or it fails to rely on exemption (h) because it does not initially appreciate that the release of the information might endanger a rare species, would a purposive interpretation of the Directive preclude the review process under art 6 from considering those exceptions however grave might be the adverse effects of disclosure? In my judgment, the answer to that question must be "No" if the Directive is read as a whole '*

54. With respect to the issue of waiver, the Respondent/Intended Defendant contended there has been no waiver in the circumstances of this case of the legal professional privilege provided under section 29(1) The disclosure to the Senate is not disclosure to the world

at large particularly since leave is often required for persons to refer to contents of proceedings in Parliament

55 The Respondent/Intended Defendant contended that it is imperative that one gives weight to the circumstances in which the Honourable Minister's statement was made. The Minister made the statement in Parliament and in response to a written question that was posed to him and there could have been no intention to waive the privileged nature of the advice since the intention was to fulfill his Parliamentary obligation to answer questions posed to him in Parliament

56 The Respondent/Intended Defendant further contended that it could not be fairly asserted that a Senator answering a question in Parliament by merely stating that he obtained legal advice before embarking on a project would amount to a waiver of legal professional privilege enabling an applicant to obtain the entire legal advice. The purpose of such disclosure was not to disadvantage anyone or create a misleading impression Section 29(1) provides as follows.

> *"A document is an exempt document if it is of such a nature that it would be privileged from production in legal proceedings on the ground of legal professional privilege "*

57 According to *Waterford v Commonwealth (1987) 163 CLR 54, 63—4* professional privilege protects confidential communications between a lawyer and their client, made for the dominant purpose of giving or receiving legal advice, or for use in actual or anticipated litigation

58 The Freedom of Information Act gives rights of public access to information held by public authorities. Public authorities have two basic functions under the Act, that is, to confirm or deny whether requested information is held and to provide the requester with that information If a public authority is refusing to meet either of these duties it is required to issue a refusal notice to the requester explaining the reasons for its decision

59 The Respondent/Intended Defendant provided its refusal notice on the 16th August, 2012 but did not rely on the exemption under section 29(1) as a reason for its refusal. In deciding whether this failure disentitled the Respondent/Intended Defendant from raising the exemption at a later date the court considered the reasoning found at paragraph 42 in the case of *Bowbrick v Information Commissioner App no EA/2005/0006* on this point:

> *"If a public authority does not raise an exemption until after the s 17(1) time period, it is in breach of the provisions of the Act in respect to giving a proper notice because, in effect, it is giving part of its notice late However FOIA does not say that that failure to specify the exemption within the 20 working day time limit means that the authority is disentitled thereafter from relying on the exemption in any way If the intention of FOIA had been that the exemption could no longer apply to the information in such circumstances then it would have been expected that the Act would say this in very clear terms, because otherwise it is a very draconian consequence of the failure to comply with the statutory time limit "*

60 The Court is of the view that the Applicant/Intended Claimant's argument that the Respondent/Intended Defendant is limited to the reasons upon which it relied at the time of the refusal, is also not an arguable ground that has a realistic prospect of success

61 However the issue as to whether the Minister's response to questions posed in the Senate should be taken, impliedly or by imputation of law, to have waived the entitlement of the Respondent to rely on legal professional privilege in respect of the advice received from the Office of the Attorney General must be considered

62. In *Mann v Carnell (1999) 201 CLR 1* it was stated at paragraphs 28, 29 and 34 respectively as follows

> *"[28] At common law, a person who would otherwise be entitled to the benefit of legal professional privilege may waive the privilege It has been observed that "waiver" is a vague term, used in many senses, and that it often requires further definition according to the context Legal professional privilege exists to protect*

the confidentiality of communications between lawyer and client It is the client who is entitled to the benefit of such confidentiality, and who may relinquish that entitlement It is inconsistency between the conduct of the client and maintenance of the confidentiality which effects a waiver of the privilege Examples include disclosure by a client of the client's version of a communication with a lawyer, which entitles the lawyer to give his or her account of the communication, or the institution of proceedings for professional negligence against a lawyer, in which the lawyer's evidence as to advice given to the client will be received.

[29] Waiver may be express or implied Disputes as to implied waiver usually arise from the need to decide whether particular conduct is inconsistent with the maintenance of the confidentiality which the privilege is intended to protect When an affirmative answer is given to such a question, it is sometimes said that waiver is "imputed by operation of law" This means that the law recognizes the inconsistency and determines its consequences, even though such consequences may not reflect the subjective intention of the party who has lost the privilege What brings about the waiver is the inconsistency, which the courts, where necessary informed by considerations of fairness, perceive, between the conduct of the client and maintenance of the confidentiality, not some overriding principle of fairness operating at large

[34] Depending upon the circumstances of the case, considerations of fairness may be relevant to a determination of whether there is such inconsistency

63 In *Grant v Downs (1976) 135 CLR 674 at 685*, the majority of the High Court described the rationale of legal professional privilege as follows:-

"According to traditional doctrine (the rationale) is that it promotes the public interest because it assists and enhances the administration of justice by facilitating the representation of clients by legal advisers, the law being a complex and complicated discipline This it does by keeping secret their

communications, thereby inducing the client to retain the solicitor and seek his advice and encouraging the client to make a full and frank disclosure of the relevant circumstances to the solicitor The existence of the privilege reflects, to the extent to which it is accorded, the paramountcy of this public interest over a more general public interest, that which requires that all relevant documentary evidence is available As a head of privilege, legal professional privilege is so firmly entrenched in the law that it is not to be exorcised by judicial decision. Nonetheless, there are powerful considerations which suggest that the privilege should be confined within strict limits "

64 The factors laid down in the case of *Mann v Carnell (1999) CLR 20* are the relevant factors that ought to be considered namely·

I Whether the privilege information was circulated confidentially;
II The purpose for which the privilege material was created,
III How widely the privilege material has been circulated,
IV. Whether the circumstances of disclosure is inconsistent with the maintenance of confidentiality;
V The nature of the obligation of confidentiality in the recipient

65. In *Goldberg v Ng (1995) 185 CLR 83* Deane, Dawson and Gaudron JJ held that:

"in considering whether there is an imputed waiver of legal professional privilege, the governing consideration is whether fairness requires that the privilege should cease irrespective of the intention of the holder of the privilege "

66 The court also considered the case of *Bennett v Chief Executive Officer, Australian Customs Service (2004) 210 ALR 220* in which (Tamberlin, Gyles and Emmett (dissenting) JJ) applied the reasoning of the majority in Mann v Carnell (supra). It was held that the voluntary disclosure of the gist or conclusion of legal advice in the circumstances of the case amounts to a waiver of the whole advice, including the reasons for the conclusion The substance and the effect of the advice were being communicated

in order to emphasize and promote the strength and substance of the case to be made At para 6, Tamberlin J stated:-

> *"It may perhaps have been different if it had been simply asserted that the client has taken legal advice and that the position which was adopted having considered the advice is that certain action will be taken or not taken In those circumstances, the substance of the advice is not disclosed but merely the fact that there was some advice and that it was considered However, once the conclusion in the advice is stated, together with the effect of it, then in my view, there is imputed waiver of the privilege The whole point of an advice is the final conclusion. This is the situation in this case "*

67 Having regard to the law and the information before the court, the court is of the view at this stage, that the argument that the Minister's conduct in the Senate was inconsistent with the maintenance of confidentiality which the sec. 29 privilege is intended to protect and that the said privilege was waived, is an argument that is arguable and same has a realistic prospect of success

68 In the circumstances, the court finds that the Applicant/Intended Claimant has an arguable ground(s) for judicial review with a realistic prospect of success Accordingly, leave is hereby granted to the Applicant/Intended Claimant to institute an action for judicial review

FRANK SEEPERSAD

JUDGE

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14th May, 2013

Senator Dr. the Honourable James Armstrong
Chairman
Independent Review Committee of the
Debe to Mon Desir Segment of the
San Fernando to Point Fortin
Highway

Dear James,

Highway Review Committee

The JCC is writing to convey our sincere thanks to you and the members of the Highway Review Committee for the outstanding efforts you all put into the production of the ground-breaking HRC Report.

The JCC and its Civil Society Kindred Associations - the Trinidad & Tobago Transparency Institute (TTTI), the Federation of Trades Unions and NGO's (FITUN) and Working Women for Social Progress (Working Women) - made our intervention - http://www.jcc.org.tt/JCC-PMreroute.pdf - into this regionally unprecedented hunger-strike set against a large-scale national development project, with the intention of restoring public trust to what had become a potentially explosive situation. Most importantly, we were attempting to replace the negative ideals of 'might is right' and degrading brinksmanship with the progressive ideals of fact-based decision-making.

The HRC comprised nineteen (19) eminent regional experts covering the range of pertinent issues as detailed in our Press Release of 5th December- http://www.jcc.org.tt/releases/5dec2012-hiway-reroute.pdf- and it must be noted that you all worked diligently and with a high degree of professionalism through two of our festive seasons of Christmas and Carnival to produce the required Report within the demanding 60-day timescale.

The HRC toured the area under consideration, met with public officials from NIDCO and various Ministries as well as the Highway Re-Route Movement and other interested parties, so as to consider the diverse perspectives and the factual record.

...//2 The HRC's Report

14th May, 2013

Senator Dr. the Honourable James Armstrong
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The HRC's Report - http://www.jcc.org.tt/highway-report.pdf - was delivered to JCC, NIDCO and the Highway Re-Route Movement, as previously agreed, on 4th February and your team then found itself immersed in a further demanding exercise of answering various queries arising from the State and its implementing agency, NIDCO. Those numerous queries were professionally handled by the HRC, with its Report being published on 4th March. It is important to note that despite the challenges, all the findings and recommendations of the submitted Report were retained in the published Report as noted in your transmission letter of 4th March 2013 - http://www.jcc.org.tt/JCC-hiway-review.pdf. The detailed record of the correspondence between NIDCO/other State Agencies and the HRC is now available at http://www.jcc.org.tt/JCC-hiway-addendum.pdf.

It now remains for the main parties to the original dispute and indeed, the wider public, to learn the many valuable lessons contained in this study. The Report has no statutory weight, so the degree to which its findings are observed is entirely a matter for the parties concerned. That said, the HRC Report is of real significance as a professional study of the facts of this controversial, large-scale development. The JCC is of the view that as the first Civil Society project review undertaken in the Caribbean, your collective efforts as embodied in the HRC Report are both historic and critical to a new development path which takes proper cognisance of the objective facts.

We are also aware that the HRC Report is now receiving attention in wider circles beyond those who are involved in the 'profession of the land and physical development'. Indeed, some commentators have dubbed it the '*Armstrong Report*' and we are sure it will form an imperishable element in the building of a new way of developing our Caribbean societies.

The JCC was also pleased to receive on 19th April, NIDCO's contribution of $742,400 towards a total expenditure in excess of $1,100,000.

In that connection, the JCC is also giving special recognition to the efforts made by your team through reduced honoraria which allowed the JCC to manage the finances of this demanding exercise.

James, Colleagues, please accept our deepest, most respectful thanks for a very tough job-Well Done!

Yours sincerely,
JOINT CONSULTATIVE COUNCIL
FOR THE CONSTRUCTION INDUSTRY

Afra Raymond, BSc, FRICS
President

REPUBLIC OF TRINIDAD AND TOBAGO

IN THE COURT OF APPEAL

Civil Appeal No. P 200 of 2014
Claim No. CV 2012-04538

Between

THE MINISTER OF PLANNING AND SUSTAINABLE DEVELOPMENT

Appellant

And

THE JOINT CONSULTATIVE COUNCIL FOR THE CONSTRUCTION INDUSTRY

Respondent

PANEL: **P. JAMADAR, J.A.**
N. BEREAUX, J.A.
R. NARINE, J.A.

APPEARANCES: **R. Martineau SC, K. Ramkissoon and S. Sharma for the appellant**
G. Peterson SC and K. Walesby for the respondent

DATE DELIVERED: 28 October 2016

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JUDGMENT

Delivered by Bereaux, J.A.

Introduction

[1] This appeal is from the decision of Seepersad J delivered on 14th July, 2014. It is from an application for judicial review brought by the Joint Consultative Council for the Construction Industry (the Council) against the Minister of Planning and Sustainable Development (the Minister) in respect of a request for information under the Freedom of Information Act, Chap 22:02 (the FIA). The Council sought a variety of reliefs against the Minister's refusal to provide information about legal advice given to him by the Attorney General and by the legal unit of the Ministry of Planning and Sustainable Development (the Ministry).

[2] The advice related to the competence of the Ministry to issue requests for proposals for the development of a strip of coast line at Invader's Bay, Mucurapo, Port-of-Spain. The Council enquired whether such a request should have come from the Central Tenders Board instead of the Ministry of Planning and Sustainable Development. The Minister, having obtained advice from the Attorney General and the Ministry's legal unit, responded that it should not have. He had responded to an earlier enquiry in the Senate in the same terms.

[3] He declined the Council's request to be provided with the advice and related documents on the ground that it was an exempt document under section 27(1) of the FIA. This reason was provided to the Council pursuant to section 23 (1) of the FIA which directs the Ministry to provide, in a written notice, reasons for its refusal to give access to information requested.

[4] In these proceedings the Minister has also relied on the additional defence

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of legal professional privilege as provided by section 29(1) of the FIA but, in breach of section 23, this defence did not form part of the reasons in the notice.

Legal professional privilege is expressly provided by section 29(1) of the FIA as a basis for the exemption of documents from production under the FIA.

[5] Undoubtedly, the documents requested by the Council attract legal professional privilege. There is no controversy as to that issue but at the hearing before Seepersad J, the Council objected to the Minister's reliance on section 29(1) on the basis that it did not form part of the reasons for refusal set out in the section 23 notice. The judge rejected the Council's objection. He granted the application and ordered the Minister to provide the information (subject to certain redactions). The Minister has appealed.

The Counsel has cross-appealed the judge's dismissal of its objection to the Minister's reliance on section 29(1).

The parties

[6] The Council is a non-governmental, consultative organization and is incorporated under the 1995 Companies Act. It comprises six member professional organizations and is dedicated to the promotion of professionalism, responsible industry growth, transparency in tendering procedures, fair business practices, training, efficient dispute resolutions, establishment of codes of practice and provision of advice.

[7] At the time of filing of this appeal the relevant Minister was Dr. Bhoendradatt Tewarie, then Minister of Planning and Sustainable Development and a member of the Senate. The Ministry was previously called the Ministry of Planning and the Economy. Minister Tewarie no longer holds office, having demitted office consequent upon a general election.

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Relevant Facts

[8] In August 2011, the then Ministry of Planning and the Economy, invited *"expressions of interest for the development of that portion of the Invader's Bay, south of Movietowne"*. The invitation was headed *"Request For Proposals"* and stated that *"This Request for Proposals ... has been assembled to provide potential developers (hereinafter referred to as the "Developer") with the information to prepare a competitive design and build proposal"*.

[9] The Request for Proposals was in respect of the development of some twenty eight (28) hectares (70 acres) of prime state land along the coastline of Invader's Bay. The lands are valued at one billion two hundred and eighty million dollars (TT $1,280,000,000.00). The Request for Proposals gave a comprehensive description of the project, setting out the role of the then Ministry of Planning and the Economy. It stated, inter alia, that:

> ***"The proposed Developer will be chosen via this RFP process and shall then enter into a Memorandum of Understanding (MOU) with the Government of Trinidad and Tobago (Ministry of Planning and the Economy) for an agreed lease rate. It is expected that this activity would be finalized within one (1) month of the submission of the ... RFP".***

[10] On 30th September 2011 the Council, through its President, Afra Raymond, wrote to the Minister expressing concerns about the Request for Proposals and asking for its withdrawal and revision so as *"to attain satisfactory levels of transparency and participation"*. There was an exchange of correspondence between the parties ending with Mr. Raymond's letter of 14th December 2011, by which he expressed the view that *"the process used to select a developer or developers amounted to a clear tender process"* which rendered it subject to the Central Tenders Board Act. He asked the Minister to explain how it was possible to pursue this project through his Ministry when the Central Tenders

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Board had the sole and exclusive authority to act for and on behalf of the Government, except for limited exceptions *"which did not apply to this case"*.

[11] The Minister responded by letter of 21st December 2011, stating, inter alia, that the matter had been referred to the Attorney General for his advice. Subsequently, by letter of 1st March 2012, the Minister informed the Council that the Attorney General's office had advised that the Request for Proposals did not have to conform with the Central Tenders Board Act. The relevant paragraph reads as follows:

> ***"Further to my letter of December 21, 2011 on the Invader's Bay Project, I write to let you know that based on advice from the Office of the Attorney General I can say that the publication of the Request for Proposals for screening of potential investors making an investment proposal on State Lands located at Invader's Bay was not required to be in conformity with the Central Tenders Board Act. I trust that this will be of some comfort to you".***

[12] On 28th February 2012, prior to this letter, the Minister had responded in the Senate to a similar enquiry from Senator James Armstrong. He stated that the Request for Proposals was *"not the subject of nor were [sic] required to be in conformity with the Central Tenders Board Act."* He added that advice to this effect was received from the Legal Unit of the Ministry of Planning and the Economy and subsequently, from the office of the Attorney General. However when requested to circulate in the Senate both legal opinions, the Minister declined to do so.

[13] It appears that Minister Tewarie's letter provided no comfort to the Council because the Council responded to the Minister's letter of 1st March 2012, and asked for the publication of the legal opinions. It then wrote to the Minister requesting the information, pursuant to the FIA. Specifically, the Council queried the decision to pursue the Request for Proposals process, in the following terms:

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"Has [the Ministry of Planning and the Economy] had legal advice on the applicability of the CTB Act to this RFP process?
When did [the Ministry of Planning and the Economy] request that legal advice? To which legal adviser did [the Ministry of Planning and the Economy] make that request?
We are requesting copies of the written instructions and the legal advices both from the Legal Unit of [the Ministry of Planning and the Economy] and the Office of the Attorney General."

[14] There was no substantive response to that inquiry until 16th August 2012 (after the Council's attorneys-at-law had sent a pre-action protocol letter to the Ministry) when the Permanent Secretary confirmed that the Ministry had sought legal advice. He supplied the information sought except the requests for copies of instructions and legal advice provided to the Minister. The Permanent Secretary stated that:

"The instructions for the provision of the legal advice, the advice and its author are however considered exempt according to Section 27(1) of the Freedom of Information Act. The revelation of same cannot be seen to be justified in the public interest since relevant information surrounding the process is now provided. Further the decision to move forward with the process and the selection of three (3) chosen investors was agreed to by Cabinet."

He added *"Please be informed that any request for copies of instructions and legal advice provided to the Attorney General must be addressed to him. The Ministry of Planning and Sustainable Development has no authority to provide that information."*

[15] Based on that response the Council then applied for and obtained permission to seek judicial review of the Minister's refusal to provide the information sought. On 4th December 2012, when the permission application

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came up inter partes before Seepersad J, Mr. Sharma, junior counsel for the Minister, informed the judge that the information sought was also exempt under section 29(1) of the FIA and that the Council had been informed of this by letter of even date. The Council did in fact receive that letter on 4th December 2012 but after the court hearing.

The Council's case

[16] Mr. Peterson contends that the refusal to provide the information sought is illegal, irrational and unreasonable because:

(i) The process that has been used by the Minister to select a developer for the Invader's Bay project amounted to a clear tender process. The Central Tenders Board has the sole and exclusive authority to act for and on behalf of the Government in these matters (subject to limited exceptions which did not apply in this case.) The decision of the Minister to by-pass the provisions of the Central Tenders Board Act in the Request for Proposals process at Invader's Bay is therefore illegal, unreasonable and amounts to an abuse of authority or neglect in the performance of official duties by the Minister. It also amounts to an unauthorized use of public funds.

(ii) The allegation by the Minister that the information sought is exempt by reason of legal professional privilege was made only after the Council had filed and served its application for judicial review and is a completely new reason. The Minister was required (by section 23) to state in the letter of refusal of 16th August, 2012 all of the statutory reasons for refusing to provide the information and, in all of the circumstances, it would be unjust to permit the Minister to rely on the new reason.

(iii) Further, in the Senate on 28th February 2012, the Minister referred to and relied on the nature and substance of the advice thereby publicly disclosing the advice received and waiving any legal professional privilege.

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(iv) Even if the information is exempt pursuant to either section 27 or section 29 of the FIA then the Minister's decision to refuse to provide the requested information without first conducting the section 35 public interest override assessment and analysis, was illegal or **Wednesbury** unreasonable and amounted to an omission by the Minister to perform a statutory duty.

The Minister's case

[17] On behalf of the Minister it was contended before the judge that:

(i) The matter is clearly covered by legal professional privilege.

(ii) The Minister could raise the section 29(1) exemption as a matter of substantive law based on evidence that was originally submitted by the Council.

(iii) Although it was given after the filing of the application for judicial review, the section 29(1) exemption was raised at a relatively early stage of the proceedings and could be relied on by the Minister in this case.

(iv) What the Minister said in Parliament did not amount to a waiver of legal professional privilege. The statement made in Parliament was in fulfilment of his parliamentary obligation to answer questions posed to him in Parliament.

(v) The Minister was under no obligation to set out reasons relating to the section 35 public interest question because the Council, on whom the onus lay, did not put any evidence before him to consider.

Judge's findings

[18] I have understood the judge's findings to be as follows:

(i) The Minister's decision was flawed as he failed to adequately outline his

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reasons and the public interest considerations which formed the basis of his refusal to disclose the information sought. There was an onus on the Minister to carry out a section 35 public interest override assessment and analysis so as to determine whether disclosure was necessary. This assessment became necessary upon his concluding that the information requested was exempt.

(ii) The Minister is entitled to rely upon the defence of legal professional privilege. The fact that a public authority does not raise an exemption until after the section 23 notice has been issued does not disentitle the authority from relying on it. If the intention of the FIA were that the exemption would no longer apply to the information in such circumstances, then the Act would have expressly so provided.

(iii) Consideration by the Court of the Minister's response in Parliament does not violate section 55 (2) of the Constitution. Section 55(2) of the Constitution contemplates civil proceedings against members of the House in their personal capacity and the proceedings must be based on a cause of action that relates to a statement that was made by the member while speaking in the House. In this case the defendant is accountable in his capacity as an office holder who has taken a decision on behalf of the Ministry and by extension, the Government of Trinidad and Tobago and no personal liability attaches to him.

(iv) When the Minister issued his response, he provided information which became a matter of public record. His statement communicated that the legal advice he received and considered was that the Request for Proposals process did not have to conform with the requirements of the Central Tenders Board Act. The gist and nature of the legal advice was in fact revealed and this amounted to conduct that is inconsistent with the stance that the legal advice is exempt from being disclosed under the Act by virtue of section 29(1).

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(v) The requested information should be disclosed to the Council under section 35 of the FIA. The nature of the project in this case and the process adopted by the Minister to pursue the Request for Proposals process require disclosure of all the relevant information that was considered before the decision was taken. Refusal to provide the requested information can create a perception that there may have been misfeasance in the process and any such perception can result in the loss of public confidence.

[19] In his judgment granting permission to file for judicial review, the judge opined that the basis of the Council's opposition to the section 29(1) defence was not an arguable ground. On the face of it, that would appear to be a refusal to permit the Council to pursue, at the substantive hearing, its objection to the section 29(1) defence. However the judge permitted the Council to raise it at the substantive hearing and then proceeded to consider and dismiss it in his judgment on the substantive question. The issue which arose in this appeal was whether the judge's initial view was an outright refusal of permission to the Council to pursue its objection which disentitled it from pursuing the argument at the substantive hearing and in this appeal.

Grounds of Appeal

[20] The Minister contends that it is an infringement of parliamentary privilege for any litigant to question in legal proceedings words spoken or actions done in Parliament. He contends that in considering the Minister's statement in the Senate the judge disregarded the purposive intent of section 55(2) of the Constitution which is to allow members of Parliament to freely speak, debate and answer questions and otherwise to freely conduct the business of the House. The Minister also contends that the judge was wholly wrong to find that the gist and nature of what was said by the Minister in the Senate amounted to conduct that was inconsistent with the Minister's stance that the legal advice was exempt under section 29(1) of the Act.

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[21] In written submissions before us the Council raised for the first time that the letter of 1st March 2012 constituted a waiver of legal professional privilege. At the hearing of the appeal we posed, inter alia, two questions to counsel, to wit:

(i) Whether the Council was entitled to raise this point in the appeal, it not having done so before the trial judge?

(ii) If the Council was entitled to do so, did the letter constitute a waiver of legal professional privilege?

Issues

[22] The main issues which fall to be decided in this appeal are:

(i) Did the judge refuse permission to the Council's pursuit of its objection to the use of a section 29(1) defence by the Minister?

(ii) If the answer to that question is no, can the Minister rely on section 29(1) although he did not rely on it in his original objections to disclosure?

(iii) Is consideration of the Minister's statement in the Senate on 28th February 2012 by the Court a breach of parliamentary privilege?

(iv) If the answer to that question is no, did the Minister's statement in the Senate on 28th February 2012 amount to a waiver of legal professional privilege?

(v) Did the Minister's letter of 1st March 2012 amount to a waiver of legal professional privilege and is the Council entitled to raise the letter in this appeal?

(vi) Should the information requested be disclosed in the public interest pursuant to section 35 of the FIA?

Summary of decision

[23]

Issue (i) The Council can pursue its objection. The judge did not refuse permission to pursue the objection when granting permission to

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seek judicial review.

Issue (ii) There is no bar to the Minister relying on section 29(1) of the FIA. The fact that the Minister did not rely on legal professional privilege in his original reasons for refusing disclosures, does not prevent the Minister's subsequent reliance in these proceedings. There is no express provision in the FIA which prohibits reliance on section 29(1) in such circumstances.

Issue (iii) Consideration by the Court of the Minister's statement of 28th February 2012 in the Senate, is a breach of parliamentary privilege.

Issue (iv) In light of the decision at (iii) the issue of (iv) will not be considered.

Issue (v) The letter of 1st March 2012 did not amount to a waiver of legal professional privilege.

Issue (vi) The information requested should be disclosed in the public interest pursuant to section 35.

Issue (i) – Can the Council pursue its objection to the Minister's reliance on section 29(1)?

[24] Mr. Martineau submitted that the Council should not be permitted to pursue its objection in this appeal because the judge, in granting permission to apply for judicial review, found that the contention was not arguable. He submitted that the Council should have appealed that finding but did not. He added that although the judge repeated his opinion at the substantive hearing, it was not a new finding neither was it an invitation to appeal the same.

[25] In my judgment, the comments of the judge at the permission hearing were simply his preliminary view of the matter. He made no hard and fast finding rejecting the argument. Had he done so I would have expected him to have expressly prohibited any open discussion of the matter at the substantive hearing; that is to say, the order of the judge would have expressly excluded this objection from discussion at the substantive application for judicial review. Not only did he

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permit the Council to make the submission but the judge also proceeded to expressly include it as an issue to be decided in his substantive judgment. He thereafter proceeded to decide upon it in favour of the Minister. The fact that he did so can only have reflected his opinion that the matter was still open to be pursued by the Council. The Council was therefore entitled to pursue an appeal against that finding before us. I turn then to the Council's objection to the Minister's reliance on section 29(1).

Issue (ii) – Can the Minister rely on section 29(1)?

[26] The judge, relying on the decision in **Bowbrick v Information Commissioner App. # EA/2005/0006** at paragraph 42, held in effect that a failure to raise the section 29(1) exemption in the section 23 notice did not preclude the Minister from doing so in subsequent court proceedings. If such a consequence was intended, he would have expected that the FIA would have expressly provided for such a draconian result. He relied on the following comments of the Information Tribunal in **Bowbrick**:

> ***"If a public authority does not raise an exemption until after the s. 17(1) time period, it is in breach of the provisions of the Act in respect to giving a proper notice because, in effect, it is giving part of its notice late. However FOIA does not say that that failure to specify the exemption within the 20 working day time limit means that the authority is disentitled thereafter from relying on the exemption in any way. If the intention of FOIA had been that the exemption could no longer apply to the information in such circumstances then it would have been expected that the Act would say this in very clear terms, because otherwise it is a very draconian consequence of the failure to comply with the statutory time limit."***

[27] I agree entirely. I accept that this is at best persuasive authority but I

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consider that the comments are well founded. To read such an interpretation into the FIA is tantamount to legislating judicially. Section 29(1) exists as a matter of substantive law. Seepersad J was correct to uphold the Minister's reliance on section 29(1). Any failure to initially rely on the section 23 notice does not affect the continued right to rely on the exemption. Nor can the failure initially to advert to it amount to a waiver. It is a defence provided by the FIA to an application for disclosure which continues to be available to the Minister. He does not lose his entitlement to that defence simply because he or his legal advisors failed initially to rely on it when giving reasons for refusing to disclose.

[28] But the decision of this Court in **Ashford Sankar v. The Public Service Commission, C.A. No. 58 of 2007** (Mendonça, Jamadar and Narine JJA) appears to support the Council's contention. In **Sankar**, the Public Service Commission had objected to the provision of minutes of its meetings in October 2005 at which promotions to the offices of Permanent Secretary and Deputy Permanent Secretary were determined. The Commission had refused to provide them on the sole ground that the minutes were internal working documents and were exempt under section 27 of the FIA. However in written submissions before the trial judge, the Commission sought to bolster its reasons by contending that the minutes were a record of consultation and deliberations between members of the Commission and were confidential. One of the questions in the appeal was whether the Commission should be permitted to rely on that submission when it was not part of its initial reasons for refusing disclosure. The Court of Appeal held that the Commission should not be permitted to rely on it. Narine JA giving the judgment of the Court stated at paragraphs 24-25:

> ***"In this case, no affidavit evidence was filed with a view to supplementing the reasons for refusal provided by the respondent in its letter dated 21st December, 2005. The supplementary reasons arose in the respondent's written submissions filed before the trial judge. There is no evidence that disclosure of the minutes requested will inhibit frankness and candour in future discussions.***

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In its oral submissions before this court the respondent contended that the submission is sustainable having regard to the nature and character of the request and the minutes themselves, which were before the trial judge.

In my view, the evidence in this case is clear. The reason provided for refusal by its letter was simply that the documents are internal working documents and are exempt under section 27 of the Act. The respondent should not be permitted to introduce a completely different reason and to rely on public interest considerations, which were not communicated to the appellant before he made his application for judicial review."

[29] In this appeal, Narine JA has stated that the Court did not lay down a principle that was of universal application (see paragraph 31 of his judgment). He adds that:

"Much will depend on the particular circumstance of the case, and the time at which the additional reasons are put forward. Clearly the longer the delay in providing the additional ground or refusal, the less likely the court will be in permitting reliance on it. The court will hardly shut out a public authority which is clearly entitled to rely on an exemption provided in the Act, but which through inadvertence did not include it as a reason at the time of refusal."

[30] He also sought to distinguish this case from **Sankar**, because in this case *"the Minister sought to introduce the additional reason for refusal under section 29(1)... before leave was granted by the trial judge to bring the application for judicial review."* (See paragraph 32 of the judgment.) I can see no real difference between the facts of **Sankar** and the facts of this case to justify a different outcome here on this question. In both cases the application for judicial review

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had already been filed at the time of the taking of the new objection. The applicants in both cases would have based their challenge on the reasons provided by the public authority in its section 23 notice. That the objection was taken in this case at the permission stage cannot significantly detract from any prejudice to the Council which would have founded its action on the reasons given to it in the section 23 notice, especially as the notice of the additional reason was given only on the morning of the hearing of the application for permission to apply for judicial review.

[31] Further, the taking of the objection at the permission stage, in this case, was purely fortuitous because the Minister was allowed to participate by leave of the judge. In most cases judicial review is granted ex parte without the public authority having an opportunity to contest the grant of permission. If early disclosure at the permission stage is a substantive distinguishing feature, it would mean that in most judicial review applications a public authority which did not rely on a statutory exemption in its section 23 notice, will be shut out from relying on a valid reason because it would not have been invited to participate in the ex parte application for permission to seek judicial review.

[32] In my judgment a public authority can rely on a reason not originally provided in the section 23 notice. It is not to be forgotten that the FIA recognises that there will be good public interest reasons for keeping a document private and undisclosed. The public authority should not be unceremoniously shut out from relying on it – because the reasons were not included in the notice. See **Birkett v. Department for the Environment, Food and Rural Affairs [2011] EWCA Civ 1606**. This is especially so in a case such as this in which the new reason relied on is a defence provided by the FIA itself as a substantive right. The absence of a sanction for non-compliance would suggest that the legislative intent was not to render ineffective any new reason not originally communicated to the applicant. It will be of course a matter of discretion for the trial judge depending on the circumstances. Public authorities are expected to comply with provisions of the FIA and will not be permitted to simply ignore its timelines. There is no real

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difference between **Sankar** and this case. The public interest considerations which arose in **Sankar** fell to be considered on the evidence already before the court (as in this case). If the submissions had succeeded, the public authority could have been punished in costs for having failed to provide notice to the other side, as has now been rightly suggested in this case.

[33] In **Birkett** the English Court of Appeal had to consider the following issue:

> ***"When a public authority has initially relied upon a particular exception when refusing to release environmental information under the Environmental Information Regulations 2004 ("the Regulations") may it rely upon a different exception or exceptions in proceedings before the Information Commissioner ("the Commissioner") and/or the First-Tier Tribunal (General Regulatory Chamber) (Information Rights) ("the Tribunal")?"***

[34] The Tribunal in that case had decided that the public authority could not rely on two new exceptions without its permission. It refused to give its permission. An appeal was taken to the Upper Tribunal which decided that the public authority was entitled as of right to rely on the two new exceptions. An appeal to the Court of Appeal was brought against that latter decision. The relevant regulations implemented Council Directive 2003/4/EC on the public's access to environmental information. It was argued before the Court of Appeal that a public authority may not rely on a new reason in proceedings before the Commissioner and the Tribunal but only on reasons which were specified in its reasons for refusing the request. Sullivan LJ, dismissing the appeal, found that the public authority was entitled as of right to rely on the new exceptions.

At paragraph 24, he stated:

> ***"Suppose a public authority mistakenly fails to rely in its refusal notification upon an adverse effect upon public security or***

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national defence because it did not realise the significance of the information; or it fails to rely on an adverse effect upon a criminal inquiry or upon the ability of a person to receive a fair trial because it is unaware of the inquiry or the impending trial; or if it fails to rely on the commercial confidentiality of information which is only raised as an issue by a third party during the review process; or it fails to rely on exception (h) because it does not initially appreciate that the release of the information might endanger a rare species; would a purposive interpretation of the Directive preclude the review process under Article 6 from considering those exceptions however grave might be the adverse effects of disclosure? In my judgment, the answer to that question must be "No" if the Directive is read as a whole."

[35] I accept that given the different considerations set out in the Directive, this decision must be approached with caution. But the premise is the same here. The FIA does not prohibit reliance on a reason not stated in the section 23 notice.

Parliamentary Privilege

Issues (iii) - Is it a breach of parliamentary privilege to consider the Minister's statement which was given in the Senate?

[36] Issues (iii) and (iv) are interwoven. The act alleged to be a waiver of legal professional privilege in this case is the Minister's response in the Senate (to Senator Armstrong) that the Request for Proposals did not have to conform to the Central Tenders Board Act. The judge held that, by revealing in the Senate the conclusion of the legal advice he received and considered, the Minister had waived legal professional privilege. Whether the judge was right so to hold requires an analysis of the Minister's statement in Parliament. However consideration of the Minister's response raises the issue of breach of parliamentary privilege. Thus, the first issue must be whether in considering the

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context and contents of the Minister's statement in Parliament, the court will be breaching the principle of parliamentary privilege.

[37] Section 55 of the Constitution falls to be considered. Section 55(1) provides that there shall be freedom of speech in the Senate and the House of Representatives subject to the provisions of the Constitution and the rules and standing orders regulating the procedure of the Senate and the House of Representatives.

[38] Section 55(2) then provides as follows:

> ***"No civil or criminal proceedings may be instituted against any member of either House for words spoken before, or written in a report to, the House of which he is a member or in which he has a right of audience under section 62 or a committee thereof or any joint committee or meeting of the Senate and House of Representatives or by reason of any matter or thing brought by him therein by petition, bill, resolution, motion or otherwise; or for the publication by or under the authority of either House of any report, paper, votes or proceedings."***

[39] The judge held that section 55 sought to prevent civil proceedings against members of the House in their personal capacity in respect of a statement made in the House. (See paragraph 75 of the decision). This would also apply to members of the Senate. Certainly section 55 is open to such an interpretation. The result is however that statements made in Parliament by Members of Parliament are open to consideration by the courts in judicial review proceedings. The question is whether that is the intention behind section 55.

[40] In my judgment it is not. Seepersad J placed too restrictive an interpretation on section 55. The intention behind the provision is to protect statements made in Parliament by Members of Parliament from any form of

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review by the courts. This serves to facilitate and encourage free and open discussion in Parliament by Members of Parliament, uninhibited by concerns that their comments are subject to review and interpretation in the courts. The phrase *"No civil ... proceedings may be instituted against any member of either House"* is not to be limited to personal actions against members but applies to any form of legal proceedings which makes the member's statement in Parliament the basis upon which legal action derives. This is consistent with the historical approach to freedom of speech in Parliament and to parliamentary privileges and immunities.

[41] **Erskine May's Treatise on The Law, Privileges, Proceedings and Usage of Parliament**, 23rd Edition, (pages 79 to 82) provides an account of the development of the principle. The earliest evidence of a distinct claim of privilege appears to have been in the petition of Speaker Sir Thomas More in 1523. In 1629, Sir John Eliot and two other Members of the House of Commons were arrested and convicted in the King's Bench for seditious words spoken in debate and for violence against the Speaker. After the nomination in 1667 of a Commons committee to review the issue of freedom of speech, the House of Commons declared that the Court of King's Bench should not have accepted jurisdiction in the matter. The Commons further declared that the judgment was illegal and against the privileges of Parliament. A successful motion was later brought in the House of Lords to reverse the judgment.

[42] Legal recognition of parliamentary privilege was thereafter inserted into article 9 of the Bill of Rights 1689. **May's** notes at page 82 that "*The assertion in article IX of the Bill of Rights that freedom of speech and debates and proceedings in Parliament are not to be 'impeached or questioned in any court or place out of Parliament' was intended to stifle both the courts and the Crown*". The intention as expressed in article 9 was to exclude any form of judicial review. Section 55 of the Trinidad and Tobago Constitution borrows from the same principle and it would be absurd to limit its provisions simply to personal actions against Members of Parliament.

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[43] Mr. Martineau cited two authorities in support of his submissions, **Prebble v. Television New Zealand Ltd. [1995] 1 AC 321** and **British American Tobacco Australia Limited v. Secretary, Department of Health and Ageing [2011] FCAFC 107**. While I have found the decision in **British American Tobacco** to be helpful, it is sufficient for the purposes of this appeal to refer only to **Prebble**, albeit extensively.

[44] **Prebble** was a decision of the Privy Council. Article 9 of the Bill of Rights which had the force of law in New Zealand, fell to be considered. Libel proceedings had been brought by the plaintiff, the former New Zealand Minister of State-Owned Enterprises, against the defendant in respect of a television programme which had made allegations against him about the sale of State owned assets while he was a Minister. The defendant alleged that seven of the twelve meanings alleged to be defamatory were true. It also alleged, inter alia, that some of the statements made in the House of Representatives by the plaintiff as a member of the House, were calculated to mislead Parliament or were otherwise improperly motivated. The allegations were struck out at first instance as being an attempt to impeach or question proceedings in the House in contravention of article 9. The striking out was upheld by the Court of Appeal.

[45] On appeal to the Privy Council Lord Browne-Wilkinson, giving the decision of the Board, gave extensive consideration to the whole principle underlying article 9. He noted at page 332 letter D that:

> ***"In addition to article 9 itself, there is a long line of authority which supports a wider principle, of which article 9 is merely one manifestation, viz. that the courts and Parliament are both astute to recognise their respective constitutional roles. So far as the courts are concerned they will not allow any challenge to be made to what is said or done within the walls of Parliament in performance of its legislative functions and protection of its established privileges: Burdett v. Abbot (1811) 14 East 1; Stockdale***

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v. Hansard (1839) 9 Ad. & El. 1; Bradlaugh v. Gossett (1884) 12 Q.B.D. 271; Pickin v. British Railways Board [1974] A.C. 765; Pepper v. Hart [1993] A.C. 593. As Blackstone said in his Commentaries on the Laws of England, 17th ed. (1830), vol. 1, p. 163:

> *'the whole of the law and custom of Parliament has its original from this one maxim, 'that whatever matter arises concerning either House of Parliament, ought to be examined, discussed, and adjudged in that House to which it relates, and not elsewhere.' "*

The Board considered the judgment of Hunt J in the Australian case of **R v. Murphy (1986) 64 ALR 498**. At issue in **Murphy** was whether, in the course of a criminal trial, the principal Crown witness could be cross-examined in respect of evidence he gave to a Select Committee of the Senate (relating to matters in issue in the trial) with a view to showing a previous inconsistent statement.

[46] Hunt J held that article 9 did not prohibit such cross-examination, even if the suggestion was made that the evidence given to the Select Committee was a lie. He also held that the statements to the Select Committee could be used to draw inferences, could be analysed and be made the basis of submissions. Having summarised the content of Hunt J's decision in the terms just described, Lord Browne-Wilkinson said at page 333 F:

> ***"It is, of course, no part of their Lordships' function to decide whether as a matter of Australian law, the decision of Hunt J. was correct. But article 9 applies in the United Kingdom and throughout the Commonwealth. In their Lordships' view the law as stated by Hunt J. was not correct so far as the rest of the Commonwealth is concerned. First, his views were in conflict with the long line of dicta that the courts will not allow any challenge to what is said or done in Parliament. Second, as Hunt J. recognised,***

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his decision was inconsistent with the decision of Browne J. in Church of Scientology of California v. Johnson-Smith [1972] 1 Q.B. 522 (subsequently approved by the House of Lords in Pepper v. Hart [1993] A.C. 593) and Comalco Ltd. v. Australian Broadcasting Corporation (1983) 50 A.C.T.R. 1, in both of which cases it was held that it would be a breach of privilege to allow what is said in Parliament to be the subject matter of investigation or submission.

Finally, Hunt J. based himself on a narrow construction of article 9, derived from the historical context in which it was originally enacted. He correctly identified the mischief sought to be remedied in 1689 as being, inter alia, the assertion by the King's Courts of a right to hold a Member of Parliament criminally or legally liable for what he had done or said in Parliament. From this he deduced the principle that article 9 only applies to cases in which a court is being asked to expose the maker of the statement to legal liability for what he has said in Parliament. This view discounts the basic concept underlying article 9, viz. the need to ensure so far as possible that a member of the legislature and witnesses before committees of the House can speak freely without fear that what they say will later be held against them in the courts. The important public interest protected by such privilege is to ensure that the member or witness at the time he speaks is not inhibited from stating fully and freely what he has to say. If there were any exceptions which permitted his statements to be questioned subsequently, at the time when he speaks in Parliament he would not know whether or not there would subsequently be a challenge to what he is saying. Therefore he would not have the confidence the privilege is designed to protect.

Moreover to allow it to be suggested in cross-examination or

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submission that a member or witness was lying to the House could lead to exactly that conflict between the courts and Parliament which the wider principle of non-intervention is designed to avoid. Misleading the House is a contempt of the House punishable by the House: if a court were also to be permitted to decide whether or not a member or witness had misled the House there would be a serious risk of conflicting decisions on the issue."

Lord Browne-Wilkinson went on to note at page 336 that:

"Their Lordships are acutely conscious (as were the courts below) that to preclude reliance on things said and done in the House in defence of libel proceedings brought by a member of the House could have a serious impact on a most important aspect of freedom of speech, viz. the right of the public to comment on and criticise the actions of those elected to power in a democratic society: see Derbyshire County Council v. Times Newspapers Ltd. [1993] A.C. 534. If the media and others are unable to establish the truth of fair criticisms of the conduct of their elected members in the very performance of their legislative duties in the House, the results could indeed be chilling to the proper monitoring of members' behaviour. But the present case and Wright's case, 53 S.A.S.R. 416 illustrate how public policy, or human rights, issues can conflict. There are three such issues in play in these cases: first, the need to ensure that the legislature can exercise its powers freely on behalf of its electors, with access to all relevant information; second, the need to protect freedom of speech generally; third, the interests of justice in ensuring that all relevant evidence is available to the courts. Their Lordships are of the view that the law has been long settled that, of these three public interests, the first must prevail."

I shall return to this particular passage at paragraph 49.

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[47] As the decision in **Prebble** indicates, the basic principle which underlies Article 9 applies throughout the Commonwealth and it is to ensure that as far as possible that a Member of Parliament can speak freely, without fear that their statements will be held against them in the courts. This safeguards the public interest by ensuring no inhibition on the part of a Member of Parliament in his or her contribution to parliamentary debate. As Lord Browne-Wilkinson noted in **Prebble**, article 9 is in fact a *"manifestation"* of *"a wider principle"* that *"the courts and Parliament are both astute to recognise their respective constitutional roles"* and that the courts as far as possible will not permit any legal challenge to be made to what is said or done within Parliament (see page 332).

[48] For the foregoing reasons I consider that the Minister's response to Senator Armstrong in the Senate cannot be considered in these proceedings. To permit consideration of the Minister's response in the Senate would be to subject the Minister's statement to review by the courts. Seepersad J placed far too restrictive an interpretation on section 55 and fell into error.

[49] I wish to caution however that while **Prebble** has given precedence to the legislature's powers over that of freedom of speech (per Lord Browne-Wilkinson at page 336). I do not accept that the same applies unequivocally to Trinidad and Tobago. We have a written Constitution. It asserts that the Constitution, unlike Parliament, is the supreme law. It also guarantees to the people of Trinidad and Tobago certain fundamental rights and freedoms in sections 4 and 5 thereof. This is not a case in which a conflict arises between a section 4 right and parliamentary privilege but I expressly reserve my views on the outcome of any conflict between those fundamental rights and freedoms and the powers of Parliament; except to say, given the supremacy of the Constitution, the powers of Parliament must be subject to it. Of course section 55 forms part of the Constitution and the issue will be how the provisions of sections 4 and 5 are to be reconciled with section 55.

Issue (iv) – Did the Minister's statement amount to a waiver of legal

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professional privilege ?

[50] Having come to the conclusion set out at paragraph 48 it is unnecessary to consider the issue of waiver of parliamentary privilege because to do so would be to do the very thing I have found section 55 to prohibit.

Issue (v) – Did the letter of 1st March 2012 amount to a waiver of legal professional privilege?

[51] Before deciding this issue, I must deal with the objection of Mr. Martineau to the Council's reliance on the letter on the basis that the Council did not raise it before Seepersad J.

In **Jones v MBNA International Bank [2000] EWCA Civ 514**, paragraph 38, Gibson LJ said:

> ***"It is not in dispute that to … take a point not argued in the lower court requires the leave of this court. In general the court expects each party to advance his whole case at the trial. In the interests of fairness to the other party this court should be slow to allow new points, which were available to be taken at the trial but were not taken, to be advanced for the first time in this court."***

[52] Relying on this dictum Mr. Martineau submitted that this Court, being a Court of re-hearing was obliged to hear only issues litigated at first instance. Moreover reliance on the letter had not been raised in the respondent's amended statement. Had that been pleaded the Minister may have led additional evidence in the High Court as to the circumstances under which the letter had been published so as to establish objectively that there was no waiver. He also relied on **Pittalis & Anor. v. Grant & Anor [1989] 2 ALL ER 622**. At page 626 it was stated thus:

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"The stance which the appellate court should take towards a point not raised at the trial is in general well settled: see Macdougall v. Knight (1889) 14 App Cas 194 and Tasmania (owners) v. City of Corinth (owners), The Tasmania (1890) 15 App Cas 223. It is perhaps best stated in Ex p Firth, re Cowburn (1882) 19 Ch D 419 at 429, [1881 – 5] ALL ER Rep 987 at 991 per Jessel MR:

> *'...the rule is that, if a point was not taken before the tribunal which hears the evidence, and evidence could have been adduced which by any possibility would prevent the point from succeeding, it cannot be taken afterwards. You are bound to take the point in the first instance, so as to enable the other party to give evidence.' "*

[53] While I accept the soundness of the authorities cited, in my judgment the respondent should be permitted to make the submission. Legal professional privilege was a live issue before Seepersad J but it was only raised by the Minister after the Council had filed its application for judicial review. The Council was thus presented with a new reason after its application for judicial review had been filed. In any event, the letter speaks for itself. I cannot conceive of any circumstances of its issue which can be put into evidence so as to demonstrate non-waiver. It was a direct response to the Council's correspondence about the Request for Proposals. It is a pure legal argument based on the contents of the letter.

I turn then to whether the letter waived the privilege.

[54] This issue was not before the trial judge. Waiver of legal professional privilege is well traversed. Mr. Martineau relied on a trilogy of Australian decisions which quite authoritatively set out the law on the subject. These are **Mann v Carnell 201 CLR 1 (1999), Osland v Secretary to the Department of Justice [2008] HCA 37** and **British American Tobacco Australia Ltd. v.**

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Secretary, Department of Health and Ageing [2011] FCAFC 107. The first two decisions are from the Australian High Court, the last is from the Federal Court of Australia. The decisions in these cases are at best persuasive authority but I consider the law they set out to be applicable to legal professional privilege in Trinidad and Tobago. Generally the test of waiver is whether there is any inconsistency between the conduct of the person entitled to the benefit of the confidentiality of communication between lawyer and client, and the maintenance of the confidentiality (See **Mann v Carnell** at paragraph 28)

[55] Disclosure of the conclusion (or gist, substance or effect) of legal advice may or may not amount to a waiver of privilege in respect of the advice as a whole. It will depend on the circumstances of the case and whether there is inconsistency between the disclosure by the client on the one hand and the maintenance of confidentiality on the other. Waiver may be express or implied. Implied waiver is also described as waiver imputed by operation of law. It reflects a judgment that the conduct of the partly entitled to the privilege is inconsistent with the maintenance of the confidentiality which the privilege is intended to protect. Such a judgment is to be made in the context and circumstances of the case and in the light of any considerations of fairness arising from that context or those circumstances. See **Osland (supra)**.

[56] In **Mann v Carnell (supra)** the High Court of Australia affirmed the decision of the Federal Court of Australia that the privilege was not waived by the provision of copies of documents containing legal advice received by the government of the Australian Capital Territory in respect of an action brought by a member of the public. The litigation had been settled by the government but the litigant complained to a member of the Legislative Assembly of the Territory about the conduct of the government in the litigation. The member passed the complaint on to the Chief Minister for the Territory who, under covering letter, sent to the member in confidence, copies of the documents containing the legal advice. This was to enable the member to consider the reasons for the conduct. The member sent a copy of the covering letter (which the Chief Minister had sent

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to him) to the litigant but did not disclose the documents containing the legal advice. The litigant sought production of copies of those documents by way of discovery contending that privilege was lost by their having been shown to the member. In rejecting that contention the majority of the High Court, in a joint opinion, stated at paragraphs 28 and 29 that:

> ***"At common law, a person who would otherwise be entitled to the benefit of legal professional privilege may waive the privilege. It has been observed that "waiver" is a vague term, used in many senses, and that it often requires further definition according to the context. Legal professional privilege exists to protect the confidentiality of communications between lawyer and client. It is the client who is entitled to the benefit of such confidentiality, and who may relinquish that entitlement. It is inconsistency between the conduct of the client and maintenance of the confidentiality which effects a waiver of the privilege. Examples include disclosure by a client of the client's version of a communication with a lawyer, which entitles the lawyer to give his or her account of the communication, or the institution of proceedings for professional negligence against a lawyer, in which the lawyer's evidence as to advice given to the client will be received.***
>
> ***Waiver may be express or implied. Disputes as to implied waiver usually arise from the need to decide whether particular conduct is inconsistent with the maintenance of the confidentiality which the privilege is intended to protect. When an affirmative answer is given to such a question, it is sometimes said that waiver is "imputed by operation of law". This means that the law recognises the inconsistency and determines its consequences, even though such consequences may not reflect the subjective intention of the party who has lost the privilege."***

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The court held that the conveyance, on a confidential basis, of the terms of the legal advice received by the government as a body politic by its Chief Minister to a member of its Legislative Assembly, to enable him to consider the reasonableness of the conduct of the Territory, was not inconsistent with the purpose of the privilege. The purpose of the privilege was to enable the Territory to obtain legal advice without the apprehension of being prejudiced by subsequent disclosure of that advice and to protect the Territory from the disclosure of legal advice it received. Accordingly, the privilege was not waived.

[57] **Osland v Secretary to the Department of Justice (supra)** was a case in which the appellant sought access to legal advice given to the Governor of the state of Victoria by three Senior Counsel. She had been convicted of murder and sentenced to fourteen years' imprisonment. She petitioned the Governor for mercy. The petition was denied. The Attorney General for Victoria issued a press release stating that he had obtained legal advice from the three Senior Counsel which had recommended that the petition be denied. It was held that the disclosure of the effect of the advice was made for the purpose of satisfying the public that due process had been followed and that the petition had not been refused on political grounds. The privilege had not been waived.

[58] In **British American Tobacco Australia Ltd. v. Secretary, Department of Health and Ageing**, the Secretary denied a request by the appellant for access to a copy of a memorandum of advice provided by the Attorney General's Department to it on the basis of legal professional privilege. The appellant contended before the Australian Federal Court that the privilege had been waived by several acts of disclosure including: (i) a reference to aspects of the legal advice in a Government Response paper that was published in the Senate (ii) subsequent publication of the Government Response paper on a government website; (iii) provision of a summary of the advice to a group of advisors to government.

[59] It was held that the privilege was not impliedly waived because the

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Secretary did not seek to deploy a partial disclosure of the advice for forensic or any other advantage so as to make his conduct inconsistent with the maintenance of privilege. Secondly the disclosure to a group of advisors to government was not made to *"outsiders"*. As a result it was not inconsistent with the maintenance of legal professional privilege.

[60] The question therefore is whether what was stated in the letter of 1st March 2012 by the Minister amounted to conduct by the party entitled to the privilege which was inconsistent with the maintenance of the confidentiality which the privilege was intended to protect. In my judgment it was not inconsistent. The relevant paragraph stated that *"based on advice from the office of the Attorney General, I can say that the publication of the Request for Proposals for screening of potential investors ... was not required to be in conformity with the Central Tenders Board Act."*

[61] Nothing in that paragraph states the substance of the advice such as to suggest that the gist of the advice has been provided. I agree with Mr. Martineau that the letter does not even give the gist of the legal advice. It must follow that if the gist was not revealed then there is nothing in the paragraph to even remotely suggest that this was conduct which was inconsistent with the maintenance of confidentiality. On the contrary, consistent with the maintenance of such confidentiality this can be seen not only from the letter but from the Minister's refusal to disclose the contents of the legal advice to the Senate. The submissions fails.

Issue (vi) – Should the information be disclosed in the public interest?

I turn finally to the section 35 override.

[62] Section 35 provides as follows:

"Notwithstanding any law to the contrary a public authority shall

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give access to an exempt document where there is reasonable evidence that significant –

(a) abuse of authority or neglect in the performance of official duty; or

(b) injustice to an individual; or

(c) danger to the health or safety of an individual or of the public; or

(d) unauthorised use of public funds,

has or is likely to have occurred or in the circumstances giving access to the document is justified in the public interest having regard both to any benefit and to any damage that may arise from doing so."

The Court's approach to the interpretation of section 35

[63] The approach of the Court to an interpretation of Section 35 in particular and the FIA as a whole, must be a purposive one having regard to the intention of the FIA. That intention is set out at Section 3 which provides that:

3. (1) The object of this Act is to extend the right of members of the public to access to information in the possession of public authorities by -

(a) making available to the public information about the operations of public authorities and, in particular, ensuring that the authorisations, policies, rules and practices affecting members of the public in their dealings with public authorities are readily available to persons affected by those authorisations, policies, rules and practices; and

(b) creating a general right of access to information in documentary form in the possession of public authorities limited only by exceptions and exemptions necessary for the protection of essential public interests and the private and business affairs of

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persons in respect of whom information is collected and held by public authorities.

(2) The provisions of this Act shall be interpreted so as to further the object set out in subsection (1) and any discretion conferred by this Act shall be exercised as far as possible so as to facilitate and promote, promptly and at the lowest reasonable cost, the disclosure of information.

[64] It creates a presumption in favour of disclosure in the exercise of any discretion conferred under the FIA. Section 35 is expressed in mandatory language but it does confer a discretion. Of course public interest considerations are paramount. But where the pros and cons are evenly balanced, the presumption in favour of disclosure in section 3(2) will tip the balance; that is to say, the public authority is mandated to give access.

[65] Indeed it was Narine JA in **Sankar** who commented on the provisions of sections 3 and 35 in these terms at paragraphs 16 and 17:

"Section 3(1) of the Act makes it clear that the object of the Act is to extend the right of the public to access information in the possession of public authorities. Section 3(2) provides that the provisions of the Act shall be interpreted in such a way as to further the object of providing access to information, and any discretion conferred by the Act must be exercised so as to facilitate and promote the disclosure of information in a prompt and cost-effective manner.

Clearly the intention of the framers of the Act was to promote disclosure of information held by public authorities to the public, as opposed to suppressing or refusing access to information. The presumption is that the public is entitled to access the information requested unless the public authority can justify refusal of access

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under one of the prescribed exemptions specified under sections 24 to 34 of the Act."

[66] Section 11 thereafter creates the right of every person to obtain access to an official document. That right however is not absolute but is subject to qualifications, among them a number of exceptions and exemptions. The exemptions are set out in sections 24 to 34 of the FIA which protect certain documents falling within their provisions from disclosure. Section 35 then provides that such protection may be overridden where the benefits to the public interest in disclosing them outweigh any damage to public interest which may result from that disclosure. Inherent in such a balancing exercise is the right of the public authority to refuse disclosure where the damage to the public interest outweighs the benefits. It follows that there will also be good public interest reasons to keep certain documents private and undisclosed.

[67] Viewed holistically therefore the FIA recognises the conflict which exists between competing rights - the right to know or to be kept informed on the one hand and the right to privacy and confidentiality on the other hand, as well as the competing public interest considerations which underpin them. In any given case it requires a balancing of those competing interests in considering whether to grant or not grant access to a document.

[68] Lord Mance's comments in **Kennedy v. Charity Commission [2014] UKSC 20** very much summarise the difficulty courts face in resolving the conflict in respect of the U.K. Freedom of Information Act 2000. He observed at paragraph 1 that:

"[1] Information is the key to sound decision-making, to accountability and development; it underpins democracy and assists in combatting poverty, oppression, corruption, prejudice and inefficiency. Administrators, judges, arbitrators, and persons conducting inquiries and investigations depend upon it; likewise

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the press, non-governmental organisations (NGOs) and individuals concerned to report on issues of public interest. Unwillingness to disclose information may arise through habits of secrecy or reasons of self-protection. But information can be genuinely private, confidential or sensitive, and these interests merit respect in their own right and, in the case of those who depend on information to fulfil their functions, because this may not otherwise be forthcoming. These competing considerations, and the balance between them, lie behind the issues on this appeal."

I daresay that they are also at the heart of the issues in this appeal.

[69] The intention of the FIA in making available information about the operations of public authorities is a radical departure from a culture of secrecy and confidentiality which pervaded the public service at the time of the Act's passage. I draw in that regard on my own experience as a legal officer in the public service.

[70] The judgment of Kirby J in Osland gives the history and evolution of the secretive approach of the Australian public service to the dissemination of information. Much of the history of secrecy to which he refers is applicable to the public service culture in Trinidad and Tobago. At paragraphs (60), (62), (65) and (66), he said:

"[60] The Freedom of Information Act 1982 (Vic) ('the FOI Act') introduced to Victoria (as like statutes have introduced elsewhere) an important change in public administration. Australian public administration inherited a culture of secrecy traceable to the traditions of the counsellors of the Crown dating to the Norman Kings of England. Those traditions were reinforced in later dangerous Tudor times by officials such as Sir Francis Walsingham (Walsingham was Principal Secretary of State to

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Elizabeth I. See A-G v Heinemann Publishers Australia Pty Ltd (1987) 10 NSWLR 86 at 127; cf Hogge God's Secret Agents (2005), pp 6, 115, 124–125, 276). They were then strengthened by the enactment throughout the British Empire of official secrets legislation (see, eg, Official Secrets Act 1911 (UK)). (See also Heinemann (1987) 10 NSWLR 86 at 129; [1987] HCA 45, [1988] LRC (Const) 1007 at 1013–1014). A pervasive attitude developed 'that government "owned" official information' (see Lane and Young Administrative Law in Australia (2007), p 294). This found reflection in a strong public service convention of secrecy …

[62] The basic purpose of the introduction of freedom of information legislation is the same in all jurisdictions. It is to reinforce 'the three basic principles of democratic government, namely, openness, accountability and responsibility' (see New South Wales Legislative Assembly Parliamentary Debates (Hansard), 2 June 1988 at 1399, cited in Comr of Police v District Court of New South Wales (1993) 31 NSWLR 606 at 612). The central objective is to strengthen constitutional principles of governance not always translated into reality because of a lack of material information available to electors. Fundamentally, the idea behind such legislation is to flesh out the constitutional provisions establishing the system of representative government; to increase citizen participation in government beyond a fleeting involvement on election days; and to reduce the degree of apathy and cynicism sometimes arising from a lack of real elector knowledge about, or influence upon, what is going on in government.

[65] The starting point for resolving the issues presented by the present appeal is an appreciation of the duty of this court, in this context, to do what we are constantly instructing other courts to do in giving effect to legislation. This is to read the legislative text in

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its context (including against the background of the significant change that the legislation introduces) and, so far as the text and context permit, to give effect to the legislative purpose (see Bropho v State of Western Australia [1991] LRC (Const) 49 at 61–62 and Project Blue Sky Inc v Australian Broadcasting Authority (1998) 194 CLR 355 at [69]–[70]).

[66] In the present setting, that purpose is a radical one. It assigns very high importance to a public interest in greater openness and transparency in public administration (see s 3 of the FOI Act and reasons of Hayne J at para [134], below). Given the historical background, the attitudinal shift that FOI legislation demanded of ministers, departments, agencies and the public service is nothing short of revolutionary. The courts ought not to obstruct that shift. On the contrary, they should strive to interpret FOI legislation in a manner harmonious with its objectives, doing so to the fullest extent that the text allows."

The provisions of section 3(2) are consistent with that approach.

[71] Section 35 applies whenever a public authority has decided that a document or information is exempt. See **Caribbean Information Access Limited v. The Honourable Minister of National Security, Civil Appeal No. 170 of 2008**, in which Jamadar JA noted that a section 35 *"public interest override assessment and analysis ... follows [from] a decision that a document is exempt"* and that in relation to the requests for information made *"the [public authority] was and is obliged to make the section 35 assessment, analysis and determination and to indicate this in its reasons ..."* (paragraphs 47 and 48). Seepersad J rightly found that there was an onus on the Minister to consider whether there should have been a section 35 public interest override. It does not appear that any section 35 assessment was made in this case. The Council contends that this failure was illegal or **Wednesbury** unreasonable and amounted

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to an omission by the Minster to perform a statutory duty. It certainly was an omission but on the evidence I cannot say that it was **Wednesbury** unreasonable. In **Caribbean Information Access Limited v. The Honourable Minister of National Security,** the matter was sent back to the public authority to consider it. Far too much time has passed for such a remedy to be applied in this case and in any event the Minister who made the decision has demitted office.

[72] I agree with Mr. Peterson that section 35 has two limbs. Firstly, it requires that access to an exempt document be granted by a public authority where there is reasonable evidence of the facts referred to in sub-paragraphs (a), (b), (c) and (d) of section 35. Secondly, access also should be granted, where, in the circumstances, it is in the public interest to disclose the information after weighing the likely harm to the public interest against the likely benefit. Much of the discussion in this appeal has focused on the first limb of section 35. Paragraphs (a), (b), (c) and (d) of section 35 set out separate and independent criteria which may or may not apply in a given case. But they do not apply in this case. It is the second limb of section 35 which falls to be considered. For the purposes of the second limb I have parsed section 35 as follows:

> ***"Notwithstanding any law to the contrary a public authority shall give access to an exempt document where ...***
> ***in the circumstances giving access to the document is justified in the public interest having regard both to any benefit and to any damage that may arise from doing so."***

This is an entirely different question. The issue in such a case is whether in the circumstances there is greater benefit or injury to the public interest in disclosing the information.

[73] The section 35 override must be considered by the public authority on each occasion on which it determines that a document to which access is sought is exempt. Having found the document to be exempt the public authority must then

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decide whether on either limb, it should permit access to the document. In the case of the first limb, it must decide whether to disclose on the basis of reasonable evidence that one or all of the factors at paragraphs (a), (b), (c) and (d) has or have occurred. It may be that such evidence may have to be provided by the person seeking the information. Where there is no such evidence the public authority should state in its section 23 reasons that there is no evidence upon which to conclude that all (or any) of the sub-paragraphs (a),(b),(c) and (d) of section 35 have been satisfied.

[74] It may also be that the evidence is in fact available to the public authority. In such a case it must decide whether on that evidence, any of the factors set out in paragraphs (a), (b), (c) or (d) of section 35 have been satisfied. But where no such evidence is available to the public authority, or it is not provided by the person seeking access, or such evidence as is available does not satisfy paragraphs (a), (b), (c) and (d) of section 35, (i.e. the public interest question) the public authority must still consider the second limb of section 35, before responding to the request. If the decision is to deny access because it is contrary to the public interest, this decision and the reasons supporting it must be stated in the section 23 notice. In any event, the public authority must set out in the section 23 notice that it has considered section 35.

[75] No section 35 override has been performed in this case. It thus fell to the Court to decide the public interest issues in the second limb of section 35. The question then is whether there is greater benefit or injury to the public interest in disclosing the information. Seepersad J found that the section 35 override should apply. I agree but for somewhat different reasons. At the invitation of the Court, written submissions were invited of both counsel on this question. Mr. Martineau submitted that greater injury than benefit was likely to occur and set out the following examples of injury to the public interest:

(i) The public interest in the maintaining and protecting of the long established right to legal professional privilege is a fundamental human right -

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Disclosure in this case would violate the fundamental human right and one of the basic tenets of the common law. See Lord Hoffman in **R v. Special Commissioners & Anor. Ex parte Morgan Grenfell & Co. [2002] UKHL 21** at para. 7. See also **R. (on the application of Child Poverty Action Group) v. Secretary of State for Work and Pensions [2011] 1 ALL ER 729** at para. 29.

(ii) Confidence - Interference with the right to the confidence of privileged communications with one's lawyer seriously undermines the rule of law. See **Warren v. Attorney General for Jersey [2011] 2 ALL ER 513** at p. 522. Also *"The need to be able to speak freely in the expectation that what is said will remain confidential is also the basis for legal professional privilege"*, **R v K [2010] 2 ALL ER 509** at para. 68. Disclosure will breach the confidence between the Minister and the Attorney General.

(iii) The candour of Ministers can be affected - In terms of the advice of law officers, it is a *"long-established rule of this House that the opinions of the Law Officers are absolutely confidential and that neither Minister nor Law Officers may be interrogated about them"* (**The Law Officers of the Crown**, p. 258-259). Disclosure in this case may lead Ministers to be less than candid in communicating with their attorneys at law when they are seeking advice.

(iv) Candour of law officers can be affected - Disclosure in this case will cause a chilling effect resulting in the government not obtaining full and frank legal advice from its law officers. *"By long-standing convention, observed by successive governments, the fact of, and substance of advice from, the law officers of the Crown is not disclosed outside government ... The purpose of this convention it [sic] to enable the government to obtain frank and full legal advice in confidence."* (See **Erskine May's Treatise on the Law, Privileges, Proceedings and Usage of Parliament (supra)** at p. 443.)

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(v) In-built public interest – *"... there is a strong element of public interest inbuilt into the privilege itself. At least equally strong countervailing considerations would need to be adduced to override that inbuilt public interest"*, **Bellamy v. The Information Commissioner and DTI (EA/2005/023)** at para. 35. See also **Mersey Tunnel Users' Association (MTUA) v. Information Commissioner and Merseytravel (EA/2007/0052, 15 February 2008** at paragraph 28 (the second one as there are two paragraphs 28 in the official judgment). In this case disclosure will significantly interfere with the in-built public interest.

(vi) The administration of justice – Disclosure in this case may undermine the administration of justice if there is litigation in which the advice becomes relevant. Legal professional privilege is a fundamental condition on which the administration of justice as a whole rests. See **R. v. Maxwell [2010] UKSC 48** at para. 28. See also para. 87 of **Three Rivers District Council & Ors. v. Governor and Company of the Bank of England (No. 6) [2005] 1 AC 610**.

(vii) Policy justification and rule of law – Disclosure of the instructions and advice in this case will shock the minds and understanding of the right thinking members of society, especially given the fact, as Baroness Hale said *"The privilege is too well established in the common law for its existence to be doubted now."* (**Three Rivers District Council & Ors. v. Governor and Company of the Bank of England (No. 6) [2005] 1 AC 610** at paragraph 61.) In the same case Lord Scott stated *"the seeking and giving of this advice so that the clients may achieve an orderly arrangement of their affairs is strongly in the public interest"* and *"it is necessary in our society ... that communications between clients and lawyers ... should be secure against the possibility of any scrutiny from others ..."* (paragraph 34).

(viii) Information may get into the wrong hands – Disclosure of the advice and

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instructions may put information contained in the advice in the hands of persons with an interest adverse to the Minister. *"Where in addition the information in question is not only confidential but also privileged, the case for a strict approach in unanswerable. Anything less fails to give effect to the policy on which legal professional privilege is based. It is of overriding importance for the proper administration of justice that a client should be able to have complete confidence that what he tells his lawyer will remain secret. This is a matter of perception as well as substance. It is of the highest importance to the administration of justice that a solicitor or other person in possession of confidential and privileged information should not act in any way that might appear to put that information at risk of coming into the hands of someone with an adverse interest".* (See Lord Millette's remarks in **Prince Jefri Bolkiah v. KPMG [1999] 2 AC 222** at p. 236 and also in **Caterpillar Logistics Services (UK) Ltd. v. Huesca de Crean [2012] 3 ALL ER 129** at para. 48.

(ix) Interference with privilege including parliamentary privilege – Disclosure in this case will undermine the principle and doctrine of parliamentary privilege which attaches to statements made in Parliament. The case for strictly protecting privilege and non-disclosure in this case is unanswerable.

[76] Mr. Martineau submitted that these were nine powerful factors which far outweighed the public interest consideration in ensuring that public authorities are transparent in their action and accountable for the decision making process. He added that the latter is a general proposition but on the particular facts of this case it is of slight weight because the Constitution provides the ideal mechanism for achieving this end. Our system of government makes ministers responsible to Parliament. Accordingly, in a case such as this, any Member of Parliament including the Opposition can take steps to make the Minister accountable for his actions. If there are concerns about the disposal of lands at Invader's Bay, any Member of Parliament can ask questions in relation thereto or even raise the matter in debate. In that way, the public can judge the Minister based on the

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disclosure which he makes or fails to make in Parliament in relation to disposal of the land. In this case therefore Parliament is a much more effective instrument in to promote transparency and accountability.

[77] Those are weighty considerations. But in considering them I must keep in view the objects of the Act set out in section 3(1). The intention of the Act is to make available to the public, information about the operations of public authorities and to provide a right of access to information in documentary form in the possession of public authorities. With that object as the focus section 3(2) then states that the Court should as far as possible facilitate and promote the disclosure of the information. That is an overarching consideration. The dictum of Kirby J in **Osland (supra)** is relevant. Speaking on section 50(4) of the Freedom of Information Act of Victoria the Victorian, equivalent of Section 35, he stated at paragraph 101:

> ***"It is essential, once again, to view s 50(4) of the FOI Act in the context of the Act as a whole, with its radical purpose to change past practices at the forefront of attention. The power that s 50(4) grants to the Tribunal (subject to exclusions) to override a ministerial claim to exemption on the basis that 'the public interest requires that access to [a] document should be granted under this Act' is significant and exceptional. It is for this reason that s 50(4) has been described, rightly, as a 'most extraordinary provision' (see Secretary to the Department of Premier and Cabinet v Hulls [1999] 3 VR 331 at [28] per Phillips JA). The power must be interpreted and applied with this in mind."***

Kirby J gave a separate judgment concurring with the majority in that case. The views he expressed on the section 50(4) approach were very much his own. Section 50(4) of course is expressed somewhat differently and places the decision to override in the hands of a tribunal. But its purpose is the same as that of section 35. It is the provision of information when to do so is in the public interest. More

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significantly, as Kirby J entreats, section 35 must be considered in the context of the Act as a whole with its aims and objects *"at the forefront of attention"*. This approach is reinforced by the provisions of section 3.

[78] The question is whether the benefits of disclosure outweigh the damage if any caused to public interest in this case. In my judgment items (i), (ii), (v), (vi), (vii), (viii) and (ix) of the nine factors apply with considerable force to legal professional privilege between the lawyer and his client where the advice relates to the personal affairs of the citizen. In this case we are dealing with legal advice given by public officers in respect of a project in which considerable public funds are to be expended. Issues of accountability and transparency are far more significant.

[79] I do not wish to be understood as saying that legal officers in the public service are not entitled to the same protections under legal professional privilege. But in such a case as this, those issues tip the public interest concerns in favour of disclosure.

[80] Further, I can see no harm to the public interest in the disclosure of the legal advice given in this case. The proposed development is in respect of state lands valued at over one billion dollars. The project appears to be quite an extensive one. The proposed developer will be chosen by the Ministry as opposed to the Central Tenders Board. The lease rate will be agreed between the Ministry and the developer. Ultimately the burden of payment falls to the public purse.

[81] The Central Tenders Board Act Chap 71:91 sets out a transparent process for the selection of bidders. The Ministry's proposals do not. It is in the public interest that the legal advice permitting the Ministry's process be subject to public scrutiny. Lord Mance's dictum in **Kennedy v. Charity Commission [2014] UKSC 20** (para. 1) is quite apposite – Information *"underpins democracy"*. It is the basis upon which an open society flourishes. Unwillingness to disclose formed by *"habits of secrecy"* and self-protection can only lead to corruption, or

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loss of faith in the system. An open democratic society thrives on robust discussion in the court of public opinion. Information properly sourced and provided can only enlighten such discussion and educate the uninformed.

[82] I accept that the Minister (or any other state agency) who (or which) has obtained legal advice to which legal professional privilege applies is entitled to claim the defence. But it is precisely because there will be occasions on which such advice should be made available to the public, that section 35 has been promulgated.

[83] With the disapplication of the provisions of the Central Tenders Board Act the effect of the legal advice is to allow the Ministry to invite proposals for developers and make a choice free from the restrictive rules which govern a choice made under the Central Tenders Board. The tendering process under the Central Tenders Board Act is designed to show transparency and fairness in the awarding of contracts financed by public funds. On the other hand the criteria for discerning the best proposal made to the Ministry in respect of the project is not disclosed.

[84] Having weighed the benefits to the public interest against the damage likely to be caused by disclosure, I consider that it is in the public interest to disclose the legal advice upon which the decision to disapply the Central Tenders Board Act was made. That way both the basis and soundness of the advice will be tested in the court of public opinion. Rather than shock the minds of right-thinking members of society, it will bolster public confidence if the advice given is sound and reveals a proper foundation for allowing the Ministry to invite Requests for Proposals. If the advice is unsound then a defective process will have been thwarted. It is also in the public interest that any advice which is negligent or unsound be revealed and corrected.

See also Kirby J in **Osland (supra)** at paragraph 114 where he stated:

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> ***"... Repeated disparagement of the expression 'transparency in government' (see reasons of Hayne J at paras [147]–[150], below) suggests an approach to the FOI Act that I cannot share. In so far as the Tribunal made reference to considerations of transparency, it was correct to do so. As the short title of the FOI Act suggests, as its long title affirms and as its stated objects demonstrate, the public purpose of the FOI Act is precisely to enhance transparency in government to the extent provided. That object is critical given the oft-repeated instruction of this court that statutes should be read, so far as their language permits, so as to fulfil their evident purposes (cf CIC Insurance Ltd v Bankstown Football Club Ltd (1997) 187 CLR 384 at 408, Newcastle CC v GIO General Ltd (1997) 191 CLR 85 at 112–113 and Project Blue Sky Inc v Australian Broadcasting Authority (1998) 194 CLR 355 at [69], [78]). The Tribunal and the courts must bear in mind the distinctive and radical purposes of the FOI Act and take particular care when reaching conclusions that appear to frustrate them."***

[85] The opinion of Narine JA that the Council can seek its own legal advice and challenge the decision to by-pass the Central Tenders Board, misses the point. It is not just a question of legality but also a question of transparency. It is important not only that the decision to by-pass the Central Tenders Board be legal and properly made but also that the process by which that decision was arrived at must be seen to be so. And it is that process which the Council also seeks to examine.

[86] I do not consider that the lawyer/client relationship will be negatively impacted in any significant degree. This is no ordinary case in which legal advice has been given to a private citizen. The nine weighty considerations put forward by Mr. Martineau constitute powerful reasons against disclosure in such a circumstance and in virtually every such case would be upheld. In this case the disclosure sought is in respect of advice by public officers about a project to be

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executed on valuable public lands, which is to be financed by a considerable injection of public funds. On the contrary it is likely to foster greater care in the giving of advice. For the same reason it is unlikely that candour between Ministers, or between Ministers and legal officers will be adversely affected. In any event, the public benefits of transparency outweigh it. National security concerns have not been raised in this case.

[87] I must add that it will not be in every case in which legal advice is given in respect of a project involving public funds and public property, that the Section 35 override will be applied in favour of disclosure. It will all turn on the facts and circumstances of a given case.

[88] As to the issue of interference with parliamentary privilege I cannot conceive of how a Section 35 override can affect parliamentary privilege in this case. A section 35 override is authorised by statute itself in the public interest, a provision which Parliament saw fit to insert into the statute. Finally, in regard to Mr. Martineau's submission that questions could be posed to the Minister in Parliament about any concerns about the disposal of the lands at Invaders Bay, I do not agree that such a measure is necessarily sufficient. It was precisely such a tactic which was employed by Senator Armstrong but the details of the basis of the advice were still not provided on grounds of legal professional privilege. The judge was right to permit access to the information under the Section 35 override.

[89] In the result the Minister's appeal is dismissed, so too the cross-appeal.

The order

[90] As to the order made by the judge I agree with Mr. Martineau that it is too wide. The Permanent Secretary in his letter of 16th August 2012 had provided all the information requested except the information relating to the legal advice. It is that latter information which has been the source of the dispute in this case. Copies of the legal advice should be provided. The information sought as to the

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date of the request for legal advice, should also be provided. That is sufficient to satisfy the interests of transparency.

Even though I have adjusted the order, the Minister has still lost his appeal. We will hear the parties on costs on both the appeal and cross-appeal.

Nolan P.G. Bereaux
Justice of Appeal

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REPUBLIC OF TRINIDAD AND TOBAGO

IN THE COURT OF APPEAL

Civ. App. No. P 200 of 2014

BETWEEN

THE MINISTER OF PLANNING AND SUSTAINABLE DEVELOPMENT

Appellant

AND

THE JOINT CONSULTATIVE COUNCIL FOR THE CONSTRUCTION INDUSTRY

Respondent

PANEL: **P. Jamadar J.A.**
N. Bereaux J.A.
R. Narine J.A.

APPEARANCES:

Mr. R. Martineau, S.C., Mr. K. Ramkissoon and Mr. S. Sharma for the Appellant.

Mr. G. Peterson, S.C. and Mr. Kingsley Walesby for the Respondent.

DATE DELIVERED: 28th October, 2016.

Delivered by P. Jamadar, J.A.

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Introduction

1. The most challenging cases are often those in which two or more competing and legitimate jurisprudential values are in tension with each other. Determining which one prevails in any given situation, as one interprets and applies the law, is influenced in part by context, circumstances and also ideology. This case is such a case.

2. I have had the benefit of reading the draft judgments of both Bereaux and Narine JJA, who agree on several points, but in the end disagree on the final outcome. Bereaux JA, in agreement with the trial judge, has concluded that based on the section 35 of the Freedom of Information Act (FOIA) public interest override,[1] access to the information sought (with certain reservations) should be ordered. Narine JA is of the contrary opinion.

3. I agree with the trial judge and Bereaux JA, that based on the section 35 public interest override, in the particular circumstances of this case, the trial judge's declaration and orders for disclosure should be upheld. In my opinion the respondent is entitled to the information requested in the Freedom of Information Application dated the 20th April, 2012; including both the instructions and advice sought as ordered by the trial judge, and redacted further only to remove the identities of and other personal information about the authors of these documents. I would therefore order that the information sought, as redacted above, is to be provided within seven (7) days of this court's judgment.

4. The background facts and issues are comprehensively set out in the trial judge's judgment,[2] as well as in the judgments of both Bereaux and Narine JJA. I see no need to repeat them in this judgment. In summary, this case involves a demand by the respondent for the disclosure of instructions and legal advice, in relation to the appellant's decision to bypass the Central Tenders Board with respect to public tenders for the development of valuable State lands in Trinidad.

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[1] See: **Caribbean Information Access Ltd. v Minister of National Security**, Civ. App. No. 170 of 2008, at paragraphs 38, 47 and 48; and **Ashford Sankar v Public Service Commission**, Civ. App. No. 58 of 2007, at paragraph 17.

[2] See paragraphs 3 – 16.

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Issues

5. The issues before this court have also been clearly identified in the judgment of Narine JA[3] and I adopt them as follows:

> "The issues that fall to be determined in this appeal are as follows:
>
> (i) Whether the Minister is entitled to rely on the additional reason provided in his letter of 4th December 2012, which raised legal professional privilege for the first time (as a basis for non-disclosure of the information sought by the respondent).
>
> (ii) Whether legal professional privilege applies to the information requested by the JCC.
>
> (iii) Whether parliamentary privilege attaches to the Minister's statement made in the Senate on 28th February 2012.
>
> (iv) Whether the JCC is entitled to rely on the Minister's letter dated 1st March 2012 as evidence of waiver of legal professional privilege.
>
> (v) Whether the Minister waived legal professional privilege by making the statement in the Senate on 28th February 2012 and/or by his letter dated 1st March 2012.
>
> (vi) Whether the judge was correct in finding that the requested information should be released in the public interest under section 35 of the Act."

The First Issue

6. On the first issue, whether the appellant can rely on the additional reason of legal professional privilege as a basis for not disclosing the information sought, I am in agreement with both Bereaux and Narine JJA, and with the trial judge, that such reliance is permissible in this case.

7. In **Ashford Sankar v Public Service Commission,**[4] this court declined to permit the introduction of new reasons for the refusal to disclose information, where those reasons were

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[3] At paragraph 19 of his judgment.
[4] Civ. App. No. 58 of 2007.

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unsupported by any evidence and were raised for the first time in written and oral submissions at the hearing before the trial judge.

8. In that context and in those circumstances, this court stated as follows:[5]

> *"22. It seems to me that having regard to the object of the Act as expressed in section 3 and the obvious bias in favour of providing access to information, there is an onus on a public authority which is refusing access to a document on the ground of public interest to comply strictly with the requirements of sections 23 and 27(3). The respondent failed to comply with the clear provisions of the Act to provide proper reasons for its refusal, so as to enable the appellant to make an informed decision as to whether or not he would challenge the refusal by way of judicial review. In these circumstances it is clearly undesirable that the respondent should be permitted to provide new reasons, or to add to, or augment vague or insufficient reasons originally advanced for refusal of access. In my view, do so will ultimately frustrate the clear purpose of the Act, which is to permit the public to access information unless refusal of access can be brought within one of the exemptions specifically set out in the Act, and adequate and intelligible reasons are provided for such refusal."*

9. Narine JA has explained in his judgment in this appeal,[6] that the court's opinion in **Sankar's** case is to be understood contextually:

> *"In expressing its reluctance to permit public bodies to supplement inadequate reasons for refusal to provide information, the court was not laying down a principle that would apply in all cases. Much will depend on the particular circumstance of the case, and the time at which the additional reasons are put forward. Clearly the longer the delay in providing the additional ground or refusal, the less likely the court will be in permitting reliance on it. The court will*

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[5] See the judgment of Narine JA, at paragraphs 22 – 25, and in particular at paragraph 22 **(Sankar v PSC).**
[6] At paragraph 31.

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hardly shut out a public authority which is clearly entitled to rely on an exemption provided in the Act, but which through inadvertence did not include it as a reason at the time of refusal. In such a case, the applicant may not be entitled to the information requested but may be compensated for unnecessary legal costs he has incurred."

10. As I have already indicated, both Bereaux and Narine JJA agree that in this matter permission was properly given to the appellant to rely on a 'new reason' for the non-disclosure (based on exemption) of the information sought; to wit, refusal under section 29(1) of the FOIA on the basis of legal professional privilege.

11. In my opinion, the following principles set out in **Sankar's** case on this issue remain valid:

(a) There is a statutory onus and duty on a public authority which is refusing access to information to strictly comply with the requirements of sections 15 and 23 of the FOIA. In this regard, the mandatory obligation denoted by the use of the word 'shall' in section 23(1) is significant. This is so, even if the consequence of non-compliance is not to deprive a public authority of relying on 'new reasons'. The statute therefore creates a positive obligation to state reasons for a decision to deny access and to do so within thirty days after the day on which the request is made. It is also important to note the positive obligation on the public authority, where it has decided to deny access to information requested, to inform an applicant of his/her right to apply for judicial review (or to complain to the Ombudsman)[7].

(b) In the context of these statutory obligations and from a pragmatic point of view, it may be unjust and could be contrary to the principles of fundamental fairness once court proceedings have commenced, to permit a public authority to provide 'new reasons' as and when they see fit and/or 'as of right' and without any form of explanation. Such permissiveness may not only be unfair, but could also serve

[7] See section 23(1) (d) and (e) of the FOIA.

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to undermine the intentions and purposes of specific provisions of the FOIA and the statutory regime and time limits set out therein.

(c) Courts exercise a responsible duty to supervise and to allow or disallow reliance on 'new reasons', in the legitimate exercise of a court's judicial discretion in applying both procedural and substantive law, when such reliance is sought outside of a specific statutory regime and time table. This is certainly so once formal court proceedings have begun, in which event the court's permission must be sought (generally on an application setting out reasons and supported by evidence).

12. Thus, while I agree with Bereaux JA that there is nothing in the FOIA that specifically prohibits reliance on a reason not stated in the section 23 notice; I also note that the very FOIA prescribes the positive obligation to provide reasons within a particular time limit.[8]

13. This court in the **Caribbean Information Access Ltd.** case explained:[9]

"The FOIA has provided a statutory right to information from public authorities subject to exceptions and exemptions. It is always for the public authority to show that it is entitled reasonably to rely on an exemption claimed and to not grant access to the documents requested. The exemptions provided for in section 28 are quite specific and limited. Thus, given the statutory right to access; the duty to assist in facilitating disclosure; the mandate to disclose even exempt documents where on a balance it is in the public interest to do so; the mandate to redact exempt documents in order to render them non-exempt so to facilitate disclosure; and the duty to interpret and apply the provisions of the FOIA (including the exemption provisions) in such a way so as to 'facilitate and promote ... the disclosure of information"; there is no presumption in favour of exemption from disclosure of or access to documents held by public authorities."

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[8] See sections 19(2), 21(7) and 23, of the FOIA; and see **Caribbean Information Access Ltd. v Minister of National Security,** Civ. App. No. 170 of 2008, at paragraphs 8 – 10 and 17 – 19.
[9] At paragraph 27.

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14. In my opinion therefore, a public authority is not prohibited from relying on 'new reasons', but to do so the authority must satisfy a court, in the exercise of its judicial discretion, that to grant permission will enable the court to deal with the matter justly (and all that that concept incorporates in the current jurisprudence of Trinidad and Tobago). To hold otherwise would be to practically render otiose the purposes intended by sections 15 and 23(1) (a),(d) and (e) of the FOIA.

The Second Issue

15. On the second issue, whether legal professional privilege applies to the information requested (section 29(1) of the FOIA), I am in agreement with Narine JA that prima facie and technically it does apply in relation to both the instructions given and the advice received.[10] I therefore also agree that the real issue on this point is whether there has been waiver of the legal professional privilege by reason of either the Minister's statement in the Senate on the 28th February, 2012, or his letter to the respondent of the 1st March, 2012 (the next day).

The Third, Fourth and Fifth Issues

16. In relation therefore to the third, fourth and fifth issues, I state as follows:

(i) I adopt the general discussions by both Bereaux and Narine JJA on parliamentary privilege and its prima facie application in the particular circumstances of this case to the statement made by the Minister in the Senate on the 28th February, 2012.

(ii) However, like Bereaux JA, I specifically reserve my position on whether the British approach has unequivocal application in Trinidad and Tobago. In Trinidad and Tobago the Constitution is the supreme law (this is declared specifically to be so by section 2 of the 1976 Republican Constitution).[11] It is the Constitution which creates the State of Trinidad and Tobago, that defines its architecture, and embodies the core principles and values that "the People" have

[10] See paragraphs 33 – 38 of the judgment of Narine JA.

[11] Section 2 of the Constitution states: "This Constitution is the supreme law of Trinidad and Tobago, and any other law that is inconsistent with this Constitution is void to the extent of the inconsistency."

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affirmed and agreed to be governed by – and to which they have purportedly given their consent. The Constitution as foundational text, is not 'just' another law, it is the People's ultimate law. It is therefore the People who have assented to the content of the Constitution and declared it to be supreme.[12]

(iii) Thus, in Trinidad and Tobago the Constitution and not Parliament (as in the UK) is supreme. In so far as section 55 of the Constitution incorporates the British notions of Parliamentary freedom of speech and the protection and privileges associated with it, that may be self-evident. What is less so, is the effect of section 5 of the Constitution on the applicability of section 55.[13]

(iv) It would appear that the only constitutionally permissible exceptions to the prohibition against infringements of the sections 4 and 5 enshrined fundamental rights and freedoms, are those provided for in Chapter 1 of the Constitution itself (which contains the statement of rights and freedoms) and in section 54 of the Constitution (which prescribes how alterations to the Constitution can be made). To be specific, section 55 of the Constitution seemingly enjoys no such prima facie excepted status in the context of the application of the fundamental rights and freedoms (though section 4(i) makes freedom of thought and expression a fundamental right). This therefore begs the question, can parliamentary privilege, per se, be invoked, where what is at stake are alleged breaches of the fundamental rights and freedoms of the citizen? It is not hard to imagine interesting constitutional questions that can arise around say, the section 4(b) and 4(c) fundamental rights in relation to possible statements made in Parliament.[14]

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[12] See the Preamble – "Whereas the People of Trinidad and Tobago – (c) have affirmed … (b) respect … (c) have asserted … (d) recognize … (e) desire … Now therefore the following provisions shall have effect as the Constitution of the Republic of Trinidad and Tobago."

[13] Section 5(1) states as follows: "Except as is otherwise expressly provided in this Chapter and in section 54, no law may abrogate, abridge or infringe or authorise the abrogation, abridgment or infringement of any of the rights and freedoms hereinbefore recognised and declared."

[14] For those who live here, it does not take a fertile imagination to conjure up situations that can give rise to these issues.

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(v) On the issue of implied waiver of legal professional privilege, I also adopt the discussion of this issue by Narine JA, and in particular his consideration of the Australian cases[15] of **Mann**,[16] **Osland**,[17] and **British American Tobacco**.[18] In short, the relevant test is whether, in all the circumstances and in the context of the conduct of the person claiming the privilege, it can be said that the behaviour of the person relying on the privilege is inconsistent with the maintenance of the privilege.

(vi) The test for implied waiver of legal professional privilege is an objective one, to be judged on the standard of reasonableness and probability. Referred to as the 'Inconsistency Test', it focuses on "whether particular conduct is inconsistent with the maintenance of the confidentiality which the privilege is intended to protect" – **Mann**, at paragraph 29. "What brings about the waiver is the inconsistency, which the courts where necessary informed by considerations of fairness, perceive between the conduct of the client and the maintenance of the confidentiality; not some overriding principle of fairness operating at large." – **Mann**, at paragraph 29.

(vii) Disclosure of the gist or conclusion of the legal advice does not necessarily effect a waiver – **Osland**, at paragraph 44. As before, it all depends on the particular circumstances and whether the requisite inconsistency exists between the disclosure (conduct) by the person seeking to rely on the privilege and the maintenance of confidentiality.

17. I am therefore in agreement with Narine and Bereaux JJA, that:

(i) Legal professional privilege prima facie applies to the instructions given and advice received which are the subject matter of this case.

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[15] See paragraphs 39 – 42 of the judgment.
[16] **Mann v Carnell** (1999) 201 CLR 1.
[17] **Osland v Secretary to the Department of Justice** (2008) 234 CLR 275.
[18] **British American Tobacco v Secretary of Health and Ageing** [2011] FCAFC 107.

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(ii) Section 29(1) of the FOIA deems those instructions and that advice exempt documents.

(iii) The statement of the Minister in the Senate on the 28th February, 2012, disclosing the gist of the advice is protected by parliamentary privilege.

(iv) The disclosure of the gist of the advice, both in the Senate on the 28th February, 2012 and by letter to the respondent on the 1st March, 2012, does not constitute a waiver of legal professional privilege; as there is no sufficient inconsistency between either the content or circumstances of that disclosure and the maintenance of the confidentiality protected by the privilege. No considerations of fairness related to the disclosure of the gist of the advice, in the circumstances of this case, justify a consequence of waiver of the legal professional privilege enjoyed by the Minister (on an application of the ordinary principles).

(v) In the Senate, the Minister was simply discharging his Parliamentary duty to answer a question posed to him by a member of that Chamber. In the letter, the Minister was replying to a specific and formal request by the respondent in terms consistent with the limited disclosure given in the Senate. There is no evidence therefore of any obvious unfair advantage sought or gained by the Minister by reason of his limited disclosures.

The Sixth Issue

18. On the sixth and final issue, whether the instructions and advice should be disclosed pursuant to section 35 of the FOIA – the public interest override provision, I am in agreement with Bereaux JA and the trial judge that they should be.

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19. Section 35 of the FOIA[19] has been interpreted by this court as follows:[20]

"It is to be noted that section 35 mandates the public authority to consider and override any initial assessment of and claim to exemption, where, any of the first four conditions in section 35 exist and/or where "in the circumstances giving access to the document is justified in the public interest having regard both to any benefit and to any damage that may arise from so doing"."

20. Once exemption is claimed by a public authority, the section 35 public interest override assessment and analysis must be undertaken by a public authority. Thus, following any claim in this case to exemption from disclosure pursuant to section 29(1) of the FOIA, the appellant was obliged to carry out the section 35 evaluation in the context of the exemption claimed, before deciding to deny access to the information sought. Furthermore, the gravamen of this evaluation also had to be disclosed in the appellant's reasons (in writing) for denying access to the information sought by the respondent.[21]

21. The justification for this public interest evaluation and override, even where documents are considered exempt, has both specific and general statutory underpinnings, as well as a constitutional warrant.

Statutory Underpinnings

22. The specific statutory underpinning is clearly section 35 of the FOIA. However, section 35 itself exists contextually within the FOIA. Section 3 of the FOIA establishes as the objective of the legislation, "the right of members of the public to access to information in the possession

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[19] Section 35 of the FOIA states: "Notwithstanding any law to the contrary a public authority shall give access to an exempt document where there is reasonable evidence that significant—

(a) abuse of authority or neglect in the performance of official duty; or
(b) injustice to an individual; or
(c) danger to the health or safety of an individual or of the public; or
(d) unauthorised use of public funds,

has or is likely to have occurred or in the circumstances giving access to the document is justified in the public interest having regard both to any benefit and to any damage that may arise from doing so.

[20] See **Caribbean Information Access Ltd. v Minister of National Security**, Civ. App. No. 170 of 2008, at paragraph 38.

[21] See **Caribbean Information Access Ltd. v Minister of National Security,** Civ. App. No. 170 of 2008, at paragraphs 47 and 48.

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of public authorities …". Section 3(2) effectively gives rise to a general presumption in favour of disclosure. There is therefore to be 'freedom of information'. This objective of a presumptive general right to information, is to be "limited only by exemptions and exemptions necessary for the protection of essential public interests …".[22]

23. Section 3(1)(b) of the FOIA thus assists in the interpretation of section 35, by further qualifying the mandate that "… a public authority shall give access to an exempt document where … in the circumstances giving access to the document is justified in the public interest having regard both to any benefit and to any damage that may arise from doing so." That is to say, the denial of justification in the public interest must be 'necessary for the protection of essential public interests'. Thus, denial of the section 35 public interest override, in cases of exempt documents, is only justified where to do so is necessary for the protection of essential public interests having regard to both the benefit and damage that may arise from granting access. The word 'essential' qualifies both the type of public interests and the degree of circumstances that justify denial of the section 35 override.

24. Moving beyond section 3 of the FOIA, it is quite clear that the FOIA was intended to be binding on the State.[23] Moreover, and so as to reinforce the general statement of the objective of the FOIA stated in section 3, section 11 is unequivocal, when it states:

> *"(1) Notwithstanding any law to the contrary and subject to the provisions of this Act, it shall be the right of every person to obtain access to an official document.*
>
> *(2) Nothing in this Act shall prevent a public authority from—*
>
> *(a) giving access to documents or information;*
>
> *(b) amending documents,*
>
> *other than as required by this Act where it has the discretion to do so or where it is required to do so by any written law or order of a Court."*

[22] See section 3(1)(b) of the FOIA.
[23] See section 6 of the FOIA.

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25. Indeed, section 14 of the FOIA creates a duty on public authorities to assist applicants to get the information that they seek. This duty of assistance is facilitative, and finds further expression in the obligation to deal with applications "as soon as practicable",[24] and where a decision is made to deny access to information sought, in the further obligation to give written reasons explaining why this is so and informing an applicant of his/her right to approach either the courts or the Ombudsman to seek further redress.[25]

26. These five principles, the general right to information, the general presumption in favour of disclosure, the duty to facilitate access to information, the obligation to explain in writing why a decision to deny access has been taken (and to do so promptly), and the obligation to inform an applicant of his/her rights to redress that are available, are all part of the context in which the evaluative and balancing exercise mandated by section 35 is to be carried out.

27. Thus one would reasonably expect, that if a public authority has decided that a document is exempt and that it should not disclose the document even after having carried out the section 35 public interest override evaluation, that in its written reasons it would detail the following: (i) the reasons for claiming exemption (and in the cases where section 35 (a) to (d) would apply, that there is no reasonable evidence of the four stated factors having occurred or having been likely to have occurred); (ii) and most importantly, why denying access is necessary for the protection of essential public interests, including the factors it considered in relation to both benefit and damage that may arise from granting access to the information sought.

28. When one fully appreciates the breadth and depth of both the duties and obligations on public authorities under the FOIA, it also becomes apparent that, even though there is no positive prohibition against the introduction of 'new reasons' to justify denial of information sought, such permissiveness runs contrary to the entire thrust of the legislative scheme and prima facie undermines its objectives and intentions. Disclosure of information is what the FOIA is all about. Significantly, the process that the legislation sets out for denying access is also premised on full and frank disclosure.

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[24] See section 15 of the FOIA.
[25] See section 23 of the FOIA.

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Constitutional Warrant: Active Participation in Public Affairs

29. There is an addition to all of the above, an underpinning constitutional value that is facilitative of the FOIA generally, and specifically of the general right to information from public authorities.

30. This court in **John Reginald Phelps Dumas v Attorney General**[26] stated as follows:[27]

> *"In a modern, democratic society founded on the ideology of participatory democracy, such as Trinidad and Tobago, every citizen has a legitimate interest in the upholding of the Constitution and the rule of law. The courts as guardians of the Constitution, have the duty and responsibility to ensure that the Constitution and the rule of law are upheld."*

This value of participatory democracy is embodied and enshrined as a constitutional value pursuant to clause (c) of the Preamble to the Constitution, which provides: "Whereas the People of Trinidad and Tobago – (c) have asserted their belief in a democratic society in which all persons may, to the extent of their capacity, play some part in the institution of the national life and thus develop and maintain due respect for lawfully constituted authority".

31. In **Dumas**[28] this court explained the value of participatory democracy further, as follows (albeit in a different context):

> *"116. The Preamble to the 1976 Republican Constitution indicates that the type of democracy that the Constitution creates, includes clear elements of civic republicanism, in which there is both an encouragement and expectation of citizens' participation in the democratic process. In this sense, the encouragement of citizens' participation in the democratic process, is a part of the Trinidad and Tobago constitutional ethic and value system that must inform a court's approach to issues of standing in non-Bill of Rights constitutional review actions. Such a constitutional*

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[26] Civ. App. No. P 218 of 2014.
[27] Civ. App. No. P 218 of 2014, at paragraph 103,
[28] Civ. App. No. P 218 of 2014, at paragraphs 116 and 117.

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ethic does not rely entirely on public interest litigation being pursued by the State and its organs – usually through the Attorney General. Rather, it recognizes, both for theoretical and pragmatic reasons, that it is the right and even the duty of citizens to get involved in appropriate cases in such public interest litigation.

117. Indeed, the 1976 Republican Constitution of Trinidad and Tobago has as an underpinning ethic, a participatory political ethos, in which the upholding and vindication of the rule of law form an integral part of the model of democratic governance."

Thus, far from being mere busybodies, citizens who have a bona fide and legitimate interest in public affairs have a constitutional warrant to get involved.

32. This reliance on the Preamble of the Constitution, raises an important question as to what uses or purposes can the Preamble of the Constitution of Trinidad and Tobago be put to? There is now a growing body of both case law and academic literature that confirms the actual use of the Preamble as an aid to interpretation and even as a source of law, and the legitimacy of such usage.[29]

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[29] Tracy Robinson, Senior Lecturer in the Faculty of Law, UWI, Jamaica, in an article entitled 'Our Inherent Constitution', states as follows in relation, inter alia, to the Preamble of the Trinidad and Tobago Republican Constitution:

> 'All Caribbean independence constitutions, except Jamaica, have preambles. They begin, 'we the people of …,' establishing the authorship of the constitutions. They express the moral and political aspirations of the political community. This includes affirmation of the principles of the rule of law, human dignity and the pre-eminence of individual freedom and human rights. Many also express a strong desire for social and economic equality and some mention regard for civil, political, social, economic and cultural rights. Caribbean judges have turned to the language of the preambles – 'Men and institutions only remain free when freedom is founded on the rule of law' – to confirm the rule of law as a constitutional value. Judges must uphold it and have regard to it in interpreting constitutional provisions, like the redress clause in the bill of rights, that express the rule of law's commitment to access to justice.
>
> The place of the preamble in constitutional interpretation is receiving growing attention by modern courts. Although not separately enforceable, increasingly courts are stressing that that they are not 'pure embellishment' or 'meaningless verbiage or empty rhetoric'. In Bowen v AG, Conteh CJ said that there was 'an indissoluble link, an umbilical cord, if you will, between the Preamble of the Constitutions and its dispositive provisions'; the preamble, he argued, 'animates' the constitutions. In Matthew v State the dissenting opinion, which is destined to gain more prominence and force, noted that while the preamble

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33. In January, 2016, I noted in relation to a series of election petitions,[30] that:

"The Constitution is the supreme law and any other law inconsistent with it is void to the extent of the inconsistency (section 2, 1976 Constitution). Thus the general and governing interpretative principle is that constitutional values 'trump' all other legal values and all other laws must be read so as to conform to and be consistent with constitutional values. In Trinidad and Tobago two core constitutional values are: (i) the establishment of 'a democratic society' in which, inter alia, there is active participation in national life through which is developed and sustained 'due respect for lawfully constituted authority';[31] and (ii) 'freedom' founded upon 'moral and spiritual values and the rule of law'.[32]

By section 11(1) of the Interpretation Act, the preamble to a written law is a part thereof intended to help reveal meaning and purpose. These provisions in the Preamble to the Constitution are therefore integral to discovering agreed and operative constitutional values."

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could not override the clear words of the constitutions, courts could have regard to the preambles in interpreting the texts. It added that interpretations that conflicted with the preambles would be suspect.

De la Bastide CJ, as he then was, argued that the Trinidad and Tobago republican constitution was 'resilient and amorphous', capable of change in response to the needs of the people. He acknowledged that it would be difficult to figure out the appropriate direction in which to chart progress through constitutional interpretation, but said that if 'we bear in mind the right principles and we focus on the preamble our task can be made a little lighter.' Conteh CJ recently went a bit further, saying that the new preamble to the Belize Constitution was more than an aid to interpretation because 'it fills the text with meaning and gives the Constitution itself a shape and form reflecting the very essence, values and logic of the Belizean people.' The preamble of the republican constitution of Trinidad and Tobago and the reform Belize constitution are post-independence preambles crafted and approved in Caribbean lawmaking spheres. In a turn around, the Chief Justices in both territories relied on them to counter the traditional critique of Caribbean constitutions – that they are not really our own – treating the preambles as the best evidence of the values, desires and hopes of 'we the people.' [See, 'Transitions in Caribbean Law: Lawmaking Constitutionalism and the Confluence of National and International Law', Ian Randle, 2013, at 248.]

See also, 'The Preamble in Constitutional Interpretation', Liav Orgad, International Journal of Constitutional Law (2010) 8 (4), 714; 'The Application of Constitutional Preambles and the Constitutional Recognition of Indigenous Australians', Anne Twomey, Sydney Law School, Legal Studies Research Paper No. 14/30 (March 2014); and 'The Invisible Constitution', Laurence Tribe, Oxford University Press, 2008.

[30] See, **Returning Officers and Ors. v Mahabir and Ors.**, Civ. App. No. S 229 – 234, Jamadar JA, at paragraphs 28 and 29.

[31] Paragraph (c), Preamble, 1976 Constitution.

[32] Paragraph (d), Preamble, 1976 Constitution.

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34. Indeed, the Caribbean Court of Justice, in a 2015 unanimous decision,[33] affirmed its earlier statements on the normative function of constitutional preambles, as follows:

> "[54] The preamble of a Constitution cannot be treated as mere surplusage. This court has recognised the normative functions served by the preamble in the Boyce decision with Wit JCCJ noting that, they 'fill the Constitution with meaning reflecting the very essence, values and logic of constitutional democracies in general' and further that '[t]hese normative parts of the Constitution breathe, as it were, life into the clay of the more formal provisions in that document'."[34]

35. Tracy Robinson and Arif Bulkan, two of the Caribbean's leading constitutional scholars,[35] in a forthcoming article,[36] have most recently stated in relation to preambles such as in Trinidad and Tobago: "Caribbean judges have insisted that constitutional preambles are not 'pure embellishment' and that they are a part of the wider context of the constitutions and should assist in determining the meaning of the constitutions, especially when difficult questions of interpretation arise."[37] And, Lawrence Tribe, Professor of Constitutional Law at Harvard University, writing in 2008 in relation to the American Constitution, explains that interpretations and applications must be chosen that are "... more consistent with the Constitution read in light of its preamble's overriding concern(s)."[38]

36. As this court has also already explained:[39] "By virtue of section 11(1) of the Interpretation Act, the Preamble is to be construed as a part of the Constitution and as an aid to explaining its meanings and purposes." Thus the Preamble of the Trinidad and Tobago Constitution is by way of specific statutory provision at the very least an 'interpretative

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[33] **Maya Leaders Alliance v A.G.** (2015) 87 WIR 178, 207.
[34] Citations refer to A.G. v Boyce (2006) 69 WIR 104, at paragraphs 18 and 19.
[35] Tracy Robinson is a Senior Lecture at the Faculty of Law, UWI, Mona Campus, Jamaica, and Arif Bulkan is also a Senior Lecturer at the Faculty of Law, UWI, St. Augustine Campus, Trinidad. Both have most recently co-authored, with Justice A. Saunders JCCJ, the constitutional text 'Fundamentals of Caribbean Constitutional Law', Sweet and Maxwell, 2015.
[36] 'Constitutional comparisons by a supranational court in flux: The Privy Council and Caribbean bills of rights', Modern Law Review, forthcoming 2017.
[37] Citing with approval Sharma JA, in **Boodram v AG** (1996) 47 WIR 459; and Wit JCCJ, in **AG v Joseph and Boyce**, CCJ Appeal No 2 of 2005.
[38] The Invisible Constitution, above, at page 167.
[39] **Dumas v Attorney General**, Civ. App. No. P 218 of 2014, at paragraph 45.

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preamble'.[40] As such, the Preamble is a 'good means to find out the meaning of the statute' and 'the key to open understanding thereof.'[41] In Trinidad and Tobago therefore, given the detail and content of the 1976 Republican Constitution's Preamble and its clear and specific statements of the core principles and values upon which the Constitution and the State of Trinidad and Tobago are based, it embodies a guiding and authoritative framework for constitutional interpretation.[42]

37. However, beyond the interpretation of the Constitution itself, as the supreme law and where multiple interpretations and applications may exist in relation to all other legislation, a preference is to be exercised in favour of the options that accord best with the constitutional values and principles enshrined in both the Preamble and the formal text of the Constitution itself. Indeed, one may venture to say that the Constitution being the supreme law, courts may have a positive duty to promote the values and principles that are contained in the Preamble, which have been declared by 'the People' as underpinning both the Constitution and the establishment of the State of Trinidad and Tobago as a society governed by the rule of law (which is not necessarily to say that the Preamble constitutes an independent source of rights).[43] It is this ideological and values-laden consensual character of the Preamble, that confers its authoritative and interpretative function.

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[40] Liav Orgad usefully posits three types of constitutional preambles: (i) ceremonial – symbolic, (ii) interpretive, and (iii) substantive – 'The Preamble in Constitutional Interpretation', above.

[41] Edward Coke, Institutes of the Laws of England, 79 (1628).

[42] It may be that sooner than later we will escape from the colonial constitutional prisms and prisons of interpretation, that thus far seem to have shackled us to a past modality of constitutional jurisprudence that inhibits the full flourishing of 'the People's' aspirations and hopes embodied in their Preamble to the Constitution. Why is it, that the core principles and values articulated in the Preamble, such as, say, 'the dignity of the human person', and 'social justice', and 'participatory democracy', and 'the rule of law', should not constitute the axis around which the sections 4 and 5 enumerated rights, as well as all other laws, constitutional or otherwise, are seen as revolving and therefore to be interpreted in furtherance of their meanings? Can our Preamble, in the context of the Constitution of Trinidad and Tobago and not as some generic 'Westminster' constitution, be a source of substantive rights, at least in the way inquired about above?

[43] Note in this regard, section 5(1) of the Constitution Act, 1976, which gives the courts very wide powers to modify existing laws inconsistent with provisions of the Constitution other than sections 4 and 5 (which latter category of instances are saved notwithstanding any inconsistencies – see section 6(1) of the Constitution). And see: **Johnson v AG** [2009] UKPC 53, at paragraph 22; **Roodal v State of Trinidad and Tobago** [2005] 1 AC 328, at paragraph 87; and **DPP v Mollison** [2003] 2 AC 411, 427 – all of which speak to the powers and duty of a court to modify existing laws so as to bring them into alignment with the Constitution; and therefore query, into alignment with core constitutional values.

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38. This focus on the Preamble is not without solid foundation. It is the Preamble of the Trinidad and Tobago 1976 Republican Constitution that establishes the basis for and the values inherent in the embodying text of the Constitution itself. It is in this light and in furtherance of these clearly articulated and quite detailed five preambular clauses that "... the People of Trinidad and Tobago ..." consent and agree to "the following provisions (having) effect as the Constitution of the Republic of Trinidad and Tobago".

39. In my opinion therefore, the core constitutional value of public participation in the 'institutions of the national life' so as to 'develop and maintain due respect for lawfully constituted authority' (stated at clause (c) of the Preamble), bolstered by the constitutional commitment to 'freedom ... founded on respect for ... the rule of law' (stated at clause (d) of the Preamble), is a legitimate constitutional lens through which the issues before this court should be viewed and analyzed.

Protection of Essential Public Interests?

40. Thus when one comes to the evaluative exercise demanded by section 35 of the FOIA, in so far as denial of access to information is justified, both a public authority (initially) and a court of review (subsequently) are obliged to carry out the required balancing exercise in the context of the above-stated statutory and constitutional framework and values. It is critical to note, that in the carrying out of this evaluative exercise it is for the public authority to demonstrate that denial of access is justified because it is necessary for the protection of essential public interests. As already explained, 'essential' qualifies both the type of public interests, as well as the degree of circumstances that justify denial of the section 35 public interest override mandate.

41. The relevant question on this issue therefore, is whether, on the available evidence and in all the circumstances, it is justifiable in the public interest to grant access to the instructions given and the legal advice received, having regard to both any benefit and to any damage that may arise from granting access (keeping in mind that any justification for denial of access must be necessary for the protection of essential public interests)?

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42. Narine JA has helpfully summarized the appellant's and respondent's arguments on the benefits and damage that may arise from disclosure of the information sought.[44] There is no need for me to repeat those submissions here and I consequently adopt his summary of them.

43. In this case the appellant did not inform the respondent that the section 35 evaluation had been carried out, nor did the statutory reasons provided condescend to any particulars sufficient to justify refusal for the protection of essential public interests. In this regard it is important to reiterate that it is generally for the appellant (and not the respondent) to demonstrate the justification for denial of access, even in relation to prima facie exempt documents, once disclosure in the public interest is reasonably self-evident.

44. In this case, given the constitutional values of participatory democracy and of upholding the rule of law, it is prima facie in the public interest to disclose why the usual statutory regime for tendering pursuant to the Central Tenders Board should be by-passed in favour of a process under the sole control of a Ministry of Government, for the purpose of selecting land developers in relation to State lands. Indeed, the respondent considered this alternative process a 'matter of grave public concern', hence its request under the FOIA and the initiation of these proceedings.

45. No useful purpose will be served by a rehashing of the arguments, as Bereaux JA has ably demonstrated why access to the documents sought is in the public interest. I adopt his lengthy reasoning on this point.

46. I however wish to make a few further comments in support of granting access in the public interest. These are as follows:

(i) Decisions such as this one must also be made in the context of the historical and social circumstances that are peculiar to Trinidad and Tobago. In this regard, this court unanimously stated in **Ashford Sankar v Public Service Commission**:[45]

> *"As noted earlier in this judgment, the object of the Act is to make information freely accessible to the public with a view to*

[44] See paragraphs 72 – 75 of the judgment.
[45] Civ. App. No. 58 of 2007, at paragraph 34.

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promoting transparency and accountability in the decision-making of public authorities. It is an important piece of legislation in a post-colonial society in which bureaucrats have historically been reluctant to expose their decisions to the glare of public scrutiny. Freedom of access to information is also important in a society that is politically polarized along ethnic lines, and in which appointment to public office, and decisions involving the allocation of state resources are often the subject of speculation and mistrust. Against this historical and social background, the right to access information from public authorities must be jealously guarded, and must not be allowed to be whittled down. Information requested must be provided unless refusal of access to information is expressly permitted by the Act, and the public authority provides adequate and intelligible reasons for refusal."

(ii) In so far as it has been advanced as a damaging effect, that the candour of law officers (to give advice) can be affected, and that somehow ordering disclosure in this case will cause a 'chilling effect', with the consequence that the government will not be able to receive full and frank advice from its law officers, I find those arguments both pessimistic and flawed.

First, in this case the instructions were given and the advice sought by the appellant Ministry from the Attorney General and the advice was received from the office of the Attorney General (and it seems also from the Legal Unit of the Ministry). This is therefore a case where one organ of the State sought the advice of its own internal legal unit and also the advice of the legal advisor to the State (the Attorney General). These were all public officers, discharging public functions in furtherance of the affairs of State.

I find it hard to accept that such public officers would somehow be inhibited to do their sworn public duty to give full and frank advice, because s/he believed that

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somehow that advice may be disclosed to the general public. Public officers are expected to always be acting for the public good and to be independent and impartial in the advice they give.

It is surely a pessimistic person who thinks so lowly of local public officers, to suppose that they do not have the necessary integrity and courage to give the advice that they consider right, irrespective of whether it may be disclosed at some subsequent time.

Second, it is flawed, because as this court observed[46] in relation to a 'frankness and candour' argument advanced in relation to non-legal public servants, adopting the views of Lord Keith in **Burmah Oil Co. Ltd v Bank of England**:[47]

> *"The notion that every competent and conscientious public servant would be inhibited at all in the candour of his writings by consideration ... that they might have to be produced in litigation is in my opinion grotesque. To represent that the possibility of it might significantly impair the public service is even more so."*

This court[48] also agreed with the words of Lord Upjohn in **Conway v Rimmer**,[49] to wit:

> *"I cannot believe that any Minister or any high level ... civil servant would feel in the least degree inhibited in expressing his honest views in the course of his duty on some subject ... by the thought that his observations might one day see the light of day".*

All the more so, I say, with respect to legal officers in any Ministry in Trinidad and Tobago and certainly in relation to the Attorney General of Trinidad and Tobago. I reject out of hand the suggestion that any attorney general or lawyer in

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[46] **Ashford Sankar v Public Service Commission**, Civ. App. No. 58 of 2007, at paragraph 28.
[47] [1980] AC 1090 at 1133.
[48] **Ashford Sankar v Public Service Commission**, Civ. App. No. 58 of 2007, at paragraph 27.
[49] [1968] AC 910 at 994.

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a public office in Trinidad and Tobago would be inhibited to give his or her full and frank advice, because it may at some time become public.

(iii) Positively, disclosure of both the instructions by and the advice to the appellant will advance the core constitutional values of participatory democracy, the involvement of persons in national life, protection of the rule of law, and will engender due respect for lawfully constituted authority.

It is positively in the public interest for the public to be satisfactorily informed why it is justifiable to circumvent the usual statutory regime for tenders in relation to State projects (the Central Tenders Board), in preference for ministerially controlled tenders. There has been no evidence that the disclosure of either the instructions or the advice, will somehow cause damage in any concrete way to any actual person(s) or projects, or will somehow endanger any particular national interests.

Disclosure can however erase the existing suspicion and mistrust in relation to the selected process of exclusive ministerial tendering, and so engender public trust and confidence in the adopted process.

If for some reason, disclosure results in the adopted process being demonstrated to be flawed or unacceptable, then there is obvious vindication of the rule of law. And, if the adopted process is accepted as legitimate, then the rule of law is also vindicated.

(iv) The value of legal professional privilege is not deleteriously undermined by disclosure in this case, because there has been no evidence to show an actual need to keep, or any benefit in keeping, either the instructions or advice secret – except for reliance on the philosophical policy considerations underpinning the principle.

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Why should the State want to keep secret from the public the justification for not following the usual and statutorily prescribed process for tendering State projects? What is there that so essentially needs to be protected? This is not advice in relation to any particular person, transaction or event. It is advice in relation to the legitimacy of a generic process adopted by the State. One would imagine it is a matter of almost pure legal interpretation and advice. Certainly no evidence has been forthcoming to demonstrate otherwise.

Indeed, one wonders on an aside, why is it, if Parliament is representative of the People, and Government is for the People, that general advice in relation to the conduct of the affairs of the People should be privileged in relation to them? Who is really the 'client' in this client/lawyer relationship?

47. Like Bereaux JA, I am of the opinion that, in the circumstances of this case, the public interest, transparency and accountability benefits far outweigh any damage that may be caused to the principle of legal professional privilege by the disclosure of the documents sought. Having carried out the requisite balancing exercise, I can find no justifiable and sufficiently essential public interest considerations of type or degree to support non-disclosure of the documents sought. It is maybe worth reminding ourselves, that whereas freedom, transparency and accountability are the hallmarks of a participatory democracy, secrecy lies at the heart of dictatorships.

Conclusion

48. For all of these reasons I join with Bereaux JA in dismissing this appeal. I will therefore, like the trial judge, order disclosure of both the instructions and the advice, redacted as described by the trial judge and to also include the identities of and any other personal information about the authors of these documents. In my opinion disclosure of the instructions is essential contextually for an accurate interpretation of the advice given by the Attorney General and the legal officers in the Ministry. The parties will be heard on the issue of costs.

Peter Jamadar
Justice of Appeal

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REPUBLIC OF TRINIDAD AND TOBAGO

IN THE COURT OF APPEAL

Civ. App. No. P200 of 2014
Claim No. CV2012-04538

BETWEEN

The Minister of Planning and Sustainable Development

Appellant/Defendant

AND

The Joint Consultative Council for the Construction Industry

Respondent/Claimant

****

Panel:

P. Jamadar J.A.
N. Bereaux J.A.
R. Narine J.A.

Appearances:

R. Martineau SC, K. Ramkissoon and S. Sharma for the appellant

G. Petersons SC and Kingsley Walesby for the respondent

DATE DELIVERED: 28th October, 2016.

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JUDGMENT

Delivered by R. Narine J.A.

1. This is an appeal from a decision of a judge of the High Court made under the Freedom of Information Act Chapter 22:02, ordering the appellant (the Minister) to provide information requested by the respondent (the JCC) by application dated 20th April 2012. The relevant facts are set out below.

2. The Minister initiated a request for proposals process to select a developer or developers for state lands located at Invader's Bay. The JCC contended that the request for proposal process amounted to a tender process. By letter dated 14th December 2011 the JCC sought an explanation from the Minister as to how this was possible since the Central Tenders Board had the sole and exclusive authority to act for and on behalf of the Government subject to limited exceptions which did not apply in this case. By letter dated 21st December 2011, the Minister informed the JCC that with respect to the query, advice was being sought from the Attorney-General.

3. In the Senate on 28th February 2012 the Minister was asked four questions by Senator Dr. James Armstrong in relation to the "Invaders Bay Request for Proposals". One of the questions posed to the Minister was whether the publication of the request for proposals conformed to the Tenders Board Act. The Minister answered as follows:

> *"the publication of the request for proposals was not the subject of nor required to be in conformity with the Central Tender's Board Act. Advice to this effect was received from the Legal Unit of the Ministry of Planning and the Economy and subsequently from the Office of the Attorney General."*

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4. Shortly afterwards, during the same sitting of the Senate, there were exchanges between the Minister and other Senators including Senator Al-Rawi, who asked the Minister whether the advice received from the Attorney-General's Office and the Legal Unit of the Ministry of Planning and the Economy could be circulated by way of a written response to the Senate. The Minister responded *"I do not know why I should circulate the entire opinion"*.

5. By letter dated 1st March 2012 the Minister wrote to the JCC indicating inter alia, that based on the advice received from the Attorney General's Office, the request for proposals process was not required to be in conformity with the Central Tenders Board Act, Chap 71:91. By reply dated 29th March 2012, the JCC requested that the Minister publish the legal advice received in respect thereof.

6. By letter dated 20th April 2012 the JCC wrote the Minister pursuant to the Freedom of Information Act requesting access to various items of information as to whether the Minister had obtained legal advice on the applicability of the Central Tenders Board Act to the request for proposals process, if so when was the request for legal advice made and to whom was the request made. The JCC also requested copies of the written instructions and the legal advice received by the Minister from the Legal Unit of the Ministry and the Attorney General's Office. The letter was accompanied by a formal application of even date setting out the documents requested.

7. The JCC received no response from the Minister. By letter dated 27th June 2012 the JCC wrote again to the Minister indicating that he was in breach of section 15 of the Freedom of Information Act (the Act) by failing to indicate within 30 days whether he was acceding to or refusing the request. By letter dated 5th July 2012 the Permanent Secretary of the Ministry replied apologizing for the delay and informing the JCC that the matter was receiving attention. By letter dated 13th July 2012 the JCC reminded the Minister that it was still awaiting a copy of the requested information.

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8. Not having received a response, on 10th August 2012 the JCC sent a pre-action protocol letter to the Minister indicating that the Minister was in direct and continuing breach of section 15 of the Act and requesting a response on or before 24th August 2012 failing which the JCC would apply for judicial review of the Minister's continued refusal and/or failure to provide a response.

9. By letter dated 16th August 2012 the Permanent Secretary of the Ministry wrote to the JCC refusing to provide the legal advice obtained on the ground that the instructions for the provision of the legal advice, the advice and its author were considered exempt under section 27(1) of the Act and that the revelation of same *"cannot be seen to be justified in the public interest"*. The JCC was also informed that the decision to move forward with the process and selection of the three (3) chosen investors was agreed upon by Cabinet. The Permanent Secretary stated further that the request for copies of instructions and legal advice provided by the Attorney General must be addressed to him since the Ministry of Planning and Sustainable Development had no authority to provide same.

10. On 31st October 2012 the JCC filed an application without notice for judicial review of the decision of the Minister by letter dated 16th August 2012 to refuse to provide copies of the written instructions, the legal advices and the identity of the author(s) of such legal advices received from the Legal Unit of the Ministry and from the Attorney General's Office.

11. The reliefs sought by the JCC included:

    (i) A declaration that the continuing decision of the Minister by letter dated 16th August 2012 to refuse to provide the information requested by the JCC in its Freedom of Information Application dated 20th April 2012, was illegal, null and void and of no effect.

    (ii) A declaration that the JCC was entitled to the information, and

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(iii) An order of mandamus compelling the Minister to provide the information.

12. On 12th November 2012 the application came up before the Honourable Mr. Justice Seepersad who ordered that the Attorney General's Office be served with the application and adjourned the matter to 4th December 2012.

13. However, on 4th December 2012, the Minister wrote to the JCC stating that the instructions for the provision of the legal advice, the advice and the authors were considered exempt documents under section 29(1) of the Act on the ground of legal professional privilege and could not be made available to the JCC. The court adjourned the matter to the 13th December 2012 for the JCC to consider its position in light of the Minister's intention to rely upon this additional reason for refusing to provide the requested information.

14. On 13th December 2012 the JCC sought and was granted permission to amend its application filed on 31st October 2012 and to file a supplemental affidavit in support of the amended application on or before the 14th January 2013. On the 11th January 2013 an amended application was filed by the JCC seeking an additional relief as follows:

(i) A declaration that the Minister was not entitled to rely upon the additional reason for his refusal to provide the said information as set out in its letter dated 4th December 2012 as a ground for his refusal to provide the said information.

15. On 1st October 2013, the learned judge granted permission to the JCC to make a claim for judicial review, which was filed on 14th October 2013. On 14th July 2014 the learned judge ordered inter alia, that the JCC was entitled to the information requested in the Freedom of Information Application dated 20th April 2012 and

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declared that the Minister's continued decision to refuse to provide the said information was illegal, null, void and of no effect .

16. On 23rd July, 2014 the Minister filed a notice of appeal seeking an order to set aside the declarations and orders of the learned judge.

17. On 4th August 2014 the JCC filed a counter-notice appealing against that part of the decision of the judge which allowed the Minister to rely upon the additional reason for refusing access to the information. The JCC is also seeking a declaration that the Minister was not entitled to rely upon the additional reason as set out in its letter dated 4th December 2012 as a ground for its refusal to provide the said information.

FINDINGS OF THE JUDGE

18. The trial judge found that the Minister's decision to refuse access to the information requested was flawed in so far as the Minister failed to adequately outline his reasons and the public interest considerations that formed the basis for his decision. In addition, the judge found that the Minister was entitled to rely upon the additional basis of legal professional privilege as set out in his letter of 4th December 2012. However, the judge went on to hold that the response of the Minister in the Senate made on the 28th February 2012 amounted to a waiver of the privilege. Further, the learned judge held that parliamentary privilege did not attach to the statement so as to prevent the JCC from relying on the statement as evidence of waiver of legal professional privilege in relation to the legal advice referred to in the statement. The judge went on to conclude that the requested information should be disclosed in the public interest under section 35 of the Act.

THE ISSUES

19. The issues that fall to be determined in this appeal are as follows:

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(i) Whether the Minister is entitled to rely on the additional reason provided in his letter of 4th December 2012, which raised legal professional privilege for the first time.

(ii) Whether legal professional privilege applies to the information requested by the JCC.

(iii) Whether parliamentary privilege attaches to the Minister's statement made in the Senate on 28th February 2012.

(iv) Whether the JCC is entitled to rely on the Minister's letter dated 1st March 2012 as evidence of waiver of legal professional privilege.

(v) Whether the Minister waived legal professional privilege by making the statement in the Senate on 28th February 2012 and/or by his letter dated 1st March 2012.

(vi) Whether the judge was correct in finding that the requested information should be released in the public interest under section 35 of the Act.

THE COUNTER-NOTICE

20. As outlined above, the Minister refused to provide the requested information by letter dated 16th August 2012, citing as the reason for refusal that the legal advice and the identity of its author were exempt by virtue of section 27(1) of the Act and that the provision of same was not justified in the public interest. Section 27(1) of the Act provides:

> *"27. (1) Subject to this section, a document is an exempt document if it is a document the disclosure of which under this Act—*
>
> *(a) would disclose matter in the nature of opinion, advice or recommendation prepared by an officer or Minister of Government, or consultation or deliberation that has taken place between officers, Ministers of Government, or an officer and a Minister of*

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Government, in the course of, or for the purpose of, the deliberative processes involved in the functions of a public authority; and

(b) would be contrary to the public interest."

21. On 31st October 2012 the JCC filed its application for judicial review of the decision to refuse the information. On 12th November 2012, the trial judge ordered service on the Attorney-General and adjourned the application to 4th December 2012. On this date the Minister wrote to the JCC indicating that the instructions for the provision of the legal advice, the advice itself, and the names of the authors were exempt by virtue of section 29(1) of the Act which provides:

> *"29. (1) A document is an exempt document if it is of such a nature that it would be privileged from production in legal proceedings on the ground of legal professional privilege."*

22. The trial judge received written submissions from the parties and gave a written judgment on the JCC's amended application for leave to apply for judicial review. On 13th October 2013 he gave a written ruling granting leave to the JCC to make the application. However, in paragraph 60 of his ruling, after considering the issue as to whether the Minister was entitled to rely on the additional reason for refusal based on section 29(1) of the Act the judge ruled:

> *"60. The court is of the view that the Applicant / Intended Claimant's argument that the JCC / Intended Defendant is limited to the reasons upon which it relied at the time of the refusal, is also not an arguable ground that has a realistic prospect of success."*

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23. There was no procedural appeal filed against the refusal of leave in respect of this ground. Curiously however, the JCC included the same relief in its fixed date claim form filed on 14th October 2012, and revisited the issue in its written submissions at the trial stage. Quite unnecessarily in my view, in his judgment given on 14th July 2014, the trial judge at paragraph 35, referred to his earlier ruling and the authority of **Bowbrick v. Information Commissioner** App No. EA / 2005 / 0006 (on which he had relied in his ruling) and repeated his earlier decision that the Minister was entitled to rely on the additional reason stated in his letter of 4th December 2012.

24. Not having appealed this aspect of the judge's decision at the leave stage by way of procedural appeal, on 4th August 2014 the JCC filed a counter-notice in this appeal, seeking to set aside the trial judge's repetition in paragraphs 35 to 37 of his judgement of the ruling he had given at the leave stage refusing leave to the JCC to argue that the Minister was limited to the reasons upon which he relied on at the time of refusal, on the basis that it was not an arguable ground that had a realistic prospect of success.

25. In its written submissions before this court, the JCC maintained that it is entitled to pursue this issue for the following reasons:

(i) Neither the Minister nor the court objected to the inclusion in the relief claimed in the fixed date claim form, of a declaration to the effect that the Minister was not entitled to rely on the additional reason set out in the letter of 4th December 2012.

(ii) The JCC made further submissions on the issue at the trial stage, to which the Minister responded that, the court having already ruled on the issue, it was improper for the JCC to revisit it.

(iii) The trial judge granted permission to the JCC to make a claim for judicial review in respect of its entire claim.

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(iv) The judge reconsidered the issue and adjudicated upon it in his final judgment in the substantive claim. This amounted to a new decision that the JCC was entitled to challenge in this appeal.

26. I find no merit whatsoever in these contentions. The trial judge, having expressly found that the ground was not an arguable one, and had no realistic prospect of success, was clearly stating that he was not granting leave for judicial review on the basis of that ground. To suggest that, because the judge went on in paragraph 68 to grant leave to institute an action for judicial review on the basis that *"the Applicant / Intended Claimant has an arguable ground(s) for judicial review with a realistic prospect of success"*, somehow entitled the JCC to pursue a ground which was expressly rejected by the judge as not being arguable and having no realistic prospect of success, is clearly untenable. Similarly, the submission that the trial judge applied a fresh adjudication to the issue at the trial stage is without basis. The judgment reflects that he merely repeated what he had said at the leave stage.

27. Some reliance was placed by the JCC on the cases of **Trevor Smith v. The Parole Board** [2003] EWCA Civ. 2014 and the decision of this court in **Ashford Sankar v. Public Service Commission** Civ. App. No. 58 of 2007.

28. In **Trevor Smith** (supra) the court was considering a situation in which permission had been granted in respect of some grounds but refused in respect of others at the leave stage, and the trial came before another judge. In that case, Lord Woolf opined that the judge hearing the main application would require "significant justification" before taking a different view from the judge who granted permission. However, if he came to the conclusion that there was good reason to allow argument on an additional ground, he had a discretion to permit it in the interests of justice.

29. In the case at hand, of course, the application for leave as well as the substantive matter came before the same judge. There is nothing to suggest from the record

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that any additional material, or any novel issues of law was placed before the judge so as to persuade him to exercise a fresh discretion in the interests of justice. On the facts therefore, **Trevor Smith** is clearly distinguishable.

30. In **Ashford Sankar** (supra), the information requested by the applicant was refused by the Commission on the basis that the documents were internal working documents which were exempt under section 27 of the Act. At the trial however, the Commission sought to put forward additional reasons for the refusal, namely that the documents requested were a record of consultation and deliberations between members of the Commission to assist in their decision making process, and their disclosure was not in the public interest since it might inhibit frankness and candour in future discussions. It was against this background that the court commented at page 15 of the judgment:

> *"In these circumstances it is clearly undesirable that the respondent should be permitted to provide new reasons, or to add to, or augment vague or insufficient reasons originally advanced for refusal of access. In my view, to do so will ultimately frustrate the clear purpose of the Act, which is to permit the public to access information unless refusal of access can be brought within one of the exemptions specifically set out in the Act, and adequate and intelligible reasons are provided for such refusal."*

31. In expressing its reluctance to permit public bodies to supplement inadequate reasons for refusal to provide information, the court was not laying down a principle that would apply in all cases. Much will depend on the particular circumstance of the case, and the time at which the additional reasons are put forward. Clearly the longer the delay in providing the additional ground or refusal, the less likely the court will be in permitting reliance on it. The court will hardly shut out a public authority which is clearly entitled to rely on an exemption provided in the Act, but which through inadvertence did not include it as a reason at the time of refusal. In such a case, the applicant may not be entitled to the

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information requested but may be compensated for unnecessary legal costs he has incurred.

32. In the instant case the Minister sought to introduce the additional reason for refusal under section 29(1) of the Act before leave was granted by the trial judge to bring the application for judicial review. The trial judge provided an opportunity to both parties to consider the issue and make submissions on it. The judge considered the issue and in a reasoned judgment ruled that the JCC's contention that the Minister was limited to the reason provided at the time of refusal, was not an arguable ground that had a realistic prospect of success. There was no procedural appeal from this refusal of leave by the trial judge. No reason has been advanced for the JCC's failure to appeal the refusal of leave within the time provided by the Civil Proceedings Rules 1998, Part 64.5. Accordingly, the JCC's counter notice must be dismissed.

LEGAL PROFESSIONAL PRIVILEGE

33. By letter dated 4th December 2012, the Minister invoked the exemption provided by section 29(1) of the Act which exempts access to documents that are protected by legal professional privilege.

34. Section 29(1) of the Act provides statutory recognition of a principle established for centuries in the common law. In **R v. Derby Magistrate's Court, ex parte B** [1996] AC 487, Lord Taylor CJ traced the history of the privilege through the case law from as early as 1577. Having considered the views expressed in the case law by such eminent jurists including Lord Brongham LC as far back as 1833 in **Greenough v. Gaskell** (1833) 1 My & K 98, and **Bolton v. Liverpool Corporation** (1833) 1 My & K 88, Lord Lyndhurst LC in **Holmes v. Baddeley** (1844) 1 Ph 476, Sir George Jessel MR in **Anderson v. Bank of British Columbia** (1876) 2 Ch. D. 644, and Cockburn CJ in **Southwark and Vauxhall Water Co. v. Quick** (1878) 3 QBD 315, Lord Taylor CJ concluded at page 507:

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"The principle which runs through all these cases, and the many other cases which were cited, is that a man must be able to consult his lawyer in confidence, since otherwise he might hold back half the truth. The client must be sure that what he tells his lawyer in confidence will never be revealed without his consent. Legal professional privilege is thus much more than an ordinary rule of evidence, limited in its application to the facts of a particular case. It is a fundamental condition on which the administration of justice as a whole rests."

35. Legal professional privilege has developed to protect communications between client and lawyer. The protection may take two forms – legal advice privilege and litigation privilege. The former is regarded as absolute and attaches to all communications between client and legal adviser for the purpose of obtaining legal advice. The latter attaches to all communications made between a client and his lawyer where litigation is pending or contemplated and made for the sole or dominant purpose of obtaining legal advice or conducting litigation (see: Halsbury's 5th edition, Volume 12, paragraph 647).

36. In **Three Rivers District Council v. Governor and Company of Bank of England (No. 6)** [2005] 1 AC 610 at 646, Lord Scott of Foscote made the following observations:

    (i) Legal advice privilege arises out of a relationship of confidence between lawyer and client. The confidential character of the communication or document is an essential element of the privilege.

    (ii) If the document or communication qualifies for legal professional privilege, the privilege is absolute. It cannot be overridden by

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some supposedly greater public interest. It can be waived by the client and it can be overridden by statute.

(iii) Legal advice privilege is both a procedural and a substantive right.

37. In **R (on the application of Morgan Grenfell & Co. Ltd) v. Special Commissioner** [2002] UKHL 21, at paragraph 7 of his judgment, Lord Hoffman described legal professional privilege as "a fundamental human right long established in the common law". In his view, an intention to override such rights must be expressly stated or appear by necessary implication (at paragraph 8).

38. In this appeal it is not in dispute that the instructions given by the Minister to his legal advisers and the advice received are prima facie protected by legal professional privilege. The question is whether the Minister waived the privilege by making the statement in the Senate and/or by his letter dated 1st March 2012 to the JCC, or whether access to the documents is justified in the public interest under section 35 of the Act.

WAIVER

39. The law with respect to waiver of legal professional privilege has been authoritatively canvassed by the Australian courts in three leading cases: **Mann v. Carnell** (1999) 201 CLR 1; **Osland v. Secretary to the Department of Justice** (2008) 234 CLR 275, and **British American Tobacco v. Secretary, Department of Health and Ageing** [2011] FCAFC 107. Although these authorities are not strictly binding on this court, I consider them to be of highly persuasive authority.

40. In **Mann**, the High Court of Australia noted that waiver may be expressed or implied. The test to be applied in the case of implied waiver is an objective one. The issue to be considered is whether the conduct of the person seeking to rely on the privilege is inconsistent with the maintenance of the privilege. The principles involved are set out at paragraphs 28-29 of the judgment:

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"...Legal professional privilege exists to protect the confidentiality of communications between lawyer and client. It is the client who is entitled to the benefit of such confidentiality, and who may relinquish that entitlement. It is inconsistency between the conduct of the client and maintenance of the confidentiality which effects a waiver of the privilege. Examples include disclosure by a client of the client's version of a communication with a lawyer, which entitles the lawyer to give his or her account of the communication, or the institution of proceedings for professional negligence against a lawyer, in which the lawyer's evidence as to advice given to the client will be received.

Waiver may be express or implied. Disputes as to implied waiver usually arise from the need to decide whether particular conduct is inconsistent with the maintenance of the confidentiality which the privilege is intended to protect. When an affirmative answer is given to such a question, it is sometimes said that waiver is "imputed by operation of law". This means that the law recognizes the inconsistency and determines its consequences, even though such consequences may not reflect the subjective intention of the party who has lost the privilege... What brings about the waiver is the inconsistency, which the courts, where necessary informed by considerations of fairness, perceive between the conduct of the client and maintenance of the confidentiality; not some overriding principle of fairness operating at large."

41. In **Osland**, Ms. Osland had been convicted and sentenced to imprisonment for murder. She petitioned the Governor of Victoria for mercy. The Attorney-General issued a press release stating that he had obtained advice from three senior counsel, who recommended that the petition should be denied. Ms. Osland sought access to the legal advice. The High Court of Australia unanimously held

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that legal professional privilege had not been waived by the disclosure of the effect or gist of the advice. In the **British American Tobacco** case (supra) the Federal Court of Australia expressly approved the reasoning of Maxwell P at paragraphs 49 – 51 of his judgment:

> *"44. It is now clear that disclosure of the gist of a privileged communication does not necessarily effect a waiver of legal professional privilege. In **Secretary, Department of Justice v Osland** at [29]-[51], Maxwell P of the Court of Appeal of Victoria reviewed the authorities. At the conclusion of that review Maxwell P said at [49]-[51]:*
>
> *[49] Disclosure of the conclusion (or the gist, substance or effect) of legal advice may, or may not, amount to a waiver of privilege in respect of the advice as a whole. Whether it does in a particular case will depend on whether, in the circumstances of the case, the requisite inconsistency exists, between the disclosure on the one hand and the maintenance of confidentiality on the other. In **Bennett**, the majority of the Full Federal Court judged that there was inconsistency and hence waiver; in **British American Tobacco Australia Services Ltd v Cowell** (discussed below), this Court judged that there was not. In each case, there was a disclosure of the gist or substance of advice given. That opposite conclusions were arrived at is simply a reflection of the different circumstances of the respective cases.*
>
> *[50] The content of an advice will often include confidential information about instructions given by the client, or about evidence to be given by a witness, or about forensic investigations being or proposed to be undertaken. These examples are sufficient to demonstrate why it is simply not the*

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case that the disclosure of the conclusions necessarily amounts to, or necessarily entails, the disclosure of the content. There is no necessary inconsistency between disclosure of the one and non-disclosure of the other.

*[51] As **Carnell** demonstrates, the inconsistency test readily accommodates the notion that, in appropriate circumstances, the privilege-holder may disclose the content of legal advice to a third party for a particular purpose without being held to have waived privilege in the advice. Likewise, in my opinion, the test of inconsistency is well capable of accommodating the notion that, in appropriate circumstances, the privilege-holder should be able to disclose publicly that it is acting on advice and what the substance of that advice is, without being at risk of having to disclose the confidential content of the advice."*

42. In **British American Tobacco**, The High Court of Australia expressly approved and applied the decisions in **Mann** and **Osland**. The facts of **British American Tobacco** are similar to those in this appeal. In that case, the respondent had denied access to a copy of a memorandum of advice provided by the Attorney-General on the ground of legal professional privilege. The appellant contended that the privilege had been waived by reference to aspects of the advice in a government response tabled in the Senate, by provision of a summary of the advice to a group of advisors to the government, and subsequent publication of the government response on a government website. The matter eventually came before the Federal Court of Australia, which held that (i) the legal professional privilege attaching to the legal advice was not waived by the acts of disclosure, since it did not seek to deploy a partial disclosure of the advice for forensic or any other advantage for itself, so as to make its conduct inconsistent with the maintenance of the privilege, (ii) the tabling of the government response in the Senate was protected by parliamentary privilege. However, that privilege did not

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extend to the subsequent publication of the statements made in the parliament, and (iii) the disclosure of information to a group of government advisors was not made to "outsiders", and so was not inconsistent with the maintenance of the privilege.

43. In this appeal the JCC relies on two occasions of disclosure of the gist of the advice. The first disclosure was made by the Minister in the Senate on 28th February 2016. The Minister contends that this statement is protected by parliamentary privilege, and the JCC is not entitled to rely on the words spoken in the Senate as a basis for waiver of legal professional privilege.

PARLIAMENTARY PRIVILEGE

44. In this jurisdiction parliamentary privilege is provided by section 55 of the Constitution:

> *"**55.** (1) Subject to the provisions of this Constitution and to the rules and standing orders regulating the procedure of the Senate and House of Representatives, there shall be freedom of speech in the Senate and House of Representatives.*
>
> *(2) No civil or criminal proceedings may be instituted against any member of either House for words spoken before, or written in a report to, the House of which he is a member or in which he has a right of audience under section 62 or a committee thereof or any joint committee or meeting of the Senate and House of Representatives or by reason of any matter or thing brought by him therein by petition, bill, resolution, motion or otherwise; or for the publication by or under the authority of either House of any report, paper, votes or proceedings.*

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(3) *In other respects, the powers, privileges and immunities of each House and of the members and the committees of each House, shall be such as may from time to time be prescribed by Parliament after the commencement of this Constitution and until so defined shall be those of the House of Commons of the Parliament of the United Kingdom and of its members and committees at the commencement of this Constitution.*

(4) *A person called to give any evidence before either House or any committee shall enjoy the same privileges and immunities as a member of either House.*

45. The privilege as set out in section 55 of the Constitution may be traced as far back as the Bill of Rights 1689 which provides in Article 9 that "Freedom of speech and debates or proceedings in Parliament ought not to be impeached or questioned in any court or place outside of Parliament". By virtue of section 12 of the Supreme Court of Judicature Act, the common law doctrines of equity and statutes of general application in operation as at 1st March 1848 in the United Kingdom are deemed to be enacted in Trinidad and Tobago from 1st January 1889. Article 9 of the Bill of Rights is therefore part of our law, in so far as it is not inconsistent with section 55 of the Constitution.

46. The privilege is rooted in two essential aspects of a working parliamentary democracy. At the heart of the privilege is the importance of the right of a Member of Parliament to speak freely and frankly without fear of civil or criminal proceedings being instituted against him in respect of words spoken by him. The privilege is also important in a democratic society in which the principle of the separation of powers applies.

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47. The important public interest in maintaining parliamentary privilege and the court's reluctance to trespass on the domain of parliament were brought into sharp focus in the case of **Prebble v. Television New Zealand Ltd** [1995] 1 AC 321, which came before the Privy Council. In **Prebble**, a former Government Minister brought an action for libel against the respondent in respect of allegations made over the sale of State assets to the private sector on unduly favourable terms and with the motive of obtaining donations for the party. In its defence of justification, the respondent relied inter alia, on statements made in Parliament, which it alleged were calculated to mislead the House, or were otherwise improperly motivated by suggesting that the government did not intend to sell State assets, when there was in fact a conspiracy to do so, by dishonestly and improperly passing legislation. On an application by the Minister the trial judge struck out the allegations which he held might impeach or question proceedings in Parliament in contravention of Article 9 of the Bill of Rights 1689. The Court of Appeal upheld the decision, but ordered that the action be stayed unless the Privileges Committee waived parliamentary privilege. The Committee decided that it had no power to do so.

48. On appeal to the Privy Council, the Board held that the judge's decision to strike out the allegations and particulars was correct. However, the Minister's appeal on the stay of proceedings was upheld, on the basis that the JCC had raised a number of matters independent of the parliamentary material which could justify the alleged libel.

49. In delivering the judgment of the Board, Lord Browne-Wilkinson expressed the view that the trial judge in **R v. Murphy** (1986) 64 ALR 498 had placed too narrow a construction of Article 9 of the Bill of Rights. At page 333H – 334C, Lord Browne-Wilkinson stated:

> *"Finally, Hunt J. based himself on a narrow construction of article 9, derived from the historical context in which it was originally enacted. He correctly identified the mischief sought to*

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be remedied in 1689 as being, inter alia, the assertion by the King's Courts of a right to hold a Member of Parliament criminally or legally liable for what he had done or said in Parliament. From this he deduced the principle that article 9 only applies to cases in which a court is being asked to expose the maker of the statement to legal liability for what he has said in Parliament. This view discounts the basic concept underlying article 9, viz. the need to ensure so far as possible that a member of the legislature and witnesses before committees of the House can speak freely without fear that what they say will later be held against them in the courts. The important public interest protected by such privilege is to ensure that the member or witness at the time he speaks is not inhibited from stating fully and freely what he has to say. If there were any exceptions which permitted his statements to be questioned subsequently, at the time when he speaks in Parliament he would not know whether or not there would subsequently be a challenge to what he is saying. Therefore he would not have the confidence the privilege is designed to protect."

50. In my view, the same sentiments may be expressed in this case. In this case the trial judge found that parliamentary privilege did not attach to the statements made by the Minister in the Senate. In coming to his decision the judge interpreted section 55(2) of the Constitution as laying down a prohibition against the bringing of civil proceedings against a member of Parliament in his personal capacity based on a cause of action that relates to a statement made by a member while speaking in Parliament. The Minister in this case is sued as an office holder who has taken a decision on behalf of his ministry, and by extension the government. In addition, the cause of action was not premised on his statement in Parliament, and so his statement could be considered in order to determine whether or not there was a waiver of legal professional privilege. This in a nutshell was the basis on which the

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trial judge came to the conclusion that parliamentary privilege did not attach to the statement of the Minister made in the Senate.

51. In my view the decision of the trial judge on this issue was plainly wrong for two reasons. In the first place, section 55(2) makes no distinction between civil or criminal proceedings brought against the member in his personal capacity or in his capacity as an office holder. In either case, the member's freedom to speak freely and fully in the Parliament is restricted if statements he makes in the Parliament can become the subject of litigation against him. The important public interest protected by the privilege is to ensure that the member can have the confidence to speak freely without fear of civil or criminal proceedings whether in his personal capacity or as an office holder.

52. The second reason has to do with the nature of the privilege itself. In his judgment in **Prebble** at page 332E, Lord Browne-Wilkinson referred to Blackstone's Commentaries on the Laws of England 17th Edition (1830) Volume 1 page 163, where he stated:

> *"the whole of the law and custom of Parliament has its origin from this one maxim, that whatever matter arises concerning either House of Parliament, ought to be examined, discussed, and adjudged in that House to which it relates, and not elsewhere."*

53. In considering the nature of the privilege, and the principle enunciated above by Blackstone, Lord Browne-Wilkinson stated at page 335F:

> *"...The privilege protected by article 9 is the privilege of Parliament itself. The actions of any individual Member of Parliament, even if he has an individual privilege of his own, cannot determine whether or not the privilege of Parliament is to apply. The wider principle encapsulated in Blackstone's words*

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quoted above prevents the courts from adjudicating on issues arising in or concerning the House, viz. whether or not a member has misled the House or acted from improper motives. The decision of an individual member cannot override that collective privilege of the House to be the sole judge of such matters."

54. It follows that once parliamentary privilege attaches to the statement, any issue that arises in relation to the statement falls to be decided by the Privileges Committee of the Senate, not the court. It also follows that the Minister could not override the collective privilege of the Senate, by purporting to waive parliamentary privilege.

55. It follows that since parliamentary privilege attaches to the Minister's statements made in the Senate on 28th February 2012, no issue of waiver of legal professional privilege arises in relation to them.

LETTER DATED 1ST MARCH 2012

56. The day after making his statement in the Senate, by letter dated 1st March 2012, addressed to the President of the JCC, the Minister essentially repeated that based on advice from the Attorney-General's Office, publication of the Request for Proposals for screening potential investors making an investment proposal in respect of state lands at Invader's Bay, was not required to be in conformity with the Central Tenders Board.

57. Before the trial judge, the JCC did not in its written submissions rely on this letter as evidence of waiver of legal professional privilege in respect of the advice. Accordingly, it is not surprising that the trial judge did not refer to the letter in considering waiver of legal professional privilege. However, the letter was annexed to an affidavit of Afra Raymond filed on 31st October 2012, and so was available for consideration by the judge, if he considered it to be relevant.

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58. However, the Minister contends that the JCC ought not to be permitted to rely on the letter of 1st March 2012 as a basis for waiver of legal professional privilege, not having done so in the court below. In the Minister's submission, this court being a court of re-hearing is obliged to hear only the issues litigated in the court below.

59. This submission appears to miss the point that waiver of legal professional privilege was precisely the issue litigated in the court below. However, it was argued solely on the basis of the Minister's statement in the Senate. The letter essentially repeats the gist of the statement made in the Senate. Having concluded that in his statement made in the Senate the Minister waived the legal professional privilege in the advice, it would be astonishing to say the least, if the trial judge had formed a different conclusion if he had directed his attention to the letter in the context of waiver of legal professional privilege. In this case both the issue and the evidence were before the judge, and the judge made a clear determination of the issue in respect of a statement made in almost identical terms. In the circumstances, I can think of no good reason in principle to disallow the JCC from raising the same issue in this court albeit in relation to a different item of evidence that was before the court below.

60. The cases of **Mann**, **Osland** and **British American Tobacco** referred to above, establish that the test for implied waiver of legal professional privilege is an objective one, based on the inconsistency of the conduct of the person seeking to rely on the privilege with the maintenance of the privilege having regard to the circumstances of the particular case. In **Osland**, it was held by the High Court of Australia that there was no inconsistency between disclosing the fact of, and the conclusion of the advice for the purpose of informing the public that the recommendation made to the Governor that the petition be denied, was based on independent legal advice. In **Mann**, the purpose of the disclosure by the Chief Minister was to satisfy the Member of Parliament that the government had acted reasonably and in accordance with legal advice. In such circumstances, the court came to the conclusion that there was no inconsistency between the disclosure of

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the fact of and the conclusion of the advice, while still maintaining legal professional privilege in respect of the advice itself.

61. In this case, the JCC contended that the disclosure of the gist and conclusion of the advice in the Senate, and its repetition in the letter of 1st March 2012, amounted to a waiver of legal professional privilege on the ground that the disclosure was made to secure a tactical advantage for the State. In his judgement, the trial judge found that the effect of the Minister's statement in the Senate "secured a benefit and/or advantage or justification for the [Minister] in so far as his maintenance that the decision to issue the Request for Proposals without ensuring that same had to conform with the provisions of the Central Tenders Board Act, was a sound and legally valid one". In the judge's view the publication of the gist and conclusion of the legal advice was inconsistent with the maintenance of legal professional privilege.

62. In the letter of 1st March 2012 the relevant words used by the Minister were:

> *"...I write to let you know that based on advice from the office of the Attorney-General I can say that the publication of the Request for Proposals for screening of potential investors making an investment proposal on State Lands located at Invader's Bay was not required to be in conformity with the Central Tenders Board Act."* (emphasis added)

63. It is clear that the letter does not expressly set out the content of the advice. The words "based on advice" must be given their ordinary and natural meaning, that what follows is a conclusion or inference derived from the advice by the writer of the letter. The conclusion, one expects, should be consistent with the advice, but to suggest that the words used convey "the gist" of the advice may require a strained construction of the words "based on advice".

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64. The real question is whether or not the reference to the advice in the letter is inconsistent with the maintenance of legal professional privilege. The basis of the waiver of legal professional privilege as argued by the JCC is that the disclosure was made in order to secure a "tactical advantage" for the State by asserting that its actions were legal notwithstanding the JCC's assertions to the contrary.

65. The JCC has not in its submissions attempted to define what this "tactical advantage" is. In my view, I can see no difference between this case, and any situation in which a potential litigant seeks legal advice, acts on it, and informs the other side, that he has acted with the benefit of legal advice, as he is entitled to. Nothing prevents the other party from seeking legal advice of his own, and if the advice is different to that asserted by the other side, taking such action as he is advised. If a potential litigant is forced to disclose his legal advice, simply because the other side challenges it as being wrong, the entire administration of justice will crumble. As the case law has demonstrated, legal professional privilege is a cornerstone of the justice system, and cannot simply be brushed aside in this way. As the cases of **Mann**, **Osland** and **British American Tobacco** illustrate, the courts are slow to find waiver of legal professional privilege, even where the gist of the advice is disclosed.

66. For these reasons, I find no merit in the JCC's submissions that the Minister waived legal professional privilege either in his statement to the Senate or in his subsequent letter to the JCC.

THE PUBLIC INTEREST – section 35 of the Act

67. Section 35 of the Act provides:

> *"35. Notwithstanding any law to the contrary a public authority shall give access to an exempt document where there is reasonable evidence that significant—*

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(a) abuse of authority or neglect in the performance of official duty; or

(b) injustice to an individual; or

(c) danger to the health or safety of an individual or of the public; or

(d) unauthorised use of public funds,

*has or is likely to have occurred **or** in the circumstances giving access to the document is justified in the public interest having regard both to any benefit and to any damage that may arise from doing so." (emphasis added)*

68. In this case no evidence has been put forward by either party with respect to the matters outlined in section 35(a) to (d). However, the use of the word or (which was previously "and" before the section was amended) before the words "in the circumstances", suggests to me that the words that follow provide a free standing basis for providing access where it is justified in the public interest, and the benefits of providing access outweigh "any damage" that may occur from doing so.

69. In **Caribbean Information Access Ltd. v. Minister of National Security** (unreported) Civ. App. No. 170 of 2008, Jamadar JA expressed the view that where a public authority withholds information on the ground that the document is exempt, it must conduct the "public interest override assessment and analysis", under section 35 and indicate to the applicant its reasons for refusal, having undertaken the exercise.

70. It is common ground in this case that the Minister did not inform the JCC that he had carried out the section 35 assessment, and did not provide reasons for his refusal, having done so. In fact, the Minister contends that the section 35 assessment did not arise, since the JCC had not placed before the authority any reasonable evidence of the matters listed in (a) to (d) of section 35. However as

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noted earlier, the last three lines of the section following the word "or", may be construed as a distinct and separate basis for carrying out the assessment. In my view, there is no requirement under this limb of section 35 for the applicant to provide evidence of circumstances to trigger the process of assessment of public interest considerations, since such circumstances may be self- evident.

71. The issue in this appeal is whether, having regard to the circumstances of this case, giving access to the documents requested is justified in the public interest, having regard to any benefit and to any damage that may arise from doing so. This court requested the parties to file further submissions setting out what they perceive to be the benefits and the damage that may arise from providing access to the documents requested.

72. For the JCC, the following benefits were outlined:

(i) Disclosure will promote transparency, accountability and public understanding and involvement in the democratic process in relation to the activities of public authorities.

(ii) The information relates to the legality of the tender process relating to valuable State lands. It is in the public interest to ensure that the tendering process for the development of these lands is conducted in accordance with the law.

(iii) It is in the public interest to dispel rumours of corruption, misappropriation of public funds or mismanagement of taxpayer's money. It will also promote public confidence in public administration.

(iv) The refusal to provide the information can create a perception of misfeasance in the process and may result in a loss of public confidence.

73. The damage that may result from disclosure from the JCC's point of view, is:

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(i) The purpose of legal professional privilege is to serve the administration of justice and safeguard the right of any person to obtain entirely frank and realistic legal advice. The privilege is a fundamental human right long established in the common law. To order disclosure may undermine the administration of justice and violate a fundamental human right.

(ii) To grant disclosure may prevent public authorities from conducting free exchange of views as to their legal rights and obligations, with those advising them without fear of intrusion.

(iii) The previously absolute discretion of the State to withhold or disclose legal advice, will now have to be balanced against the public interest under section 35.

(iv) The High Court could use the judgment of this court to order disclosure of legal opinions provided to the State if no compelling case is made to eclipse public interest.

(v) Loss of credibility. The State's repeated claims as to the conclusion of the advices would be open to public scrutiny.

74. According to the Minister, the sole benefit of allowing access is the public interest in ensuring that public authorities are transparent in their actions and accountable for the decision making process. However, the Minister submits that this consideration is of slight weight, since the Constitution contains provisions to make the Minister accountable to the public through Parliament, which is a much more effective instrument to promote transparency and accountability. In addition the Minister submits that disclosure in this case will undermine the confidentiality which Ministers enjoy with the Attorney-General in relation to legal advice.

75. In the Minister's submission the damage in allowing access far outweighs any perceived benefit. In setting out his concerns the Minister relied heavily on the importance of legal professional privilege in the context of the administration of our system of justice. The main factors outlined were:

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(i) The public interest in the maintenance and preservation of the basic common law right of legal professional privilege which has now been elevated to the status of a fundamental human right: per Lord Hoffman in **R v. Special Commissioners & Ors.** (supra).

(ii) The interest in preserving and protecting legal professional privilege is a "towering public interest": per Lindsay J in **Saunders v. Punch Ltd** [1998] 1 WLR 986 at 998 C-D. Interference with the right to the confidence of privileged communications with one's lawyer seriously undermines the rule of law: **Warren v. Attorney General for Jersey** [2011] 2 All ER 513 at 522.

(iii) The candour of Ministers in communicating with their attorney and law officers may be affected if disclosure is granted.

(iv) There is a built-in public interest in the privilege itself, which commands significant weight.

(v) Legal professional privilege is a fundamental condition on which the administration of justice as a whole rests: **R v. Derby Magistrates Court** (supra).

(vi) The public interest in people being properly advised on matters of law is held to outweigh the competing public interest in making that evidence available: per Lord Rodger in **Three Rivers District Council** (supra) at paragraph 54. It is in the interests of the whole community that lawyers give their clients sound advice, based on the maintenance of the privilege: see Baroness Hale at paragraph 61.

76. In his judgment in considering the public interest the trial judge considered that the purpose of the Central Tenders Board Act is to avoid political interference in the process of awarding contracts which gives rise to an actual or perceived perception of misappropriation or mismanagement of taxpayer's money. He then referred to the case of **Bland v. Canada (National Capital Commission)** 1991 FTR LEXIS 995, where Justice Muldoon opined that it is always in the public interest to dispel rumours of corruption or just plain mismanagement of taxpayer's

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money. The trial judge went on to consider the importance of accountability and transparency in the process and expressed the view that refusal of the information can create a perception that there may have been misfeasance in the process and such a perception can result in the loss of public confidence. On this basis, the judge concluded that it was in the public interest to disclose the documents requested.

77. In my view, the trial judge's analysis of the public interest was flawed for two reasons. Firstly, there was no evidential basis for his analysis of actual or perceived misfeasance, misappropriation or financial impropriety. Further, he did not factor in the importance of maintaining legal professional privilege in the circumstances of this case, and balance it against the perceived benefits of disclosure. In short, he did not carry out the balancing exercise of benefits and damage as envisioned by section 35.

78. I have set out in some detail the various matters outlined by the parties as being the benefits and the damage resulting from disclosure. Broadly speaking, the JCC advocates for disclosure on the basis of considerations of accountability and transparency in the process of inviting proposals for development of state lands in which the public has a legitimate interest. On the other hand, the Minister emphasises the importance of legal professional privilege in the operation of the administration of justice and the likely consequences of an order for access which essentially destroys the basis of the privilege.

79. Legal professional privilege has developed in the common law to the extent that it has now been elevated to the status of a fundamental human right. It is said to be at the foundation of our system of justice, and there is a "towering" public interest in preserving it. On the other hand, there is also the public interest in matters involving the management and allocation of state resources, and in ensuring transparency and accountability in processes involving State resources. This public interest is built into all matters in which the government makes decisions involving investment in development projects. Does this mean that in all such

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matters the government is obliged to give up its right to legal professional privilege, and give access to legal advice it receives and instructions that it gives to its legal advisors be they internal or external to the government? The case law referred to earlier in this judgment suggests that the answer to this question must be in the negative. The question then becomes whether, in the particular circumstances of this case, is there any special feature that causes the balance to lean in favour of depriving the Minister of his fundamental right to legal professional privilege to which he is entitled like any other potential litigant? In my view, there is no such feature in this case.

80. In arriving at this conclusion, I bear in mind the consideration candidly put forward by the JCC on the "damage" side of the scale that is, the danger that the creation of a precedent which abrogates the State's right to legal professional privilege, may well open the floodgates for applications to the High Court for access to legal opinions provided to the State.

81. In concluding that the public interest does not require the Minister to give access to the documents, I bear in mind that the JCC is not without a remedy. If it holds the view that the process is unlawful, it is entitled to seek legal advice of its own and take such steps as may be advised to challenge the minister's decision.

DISPOSITION:

82. I would allow this appeal and set aside the orders of the trial judge.

Dated the 28th day of October, 2016.

R. Narine
Justice of Appeal.

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2013

INDEPENDENT
REVIEW
COMMITTEE

13th March 2013

[COMPILATION OF COMMENTS AND RESPONSES TO STATEMENTS MADE ON REPORT OF THE HIGHWAY REVIEW COMMITTEE]

SUBMITTED BY: DR. JAMES ARMSTRONG
CHAIRMAN

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ECOENGINEERING

REPORT OF THE HIGHWAY REVIEW COMMITTEE
DEBE TO MON DESIR SEGMENT:
SAN FERNANDO TO POINT FORTIN HIGHWAY

Ecoengineering's Comments

This document presents comments by Ecoengineering Consultants Limited on the **"Report of the Highway Review Committee, Debe to Mon Desir Segment: San Fernando to Point Fortin Highway"** (hereinafter called "the Report"). For convenience, the comments are presented in the order in which they appear in the Report. The Independent Review Committee (IRC) Report comments extensively on the EIA prepared by Ecoengineering Consultants. Appendix 3 of the IRC Report lists meetings and consultations held. It should be noted that no meeting was held with Ecoengineering Consultants to discuss or clarify any aspect of the EIA.

Response – Chairman, HRC

The statement that 'no meeting was held with Ecoengineering consultants to discuss or clarify any aspect of the EIA' is misleading.

In the first place, it should be noted that the "Review" was largely a review of all available documentation presented, with an indication that submissions were also invited. The HRC could not reasonably be expected to seek out all parties within the tight timeframe of 60 days. However, specifically in the case of Ecoengineering, we were aware that they were present at a meeting held at NIDCO on 9 January 2013. Many of the issues raised with respect to the EIA were discussed at that meeting as will be borne out in the verbatim notes of the meeting. At that meeting only one instance was recorded of an Ecoengineering intervention, which was to caution that an issue under discussion was the subject of a court matter. The HRC is therefore now surprised that Ecoengineering has decided to comment in some detail.

The HRC also interrogated, in great detail, the meticulous public Administrative Records of the EMA to which reference has been made in parts of the Report. It should also be mentioned that some of the other entities which submitted queries on the HRC's Report were likewise present at the meeting on 9 January, where some of the issues now being raised were identified.

1 Acceptability of the EIA

Statement:

On Page 7, the Report states that: **"The opinion of the HRC is that the EIA was not acceptable and should have been rejected and returned to the Applicant"**.

Ecoengineering's Comment:

This statement is inconsistent with the evaluation of Mr Eden Shand, Resource Consultant to the HRC, who states on Page 182 **"Notwithstanding the above deficiencies, the EIA is acceptable insofar that it contains enough information, though deeply buried, to enable a decision on the project"**.

Response– Chairman, HRC

It has been noted that Ecoengineering, and others who commented on the HRC's Report, selected a statement by a resource consultant – Mr Eden Shand - to challenge the collective finding of the HRC that the EIA was inadequate and should not have been accepted and a CEC granted. Mr Shand was engaged to advise the Chairman and submit a report. It should be noted that this consultant cited numerous incidences of shortcomings, and endorsed many of the findings of specialist-consultants, as is evident in his submission in the Report and written advice to the Chairman. This consultant also advised the HRC to interrogate the Administrative Records of the EMA, which was actually already in progress, and which revealed various discrepancies which could not be reconciled, as has been pointed out in the HRC's Report. The Committee as a whole also had considerably greater access to information, site visits and inter-disciplinary discussions, including the most valuable conclusions of Mr. Shand. Therefore, while, based on the information at his disposal, might consider the EIA as "acceptable", this was not the considered opinion of the HRC. It is important that the Report should be considered more extensively. The Committee stands by its position on this matter.

Response – Environmental Consultant, HRC

My opinion on the acceptability is unchanged.

Response – EIA External Resource Consultant

Ecoengineering is correct. I stand by my own statement, supported by the matrix analysis. The response of the MOWT might be properly characterized as impertinent and dismissive, but that does not mean that their comments were unfounded. The absence of a record of communication between the proponent and the EMA in the period between the MOWT comments and the granting of the CEC does not constitute grounds for rejecting the EIA. More potent grounds must be articulated for the rejection. No EIA Report is perfect. Further study can always be indicated, but when does it end? How long is a piece of string?

2 Adequacy of the Social Impact Assessment

Statement:

On Page 7, the Report states that: **"A closer examination of the treatment of SIA within the EIA also indicates that this was quite inadequate"**.

Ecoengineering's Comment:

In the Review of Social Components of the Environmental Impact Assessment (Section 3 of the Report of Resource Consultants), it is stated on Page 182that **"First of all it must be acknowledged that the TOR, though thorough, did not require a separate social impact assessment (SIA)"**. In that circumstance, we question the approach used in Chapter 3 (Page 67 and following) of evaluating selected sections of the EIA against SIA Best Practice since the EIA does not contain an SIA.

Instead, when the Human impact sections of the EIA are evaluated on the basis of the requirements of the TOR (see Pages 159 and 160 of the Report), 23 of 29 were indicated as having been completed. For three others, the notation is that some information is provided (but not sufficient in the view of the Resource Consultants), and three were noted "the consultant did not receive or review the EMP". The reason for this is not clear, since the digital copy of the EIA which was submitted to the HRC contained the EMP in Appendix Q.

Response – SIA External Resource Consultant

The absence of a specific and separate SIA is not the issue here. A level of social assessment was undertaken and it has to meet a standard, which could be nothing other than SIA best practice. It is not uncommon for the SIA to be subsumed under the EIA as it was in this case. However, the work is no different.

There were two levels of evaluation. Page 159-160 merely ascertained that the tasks were completed. The following section evaluated the quality of the work completed. Therefore the focus is not on the fact that they completed the work; it is on the quality of the work. The point about the EMP is not a big issue unless it contained information that would change the nature of my evaluation.

Response - SIA Consultant, HRC

Our report, while acknowledging that a separate SIA was not required, noted in considerable detail the elements of an SIA that were in fact required by the TOR and which followed best practice. The following is a direct quotation from our Report:

For example, the TOR in Section 1.2 describes the objectives of the environmental assessment as follows:

> *"The scope of the environmental assessment will be to determine the extent of environmental and **social impacts arising from the proposed highway alignment from Debe to Mon Desir** and at the same time **examining the cumulative impacts from ongoing and other proposed development for the southwest Trinidad.** It will also include a management plan to provide **mitigation measures** to deal with the negative impacts, **a monitoring plan** to gauge effectiveness of mitigation, and an assessment of the risks and hazards associated with the activity. **The timely provision of adequate data to support the environmental assessment process is important.**"*

The highlighted phrases point to key elements of an adequate SIA.

This therefore cannot be the basis for questioning "the approach used in Chapter 3 (Page 67 and following) of evaluating selected sections of the EIA against SIA Best Practice".

Further, our mandate required that we would examine the SIA elements from two viewpoints, in keeping with our mandate:

The actual SIA elements contained in the EIA report are now examined from two viewpoints v

1. To what extent it conforms with the requirements of the TOR and to "best practice".
2. To what extent it addresses issues raised by the HRM.

We further went on to outline why the Ecoengineering study was considered to be inadequate as follows:

With respect to the second major document containing data relevant to an SIA *(Appendix L Attitudes to the Proposed Highway*), three features are noted which make the study inadequate viz:

1. Inappropriate use of data gathering techniques
2. Restriction of the target groups of the surveys to those directly in the ROW and who were earmarked to be displaced.
3. Failure to clearly identify impacts in such a manner as to be able to quantify them for cost benefit analysis and for purposes of mitigation.

Note that only a part of item 3 above (quantification for cost benefit analysis) was not required by the TOR. Nothing of substance was mentioned with respect to mitigation measures resulting from SIA risks.

Finally even if 23 of the 29" elements were "completed", the EMA was clearly not satisfied with the SIA elements (by whatever name called). We quote the EMA in our report as follows:

The limitations of the SIA related reports of the EIA were recognised by the EMA which noted in its response (RAR) to the CEC submission that:

.....

mechanisms were not identified, neither was the process outlined. The EIA report required a more in-depth investigation and analysis of the socio cultural environment. It is suggested that a detailed justification be provided for the methodology employed in the study."

On the basis of the above, we maintain that the SIA elements of the study were clearly inadequate even if the analysis was restricted solely to what was required by the TOR.

Response – EIA External Resource Consultant

The term "Social Impact Assessment" should never have appeared during a review of the EIA. However, once the term was used, it has to be taken as synonymous with "Socio-cultural Impact Assessment. EIA TOR do not normally use the SIA term. A proper SIA is often an exercise of the same magnitude as a full-blown EIA. This is because it takes in economic impacts. EIAs do not include economic impacts. That is why that dimension is referred to as socio-cultural as opposed to socio-economic. Economic feasibility is done after engineering feasibility and before environmental feasibility. Cost-benefit analysis does not belong in an EIA. I have, therefore, to agree with the Ecoengineering comments.

3 Importance of the Oropouche Lagoon

Statement:

On Page 43, the Report lists among the issues raised by the HRM: **"The EIA ignoring the importance of the Oropouche Lagoon as one of the country's most significant wetlands and its use in the context of the National Wetland Policy"**.

Ecoengineering's Comment:

This statement is inaccurate. The importance of the lagoon is clearly outlined in Section J.6.1 of Appendix J (Ecology) the EIA Report. The Oropouche lagoon is also the subject of Appendix K (IMA Wetland Report) of the EIA Report. Finally, the National Wetlands Policy is clearly described in Section 2.4.3 of the EIA Report.

Response –Environmental Consultant, HRC

Ecoengineering included information as stated in their comments above. The problem with the EIA is that the information is presented in isolation and is not utilized to properly assess the impacts of placing the Highway within the wetland in the ways described within the HRC report. What has not been done for example, with regards of the Wetlands Policy is to discuss whether the proposed project conforms to the tenets of the Wetlands Policy. The presentation from the HRM did this examination and was

able to demonstrate that the Oropouche Lagoon in this case, was not treated as it should have been in accordance with the National Wetlands Policy.

We also go back to the fact that the entire Oropouche Lagoon should have been included in the Defined Study area in Section 4.1.1 if the interpretation of the EMA's TOR is to be properly applied whereby it stipulates:**"the study area should be determined by the extent of direct and indirect impacts on the physical, biological and social environments".** The reason for that stipulation is the expectation that the direct and indirect impacts on these environments would be properly assessed.

The brief reference to a 'Wider Study Area' much later in Chapter 4 (in 4.3.6) and presentation of information on these areas in appendices does not demonstrate treatment of these areas as high in priority. The EIA further did not properly assess impacts on these resources as Ecological units in Section 5. While the IMA report lists potential impacts (and in going further here, I am unaware of the TOR that the IMA was given to fulfil), it does not assess "the extent" of them and had it been done, the place for this was in Section 5.

Response - Hydrology Consultant, HRC

This statement is from HRM, same for 4-8

Response – EIA External Resource Consultant

Both the HRM and Ecoengineering deem the Lagoon to be an important wetland. Has either articulated why this ecosystem is important and what ecosystem services are derived therefrom?

4 Siparia Forest Reserve

Statement:

Again on Page 43, the Report lists among the issues raised by the HRM: **"The fact that the Siparia Forest Reserve is in close proximity to the Highway and should have been included in the Study Area"**.

Ecoengineering's Comment:

This is inaccurate. The forest reserve is included in the "wider study area" as described in Table 4-1, Section 4.1.1 of the EIA Report and Section J.6 of Appendix J (Ecology).

Response –Environmental Consultant, HRC

The response given -with respect to Comment 3 above also applies. The 'wider study area' is only referred to briefly in 4.3.6 and in Appendix J and not in Section 4.1.1 which is headed Definition of the Study Area. Once again the Oropouche Lagoon should have been included as a unit within the Defined Study Area and the impact analysis should have treated it as such and it did not. Further, even within Appendix J, the boundaries of Siparia Forest Reserve are not mapped and once again the ROW is used as the sampling area.

Our substantive criticism is that the EIA does not assess the extent of impacts of the Siparia Forest Reserve as an Ecological Unit.

Response – EIA External Resource Consultant

The important question is whether or not the impact of the highway on the Reserve was considered, whether or not it was in the "study area" or "wider study area". Was there any impact at all? Significant or otherwise? My guess is that the Siparia Forest Reserve would not have appeared on the radar screen in a proper scoping exercise.

5 Human Crossings of the Proposed Highway

Statement:

Also on Page 43, the Report lists among the issues raised by the HRM: **"The health and safety issues associated with likely human crossings across the proposed highway"**.

Ecoengineering's Comment:

This statement is inaccurate. The Highway Design clearly describes fencing of the highway as a safety aspect (see Section3.4.5.3 of the EIA Report). In addition, the design provides a footbridge in the Johkan Road area (see Section 3.2.13 of the EIA Report).

Response –Environmental Consultant, HRC

What the HRM referred to in this point was that residents would attempt to illegally cross the highway in order to reach relatives. I think there needs to be some clarification on the type of fencing that it proposed. A wall for example would be much more of a deterrent than a chain link fence. This option has been used in the past on the Cocorite stretch and residents made holes in the fence to cross it anyway.

Response – EIA External Resource Consultant

Whether these design features adequately deal with health and safety issues could best be answered by the engineers.

6 Crossing of Energy Pipelines

Statement:

On Page 47, the Report list among the deficiencies highlighted by the Ministry of Energy and Energy Industries: **"Lack of proper discussion of treatment of crossings with energy pipelines"**.

Ecoengineering's Comment:

This is inaccurate. The EIA Report documents:

- A HAZID was included in the EIA for the crossing of natural gas pipelines along the route (see Section 6.2 and Appendix O).

- Consultation was held with NGC, bpTT, Petrotrin and PPGPL on the question of crossing of pipelines (see Section 3.3.9.4 and 3.3.9.5 and Appendix C).

Response- Hydrology Consultant, HRC

This statement was made by the Ministry of Energy as part of a set of main concerns brought forward by the technical review committee. These statements are just listed here, for completeness, and are NOT the position/opinion of HRC.

The MEEI's concern as written, was specifically with regard to consultations with itself as the Regulator of energy pipelines

Response – EIA External Resource Consultant

What constitutes proper discussion is another matter for the engineers.

7 Consultation regarding Abandonment of Wells

Statement:

Also on Page 47, the Report lists among the deficiencies highlighted by the Ministry of Energy and Energy Industries: **"No consultation with regard to abandonment of wells"**.

Ecoengineering's Comment:

This statement is inaccurate. Consultation proceeded as follows:

- On June 10, 2005, a letter was sent to the MEEI during the conduct of the Environmental Feasibility Study to confirm that setback distances from existing wells (operating and abandoned) would be applicable to this highway extension project.
- As stated in Section 3.3.10.6 of the EIA Report, no response had been received as of the time of issuing that document.

Response –Environmental Consultant, HRC

I cannot comment on the letter as I have not seen it and am not certain the level of detail that it included. The concern was raised by the MEEI in its role as EIA reviewer and not the HRC, however, from my personal knowledge of the operations of the MEEI, it is quite easy to make appointments with their Engineers to discuss matters of this nature notwithstanding the lack of response to the letter.

Response – EIA External Resource Consultant

Ecoengineering could have re-opened the matter during the EIA preparation, which came after the earlier Environmental Feasibility Study. Therefore, there was no consultation.

8 Mitigation of Slope Instability

Statement:

Again on Page 47, the Report lists among the deficiencies highlighted by the Meteorological Office: **"Need for mitigation measures to deal with the levelling and cutting of slopes"**.

Ecoengineering's Comment:

In fact, mitigation measures against slope instability are listed in Section 5.3.1.2 of the EIA Report.

Response –Environmental Consultant, HRC

This concern was raised by the Met Office in its role as a reviewer and not by the HRC. My comment is that there should have been some more detail with regard to mitigation measures stated and at least some demonstration that the technical team had developed some level of design for slope conservation measures given the level of design seen with regard to the roads and intersections.

9 Reference to Scarlet Macaw

Statement

On Page 59 the report incorrectly states**"..the Scarlet Macaw was not included as a rare/vulnerable/threatened species, however it is listed on Appendix I of Convention on International Trade in Endangered Species (CITES)."**

Ecoengineering's Comment:

This statement is incorrect since the species is clearly referenced as CITES listed in Sections 4.3.5 and 5.3.2.6 of the EIA.

Response –Environmental Consultant, HRC

Ecoengineering's comment is correct and therefore the statement made on Page 59 is incorrect.

The correction has been made in the revised report by deleting the incorrect statement.

10 Definition of Study Areas

Statement

On Page 55 it states that **"The area studied is defined differently for each environmental element studied which is highly irregular and poor practice"**

Ecoengineering's Comment:

In the TOR, the EMA indicated that **"the study area should be determined by the extent of direct and indirect impacts on the physical, biological and social environments".** The rationale for defining different study areas is to recognize that different impacts have different extents. For example, the study area for stream flow and flooding is likely to encompass the entire catchment. In contrast the study area for noise will only be a relatively narrow band along both sides of the highway. The use of different study areas for different environmental

components is recognized for EIAs conducted in other jurisdictions: For example, in Canada guidelines prepared for an EIA for a Copper Mine Project clearly indicates that **"Scoping establishes the boundaries of the EA and focuses the assessment on relevant issues and concerns. By defining the spatial and temporal boundaries, a frame of reference for identifying and assessing the environmental effects associated with the Project will be established. Different boundaries may be appropriate for each VEC."** A VEC is defined as Valued Ecosystem Component.

(Ref: Canadian Environmental Assessment Agency and Ontario Ministry of Environment - Environmental Assessment and Approvals Branch, 2011. Guidelines for the Preparation of An Environmental Impact Statement Pursuant to the Canadian Environmental Assessment Act and Ontario Environmental Assessment Act For The Marathon Platinum Group Metals and Copper Mine Project.)

Response –Environmental Consultant, HRC

Firstly, the Ontario system is much different from Trinidad's whereby different 'classes' or levels of EIA's are used for different types of projects (e.g. Municipal projects like water and sewage projects use a much less detailed EA than do projects in rural environments) so that any reference to their system cannot be taken in isolation.

Secondly, it is common for study boundaries for different environmental components to be defined and mapped differently and in configurations that best assess that component, however, a Defined Study area in practice refers to the overall boundary within which the entire EIA study is undertaken. It would be easy to enter a debate about terminology here and what is done internationally (which also varies from region to region). What remains is the fact that the area selected as the Study area in Section 4.1.1 was grossly inadequate and created a poor basis for impact assessment, particularly for a project to be introduced into a geographical area with two sensitive ecological units.

Response - Hydrology Consultant, HRC

This whole issue of Study Area Definition is not clear to me. There is one overall "Project Impact Study Area". However, while assessing the different environmental elements, it makes sense to use different "element impact study areas" with boundaries per element for a project at this scale, purely for practical mapping reasons.
The main question is if this approach resulted in "Environmental Element Impact Study Areas", which boundaries are too limited to include all the direct and indirect impacts for that specific element.

Response – EIA External Resource Consultant

Ecoengineering makes a reasonable point

11 Geological Survey

Statement

Page 59 states that **"A Geological (as differentiated from soil engineering) Survey along the highway route should be done".**

Ecoengineering's Comment:

Information on geology was accessed from published sources and provided in Section 4.2.2 of the EIA Report. Field geology studies have not typically been done as part of EIAs submitted to the EMA.

Response –Environmental Consultant, HRC

The suggestion of a field geological survey was not directed at the EIA preparers but rather to the technical team, should the highway move forward.

12 Proposed Mitigation Measures

Statement

There is a comment on page 62 Section 2.5.7.1 which states that **"The EIA seems to have considered mitigation measures in passing".**

Ecoengineering's Comment:

Mitigation measures were clearly identified and highlighted in the EIA report. Appendix Q (Environmental Management Plan) also describes mitigation measures in the context of action by, timing, the need for specialized equipment, any necessary competence and training and estimated cost. This Plan also describes the means for verification of the effectiveness of these mitigation measures.

Response –Environmental Consultant, HRC

I'll take the opportunity here to expound on the comment "in passing" and perhaps could have chosen different words in my initial comments, though my opinion remains the same.

The Mitigation Measures described in the Section 5 were in most cases, written in very generic terms with extensive use of the word "should", which gives the impression that in most cases the measures are posed most often as suggestions rather than commitments to be undertaken by the proponent. The way that they were written gives the impression that the mitigation measures have not been well fleshed out and agreed with the technical team.

It is preferable at EIA stage to provide technical descriptions and details, including mitigation measures such as retaining walls, etc. It is possible however, that the EIA preparers had not received details from the technical team when they were preparing the EIA which resulted in the cursory discussion of mitigation measures.

13 Environmental Economic Study

Statement

On Page 108 it is stated that **"Economic Valuation is a mandatory aspect of an EIA and SIA to determine the direct and indirect cost of a project".**

Ecoengineering's Comment:

An Economic valuation is not requested in the TOR for this project, nor in other TORs for other projects. This is acknowledged on page 170 of the Report which recommends **"amend the terms of reference to require an economic assessment..."**

Response - Cost/Benefit Analysis Consultant, HRC

Acknowledgement is made of Ecoengineering's Comment that the Economic Valuation was not requested in the TOR for the project. However the position is maintained that:

a) in the context of sustainable economic development which is one of the stated objectives of this project, social, economic and environmental costs and benefits (direct and indirect) must be factored into the decision-making process; and
b) given the extraordinary financial outlay for this project

It was a grave "oversight" that the TORs did not explicitly require an economic assessment given the range of possible direct and indirect social and environmental that arise from a project of this nature. At a meeting with the HRC Team on January 9th2013 the President of NIDCO stated that the issue of quantifying costs and benefits (for the project) was not done since it is a "large" issue. He also noted that the project has "tremendous benefits". In the absence of details it is not known what these benefits might be and whether they do in fact outweigh any direct and indirect costs. These details can only be obtained via economic valuation and economic assessment.

On this score the World Bank (1998) noted that:

Successful economic development depends on the rational use of natural resources and on reducing as far as possible the adverse environmental impacts of development projects. Environmental assessment (EA) is a primary tool for achieving this objective,

by inserting critical environmental information into the process of project identification, preparation, and implementation.

Economic analysis, by comparison, is employed to determine if the overall economic benefits of a proposed project exceed its costs, and to help design the project in a way that produces a solid economic rate of return. **Adverse environmental impacts are part of the costs of a project, and positive environmental impacts are part of its benefits. Consideration of environmental impacts, therefore, should be integrated with the other aspects of the project in the economic analysis to the extent possible.**

"…Economic analysis… is employed to determine if the overall economic benefits of a proposed project exceed its costs, and to help design the project in a way that produces a solid economic rate of return. Adverse environmental impacts are part of the costs of a project, and positive environmental impacts are part of its benefits. Consideration of environmental impacts, therefore, should be integrated with the other aspects of the project in the economic analysis to the extent possible…"

Environmental economic analysis can play an important role at three main stages [of a project]: (i) in the assessment of the impacts of a proposed project and its various alternatives; (ii) in the analysis of preventive or mitigative options; and (iii) in project appraisal, once a specific alternative has been selected. In the case of both economic analysis and environmental assessment, the important distinction is between what would happen with the project and without the project, not other changes that may be happening over time.

Response – EIA External Resource Consultant

Ecoengineering is correct.

14 Detailed Designs as the Basis for the EIA

Statement:

The EIA prepared for the Debe to Mon Desir highway segment is referred to as a **"preliminary EIA"** on Pages 134 & 137.

In addition, the Report contains the following statements concerning the need for Detailed Designs as the basis for an EIA:

- **"It is unusual to grant a CEC without detailed plans and designs. …"** (pages 123 & 134), and

- **"… a Final EIA should be based on detailed designs. ..."** (page 139).

"At most a preliminary CEC can be granted based on preliminary designs...." (page 139).

Ecoengineering's Comment:

Reference to a Preliminary EIA is incorrect, since that term does not appear anywhere in the CEC Rules. Similarly, the CEC Rules make no provision for a preliminary CEC.

The rationale for undertaking the EIA early in the project cycle is to allow the findings of the EIA to influence the final designs of the project. It must be noted that the statement that the EIA must be based on detailed designs goes against international "good-practice" for EIAs; as shown in the following quotations:

1) Information on the website of the Food and Agriculture Organization states: **"To be of most benefit it is essential that an environmental assessment is carried out to determine significant impacts early in the project cycle so that recommendations can be built into the design and cost-benefit analysis without causing major delays or increased design costs. Scoping is the process of determining which are the most critical issues to study and will involve community participation to some degree. It is at this early stage that EIA can most strongly influence the outline proposal. Detailed prediction and mitigation studies follow scoping and are carried out in parallel with feasibility studies"**.

(Ref: http://www.fao.org/docrep/V8350E/v8350e06.htm)

2) The UNEP Environmental Impact Assessment Training Resource Manual (Second Edition) describes the EIA Process as **"beginning as early as possible in the pre-feasibility stage"**.

(Ref: http://www.unep.ch/etu/publications/EIAMan_2edition_toc.htm)

3) The website of the Environmental Management Bureau, Government of the Philippines, indicates **"During the preparation of the project Feasibility Study, the proponent initiates the detailed environmental impact assessment"**.

(Ref: http://www.emb.gov.ph/portal/eia/Aboutus/EIASystem/EIAandtheProjectCycle.aspx)

4) A presentation on the website of the United Nations Environment Programme lists one of the Key Operating Principles of Good EIA Practice as: **"begin early in the project cycle"**.

(Ref: http://www.unep.ch/etu/publications/EIA_ovrhds/top01.pdf)

5) Notes of a 2007 Short Course organized by the United Nations University Geothermal Training Program indicate: **"The (EIA) study therefore requires a multi-disciplinary approach and should be done very early at the feasibility stage of a project. In other words, a project should be assessed for its environmental feasibility"**.

(Ref: http://www.os.is/gogn/unu-gtp-sc/UNU-GTP-SC-05-28.pdf)

Response-Hydrology Consultant, HRC

The EIA has to be done early in the project design cycle to determine significant impacts so that recommendations can be built into the design and cost benefit analysis without causing major delays or increased design costs. The required "detailed prediction and mitigation studies" are to follow the scoping and "are to be carried out in parallel with feasibility studies". It is the opinion of the HRC that even though the hydrological studies were considered adequate to inform the preliminary technical design of the highway concerning dimensions for crossings of watercourses, the studies were considered insufficiently detailed to inform the impact assessment on the sheet flows on the flood plains, the potential impacts on flood patterns both upstream and downstream, the impacts on (ground) water quality as well as the potential resulting impacts on the existing ecology. It is in this context that the term "preliminary EIA" was used (even though this is not a term in the CEC rules) as the EIA was based on preliminary design and certain impacts and their mitigation measures were not yet sufficiently assessed.

Response –Environmental Consultant, HRC

I am not certain where the reference to this EIA being a 'Preliminary EIA' originated in our report. Eco is correct that it does not appear in the CEC Rules. It is true however, that in our system the EIA reviewed by the EMA is typically based on detailed designs or at least detailed descriptions (many of which were not presented in this EIA, particularly with regard to mitigation measures). It does not allow for EIA at different stages.

I do not agree with Ecoengineering's use of citing here, as they seem to be very selectively supporting their concerns. It is true that in best practice the EIA process should begin early to assist with early decision making. It is also true that EIAs in different systems begin with a ''Preliminary" EIA or Environmental Feasibility Study and are augmented at different stages of design (e.g. at feasibility, then front end design, then detail design) to allow for more in-depth assessment of impacts and presentation of mitigation measures, as more detail evolves in a project.

There is no 'one way' defined internationally for this process, though there are threads of similarity amongst developed regions, NGOs and international associations. It is however, incumbent on this committee to recommend what may be the best way forward for Trinidad and Tobago, which may in fact require the amendment of the CEC Rules and other related legislation (e.g. TCPD) to allow for changes.

Response – EIA External Resource Consultant

I do not see the connection between the selected quotes from the HRC Report and the Ecoengineering defence.

NIDCO LETTERS: Dr Carson Charles

21.2.2013	Letter to Afra Raymond
25.2.2013	Cover Letter to Afra Raymond
25.2.2013	Edited Letter to Afra Raymond

NIDCO
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Partnering to build Modern Infrastructure

21 February, 2013

Mr. Afra Raymond
President
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Professional Centre Building
11-13 Fitzblackman Drive
Wrightson Road
Port of Spain

Re: Report of the Highway Review Committee

Dear Mr. Raymond

The National Infrastructure Development Company Limited (NIDCO) has made a preliminary study of the document conveyed to us by email and hard copy entitled: "Report of the Independent Review Committee of the Debe to Mon Desir Segment of the San Fernando to Point Fortin Highway, submitted by Dr. James Armstrong, Chairman." Further to email correspondence exchanged between NIDCO and the Joint Consultative Council (JCC), we now present the following general and specific comments:

1. The document is a collection of papers prepared independently by consultants with an executive summary prepared independently by the Committee Chairman. This is procedurally flawed, as it does not result in a proper committee report. Instead, the several papers prepared should be considered working papers or background documents and a cohesive document representing the findings, analyses and recommendations of the committee as a whole and signed by all committee members, except where minority reports are presented, should be prepared and presented to the J.C.C. for transmission to NIDCO.

2. No consideration has been given to the fact that a $5.2 Billion construction contract exists between NIDCO and an international contractor to build the highway and there was neither protest nor appeal by the Highway Re-route Movement, or any other group or individual against the grant of Certificate of Environmental Clearance (CEC) by the Environmental Management Authority (EMA) within the stipulated time, or the announcement of the project by the Government in 2010, or the symbolic turning of the sod by the Prime Minister in January 2011, or the well publicised receipt of funds and signing of the contract by NIDCO in July 2011.

   There is also no evidence presented to the effect that NIDCO has proceeded in violation of any law. In these circumstances it is professionally improper and entirely unreasonable for the consultants to conduct these analyses and arrive at recommendations without giving consideration to the very significant financial and other consequences of suspending or truncating any portion of the contract. It is indeed amazing that this matter was not even enquired into by the consultants.

Board of Directors: Mr. Krishendath Ramoutar (Chairman)
Professor Winston Suite (Deputy Chairman), Mrs. Mandavi Tiwary, Mr. Hollis J. Eversley, Mr. Rabindra H. Outar, Ms. Reneelise Khan

3. In the Executive Summary, 'Historical Context' (page 3 of the report), it is stated that "A Brazilian Company, Construtora OAS Ltda (OAS) was procured in 2011…". The procurement of the company was actually conducted in early 2010 and construction started under a Letter of Intent in March 2011, with a planned completion date of March 2015. On page 4, correction should be made to the second paragraph to indicate that the HRM wrote to the Prime Minister in February 2012 and not February 2011. This is important as the matter was highly publicised and the route presented in detail at a public meeting in December 2010, followed by start of works in March 2011 and signing of the contract in July 2011, well before the first expression of protest by the HRM more than a year after public presentation of the route.

4. In the Executive Summary (page 5 of the report), it is reported that "In separate discussions it was also agreed with NIDCO that work in other areas would be scaled back pending the receipt of the report of the Review Committee". This statement is false and should be deleted as there was no discussion or agreement between NIDCO and the JCC or the HRM on the other segments of the highway.

5. Urban and Regional Planning – NIDCO agrees with the view that the entire highway needed to be planned as part of a comprehensive land use/transportation planning exercise for South Trinidad. NIDCO asserts that this was indeed so and cites the National Physical Development Plan and the South West Regional Plan wherein the highway was recognized as an integral element. It should be noted that in no plan or project document is 'Debe to Mon Desir' recognised as a coherent entity, except in reference to the HRM protest group.

6. Environmental Impact: The HRC has concluded that the EIA was not acceptable although it addressed the requirements of the Terms of Reference (TOR). This is not logical as the EIA is required to satisfy the TOR. The HRC has unfairly condemned the professional work of the consultants that carried out the EIA. Instead, the HRC should have enquired of the EMA as to its reasons for granting the CEC in spite of what were deemed to be inadequate and dismissive responses by the Ministry of Works and Infrastructure in 2009/2010.

   Indeed, the HRC may be accused of suggesting some level of impropriety in the conduct of the affairs of the EMA. It is not acceptable to make an accusation that the EMA improperly 'relented' without having given the EMA an opportunity to respond in this matter. Given the far reaching implications of seeking to derail a project on the grounds that the body with statutory authority for granting approval to proceed was guilty of improper conduct in discharging its responsibilities, the HRC has a professional duty to seek clarification on this matter before arriving at its conclusions.

7. Human Settlement: It is to be noted that Outline Approval has been granted by the Town and Country Planning Division for the Petit Morne site. Cabinet, and by implication the Minister with responsibility for Planning, has also approved the site for residential development, and, inter alia relocation of persons affected by the highway acquisition process. The Ministry of Works and Infrastructure is currently preparing an application for Final Planning Permission and NIDCO does not intend to relocate persons to the site before these approvals are received. It is difficult to see how this can constitute a "flagrant flouting of the statutory requirements".

The HRC may also wish to take into consideration the fact that the only organization representing residents to be relocated in 2010 when the project was launched was the Debe to San Francique Highway Action Committee. This group was requested to identify preferred sites for relocation. The first area of preference was a site at Hermitage. When this proved unsuitable the group selected Petit Morne as its alternate preferred site. It cannot be appropriate for the HRC to select its own site at Golconda as more suitable without reference to the views expressed by the affected persons at the time when these matters were being addressed.

8. Traffic and Transportation: This is the primary purpose of the highway, yet it is treated as a minor issue in the report. The Ministry of Works and Infrastructure and NIDCO have the responsibility to meet the traffic and transportation needs of the South Western Region of Trinidad, along with other areas of the country. It is because of this mandate that there are adverse impacts on the environment and on settled communities that must be minimized and mitigated.

9. Hydrology and Hydraulics: The comments regarding the Design-Build approach are out of place here as they reflect opinions on procurement policy and are unrelated to the review of hydrology and hydraulics. In a situation where complete engineering designs existed for the highway before the design-build contract was awarded, these comments cannot possibly follow from any logical argument.

10. Land Tenure and Acquisition: NIDCO assures the Committee that there is no instance where entry on to property has been made without legal authority. It should be noted that under Section 3 Notice authority is granted to carry out surveys and other relevant investigations. Sections 4 Notice has been published for all areas released to the contractor. The offending statement is inflammatory and prejudicial and has been made without any evidence whatsoever. It should be deleted.

11. Conclusion (page 8 of the report) : The HRC cannot professionally justify the statement that "A significant concern …is whether or not the lawful authority …is conforming to due process…" with not a shred of evidence to support such a statement. Not one case has been presented where due process was not followed. This is a serious matter in that it appears to cast doubt on whether the constitutional rights of persons are being abridged during the acquisition and other processes in the absence of any information that this is so. NIDCO assures that due process is being fully adhered to in respect of all legal requirements and requests, that the statement be deleted.

12. Recommendations (page 9 of the report) : The recommendations constitute a list of instructions to stop all work along an entire segment of roadway, which does not itself constitute a single community, without regard to consequences for the construction contract and the cost to Government and tax payers. There is no attempt to identify areas of this segment where there may be no significant environmental or other danger. No account is taken of the balance to be made between the risks associated without proceeding, stopping all work or proceeding in particular areas. Without considering and comparing these risks, the HRC is being professionally irresponsible in the presentation of its recommendations.

In addition to the above comments, several comments, some of which were previously sent by email, are hereto attached for the consideration of the J.C.C. and its technical committee, as follows:

- ✓ Comments by Ecoengineering Consultants
- ✓ Comments by Trintoplan Consultants Ltd.
- ✓ Comments by Mr. Kelvin Ramkissoon, Attorney-at-Law
- ✓ Comments by Mr. Doolar Ramlal – Director, Environmental Unit, Ministry of Works and Infrastructure
- ✓ Comments Mr. Steve Garibsingh – Vice President, Engineering & Programme Management- NIDCO

Yours sincerely

Dr. Carson Charles
President

NIDCO
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Partnering to build Modern Infrastructure

25 February, 2013

Mr. Afra Raymond
President
Joint Consultative Council
Professional Centre Building
11-13 Fitzblackman Drive
Wrightson Road
Port of Spain

Re: Report of the Highway Review Committee

Dear Mr. Raymond

I refer to our letter dated 21 February, 2013. Please note that item #10 of the said document is to be replaced by the following:

10. Land Tenure and Acquisition (page 8 of the report): NIDCO assures the Committee that there is no instance where entry on to property has been made without legal authority. It should be noted that under Section 3 Notice authority is granted to carry out surveys and other relevant investigations. However, it is common practice for investigations and studies to be carried out prior to the start of the acquisition process for the purpose of acquiring a CEC, preparing project, estimates or conducting feasibility studies. In such a situation entry would not be made onto any property without the permission of the owner or occupier. It should also be emphasized that Section 4 Notice has been published for all areas released to the contractor.

    The offending statement is inflammatory and prejudicial and has been made without any evidence whatsoever. It should be deleted.

    By way of further clarification, it should be noted that the land acquisition consultant made several comments (pages 145 to 149 of the report) which must be carefully examined.

Firstly, the case presented that "NIDCO has failed to follow due process…" is completely unacceptable (page 144 of the report).

At (a) : As explained above, social surveys and investigations are routinely carried out without the publication of Section 3 Notices in the early stages of any project, provided that persons' properties are not entered into without their consent. The HRM did not exist six years or even three years ago and no complaint has been received of such unauthorized conduct from the community groups which then existed. In any event, such preliminary work does not form part of the acquisition process.

At (b) : At no point was entry made for construction purposes without Section 4 authority. NIDCO challenges the consultant to identify any such case before making remarks **designed to cast doubt in a court of law** over Government's commitment to lawful acquisition of private property.

At (c), (d), (e) : These matters reflect differences of opinion between the consultant and NIDCO over policies which should govern the treatment of encroachers and squatters. However, they bear no relationship whatsoever to the matter of due process insofar as the acquisition process is concerned.

Secondly the consultant indicated that "up to the time of writing of this repor', NIDCO had not provided written documentation to the HRC Consultant on land acquisition and re-settlement measures in the affected communities". However, no such request has been made to NIDCO in writing and no indication that this was required, has been conveyed to the President of NIDCO at any time. Indeed the only request made by the JCC for responses to specific items of concern was by way of an Aide Memoire sent by Ms. Desiree Arthur Lopez on behalf of the JCC to Dr. Charles on 09 January, 2013, wherein it was stated "This is not intended to solicit any written response from NIDCO or HRM".

Thirdly, the consultant stated that his research findings suggest the following

"3) A lack of transparency in the calculation of compensation for some who have agreed

to be relocated.

4) Inconsistency in the quantum of payments made to various property owners"

It needs to be emphasized that all acquisition procedures followed and all settlements arrived at up to the time of the delivery of the HRC report were made under the process followed previously for other highway acquisitions and **all negotiations were carried out by the Commissioner of Valuations.** Clearly the consultant's comments were based on no relevant information whatsoever and are completely unrelated to any actions of NIDCO.

I have accordingly amended NIDCO's letter to the JCC as attached.

Yours faithfully

Dr. Carson Charles
President

National Infrastructure Development Company Limited

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Port of Spain, Trinidad, West Indies
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25 February, 2013

Mr. Afra Raymond
President
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Professor Winston Suite (Deputy Chairman), Mrs. Mandavi Tiwary, Mr. Hollis J. Eversley, Mr. Rabindra H. Outar, Ms. Reneelise Khan

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4. In the Executive Summary (page 5 of the report), it is reported that "In separate discussions it was also agreed with NIDCO that work in other areas would be scaled back pending the receipt of the report of the Review Committee". This statement is false and should be deleted as there was no discussion or agreement between NIDCO and the JCC or the HRM on the other segments of the highway.

5. Urban and Regional Planning – NIDCO agrees with the view that the entire highway needed to be planned as part of a comprehensive land use/transportation planning exercise for South Trinidad. NIDCO asserts that this was indeed so and cites the National Physical Development Plan and the South West Regional Plan wherein the highway was recognized as an integral element. It should be noted that in no plan or project document is 'Debe to Mon Desir' recognised as a coherent entity, except in reference to the HRM protest group.

6. Environmental Impact: The HRC has concluded that the EIA was not acceptable although it addressed the requirements of the Terms of Reference (TOR). This is not logical as the EIA is required to satisfy the TOR. The HRC has unfairly condemned the professional work of the consultants that carried out the EIA. Instead, the HRC should have enquired of the EMA as to its reasons for granting the CEC in spite of what were deemed to be inadequate and dismissive responses by the Ministry of Works and Infrastructure in 2009/2010.

   Indeed, the HRC may be accused of suggesting some level of impropriety in the conduct of the affairs of the EMA. It is not acceptable to make an accusation that the EMA improperly 'relented' without having given the EMA an opportunity to respond in this matter. Given the far reaching implications of seeking to derail a project on the grounds that the body with statutory authority for granting approval to proceed was guilty of improper conduct in discharging its responsibilities, the HRC has a professional duty to seek clarification on this matter before arriving at its conclusions.

7. Human Setilement: It is to be noted that Outline Approval has been granted by the Town and Country Planning Division for the Petit Morne site. Cabinet, and by implication the Minister with responsibility for Planning, has also approved the site for residential development, and, inter alia relocation of persons affected by the highway acquisition process. The Ministry of Works and Infrastructure is currently preparing an application for Final Planning Permission and NIDCO does not intend to relocate persons to the site before these approvals are received. It is difficult to see how this can constitute a "flagrant flouting of the statutory requirements".

The HRC may also wish to take into consideration the fact that the only organization representing residents to be relocated in 2010 when the project was launched was the Debe to San Francique Highway Action Committee. This group was requested to identify preferred sites for relocation. The first area of preference was a site at Hermitage. When this proved unsuitable the group selected Petit Morne as its alternate preferred site. It cannot be appropriate for the HRC to select its own site at Golconda as more suitable without reference to the views expressed by the affected persons at the time when these matters were being addressed.

8. Traffic and Transportation: This is the primary purpose of the highway, yet it is treated as a minor issue in the report. The Ministry of Works and Infrastructure and NIDCO have the responsibility to meet the traffic and transportation needs of the South Western Region of Trinidad, along with other areas of the country. It is because of this mandate that there are adverse impacts on the environment and on settled communities that must be minimized and mitigated.

9. Hydrology and Hydraulics: The comments regarding the Design-Build approach are out of place here as they reflect opinions on procurement policy and are unrelated to the review of hydrology and hydraulics. In a situation where complete engineering designs existed for the highway before the design-build contract was awarded, these comments cannot possibly follow from any logical argument.

10. Land Tenure and Acquisition (page 8 of the report): NIDCO assures the Committee that there is no instance where entry on to property has been made without legal authority. It should be noted that under Section 3 Notice authority is granted to carry out surveys and other relevant investigations. However, it is common practice for investigations and studies to be carried out prior to the start of the acquisition process for the purpose of acquiring a CEC, preparing project, estimates or conducting feasibility studies. In such a situation entry would not be made onto any property without the permission of the owner or occupier. It should also be emphasized that Section 4 Notice has been published for all areas released to the contractor.

    The offending statement is inflammatory and prejudicial and has been made without any evidence whatsoever. It should be deleted.

    By way of further clarification, it should be noted that the land acquisition consultant made several comments (pages 145 to 149 of the report) which must be carefully examined.

    Firstly, the case presented that "NIDCO has failed to follow due process..." is completely unacceptable (page 144 of the report).

        At (a) : As explained above, social surveys and investigations are routinely carried out without the publication of Section 3 Notices in the early stages of any project, provided that persons' properties are not entered into without their consent. The HRM did not exist six years or even three years ago and no complaint has been received of such unauthorized conduct from the community groups which then existed. In any event, such preliminary work does not form part of the acquisition process.

At (b) : At no point was entry made for construction purposes without Section 4 authority. NIDCO challenges the consultant to identify any such case before making remarks **designed to cast doubt in a court of law** over Government's commitment to lawful acquisition of private property.

At (c), (d), (e) : These matters reflect differences of opinion between the consultant and NIDCO over policies which should govern the treatment of encroachers and squatters. However, they bear no relationship whatsoever to the matter of due process insofar as the acquisition process is concerned.

Secondly the consultant indicated that "up to the time of writing of this report, NIDCO had not provided written documentation to the HRC Consultant on land acquisition and re-settlement measures in the affected communities". However, no such request has been made to NIDCO in writing and no indication that this was required, has been conveyed to the President of NIDCO at any time. Indeed the only request made by the JCC for responses to specific items of concern was by way of an Aide Memoire sent by Ms. Desiree Arthur Lopez on behalf of the JCC to Dr. Charles on 09 January, 2013, wherein it was stated "This is not intended to solicit any written response from NIDCO or HRM".

Thirdly, the consultant stated that his research findings suggest the following:

"3) A lack of transparency in the calculation of compensation for some who have agreed

to be relocated.

4) Inconsistency in the quantum of payments made to various property owners"

It needs to be emphasized that all acquisition procedures followed and all settlements arrived at up to the time of the delivery of the HRC report were made under the process followed previously for other highway acquisitions and **all negotiations were carried out by the Commissioner of Valuations**. Clearly the consultant's comments were based on no relevant information whatsoever and are completely unrelated to any actions of NIDCO.

11. Conclusion (page 8 of the report) : The HRC cannot professionally justify the statement that "A significant concern ...is whether or not the lawful authority ...is conforming to due process..." with not a shred of evidence to support such a statement. Not one case has been presented where due process was not followed. This is a serious matter in that it appears to cast doubt on whether the constitutional rights of persons are being abridged during the acquisition and other processes in the absence of any information that this is so. NIDCO assures that due process is being fully adhered to in respect of all legal requirements, and requests that the statement be deleted.

12. Recommendations (page 9 of the report) : The recommendations constitute a list of instructions to stop all work along an entire segment of roadway, which does not itself constitute a single community, without regard to consequences for the construction contract and the cost to Government and tax payers. There is no attempt to identify areas of this segment where there may be no significant environmental or other danger. No account is taken of the balance to be made between the risks associated without proceeding, stopping all work or proceeding in particular areas. Without considering and comparing these risks, the HRC is being professionally irresponsible in the presentation of its recommendations.

In addition to the above comments, several comments, some of which were previously sent by email, are hereto attached for the consideration of the J.C.C. and its technical committee, as follows:

- ✓ Comments by Ecoengineering Consultants
- ✓ Comments by Trintoplan Consultants Ltd.
- ✓ Comments by Mr. Kelvin Ramkissoon, Attorney-at-Law
- ✓ Comments by Mr. Doolar Ramlal – Director, Environmental Unit, Ministry of Works and Infrastructure
- ✓ Comments Mr. Steve Garibsingh – Vice President, Engineering & Programme Management- NIDCO

Yours sincerely

Dr. Carson Charles
President

Response – Urban Planner, HRC

Re: Point 2:

The HRC was indeed mindful of these issues. It was also of utmost importance that the Committee advise NIDCO and the Government of the Republic of Trinidad and Tobago of the need to conform with the relevant legislation and to take account of the interest of the affected publics prior to embarking upon construction of the Debe to Mon Desir highway segment.

With respect to the contention that there is no evidence that NIDCO has proceeded in violation of any law, note the following:

As indicated at page 39 of the report of the HRC, Part III of the TCP Act stipulates that permission is required for any development that is carried out after the commencement of the Act, development being defined to include the carrying out of building or engineering operations in, on, over or under any land; and the subdivision of any land. This is acknowledged on page 7 of the EIA at 2.1.3.2 which states "Planning Permission….. is the legal requirement before development can commence." Planning Permission has indeed been obtained for the construction of the highway segment under review for applications referenced T7M: 0440/2007 and T8N: 0443/2007 with a number of conditions including the following:

"That the consent of the Local Authority be obtained prior to the commencement of development" as "The Municipal Corporation Act (1990) requires this to be done."

A note was included on both notices of Planning Permission as follows:
"Grant of planning permission indicates only that the development permitted has the Minister's approval for the purposes of the Town and Country Planning Act. This planning permission could be lawfully implemented only if you satisfy the requirements of all other laws applicable to the implementation of the development permitted and grant of planning permission is not necessarily an indication that you would be able to do so."

"Other laws applicable….." would include the Environmental Management Act, and would therefore require that all of the conditions attached to CEC1372/2006 be fulfilled, including the following:

- The design, layout, scale and components of the development shall be subject to the approval of the relevant authorities…..such as the Penal/Debe Regional Corporation, Siparia Regional Corporation, TCPD, MEEI, WASA, WRT….. (Condition (iii) (b) on page 25).
- The Applicant should pursue…..resident relocation and resettlement utilising best industry practices, such as the World Bank Operational Policy 4.12. (Condition (iii) (e) on page 26).
- The Applicant shall ensure that all final negotiations for the acquisition of all properties (inclusive of private agricultural lands) and compensation to the owners shall be completed before the commencement of any relocation and demolition works…..(Condition (iii) (f) on page 26).

In this regard it is noted that engineering works have commenced on interchanges at Debe and Siparia even though, at March 04, 2013, the approval of the relevant local authorities, *viz*., the Penal/Debe Regional Corporation and the Siparia Regional Corporation had not yet been obtained.

Continuation or start of any work on this highway segment would be unauthorised under the provisions of the TCP Act, and such actions are, therefore, NOT advised.

Engineering operations have also been started on land at M2 Ring Road and Manahambre Road, Petit Morne, St. Madeline for residential purposes, partly for the resettlement of persons who currently reside in the path of the Debe to Mon Desir segment of the highway. There is no permission for this development, Outline Planning Permission granted June 15, 2010 having lapsed one year later in accordance with the condition in the permission that it *"…..shall lapse and become null and void unless the particulars and plans…..are submitted…..within one (1) year from the date of this Outline Permission*". Since no particulars and plans have been submitted to the Town and Country Planning Division in this respect, there is currently **no** permission for these lands to be developed. The developer would be required to obtain **Final** Planning Permission for the development, and to meet all other statutory requirements, before plots of land can legally be transferred to individual owners. The process of obtaining Final Planning Permission is likely to be quite protracted because a CEC, most likely involving the preparation and approval of an Environmental Impact Assessment (EIA), would need to be obtained from the EMA before permission can be granted by the Town and Country Planning Division.

Even if NIDCO can argue that this violation of the TCP Act could not, properly, be laid at its doorstep, the HRC needed to advise of the regulatory requirements and the time

frame involved in allowing the occupation of this land by the affected persons (see pages 40 and 41 of the HRC report).

Re: Point 5:
Note that the National Physical Development Plan (NPDP), as stated in the HRC report (page 31) stressed the need for "*a national transportation plan which would analyse transport demand in the context of the NPDP and detail transportation proposals for implementation and phasing over the ensuing 20 years*." In addition, the Plan states that "…..detailed feasibility studies of all proposed new links and of recommended upgrading for existing links must be carried out. Such studies will determine the projected traffic and therefore the class and quality of routes necessary as well as the exact alignment of these routes."

The Plan also advised that consideration should be given, *inter alia*, to:

"*Traffic management and traffic control devices and techniques to improve large scale movement of goods and people; investigation of alternative means of transportation for people and/or goods such as rail…..and internal air and sea transportation; and staggering of working hours to ease traffic congestion*." The Proposals map from the Plan, which was reproduced at page 32 of the HRC report, and which is shown on Figure 1 below, shows a number of 'coastal transport' links connecting La Brea to San Fernando, and San Fernando to points to the north of Trinidad.

A precise and firm alignment for a highway such as this would need to be determined based on detailed feasibility studies which, three decades after the preparation of the Plan and in accordance with the current legislative regime, would include rigorous investigation into the social, economic, and environmental impacts of alternative alignments, and the formulation of appropriate and effective mitigation measures, before a final and firm alignment and other details relating to road width and capacity, for example, could be determined. Therefore, while the highway was "*recognised as an integral element*" of the Plan a firm and dedicated alignment was not.

'The South West Regional Plan' (properly named *Planning for Development: The South West Region*), prepared in 1974, recommended the extension of the SHH to link Point Fortin and Siparia with San Fernando and other points to the north, as well as the provision and/or upgrading of rural access roads through key agricultural areas. As stated in the HRC report, *"the view was expressed that the capital costs of this project should be measured against the benefits to be derived in the form of shorter travel times and distances between the Capital Region and St. Patrick….."* signalling the importance of proper cost-benefit studies in the determination of the details of the

highway. Again, as indicated in the HRC report the Plan also recommended that "*improvements be effected to the road network in the region as the basis of a more efficient system of bus routes and a more reliable public transport service*."

Hence, both the NPDP and the 'South West Regional Plan' emphasised the need to employ measures to supplement transportation improvements afforded by the construction of additional highways. It is not clear whether or not such measures were considered, in this case, to provide for the needs of the south west peninsula of Trinidad.

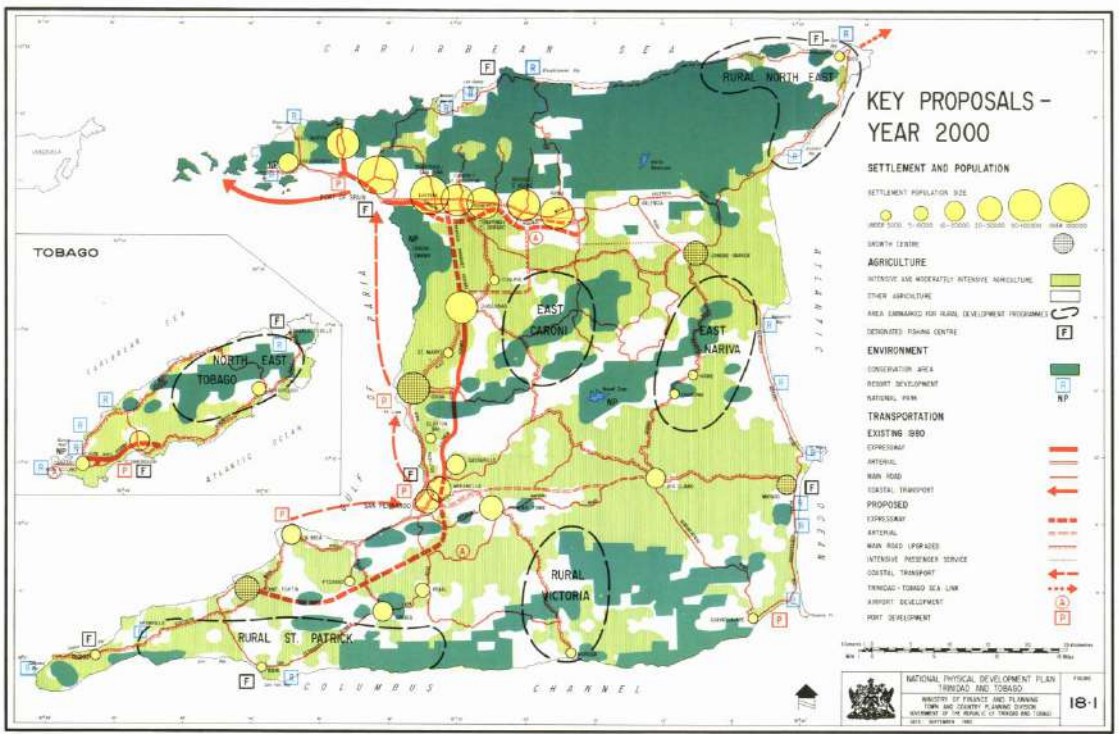


Figure 1.1: NPDP Proposals Map
Source: NPDP

<u>Re: Point 6</u>:

It is reasonable to assume that, in the interest of transparency, and in accordance with the EMA legislation, all of the considerations relating to the processing of the EIA and the CEC application had been placed on the Administrative Record of the EMA. Hence, making enquiry "of the EMA as to its reasons for granting the CEC….." was a luxury that could not be afforded within the very limited time frame granted for the review.

Re: Point 7:

In accordance with the TCP Act, and as acknowledged in the EIA at 2.1.3.2 on page 7,*"Planning Permission (commonly called Final Planning Permission…) is the legal requirement before development can commence. The Grant of Outline Planning Permission comes with a list of conditions to be satisfied in the application for Planning Permission.*" Sub-section 11 (eleven) of Part III of the TCP Act and Section 6 of the Town and Country Planning (General Development) Order made under Section 9(1) of the Act set out the procedure by which the Minister (with responsibility for town and country planning) can grant permission to develop land, and that involves the submission of an application on a form issued by the Minister.

Approval granted by "*Cabinet, and by implication the Minister*….." for the use of the site for residential purposes including the relocation of persons residing in the route of the highway alignment, does **not** constitute planning permission in accordance with the TCP Act and, therefore, does not empower the developers to start or proceed with clearing and engineering works on the Petit Morne (or any other) site. As indicated in the HRC report, the procedure for bringing this land into readiness for the intended purpose is likely to be quite protracted, involving, as it does, the grant of a Certificate of Environmental Clearance (CEC) by the EMA before Planning Permission can be obtained from the Minister, and the completion of all infrastructural works before applications for Planning Permission to develop individual plots can be entertained by the TCPD on behalf of the Minister.

Re the second paragraph of point 7 it would have been helpful if this information had been communicated to the HRC during its review of the matter.

Re: Point 11:

The issues relating to the illegal development of land covered above are relevant.

DOOLAR RAMLAL, MINISTRY OF WORKS AND TRANSPORT

COMMENTS ON REPORT OF THE HIGHWAY REVIEW COMMITTEE

DEBE TO MON DESIR SEGMENT

SAN FERNANDO TO POINT FORTIN HIGHWAY

By Mr Doolar Ramlal, Director – Environmental Unit, Ministry of Works and Transport

A. SCOPE OF REPORT

This report seeks to highlight the validity of information presented in the Report of the Highway Review Committee (HRC).

For each of the relevant sections in the report the comments on the HRC have been grouped as follows:

a) Comments that contain errors of fact
b) Comments that contain misleading statements
c) Comments that offer opinions that are not properly justified
d) Comments that illustrate errors of conclusion

In addition, conflicting views were highlighted.

B. SUMMARY OF FINDINGS

Urban and Regional Planning

It would appear that the planning consultants support the proposed alignment since it closely follows that set out in the National Physical Development Plan (NPDP) and the South West Regional Plan of 1974.

Environmental Impacts

The contents of the summary reflect the views of the HRC. The other consultant's (Mr Eden Shand) views mostly conflict with the HRC's views and for some inexplicable reason, was not represented or reproduced in the summary. The HRC opined that the EIA was not acceptable conflicts with Mr Shand's view that the EIA was acceptable. The opinions of the HRC here are unfounded.

Social Impacts

1. The findings of the HRC contradict with some of the findings of Mr Eden Shand. In addition, there are many inaccuracies with the information presented in the body of the report some of which are highlighted later in this report.

2. The omission that is most glaring is that the HRC failed to indicate whether the EIA satisfied the TOR. Only Eden Shand addressed this question which was answered in the affirmative.

C. COMMENTS ON RELEVANT SECTIONS

Section 1.0 URBAN REGIONAL PLANNING

Introduction

The work of the HRC was evaluated and this process yielded the following information.

It would appear that most of the HRC's comments lend additional support for the highway project as proposed. A major portion of the HRC's comments in the area dealing with 'Urban Regional Planning' relates to a review of all of the development plans that impact upon the area within which the San Fernando to Point Fortin Highway runs. Plans prepared before the project documents were submitted to the approval agencies all claim that the San Fernando to Point Fortin Highway was an important project and formed part of their proposals.

1.1 Comments that contain misleading statements

- P. 29. Line 10: The HRC is claiming that more attention needed to be given to the impact that the highway will have on the 'landscape of the south western peninsular'.

  This statement is unclear and misleading as it can be interpreted in a variety of ways by the reader.

Response - Urban Planner, HRC

The word 'landscape' here is used as a synonym for land space or spatial make-up (note the Wikipedia definition of the word includes "*….the living elements of land cover including indigenous vegetation, and human elements including different forms of land use….*"

It is difficult to understand the confusion in the reader's mind or how the term can mislead.

1.2 P. 29, 2nd paragraph: The HRC is claiming that the potential adverse impacts of the proposed highway in terms of induced development that does not have planning permission, cannot simply be mitigated by having proper land use plans with enforced policy by the relevant authority (in this case the TCPD). The HRC however quotes this same argument as voiced by the TCPD on p. 31, 2nd- to- last paragraph, where the NPDP is quoted as calling for 'strong land use controls, particularly with respect to agriculture and conservation areas'. The HRC is therefore claiming that projects like the proposed highway should be withheld because the planning authority does not have the capacity to manage enforcement.

If this is so, then the planning authority should be strengthened otherwise positive development projects such as the highway will be stymied.

Response - Urban Planner, HRC

It is quite a stretch to deduce that the HRC is *"….claiming that projects like the proposed highway should be withheld….because the planning authority does not have the capacity to manage enforcement."* This could not possibly have been what the report intended to state. It is a fact that the Town and Country Planning Division and other relevant agencies need to be strengthened with regard to their capability to pursue enforcement action against unauthorised development.

1.3 P. 29, Second-to-last paragraph: The HRC is claiming that the proposed highway will split communities and services.

The MOWI is claiming however that the new frontage roads running parallel to the highway, would allow the parties on both sides of the alignment to still connect via overpasses and interchanges along the route.

The HRC perhaps has not grasped this point as it refers only to interchanges and overpasses and not the local frontage roads which are the key to the continued connectivity. In addition, the point must be made that built development along much of the Debe - Mon Desir segment is loosely scattered and very often unauthorised. In reality, it is virtually impossible to find a clear path through the apparent maze without separating parts of the 'community', as dispersed as these communities are, because they are unplanned and likely unauthorized.

Response - Urban Planner, HRC

Section 1.2.2 of the Urban Regional Planning section of the report admits that *"It is difficult to determine the efficacy of the proposed mitigation measures, that is, the construction of interchanges and overpasses at the affected locations.* "The same holds true for any proposed frontage roads.

- P. 41, Sec. 1.6: The HRC claims that the planning for the project need to benefit from a wider comprehensive plan that 'seeks to balance land use and transportation needs'. **The planning for the project however was done in the context of the 1974 South West Region Plan and the 1984 National Physical Development Plan, as reported by the HRC. As indicated elsewhere by the HRC, both of these plans included proposals for the highway to Point Fortin.**

Response - Urban Planner, HRC

The response to point 5 of the letter from Dr. Carson Charles is relevant.

1.4 Comments that offer opinions that are not properly justified

- The HRC claims, at page 28, Mapping, that **"**a land use survey should have been undertaken to determine the exact location of the properties to be acquired and the use to which each one is put, and the results of the survey mapped and submitted with the EIA".

This comment does not benefit from an understanding of the problems associated with doing detailed land use surveys in rural and agricultural areas where mapping is often incomplete or outdated and access on the ground sometimes very difficult, particularly for agricultural lands. At the preliminary stage of an EIA, without the benefit of land surveyors' inputs, it would have been very difficult to spatially locate the alignment, structures and unfenced agricultural properties on the ground. The only option at this early stage in the project cycle would have been to do a preliminary identification of structures and parcels using secondary sources of data, including existing cadastral mapping and the most recently available aerial photography, supplemented by a practical level of ground-trothing.

Response - Urban Planner, HRC

It is difficult to understand the problem involved in undertaking a land use survey of 165 buildings that are all accessed by roadways in motorable condition. All that is required is a windscreen survey that would take not more than one-half day to record the fact that 150 of the structures are (in most cases, clearly) utilised for residential purposes, and that would cost almost nothing when compared with the overall cost of the project. Note that the HRC report, at page 28, suggests that *"….what was required was detailed land use information relating to all of the buildings in the path of the alignment."* This information would, in any event, be required for the purpose of determining the level of compensation to be paid to affected property owners.

1.5 Comments that illustrate errors of conclusion

- P. 39 Sec. 1.5.1: It would appear that the HRC does not realize that the highway segment referred to as 'Debe to Mon Desir' consistently stops at the Fyzabad Interchange in the west, in both the CEC and planning applications. The St. Mary's to Point Fortin segment includes a 'spur'

running to the east that connects with the Debe to Mon Desir segment in its western extremity.

The result of this misconception is that the HRC erroneously concluded that Planning Permission for the area between the Fyzabad Interchange and Mon Desir was granted before the CEC was obtained as they were comparing the date of the Planning Permission for the St. Mary's to Point Fortin segment with the date of the CEC for the Debe to Mon Desir segment.

Response - Urban Planner, HRC

With respect to the CEC application (1372/2006), which was based on the EIA under reference, the description at 3.1.7 on page 46 of the EIA is relevant: "*The alignment….. ends in the **Mon Desir** area where it intersects the St. Mary's Junction to Point Fortin segment. The total length of the segment from the San Francique area to **Mon Desir** is approximately 11.1 km.*" This is reflected on page 24 of the HRC report (at 1.1 of the Urban and Regional Planning section). The Debe to Mon Desir alignment shown in the EIA report is shaded magenta in Figure 2 following, and distinguished from the other segments which are shown green. Note that the magenta line goes from Debe to Mon Desir **past Fyzabad**. The EIA and, consequently, the CEC therefore relate to the entire Debe to **Mon Desir** segment and not a Debe to Fyzabad segment as stated by Mr Ramlal.

With respect to the contention that the stretch between Fyzabad and Mon Desir is a 'spur', note that the expression 'spur' is defined in various dictionaries as "a short branch road or railway line" (Oxford); or "a railroad track that branches off from a main line" (Merriam-Webster). The Fyzabad to Mon Desir section could not be considered a 'spur' based on the information at hand as clearly shown on the map. There are two spurs in the segment, shown in broken magenta line on the map, one connecting the highway to the San Fernando Siparia Erin Road at Penal, the other connecting to the Siparia Road at Siparia.

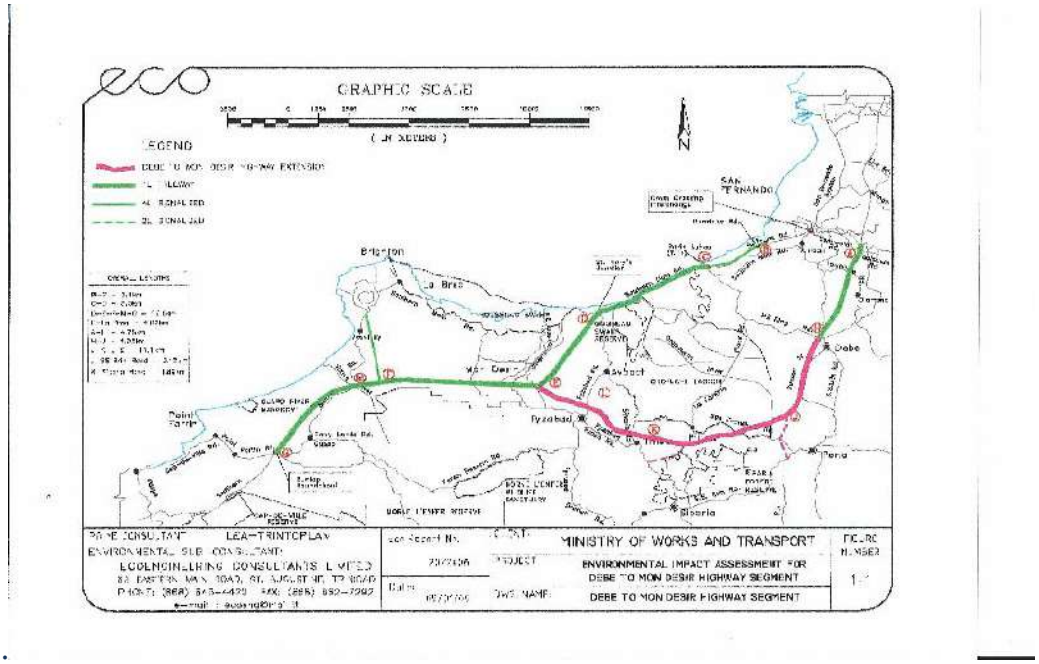


Figure 2: Alignment Debe to Mon Desir and other Segments

Source: Figure 1-1 following page 2 of the EIA report

With respect to the planning application, the location drawing at Figure 3 herein is taken from the actual application T7M:0440/2007 submitted to the TCPD.

Mr Ramlal is correct in stating that the planning application was for the Debe to Fyzabad portion of the highway (although the location drawing showed the entire Debe to Mon Desir segment). And that is precisely the problem, and precisely what the HRC report states:

*"Application **T7M:0440007**– this submission was made on March 05, 2007 for Planning Permission (PP) for the development of ..... land for 'Transportation purposes' ..... Whereas the location of the land was given as "Debe – **Mon Desir**" and the alignment shown on what appears to be a location drawing is the entire alignment of the segment under review, all of the other drawings attached to the application show only the stretch from the intersection of the M2 Ring Road and the S.S. Erin Road in the Debe area to the proposed Fyzabad Interchange."*

As stated in the HRC report the remainder of the alignment (Fyzabad to Mon Desir) was covered under application **T7M:0443/2007** which was submitted on the same day as 0440/2007 but approved on March 12, 2009 long before the CEC 1372/2006 was granted in April 20, 2010.

If there is an error as Mr Ramlal states, it comes from the labelling and coverage of the EIA with which the HRC was presented and from the failure of NIDCO, *et al*, to provide the Committee with the EIA that would have included the Fyzabad to Mon Desir segment or 'spur'.

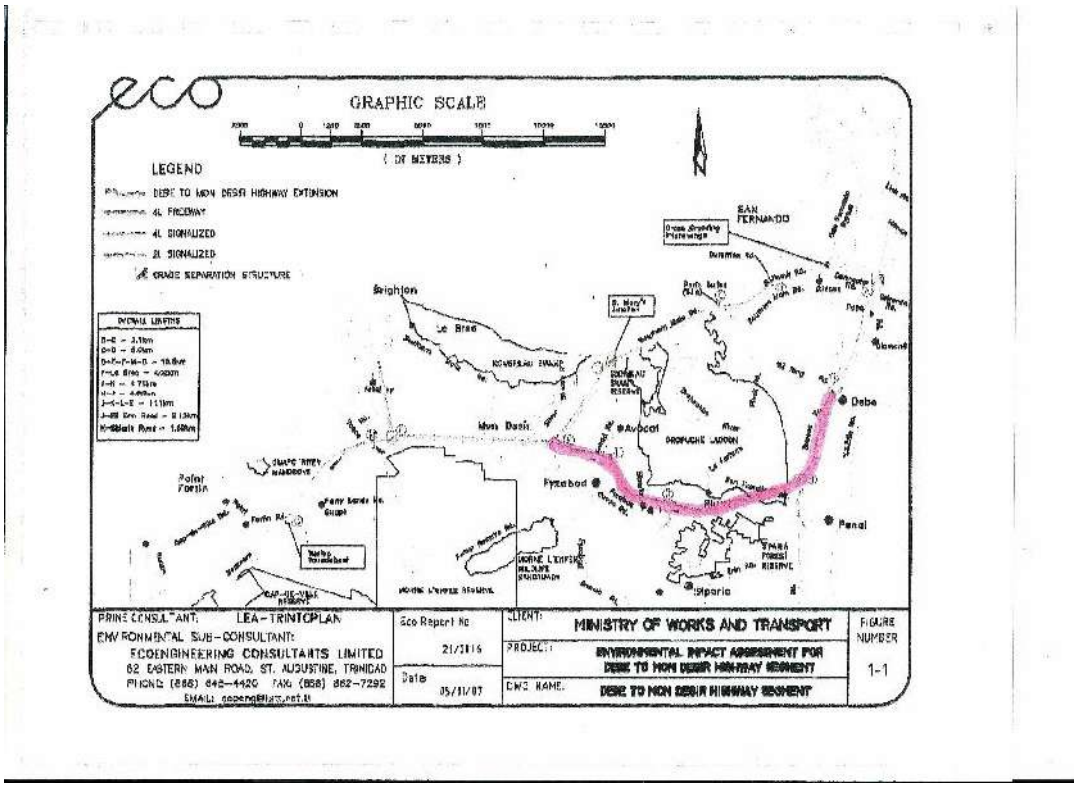


Figure 3: Location Drawing, Application T7M:0440/2007 for Debe to Mon Desir Highway Segment

Source: Application for Planning Permission T7M:0440/2007

Section 2.0 ENVIRONMENT

This Chapter was littered with erroneous and misleading statements and unwarranted opinions conclusions and recommendations.

The HRC totally failed to address the most important of the three objectives i.e. to determine the validity of the concerns brought forward by the HRM.

An EIA is generated based on the mandate given, in a TOR. As a consequence, any sensible reviewer should know that an EIA could only be evaluated based on whether the TOR was or was not satisfied. This HRC failed to indicate that **based on the TOR** whether the EIA was/was not acceptable. Rather, the HRC took an unprofessional and biased approach to indicate that the EIA was not acceptable. The scope of any review is determined by the requirements of the TOR, nothing else.

2.1 Comments that contain misleading statements

- P. 52 Section 2.4.2 Scoping
  The HRC indicated that there is an omission of a proper scoping exercise prior to the development of a TOR.

  FACT: A proper scoping exercise was done in the feasibility study.

- P. 62 Section 2.5.7 Method for Assessing Impacts and Proposing Mitigation Measures
  The entire paragraph is misleading.

  FACT: The proposed Mitigation Measures were adequate, this was supported by Mr Eden Shand who gave this chapter a high quality grading.

2.2 Comments that offer opinions that are not properly justified

The HRC states that "the lack of documented public concerns from the local communities **seems** to have been a missed opportunity by those who are calling for a reversal of the decision to proceed with the Highway. **If public comments had been submitted** in writing iterating many of the concerns being brought forward during this HRC review and in the great detail that has been presented by the HRM to the HRC, **the EMA should have had to have demonstrated greater consideration of the perceptions of this group.**"

FACT: The above opinion of the HRC implies that the information received during Public Review of the EIA Process was insufficient when compared to the detailed information presented by the HRM.

These issues presented by the HRM were NOT submitted during the allocated time period for Public Comment. It must be noted that the MOWT followed all protocol regarding the timelines required for Public Comment. To this end, it can be concluded that the HRM simply did not present their issues during the required time to the EMA and for the HRM to present information at this time has a great negative cost impact on the Government of the Republic of Trinidad and Tobago (GORTT). All public consultants were properly advertised in the newspapers as well as by loudspeakers. The EIA was place for public comment for one (1) month.

- P. 65 Section 2.8 – Main Conclusions

FACT: All of the points highlighted in this section are quite contentious as they are warped opinions. They refer to the EIA Review Process carried out by the EMA. It must be noted that the MOWT satisfied all the requirements put forward by the EMA during the EIA Process.

Section 3.0 SOCIAL IMPACTS

3.1 Comments that contain errors of fact

- Page 80. Section 3.7. Evaluation of issues raised by the HRM.

The consultant argued on behalf of the HRM by citing two samples- Sample 1 on page 81 and Sample 2 on page 82.

The two examples put forward can be used in any textbook as glaring examples of bias in sampling a population. Clearly, the samples were taken in areas where the people objected to the construction of the Highway and are meant to mislead the reader.

The consultant failed to take into account the terms and conditions mentioned in the CEC regarding relocation issues. In addition, he failed to address the provision of lands at Petit Morne etc. for persons to be relocated.

The consultant supports Mr Boodhai's views without giving proper justification.

Response – SIA Consultant, HRC

The actual HRC report in this regard, reads as follows:

Dr Sinanan spent two days in the area (Debe to Mon Desir) to elucidate some of the social impacts which would relate especially to elderly women and children; issues of impact equity. She is well aware of the preliminary nature of the findings (given the short time period and the small samples of people interviewed) but they are instructive for three reasons:

- Firstly, they illustrate the need for data.
- Secondly, they illustrate some of the techniques used world wide in assessing social impacts of this nature
- Thirdly, they illustrate what a scoping study even of such short duration could achieve in terms of study area definition, issue identification and selection of significant impacts to be further investigated in the full SIA.

The only reader who could be misled by the above is one who is wilfully blind. Where is the "error of fact" in the above statement? It is interesting to note that the "textbook" which indicated the problems of small sample sizes was apparently not useful in evaluating the improper use of focus groups. The Report states in this regard that:

The first point to note is that the use of focus groups to collect socio-economic data is inappropriate. The sample of persons in such groups is small and typically not representative of the population of interest. Such groups are very useful to gain insights into socio-cultural issues, lifestyles, stakeholder identification etc.

The second point made by Mr Ramlal is as follows:

"The consultant failed to take into account the terms and conditions mentioned in the CEC regarding relocation issues. In addition, he failed to address the provision of lands at Petit Morne etc. for persons to be relocated."

Response:

An entire section of the report, handled by a different consultant, dealt with this in detail.

The third comment by MOWT was as follows:
"The consultant supports Mr Boodhai's views without giving proper justification."

Response:

The report states as follows:

We note three features which make the study inadequate viz:

- ❖ Inappropriate use of data gathering techniques
- ❖ Restriction of the target groups of the surveys to those directly in the ROW and who were earmarked to be displaced.
- ❖ Failure to clearly identify impacts in such a manner as to be able to quantify them for cost benefit analysis and for purposes of mitigation.

Each of the above is detailed in the report and form the basis for the agreement with Mr Boodhai's views.

3.2 Comments that contain misleading statements

- Pg74 Section 3.5 Conformity with the Requirements of the SIA and with "Best Practices".

The Reviewer : In our view, a major failing of the SIA components of the EIA related to the Debe to Mon Desir segment of the Solomon Hochoy Highway Extension to Point Fortin project begins with inadequate scoping. He goes on to state in the last paragraph – No SIA studies have been found relating to the segment relating to the "widening and reconstruction of approximate 12 km of the Southern Main Road and South Trunk Road from Dumfries Road to Delhi (Mon Desir). Based on this misconception the reviewer found that there was not enough data in the current EIA to assess social impacts.

FACT: SIA studies were done for all areas except for the segment between Dumfries Road to Paria Suites, where no persons were affected. SIA studies were done for the rest of the area. The reviewer should check the EIA from Paria Suites to St. Mary's Junction and also the EIA from St. Mary's Junction to Pt. Fortin. All relevant information is contained therein.

Response – SIA Consultant, HRC

Mr Ramlal is of the view that the reason that the HRC found the SIA to be inadequate relates to the lack of SIA data relating to the Dumfries Road to Delhi (Mon Desir) highway. He notes that "Based on this misconception the reviewer found that there was not enough data in the current EIA to assess social impacts."

As mentioned before, the inadequacy of the SIA data is firmly rooted in an analysis of the data relating to the Debe to Mon Desir segment of the highway. The bulk of the SIA section of the report is devoted to his segment. Even the most cursory examination of Section 3 of the HRC report will substantiate this.

A single example will suffice. The Report states, inter alia about this segment:

Note that the house owners interviewed did not include any that were not directly in the ROW – a major omission in the determination of social impacts. All of the data collected on the ROW properties to be acquired, should have been collected on a sample of households in a 2-3 km wide band on either side of the proposed roadway. This includes data on commuting, location of employment, age structure of households (to assess vulnerability of the old and children) community structures etc.

We stand by our conclusion that:

The fundamental determination of this review is that there is not enough data in the current EIA to adequately assess the social impacts, to classify them in terms of severity and to plan adequately to mitigate them.

Response: Urban Planner, HRC

With respect to the final sentence that "The reviewer should check the EIA from Paria Suites...", it was the responsibility of NIDCO *et al* to provide the information relative to the review exercise. It is noted that the original package from NIDCO included two CECs, one of which was for the segment under review, the other for the Golconda to Debe segment of the highway.

CONFLICTING VIEWS

Section 2.0 ENVIRONMENT

- P. 53, Section 2.4.1 Terms of Reference (TOR) as required by the Certificate of Environmental Clearance (CEC) Rules.

  The HRC agreed that the TOR covers the critical views of development and confirms to World Bank Standards.

  FACT: This statement conflicts with another statement on Page 54 – Section 2.4.2. - Scoping, where the HRC 'out of the blue' stated that there were flaws in the TOR as reflected by an omission of a proper scoping exercise. The scoping exercise was done in the feasibility study phase. The HRC went on to list deficiencies in the TOR on Page 54 – Section 2.4.3. TOR Deficiencies

- P. 62 – Section 2.5.6. Public and Stakeholder Engagement.

  The reviewer stated that:
  "Consultations seem to have been done at least in keeping with the requirements of the EMA's TOR".

  CONFLICTS WITH
  P. 63 – Section 2.6. Role of the Public in the EIA Review Process

  2nd Paragraph.
  The Reviewer stated: That there was a lack of documented public concerns from local communities.

CONFLICTING VIEWS- Chapter 2 VS Eden Shand

Chapter 2/HRC	Eden Shand's Report
1. Page 62. Section 2.5.7.1 HRC calls for entire chapter on Proposed Mitigating Measures to be redone. **2. Page 62 Section 2.5.6** Public and Stakeholder Engagement. 1st Paragraph, Last Line states "A number of concerns were raised during the public consultation meetings by affected community members are not resolved in the EIA." **3. Page 65. Section 2.8 – Conclusion** **<u>EIA was not acceptable.</u>** **4. Page 55. Section 2.5.1. Rationale for Projects** **HRC – states that:** There are no specific goals or objectives for the project that explains why this segment is needed and who needs it. **Page 62. Section 2.5.8.** **The HRC:** Called for examination of two alternatives based on presentation of HRM.	**Page 183. Table** Consultant gave this entire chapter – a high quality grading. **Page 181 Section 14** Consultations seem to have been done at least in keeping with the requirements of the TOR. **Page 182.** **EIA acceptable –** Contains enough information to enable a decision on the project. **Shand Page 180 – 1st Paragraph states:** The body of the report contains sufficient detail about purpose and objectives of the development. **Page 181. Section 13 –** **Reviewer states:** Consideration of advantages and disadvantages of alternative routes and alignments was completely done. A clear case was made for the route and alignment finally selected. The justification for the chosen route on the grounds of accessibility for the settlements of Debe, Penal, Siparia and Fyzabad was indisputable.

CONFLICTING VIEWS – SOCIAL IMPACTS

Social Impacts Assessment	**Social Component of EIA**
Page 76. 2nd Paragraph – 1st Line Focus groups to collect socio – economic data inappropriate. **Page 85. Section 3.9** HRC states- "There is not enough data in the current EIA to adequately assess the social impacts, to classify them in terms of severity and to plan adequately to mitigate them".	**Page 162. Section 3.3.3.3 – Focus Groups** **1st Line** Focus groups were used during the public consultations. This is a good approach. **(a) Page 183. – Eden Shand** There is enough information to enable a on decision in the project. **(b) Review of Social Components. Page 159. Section 3.2** The TOR for SIA was adequate. Overall the EIA complied with the social components of the TOR.

TRINTOPLAN CONSULTANTS LTD

COMMENTS ON REPORT BY HIGHWAY REVIEW COMMITTEE (HRC)

From a reading of the Highway Review Committee (HRC) report it is clear that a number of professional specialists undertook an extensive review of a wide range of technical issues which in their opinion should have been considered in the preparation of the feasibility study and design of the Solomon Hochoy Highway Extension to Pt. Fortin. Unfortunately, their review and comments did not seem to include a review of the Terms of Reference and Scope of Works for the project. As a consequence, whilst there are meaningful comments relating to the feasibility and design, there are comments about issues that were beyond the scope of the original Terms of Reference and Scope of Works. Their report also includes a number of factual errors.

Some specific comments include:

1. The Terms of Reference for the study undertaken by Trintoplan is for the design of a highway. One cannot expect that the Lea-Trintoplan team could have responded to the suggested Integrated Watershed Management Study as such a study was clearly completely outside the scope of services to which Lea-Trintoplan responded. This project was for a highway design and therefore all the studies, assessments etc. would have been done on the basis of work required for a highway extension.

2. It would appear that some members of the Highway Review Committee (HRC) have done reviews of design reports and technical reports without the benefit of seeking clarification on the contents of the referenced documents from the originators of the documents. This is particularly so with respect to the Environmental Component and the Social Impact component of the review. This is unfortunate especially considering that wide ranging and often inaccurate comments have been made. It is normal professional ethics that in situations like this, there should be discussion between the reviewers and the originators of the documents.

Response – Hydrology Consultant, HRC

It was not the intention to suggest that Lea-Trintoplan was to undertake the IWMS but that one should have been done and LEA –Trintoplan would have had the benefit of referencing this.

However, the impact of infrastructure such as the highway is not outside the scope of an IWMP. HRC does not expect that the highway project is responsible for such a plan but that such a plan is within the scope of proper water management and environmental management.

At the preliminary design level, the need for such a plan should have been indicated and seen as a necessity for the detailed design, considering the impact of the highway on the local and downstream hydrology of the flood plains and wetlands.

EXECUTIVE SUMMARY: INTRODUCTION

"The exercise demonstrated the advent of an era of enlightenment -----. "

It should be pointed out that while the age of ICT has led to a high level of environmental awareness and activism in developing countries, it has not concurrently highlighted the lack of information (e.g. hydrologic in the case of T&T) on which such awareness can move forward. An analogy with the density of car ownership amply illustrates this point: It has been rapidly possible to achieve high levels of car ownership per capita in developing countries e.g. Brazil, India, Nigeria, T&T to name a few - some of which are close to the developed world. However, to reach the state of corresponding transportation infrastructure is another, and challenging, matter. It is our humble view that the abovementioned report should take cognizance of the dichotomy between what is desirable and what is possible.

SUMMARY OF FINDINGS

Hydrology and Hydraulics:

"However, the analyses are not carried out in the context of an Integrated Watershed Management Plan for the South Oropouche River Basin."

It should be pointed out that so far no Integrated Watershed Management Plan for the South Oropouche River Basin is available. Moreover, such plans - out of necessity - are multi-disciplinary and comprise many study fields ranging from Anthropology, Archaeology ----- Economics--- Public Health --- Sociology ----- Zoology. It is beyond the scope of Hydrologic and Hydraulic Engineering as would be carried out for the extension of the highway.

EXECUTIVE SUMMARY – GENERAL

The majority of readers (perhaps 95% or more) will only read the executive summary. Therefore, it ought to be accurate and balanced.

Section 7 (Page 117 - 139)

Section 7.3.3, Page 129, Sub-section: Estimation of Peak Flows

"The analyses undertaken did not include a multiple-day rainfall event with subsequent flood event with the consequence that the peak flows could be seriously underestimated."

Such analysis requires the use of a rainfall/runoff model. However application of such models is not possible in T&T due to hydrologic data limitations. In its absence, Antecedent Moisture Condition (AMC) II (which assumes five preceding days of rain totalling 3.5 cm) was used in the NRCS Method.

Response – Hydrology Consultant, HRC

The Antecedent Moisture Condition (AMC) II assumes 35mm of rain in the five preceding days but this does not reflect the reality of flood events in Trinidad and especially the South Oropouche River Basin. Hence the AMC III may have been the preferred option for South Oropouche. In addition, the areas which are crossed are most likely already inundated with water when the design event happens.

The HRC acknowledges the hydrologic data limitations and therefore the deficiency in the presented analysis to properly assess both the impact on the flood patterns and related ecology during different rainfall scenarios (not only the extreme one).

Section 7.3.3 Page 131, Sub-section: Hydraulic Design of Bridges(Last sentence in the penultimate paragraph)

"- - a 50-year 24-hour rainfall event causes a flood event with a return period which is smaller than 50 years."

Lack of correspondence between design peak rainfall and the resulting peak stream flow is well known in engineering hydrology, and should be considered in hydrologic design. However, there is no measured relationship known for T&T. In the absence of such information, a higher curve number of 70 was used for the South Oropouche River; compared to a lower value of 60 for the smaller streams. This aspect was inadvertently not mentioned, in an explicit manner, in the mentioned Hydrology and Hydraulics Report.

It may be noted that the author had explicitly mentioned this aspect in his report for the 60 inch diameter natural gas pipeline river crossings for the Atlantic LNG Train IV Project for the TRINTOPLAN/KBR in 2003. In that case, fracture of the pipeline at a river crossing by hydrodynamic forces can lead to release of a buoyant plume of odourless, colourless and flammable gas and a public disaster, and in the absence of information, AMC III - the most severe antecedent moisture condition - was used.

Response – Hydrology Consultant, HRC

Comments on the lack of information are acknowledged and the conservative approach taken noted. However in another study in the Caparo basin, extensive multiple day analyses were undertaken but this may not have been included in the scope of this project and the data may not have been available.

1.0 REGIONAL AND URBAN PLANNING

The HRC recommends that "the planning of the proposed Debe to Mon Desir segment of the extension of the SHH needed to have been undertaken as part of a comprehensive plan that seeks to balance land use and transportation needs of south west Trinidad and to do so with a minimum of disruption of human communities. Given the limited land space that is available in Trinidad and Tobago, and the large land take associated with road infrastructure such as highways and interchanges, the Planners need to come up with mechanisms and approaches that would effectively address long term congestion

problems and provide the accessibility that is needed to improve connections between the various areas of the country without severely impacting the lives of people.

The above observation makes reference to the responsibility of **"the planners".** But there is no definition of who these planners are. This could and should mean the Town and Country Planning Division for land use planning and the Highways Division of the Ministry of Works for transportation planning. The scope of works for the project did not include a land use planning study for the south west region. However, the design did include seeking an alignment that minimised disruption to communities to the extent that was practicable.

Response – Urban Planner, HRC

The Land Use/Spatial Planner engaged on a project with potential for far-reaching consequences for the land space of the south west region should, as a matter of course, take these matters into consideration in working and reporting on the EIA.

4.0 HUMAN SETTLEMENTS

This section of the review report recommends as follows:

- Expand the Study Area to cover the South West Region so as to ensure that sustainable development possibilities can be viewed from the stand point of the Human Settlement Perspective.
- Draw on current and on-going studies to ensure integration development strategies are achieved.
- Embrace a staged infrastructural upgrading programme to substantially improve the road connections within the Peninsula and to those Settlements to the east which whilst having the effect of opening up possibilities for enterprising endeavours, job opportunities and economic pursuits.
- Let GOLCONDA be the chosen site for Village Expansion – an Integrate Human Settlement.

These recommendations are clearly extra and additional to the scope of work for the feasibility study and design of the highway extension. These recommendations are therefore the basis for an additional and separate study for the south west region.

6.0 TRAFFIC AND TRANSPORTATION

A factual error is observed in the last line of page 112. That line states: "It is also the opinion of the consultants that Trintoplan **did** consider the alternative route option being suggested by the HRM."

It is not clear how the HRC arrived at this opinion, but if the alternative route is the one suggested by the HRM from Debe to Mosquito Creek, this alignment alternative was not in fact conceived or considered as a genuine alternative route.

Another factual error is observed in the first bullet line of page 115. That line states "The Trintoplan pre-feasibility study of 1998 **did** include the alternative northern route suggested by the HRM."

The northern route included in the 1998 pre-feasibility did not include a link from Debe to Mosquito Creek as proposed by the HRM. The northern route referred to in the 1998 study is the widening of the South Trunk Road from Cross Crossing to St. Mary's junction and then a new 4-lane highway cross country from St. Mary's junction to Pt. Fortin. This is also part of the proposed highway improvements in the 2005 study, in addition to the extension of the SHH from Golconda to Mon Desir to link up with the "northern route" from St. Mary's junction.

Response – Traffic and Transportation Consultants

The Trintoplan questions probably have arisen because of alterations introduced in editing the Traffic & Transportation submission.

1) The map illustrating the similarity of the route considered by Trintoplan to the HRM route was omitted.
2) During editing the phrase "[study] of 1998" was inserted into the bulleted point in the Conclusions and is removed:

"The Trintoplan pre-feasibility study did include the alternative northern route suggested by the HRM;" (The Traffic & Transportation submission does not refer to the 1998 document in its list of documents commented upon)

The document has been amended as follows:

1. The sentence has been amended, and the missing map inserted, as follows:

Among the options considered by Trintoplan was a route which effectively is the option suggested by the HRM (*See Figure 6.3).*

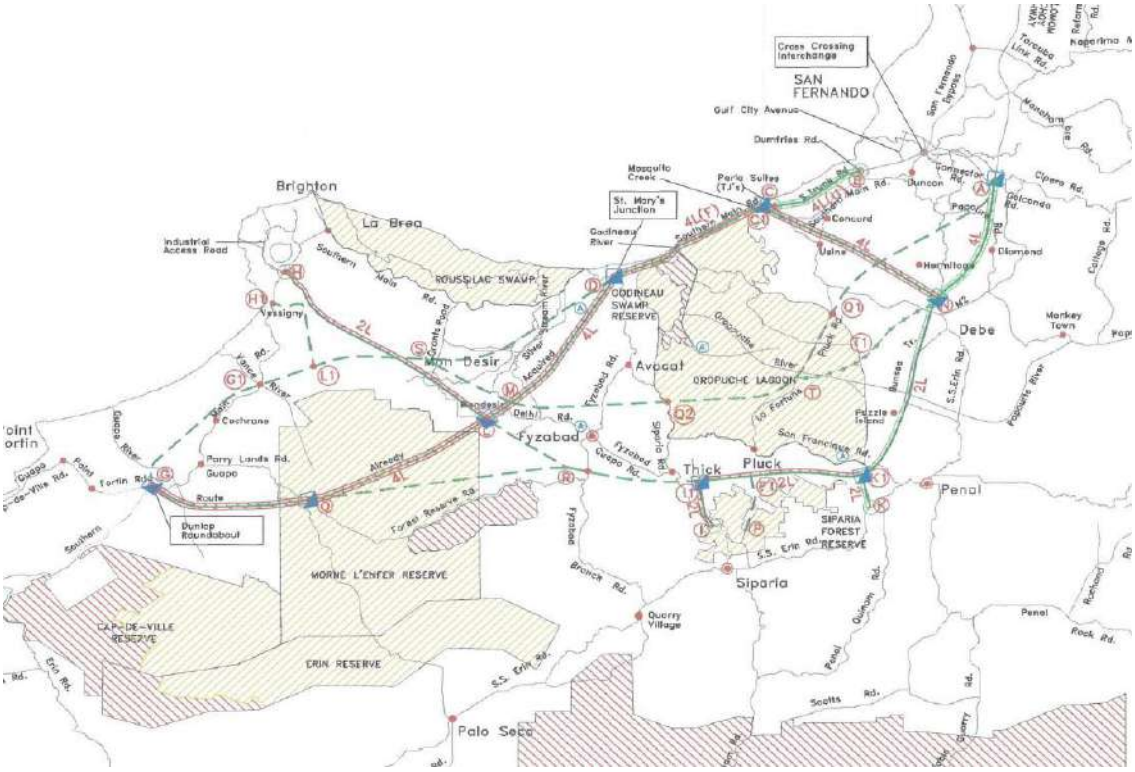


Figure 6.3: Golconda to Point Fortin Highway, Possible Route Options
Source: *Solomon Hochoy Highway Extension to Point Fortin, Final Report on Feasibility Investigations, Volume 1 - Engineering and Economic Feasibility*, LEA-Trintoplan Consultants Ltd, Figure 2.4.B.a.

It is not clear what the 4th bullet sentence of page 115 is saying.

Response – Traffic and Transportation Consultants

What is unclear is that the public reads about building a highway to Point Fortin. The question then arises: If you are going to build a highway to Point Fortin, and you are already widening Mosquito Creek, then the man-in-the street will ask : why then do you still need to pass the highway through Penal and Siparia? Part of the answer seems to be that there may be another motive: to develop the Penal-Siparia-Fyzabad area. This motive is not captured in the phrase "a highway to Point Fortin". So there is some confusion about what one is really doing.

Kelvin Ramkissoon – Attorney at Law, Legal Advisor to NIDCO

Comments by Attorney at Law, Mr Kelvin Ramkissoon

AN ANALYSIS OF THE HIGHWAY REVIEW COMMITTEE'S REPORT

Background

1. In late 2012, the Highway Re-route Movement ("HRM") staged public demonstrations in response to GORTT's decision to undertake the construction of the extension of the Solomon Hochoy Highway ("the Highway") in respect of the Debe to Mon Desir segment. The HRM outlined a plethora of reasons why this segment of the highway should not be undertaken. The public demonstrations and postulations of the HRM attracted widespread media coverage. In an apparent attempt to quell the public rantings of the HRM and to determine the veracity of their claims, the Joint Consultative Council ("JCC") undertook to establish a committee known as the Highway Review Committee ("HRC") to undertake a technical review of the Debe to Mon Desir segment of the highway. The HRC presented its draft report in early February 2013.

2. This paper proposes to critically analyse the findings and conclusions of the HRC. In so doing, particular emphasis would be placed in determining whether the HRC's report in terms of its references and findings on legal issues, statutes and legislation can be supported. This analysis further attempts to examine some of the technical conclusions reached by the HRC and determine whether the same are tenable or can be impeached on the ground of irrationality in the Wednesbury sense.

Methodology

3. The analysis will be undertaken by examination of the primary material which has been formulated (studies, technical reports, data etc.) in support of the application for the Certificate of Environmental Clearance ("CEC"). It will then identify the statements or findings of the HRC to determine the legal or technical soundness thereof and highlight any incongruity, insofar as the same may arise.

Discussion and Analysis

4. Section 75 of the Constitution confers upon the Cabinet of the Republic of Trinidad and Tobago the general direction and control of the Government. It is collectively responsible therefor to the Parliament. The construction of the highway is a decision of the Cabinet and there is nothing to suggest that the decision to do so is illegal or otherwise improper. This must be the starting point.

Response - Land Acquisition Consultant, HRC

This consultant is unaware that the HRC suggested that Cabinet did not have the authority to make decisions in respect of the highway .The report lists a number of cases where the law appeared to have been flouted. NIDCO failed to provide all the documentation requested to determine the full and accurate position .It appears that NIDCO is now laying the blame on Cabinet. Cabinet decisions are normally based on a Cabinet Note requesting the said decision(s) with the technical rationale .The background documentation to these questionable policies/decisions was requested but was not supplied. It may well be that Cabinet was not properly advised. This consultant suggests that NIDCO should still supply the documentation requested in respect to land acquisition, private treaty ,resettlement policy, ex gratia awards and other payments to occupiers/owners so that the consultants can review their position. This consultant assumes that "general control and direction" do not include unlawful, illogical or improper policies and/or directives.

5. In any project of this nature, it must be assumed that there will be some displacement. Insofar as the allegation is made that such displacement will involve violations of fundamental rights as guaranteed under the Constitution, the same is misplaced. Rights are not absolute, but are qualified and circumscribed. No fundamental right is untrammelled. In **Collymore v AG,** Wooding CJ opined at pg. 14 as follows:

> "In my Judgment, then, freedom of association means no more than freedom to enter into consensual arrangements to promote the common-interest objects of the associating group. The objects may be any of many. They may be religious or social, political or philosophical, economic or professional, educational or cultural, sporting or charitable. But the freedom to associate confers neither right nor licence for a course of conduct or for the commission of acts which in the view of Parliament are inimical to the peace, order and good government of the country. In like manner, their constitutionally-guaranteed existence notwithstanding, freedom of movement is no license for trespass, freedom of conscience no license for sedition, freedom of expression no license for obscenity, freedom of assembly no license for riot and freedom of the press no license for libel."

Response - Land Acquisition Consultant, HRC

This consultant is assuming that this relates to the conclusions of "the summary of findings"; if it is, it is unprofessional as the statement clearly referred to actions which were contrary to law and in no way suggested untrammelled "rights".

Some of the individual statements and findings analysed.

i. **Statement**

"The Ministry and NIDCO must approve the design at intervals and, therefore, OAS has engaged the service of international consultants HALCROW to prepare designs that satisfy the requirements of the contract. Further design checks are to be undertaken by reputable consultancy firms."

Comment

The HRC's report recognizes that MOWI and NIDCO must approve the designs at intervals. These designs are further subject to approval from the various regulatory agencies such as the TCPD, the EMA and the Drainage Division. In saying that further design checks are to be undertaken by reputable consultancy firms, and having regard for the necessity for approval from the regulatory bodies, the HRC has no basis to presume that such designs would not conform to the requirements of international best practice and propriety.

ii. **Statement**

"Given the limited land space that is available in Trinidad and Tobago, and the large land-take associated with road infrastructure such as highways and interchanges, the Planners need to come up with mechanisms and approaches that would effectively address long-term congestion problems and provide the accessibility that is needed to improve connections between the various areas of the country without severely impacting the lives of people."

Comment

The traffic studies which were conducted suggest that the Debe to Mon Desir segment of the highway will address long term congestion and provide both connectivity and accessibility within the communities and between various areas of the country. The extension of the highway to Point Fortin is well documented. It is a project which goes back as far as 1963. It is not of recent vintage. In 1963 the Princess Margaret Highway was extended to create the Sir Solomon Hochoy Highway from Chaguanas to Chase Village. The second phase was the extension from Chase Village to Couva and the third phase from Couva to St. Joseph Village, San Fernando, then to Golconda. The extension from Golconda to Point Fortin is yet another phase as part of

the national Physical Infrastructure Development for Trinidad. It is part of a wider comprehensive plan that takes cognizance of the 1974 South West Region Plan and the 1984 National Physical Development Plan.

Response - Urban Planner, HRC

With respect to comments on the South West Region Plan and the NPDP: Refer to response on point 5 of Dr. Charles letter..

iii. **Statement**

"The Committee determined that while the requirements for the environmental assessment were generally adequately set out in the TOR issued by the EMA in April 2006, these were quite dated. The EIA was actually submitted in February 2009, almost three years after the issuance of the final TOR."

Comment

A typical EIA may take 2 to 3 years to complete. There is thus a lapse between the TOR and the EIA report. The information contained in the EIA was the latest available material. It is incorrect to say that any information was out-dated. The information was produced in response to that mandated by the TOR.

iv. **Statement**

"The responses from the Ministry of Works and Infrastructure (MOWI) to the issues raised by the Review Panel were found by the HRC to be inadequate and often dismissive.... The opinion of the HRC is that the EIA was not acceptable and should have been rejected and returned to the applicant. It seems that the EMA relented without having the applicant provide adequate responses."

Comment

This is an inaccurate statement. The Drainage Division, the Met services and WASA were amongst others that submitted responses. The statement that the EIA should have been rejected is incongruous with that of Mr Shand's who at page 182 of the report stated that the EIA was acceptable. He however stated that it contained enough information but qualified that by saying

that such was "deeply buried" to enable a decision on the project. It is to be further noted that the extant legal proceedings do not challenge the grant of the CEC on the classic judicial review grounds of illegality, irrationality or procedural impropriety. In any event any challenge to the CEC ought to have been made within three months of the date of its issue in accordance with the provisions of the **Judicial Review Act**. A court at this stage cannot embark upon a review of the decision making process relating to the CEC since any challenge by way of judicial review is woefully out of time. The statement that the EMA "seems" to have relented is a serious indictment against the regulatory independence and integrity of the EMA. Such a statement has no place in a report compiled by a group of professional men and women and ought to be struck out from the HRC's report in the absence of any conclusive evidence to validate such a bold assertion.

v. **Statement**

"A closer examination of the treatment of SIA within the EIA also indicates that this was quite inadequate. It was noted that the study area of direct and indirect impacts was not clearly defined, and not drawn sufficiently wide to allow for the consideration of all of the relevant social issues."

Comment

The project executors cannot be expected to go beyond the terms of the TOR. In any event at page 70 of the HRC's report it is concluded that "that TOR for the Debe to Mon Desir segment of the proposed highway contains many of the elements [described above] as being required for an acceptable SIA..." The HRM consultant at page 81 undertook a sample of 40 women living outside and within the ROW. She then took two samples, the first consisting of 20 persons over age 60, and the second 20 women between 22 and 68. Her focus was on the elderly and on women. The sample groups came from persons in the immediate vicinity who are living in the proposed segment of the highway. It is submitted that any result arising from such a sampling population would be skewed and inherently biased. The sample study came from areas where it is most likely that persons were objecting to the construction of the highway and from persons who would most likely be objectors to the project. It is to be noted that SIA studies were conducted for all areas save for the segment between Dumfries Road to Paria Suites, where there were no affected persons. At page 159 of the HRM's report, the relevant components are extracted to highlight the areas which should have been addressed in the social components of the EIA. In terms of the study area (Box 1), it was stated that this should be determined by the extent of direct and indirect impacts...and social environments... as well as surrounding communities....that can be affected. The HRC's reviewing consultant has stated there was compliance with this. In terms of identification and description of the study area to illustrate the spatial extent of the project and the impact area, the reviewing consultant again indicated that there was compliance. Likewise, the HRC's consultant stated that there was compliance with the

identification and location of all human settlements (including ribbon development) impacted by the proposed project. In the light of the identification of the study areas, the HRC's comments on social impact are untenable and cannot be substantiated.

vi. **Statement**

"Indications are that approvals for development of the proposed resettlement sites at Petit Morne and Golconda were not obtained from the appropriate authorities, which suggests a flagrant flouting of the statutory requirements. It is felt that Golconda offers a better option for the consideration of relocation as it allows for conditions similar to those to which the relocates are accustomed."

Comment

Information coming to hand is that the TCPD has granted outline approval for the Petit Morne site. Other approvals from other regulatory agencies such as the Regional Corporation are required at a later stage in the development.

Response - Land Acquisition Consultant, HRC

Can this be satisfactory when the contract has already been awarded and NIDCO stated that failure to hand over the lands needed on a timely basis is likely to lead to substantial claims from the contractor.

To suggest that there was "a flagrant flouting of the statutory requirements" is accusing the GORTT and its agencies of committing violations of the law. Such a statement ought not to be made unless there is conclusive evidence to suggest such. In any event, failure to observe the statutory requirements often attract penal sanctions and it is the function of a court of law, not the HRC to determine whether there has been violation of the law .

Response - Land Acquisition Consultant, HRC

Evidence of failure to observe statutory requirements are documented in the Report**.** The HRC would have been failing in its duty not to make appropriate recommendations.

vii. **Statement**

"The Committee agreed that the EIA considerations were eventually compromised by the Design-Build approach, and concluded that this approach was ill-advised for this project as the implementation risks are in direct conflict with Best Practice, and therefore not in the best interest of the people of Trinidad and Tobago."

Comment

The HRC has failed to particularize how the EIA considerations were compromised by the design build/approach. It has further failed to identify how the implementation risks are in conflict with best practice and not in the interest of the people of Trinidad and Tobago. On the contrary, the essence of the design/build model is that the contractor will share some of the risks and the liabilities. It is the contractor who is charged with the designing of various segments of the project. Where a design is unsuitable or would not be appropriate for the particular component or geographical area, the contractor bears the risk. Because the contractor is engaged in designing, the risk is shared. This is the rationale for the adoption of the design build model. The sharing of the risk in this model is of tremendous advantage to the government and people of Trinidad and Tobago.

Response - Land Acquisition Consultant, HRC

This addresses the general concept and not the peculiarities of this project where official land acquisition procedures were not in place before the contract was awarded and where it has been stated that the law will not be used to remove occupiers.

General Comments and Responses

6. At page 28 of the report, the HRC suggested that a land use survey should have been undertaken to determine the exact location of properties to be acquired and the results mapped and submitted with the EIA.

Response - Urban Planner, HRC

Refer to comments on point 1.4 of Mr Ramlal's report relating to the issue of the land use survey.

Response

It is reasonable to assume that in the early stages of the project all that was required would be identification of structures and parcels using secondary source material such as the information contained in the land registry, the district revenue office, existing maps and cadastral sheets from the lands and surveys division and from aerial surveys.

7. At page 40 (ii), the HRC makes the statement that planning permission was granted before the CEC was obtained whereas the CEC rules stipulate that planning permission cannot be granted until a CEC is obtained from the EMA

   .

Response

This is false and misleading and refers only to projects that also require an EIA as part of the CEC process.

Response - Urban Planner, HRC

The issue of approval having been granted to application T7M:0440/2007 prior to the issue of the CEC is covered at the response to point 1.5 of Mr Ramlal's report. Mr Ramkissoon appears to have missed the point that this project **does** require an EIA as part of the CEC process.

8. The HRC at recommendation 2.6 page 13 states that effective stakeholder participation is essential in the decision-making process and that the relevant agencies must ensure that proper consultation is carried out.

Response

Where a duty of consultation is placed upon a decision maker, this is almost always interpreted by the courts to require merely an opportunity to make written representations or comments upon announced proposals. Where the words, "hearing" or "opportunity to be heard" are used in legislation, they usually require a hearing at which oral submissions and evidence can be tendered: See **Lloyd v Mc Mahon [1987] AC 625.** The proper approach to consultation was stated in **R v North and East Devon Area Health Authority ex parte Coughlan [2001] QB 213** as follows:

> "To be proper, consultation must be undertaken at a time when proposals are still at a formative stage; it must include sufficient reasons for particular proposals to

allow those consulted to give intelligent consideration and an intelligent response adequate time must be given for this purpose; and the product of consultation must be conscientiously taken into account when the ultimate decision is taken."

Response - Land Acquisition Consultant, HRC

The consultations were not conducted under conditions that would ensure effective or genuine stakeholder participation.

Although consultation must take place at the formative stage, it does not require consultation on every possible option. While consultation requires that sufficient reasons be given for the particular proposals to enable those consulted to give intelligent consideration and an intelligent response to the proposals, it does not usually require that sufficient information be given about any objections to the proposals to enable those consulted to give intelligent considerations and intelligent response to the objection. In general, there is no duty to re-consult unless there is a fundamental difference between the proposals consulted on and those which the consulting party subsequently wishes to adopt. See **De Smith's Judicial Review, Sixth Ed. Para 7-054**.
In these circumstances, and the consultations having taken place in accordance with that mandated by the EIA, there can be no complaint that there was inadequate consultation such as to vitiate any decision made in respect of the project.

Response - Land Acquisition Consultant, HRC

Two of the most important items of such consultations are "compensation" and "relocation." Relocation proposals affect compensation. The resource personnel at the consultations did not include the necessary valuation expertise and the information provided was inadequate. A Section 3 notice under the Act allows, " to enter upon the land for investigative purposes only and do all or any of the following things:(a) survey and take levels of any land in any locality to which the public purposes relate;(b) dig or bore into the subsoil of such land; (c) do all other acts necessary to ascertain whether the land is adaptable to the purposes for which it is required; (d) set out the boundaries of the land intended to be acquired and the intended line of the works, if any, proposed to be done thereon; (e) mark levels, boundaries and lines by placing marks and cutting trenches; (f) cut down and clear away any standing crop, fence, tree or bush, where otherwise the survey cannot be completed, the levels taken or the boundaries or line of the works marked; (g) set up and maintain gauges in any stream or watercourse, and

have access to the same from time to time for purposes of observation; and (h) do all such other acts as may be incidental to or necessary for any of the purposes aforesaid" and under subsection . "(6) The Commissioner shall not enter into any building, or into or upon any enclosed yard, court or garden attached to a dwelling house, except—(a) with the consent of the occupier thereof; or (b) after giving to the occupier at least twenty-four hours' notice in writing of his intention to do so." And under sub section "(7) Compensation shall be paid to any person interested in the land so entered for any actual damage or injury resulting to him by reason of the exercise of the powers conferred by this section and shall be assessed—(a) in so far as it relates to land, the acquisition of which is subsequently abandoned under section 8 or deemed to be abandoned under section 9, in the manner provided by this Act; or (b) in so far as it relates to land, the compulsory acquisition of which is completed under section 5, as though it were part of the compensation for the acquisition of the land" .

The consultations were held after many of these activities were completed but the notice was only published on the 3rd Feb 2012 .Nowhere in the documents provided was it mentioned that "payments" would be assessed "under the shadow of Compulsory Purchase" although NIDCO stated so in January 2013 and it was clearly indicated that this was incorrect. The problem at the consultations was not that stake holders were not given an opportunity to respond but that the "proposal"… It is obvious that the "proposal" did not include sufficient reasons for particular proposals to allow those consulted to give intelligent consideration and an intelligent response was not properly documented. It is not sufficient to say we are going to build a highway from San Fernando to Pt. Fortin. Public notice of the lands "likely to be required" must be published in accordance with the Act and must be sufficiently detailed to allow the average person to determine whether it was likely that his property would be affected. It does not appear that this was done.. Even when the notice was published on the 3/2/12 it was useless as it was inadequate for anyone other than a land surveyor to locate the approximate area on the ground.

9. At page 63 of the report, the HRC states that the lack of documented public concerns from the local communities seems to have been a missed opportunity by those who are calling for a reversal of the decision to proceed with the highway. It further states that if public comments had been submitted in writing outlining many of the concerns brought forward during the HRC's review and in the great detail that has been presented by the HRM to the HRC, the EMA should have demonstrated greater consideration of the perceptions of this group (the HRM).

Response

This criticism of the HRM's is flawed in logic. It subsumes that the HRM was an entity in existence in the formative stages of the project and during the subsistence of the consultation sessions held in 2006 and 2007. It fails to take cognizance that the HRM as an organized body only emerged in 2011 and started its public campaign in 2012. The applicant for the CEC, the MOWT complied with all protocols, statutory and regulatory, regarding the timelines fixed for public comment. The reality is that the HRM did not present their points of view during this timeframe which was stipulated. To suggest that the project undertakers must now accept the proposals of the HRM is to disregard and ignore the existence of the statutory and regulatory timeframes which have been fixed to undertake such processes of consultations and stakeholders' representations. Taken to its logical conclusion, this would entail an exercise carried on ad infinitum. This could not have been the intention of the framers of the legislation.

Conclusion

10. There are many other instances of factually flawed statements and consequential misleading analyses which are contained in the HRC's report. Insofar as the same consist of technical and engineering issues, these are beyond the scope of this analysis. However, there is sufficient material in the HRC's report which may justify the same being impugned on the ground of irrationality in the Wednesbury sense. The Executive Summary of the report contains material which is often incongruous with the detailed analyses conducted by the individual reviewers.

Response - Land Acquisition Consultant, HRC

There is no evidence to justify this statement.
If there are disagreements with the HRC recommendations, these must be clearly defined.

11. In the case of the individual reviewers, their right to criticize and present alternative view points and suggestions in a professional and considered manner is respected. However, such must be predicated upon a fair and meaningful analysis of the body of studies, reports and data upon which the project was conceptualized and which justified its necessity.

It must also include evidence presented by the HRM and the general public.

12. In presenting this analysis, it is evident that in the instances highlighted above, such matters were either overlooked or were not duly taken cognisance of . The result is that unwarranted and sometimes baseless criticisms and findings have been made with the consequence that the Debe to Mon Desir section of the highway has been unnecessarily castigated.

NIDCO: STEVE GARIBSINGH

EPM COMMENTS ON REPORT BY THE JCC HRC

Nr	JCC HRC Statement	EPM Response
1.	Urban and Regional Planning, 1.6 Conclusions and Recommendation, p. 41 – "The planning of the proposed Debe to Mon Desir segment of the extension of the SHH highway needed to have been undertaken as part of a comprehensive plan that seeks to balance the land use and transportation needs of south west Trinidad, and to do so with a minimum of disruption of human communities."	1. All the relevant available planning instruments reviewed in the report are in full support of the construction of the extension of the highway through the Debe, Penal, Siparia regions (Planning for Development: The South West Region, The National Physical Development Plan Trinidad and Tobago (NPDP), Siparia Final Draft Municipal Development Plan, Penal/Debe Regional Corporation Final Draft Municipal Development Plan, and the Point Fortin Plan). The construction of the highway is consistent with the development plans that are available for the region. 2. One of the key factors in route selection was minimum disruption of human communities. 3. The optimum route was selected as confirmed by the APDSL study (Least Cost Path Analysis for Debe - Mon Desir Segment of the Solomon Hochoy Highway Extension, Prepared by Dr. Bheshem Ramlal, All-Inclusive Project Development Services Limited, January 2013).
2.	Human Settlement – "Relocation to Petit Morne would take affected residents well away from their current environments and involve significant dislocation including school accessibility, family connections, and generational patterns of community. In addition the current approval and implementation process indicates that the availability of usable residential plots at Petit Morne cannot be achieved under two to three years. **This site is not recommended for Relocation**." Executive Summary by Dr. James Armstrong, Human Settlement, 2nd paragraph, p. 7 – "Indications are that approvals for development of the proposed resettlements sites at Petit Morne and Golconda were not obtained from the appropriate authorities, which suggests a flagrant flouting of the statutory	1. It should be noted that the site at Petit Morne was agreed to by residents who were represented by the Debe San Francique Highway Action Committee. 2. "…which suggests a flagrant flouting of the statutory requirements…" Nowhere in the HRC consultant's report does such strong language exist – The consultant simply states that there are no approvals.

Nr	JCC HRC Statement	EPM Response
	requirements. It is felt that Golconda offers a better option for the consideration of relocation as it allows for conditions similar to those to which the relocates are accustomed.	
3.	Economic Cost Benefit Considerations, p. 107 Consultant's Comments – "The Consultant concurs with the general sentiment of the HRM as stated above given the absence of quantifiable evidence to corroborate the benefits and costs of the Project. It should be noted though that the HRM/Kublalsingh report also does not detail any dollar values for the ranges of negative impacts from the project that it has identified."	Based on the Consultant's statement, one is forced to conclude that the consultant (Ms Marlene Attz?) has a complete understanding of the highway alignment, and its costs and benefits, and agrees with the following: "Even a cursory glance at the potential costs and perceived benefits of the Debe to Mon Desir High-way shows that this project is an unmitigated planning disaster. Its potential destructive impacts are non-mitigatable and permanent: (i) It will bifurcate thirteen well-established communities and engender permanent disconnectivities. (ii) It will disaggregate a socially, economically, and culturally empowered region. (iii) It will jeopardize the future of the Oropouche Lagoon as a potential food basket. (iv) It will fragment a system of well-connected road system West of the Siparia-Erin Main Road. (v) it will compromise the system of hydrology of the Oropouche Lagoon and its ecology. (vi) Its financial costs will be exceedingly more than advertised by the state and will jeopardize the other viable segments of the highway, and the national economy. (vii) It will lead to significant and permanent negative environmental and health effects on residents who live within its catchment. (viii) It would cause flooding to remaining communities stretching as far back as Barrackpore in the East; particularly if hydraulic systems are not maintained; the costs of these systems will be permanent. (ix) The aggregate required will be 1.4 million tons which will jeopardize the water, soil and vegetation systems of the Northern Range and North East Trinidad." What is the basis for the consultant's conclusion that "Perceived benefits, as listed in the EIA for this

Nr	JCC HRC Statement	EPM Response
		project, and implied in the rationale and objectives for this project are either negligible when contrasted with potential costs; …"? Why is the Government's position less believable that the HRM's position – on what evidence? No evidence presented to support consultant's position.
4.	Executive Summary, Summary of Findings, Land Tenure and Acquisition, p. 8 – "Indications are that entry on to property for executing the project might have been made without Section 4 authority as required by legislation."	NIDCO has not entered any property without appropriate authorization. Section 4 Notice was published for all properties entered in the segment.

Response – Urban Planner, HRC

With respect to point 1 EPM Response, please refer to comments on point 5 of Dr. Charles' letters. Note that the Siparia, Penal/Debe, and Point Fortin Plans would not have been required to critique the highway alignment, but to consider it a given on which the respective proposals would need to be based.

On point 2 EPM Response, the conduct of engineering operations at the Petit Morne site **does**, indeed, represent a "flagrant flouting" of the Laws of the land as indicated in response to point 2. of Dr. Charles' letter, the relevant excerpt of which follows:

As indicated at page 39 of the report of the HRC, Part III of the TCP Act stipulates that permission is required for any development that is carried out after the commencement of the Act, development being defined to include the carrying out of building or engineering operations in, on, over or under any land; and the subdivision of any land. This is acknowledged on page 7 of the EIA at 2.1.3.2 which states "***Planning Permission….. is the legal requirement before development can commence."***

Engineering operations have been started on land at M2 Ring Road and Manahambre Road, Petit Morne, St. Madeline for residential purposes, partly for the resettlement of persons who currently reside in the path of the Debe to Mon Desir segment of the highway. There is no permission for this development, Outline Planning Permission granted June 15, 2010 having lapsed one year later in accordance with the condition in the permission that it *"…..shall lapse and become null and void unless the particulars and plans…..are submitted…..within one (1) year from the date of this Outline*

Permission". Since no particulars and plans have been submitted to the Town and Country Planning Division in this respect, there is currently **no** permission for these lands to be developed. The developer would be required to obtain **Final** Planning Permission for the development, and to meet all other statutory requirements, before plots of land can legally be transferred to individual owners.

Highway Review Committee
JCC Head Office
Professional Centre
Wrightson Road Extension
Port of Spain

04 March 2013

Mr. Afra Raymond,
President,
Joint Consultative Council for the Construction Industry,
The Professional Centre Building, Unit 202,
Fitzblackman Drive, Wrightson Road Extension,
Port of Spain.

Dear Mr Raymond,

Re: Re-Submission of the Report of the Highway Review Committee – Including Specific References to the Correction of Errors and an Explanation of the Process

On behalf of the members of the Highway Review Committee (HRC), I am pleased to resubmit the Report, including some minor corrections and rephrasing of some statements. These corrections do not in any way change the original findings and recommendations. Also, rather than attaching an Addendum, the various issues brought to our attention via the Joint Consultative Council for the Construction Industry (JCC) will be addressed in a separate supplementary document, so as not to tamper unduly with the original Report.

It will be recalled that the HRC submitted its Report to the JCC on 4 February 2013, as was scheduled. We anticipated a delivery date of 5 February but were advised that this one day extension was not possible. The Report at the time was considered to be final. We were subsequently advised by the JCC that the National Infrastructure Development Company Limited (NIDCO) wished to review the document for any factual errors. Between 21 – 27 February 2013 we received, via the JCC, seven sets of comments from different parties mentioned in the Report, including: Ecoengineering, NIDCO, Trintoplan Consultants (Trintoplan), and the Ministry of Works and Infrastructure. These comments were immediately circulated to the Committee for further review. The consultants submitted responses to the substantive issues which were raised. It was noted that the vast majority of the comments received had nothing to do with factual errors, but rather differences of opinion regarding findings and conclusions of issues within the Report. In many cases one-liners were extracted to attempt to refute findings or bolster the preference of opinion of the writer. To the extent warranted, these have been addressed for the records and will be lodged with the JCC. It was also felt that legal advice was advisable in light of some of the points raised.

The Committee also met on 25 February 2013 to consider the comments and responses collectively and to agree on the way forward. It was reconfirmed that most of the comments had nothing to do with factual errors. It was further agreed that any factual errors should be recorded on an Errata Sheet to be attached to the original document and that the queries should be addressed in an Addendum to the Report, including an explanatory Preface by the Chairman. However, the Committee also felt that if we were to adopt this approach, the HRM should have been advised accordingly and invited to likewise submit any observations of factual errors and queries. This position was communicated to the JCC on 26 February however it was agreed that we should limit our focus to any factual errors and omissions. It was noted that the comments received were not solicited by the JCC. The JCC also arranged for legal advice regarding some of the comments received and counsel advised that two statements in particular should be revised so as not to infer impropriety in any part. This recommendation was taken on board.

It should be noted that some of the persons who submitted comments indicated that they were not approached by the Committee to clarify certain points. This claim should be clarified. In the first place, it should be emphasised that the Review was limited to 60 days, which was already tight, and could not be extended. The exercise was significantly constrained by the limited time. However, the records will show that at a meeting with NIDCO on 9 January 2013, Ecoengineering was represented by two persons, one of whom intervened only to state that a matter raised in the discussions was the subject of a court matter. A separate meeting was held with Trintoplan although they were also represented at the meeting with NIDCO, as was the Ministry of Works and Infrastructure. These records of attendance, along with verbatim transcripts have been lodged with the JCC for any reference. The Committee was therefore quite surprised that queries and points of explanation were subsequently submitted on many of the issues discussed at the meetings cited, after the final Report was handed over to the JCC.

The point was also made in the queries that there were differences of opinions between consultants who participated in the Review, particularly with respect to the findings on the EIA. It should be noted that all of the principal consultants were procured locally. Three resource consultants were engaged to provide technical backstopping/advice directly to the Chairman and were also invited to submit their findings. In respect of the EIA, all the consultants found quite similar deficiencies, although there were differences in qualifying their extent. For transparency, all substantive submissions were included in the final Report without tampering. It should be further noted that one resource consultant advised the Chairman and others to interrogate additional records of the EMA to which he did not have access abroad. This review of additional records was actually already in progress and was discussed extensively within the interdisciplinary group, and findings and conclusions drawn accordingly.

The point about signature of the previous Report was also raised. Recall that the Report was submitted under the signature of the Chairman on 4 February 2013. It was not the intention to have each consultant sign, although it has since been agreed that each consultants will be requested to sign indicating that they were responsible for respective disciplines and submissions. However, the process employed in the Review should be further explained and emphasised. All documentation received from any source was circulated to all consultants on 20 December 2012. All of this information was then made available within a Dropbox to which the group had access. It should be further noted that, from the outset, every single submission by any consultant was reviewed by the Chairman and circulated to the entire Committee for consideration and follow-up intense inter-sectoral discussions, often late into the evenings. At every stage all consultants collaborated and were able to comment on individual as well as the collective findings and conclusions. Consequently, the Report is not simply a collection of individual submissions as has been suggested by one party.

It also is not agreed that the format of the Report should have been different whereby the individual submissions should have been subsumed under one summarised document. It is exactly because of the queries being raised now that the Chairman opted not to go that route. It must be recalled that this Review was occasioned by entrenched opposing entities and positions in respect of some very specific issues as set out in the terms-of-reference (TOR) for the Committee. The Report therefore reflects the sector-specific concerns as set out in the TOR and the substantive findings, conclusions and recommendations, within the context of the unifying issue of 'the Highway'. All records of submissions and transcripts of discussions at meetings, as set out in the Report, have been passed over to the JCC for any reference.

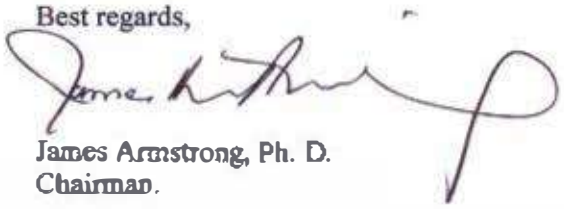
A point was made about the fact that the State has already entered into a contract to build the Highway and that this matter should have been given greater consideraton by the Committee. Kindly note that this fact has been cited in the Report but was not a material focus of the technical review as set out in the TOR. This certainly would have required additional time and expertise.

Briefly, I should like to draw your attention to the adjustments which have been made to the original Report:

1. A typographical error was noted in the Table of Contents in which the second Roman II should actually be III and likewise on page 25 the Roman III should be II.
2. On page 2, second para 2 "Southern Trunk Road" was changed to South Trunk Road. The sentence "The study noted that there were....Point Fortin" was replaced by a section starting "The final report of the latter study..." and ending with "...St. Mary's Junction." (at point 3) for clarity.
3. On page 3 it has been corrected that the HRM wrote to the Prime Minister in February 2012, and not 2011, and footnote inserted to cite the reference to the procurement of Construtora OAS Ltda (OAS) taking place in 2011.
4. On page 63 the reference to the Scarlet Macaw has been removed along with other items listed in the Convention on International Trade in Endangered Species (CITES).
5. On page 115, the sentence "It is also the opinion of the consultants that ....the HRM" has been changed to "Among the options considered by Trintoplan was a route which effectively is the option suggested by the HRM." A map that had, inadvertently, been omitted from the first printing of the report, has been inserted as Figure 6.3 to show the route options considered by Trintoplan.
6. On page 146, the sub-heading of **8.3 "The Land Conflict"** has been changed to **Issues Raised by the HRM.** Parts of section **8.4** have been moved to **8.3** for consistency and clarity. The sub-heading of **8.4 "Role of NIDCO"** has been changed to **Review of the Issues** for clarity. The first paragraph of **8.4** has been modified to make specifice reference to the date on which the meeting with NIDCO was held and a request made for documentation. The point made at **8.4** (4) has been removed because it was already stated at (g).
7. On page 147, Under **8.5 Findings**, the reference that "...NIDCO has failed to follow due process ....." has been changed to remove the specific reference to NIDCO and state that "...there has been failure to observe due process ...." Under **8.5** 2 (a) the statement that "..... entry for activities permitted under Section 3 were conducted up to six years previously" has been changed to state "... were said to be conducted up to six years previously." Under **8.5** 2 (b) that "Entry for the executing of the project appears to have been made without Section 4 authority." has been excised. Further down at (15) the reference to NIDCO reimbursing costs that are not allowed under the Land Acquisition Act (LAA) or Highways Aet has been restated that: "The procedures for reimbursement costs in accordance with the LAA or Highways Act could not be ascertained."

In conclusion, I wish to reiterate that the Committee stands by its earlier findings and recommendations.

Best regards,



James Armstrong, Ph. D.
Chairman.

Highway Review Committee
JCC Head Office
Wrightson Road Extension
Professional Centre
Port of Spain

2013 February 04

Mr. Afra Raymond
President
Joint Consultative Council
Wrightson Road Extension
Port of Spain

Dear Mr Raymond,

Re: Submission of the Report of the Highway Review Committee

On behalf of the members of the above captioned Committee, we are pleased to transmit ten (10) copies of the Final Report of the Highway Review Committee. It was indeed an honour to serve in this capacity, particularly in light of the circumstances which led to the occasion of such a review.

It will be appreciated that the time allowed for this exercise was very tight. The findings and consequent recommendations are based on the knowledge of the individual consultants and information made available to the Committee by various parties within this confined timeframe. While every effort has been made to verify the information where possible, we could not attest to the factual content of all the information presented for review.

All documentation related to the exercise will be transmitted electronically and hard copies lodged with the JCC for your records. We propose that an additional three days be allowed for the support staff to complete the transcripts of the proceedings, which will also be lodged with the JCC. Accordingly, arrangements should be made for the handing over of the office facility at Edward Street.

As also indicated earlier, all consultants worked in good faith on this exercise and there is now some anxiety with respect to the settlement of their remuneration.

Best regards,

James Armstrong, Ph. D.
Chairman.

THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Claim No. CV 2012-04538

BETWEEN

THE JOINT CONSULTATIVE COUNCIL FOR THE CONSTRUCTION INDUSTRY

Applicant/Intended Claimant

AND

THE MINISTER OF PLANNING AND SUSTAINABLE DEVELOPMENT

Respondent/Intended Defendant

Before the Honourable Justice Frank Seepersad

Appearances

1. Ms Kingsley Walesby for the Applicant
2. Mr Russell Martineau S.C and Mr Shiv Sharma, Deowattee Dilraj- Batoosingh for the Respondent.

Date of Decision: October 1, 2013

Decision

Introduction

1 In the proceedings before the court, the Applicant/Intended Claimant is seeking leave to institute Judicial Review in order to challenge the decision of the Respondent/Intended Defendant to refuse to disclose copies of the written instructions, the legal advices and the identity of the authors of such legal advices it received from the Legal Unit of the Respondent and the Office of the Attorney General.

2 The refusal was primarily on the basis that the documents were exempted under the Freedom of Information Act (Chap 22 02)

3. The application was filed with notice on the 31st October, 2012 and it was later amended and re-filed without notice on the 11th January, 2013.

4. The relief sought included *inter alia*:

i A declaration that the continuing decision of the Respondent by letter dated the 16th August, 2012 to refuse to provide the said information which was requested by the Applicant in its Freedom of Information application dated the 20th April, 2012 is illegal, null and void and of no effect,

ii A declaration that the Respondent is not entitled to rely upon the additional reasons for its refusal to provide the said information as set out in its letter dated the 4th December, 2012 as a ground for its refusal to provide the said information,

iii A declaration that the Applicant is entitled to the said information; and

iv An order of Mandamus compelling the Respondent to provide the said information.

Background Information

5. The Ministry of Planning and Sustainable Development was formerly known as the Ministry of Planning and the Economy until the year 2012. Senator the Honourable Minister Dr Bhoendrat Tewarie while functioning under the Ministry of Planning and the Economy initiated a Request for Proposal process to select a developer or developers for state lands located at Invader's Bay

6 The Applicant/Intended Claimant contends that the request for proposal process amounted to a tender process and by letter dated 14th December, 2011 called upon the Minister to explain how this was possible under the Ministry when the Central Tenders Board has the sole and exclusive authority to act for and on behalf of the government subject to limited exceptions which did not apply in this case.

7 The Applicant/Intended Claimant requested a response from the Ministry on this apparent circumvention of the Central Tenders Board and described same as a 'matter of grave public concern'

8 By letter dated the 21st December, 2011, the Minister informed the Applicant that with respect to its query advice was being sought from the Attorney General on the matter.

9 By letter dated the 1st March, 2012, the Minister wrote to the Applicant indicating *inter alia* that based upon advice received from the Office of the Attorney General the Request for Proposals process was not required to be in conformity with the Central Tenders Board Act (Chap. 71:91)

10 By letter dated the 29th March, 2012, the Applicant called upon the Minister to publish the legal advice received with respect to the Central Tenders Board Act.

11 By letter dated the 20th April, 2012 the Applicant wrote to the Ministry pursuant to the Freedom of Information Act requesting access to various information including a printed copy of the following documents and information -

i *"Has MPE had legal advice on the applicability of the CTB Act to this RFP process?*

ii *When did MPE request that legal advice? To which legal adviser did MPE make that request?*

iii *We are requesting copies of the written instructions and the legal advices both from the Legal Unit of MPE and the office of the Attorney General "*

12 Having regard to the lack of acknowledgement or a substantive response to the said letter the Applicant wrote to the Ministry again indicating that its previous letter had not been acknowledged by the Ministry and that the Ministry was in breach of section 15 of the Freedom of Information Act by failing to indicate within thirty (30) days whether it was acceding to or refusing the Applicant's request for the requested documents

13. By letter dated 5th July, 2012 the Ministry acknowledged receipt of the Applicant's letter dated the 27th June, 2012 and in which it apologized for the delay and informed the Applicant that the matter was receiving its attention

14 By letter dated the 13th July, 2012 the Applicant wrote to the Respondent referring to its letter dated the 29th March, 2012 and indicated that it was still awaiting a copy of the said information.

15. By letter dated the 10th August, 2012 the Applicant through its Attorneys at law sent a pre-action protocol letter to the Respondent indicating that the Ministry in failing to indicate whether it was approving or refusing to grant the information requested by the Applicant was in direct and continuing breach of Section 15 of the Freedom of Information Act The Respondent was requested to provide its substantive response on or before the 24th August, 2012 failing which it was indicated that the Applicant would apply for judicial review of the said continuing refusal and/or failure of the Ministry to provide its substantive response to the request

16 By letter dated the 16th August, 2012, the Permanent Secretary, Ministry of Planning and Sustainable Development refused to provide the legal advice obtained on the matter and informed the Applicant as follows

"The instructions for the provision of the legal advice, the advice and its author are however considered exempt according to Section 27(1) of the Freedom of Information Act The revelation of same cannot be seen to be justified in the public interest since relevant information surrounding process is now provided Further the decision to move forward with the process and the selection of the three (3) chosen investors was agreed by cabinet "

17 Further by Letter dated the 4th December, 2012 the Respondent indicated that the information requested by the Applicant is exempt under section 29(1) of the Freedom of Information Act on the ground of legal professional privilege and therefore could not be made available to the Applicant.

Attorneys' Submissions

18. By submission dated the 7th February, 2013 the Applicant/Intended Claimant's attorney submitted as follows:

i The test to be applied when considering whether leave for Judicial Review should to be granted is whether the Applicant has an arguable ground for judicial review with a realistic prospect of success and not subject to a discretionary bar such as delay or an alternative remedy. The case of *Sharma v Antoine [2006] UKPC 57* was relied upon,

ii There has been no unreasonable delay in the filing of this application and that the Applicant has no alternative remedy or means of obtaining the requested information having regard to the refusal of the Respondent to provide same,

iii. The Request for Proposals process adopted by the Ministry was illegal given that it was not in conformity with the Central Tender Boards Act,

iv. Section 27 (1) (b) of the Freedom of Information Act does not apply to the requested information as it would not be contrary to the public interest for the requested information to be provided to the Applicant,

v Neither of the explanations provided by the Respondent/Intended Defendant for withholding the information is a credible explanation,

vi The Respondent/Intended Defendant's refusal to provide the requested information on the ground that the documents are exempted on the ground of legal professional privilege under Section 29 (1) of the Freedom of Information Act was not an original reason relied upon by the Respondent in its letter date 16th August, 2012 and therefore the court should refuse or be reluctant or at least highly circumspect in accepting reasons provided by the decision maker that were not advanced at the time that the decision was made

vii. Even if the court accepts the additional reason provided by the Respondent/Intended Defendant in its letter dated 4th December, 2012, that is, that the requested information is also exempted on the grounds of legal professional privilege, the action of the Respondent/Intended Defendant in requesting advice on an issue that was raised by the Applicant as a matter of public interest and the subsequent actions of the Respondent in referring to the said advice and voluntarily relying upon the contents of same in the Senate on the 28th February, 2012 amounted to a publication and disclosure of the substance of the advices received and constituted an act of waiver or loss of legal professional privilege

viii Even if the requested information is exempted under Section 27 and/or Section 29, the Respondent/Intended Defendant is in breach of its statutory duty as it has refused to provide same without first conducting the section 35 assessment, analysis and determination and communicating this in its reasons to the Applicant.

19 By submission dated the 11th March, 2013 the Respondent/Intended Defendant's attorney submitted as follows:

i. In deciding whether or not leave should be granted the Court should apply the elevated threshold test, that is, whether the applicant has a reasonably good chance of success, as outlined in the case of *R v Cotswold District Council ex parte Barrington [1998] 75 P &CR 515.*

ii. The Respondent/Intended Defendant should be allowed to rely on section 29(1) because it raises a substantive issue of law and having regard to the clear nature of the information sought the Respondent should be allowed to rely on the exemption especially since no new evidence is required

iii. There has been no waiver in the circumstances of this case of the legal professional privilege provided under section 29(1).

iv The Respondent/Intended Defendant was under no obligation in this instance to set out reasons relating to the overriding section 35 provision in the public interest as the Applicant placed no evidence before it to consider

20. The primary issue that the Court is required to determine at this stage is

i Whether or not the Applicant/ Intended Claimant has an arguable case so as to justify a review of the Respondent's decision to refuse to provide copies of written instructions, legal advice and the identity of the author(s) of same received by the Respondent from their legal unit and the office of the Attorney General

Test for granting leave

21 The Applicant and the Respondent are at odds with respect to the test that should be applied when determining whether leave for judicial review should be granted

22. The Applicant/Intended Claimant relied on the case of *Sharma v Antoine [2006] UKPC 57* for its position that the test is 'whether the applicant has an arguable ground for judicial review with a realistic prospect of success '

23. The Respondent/Intended Defendant submitted that the threshold test as outlined in *Sharma* is not the only test and relied on the case of *R v Cotswold District Council ex parte Barrington [1998] 75 P&CR 515* in support of its position that the elevated test, that is, 'whether the applicant have a reasonably good chance of success with its claim for judicial review as amended,' should be applied in these circumstances

24 Before determining which test is to be proffered it is important to understand the reason(s) why leave is required for judicial review The entire law was analysed in Mitchell v Georges by Rawlins JA (as he then was) at paragraphs 46 to 49 in these terms

> *"[46] An applicant for leave is required to show that there is an arguable case, one that is not frivolous This is to prevent busy-bodies from wasting the court's time with misguided or trivial complaints Thus in Inland Revenue Comrs v National Federation of Self-Employed and Small Business Ltd Lord Diplock stated as follows*
>
> > *'The whole purpose of requiring that leave should first be obtained to make the application for judicial review would be defeated if the court were to go into the matter in any depth at that stage If, on a quick perusal of the material then available, the court thinks that it discloses what might on further consideration turn out to be an arguable case in favour of granting to the applicant the relief claimed, it ought, in the exercise of a judicial discretion, to give him leave to apply for that relief The discretion that the court is exercising at this stage is not the same as that which it is called on to exercise when all the evidence is in and the matter has been fully argued at the hearing of the application.'*
>
> *[47] In Sharma v Browne-Antoine, the appellant, the then Chief Justice of Trinidad and Tobago, allegedly attempted to influence the course of a trial conducted by the Chief Magistrate The Chief Justice denied the allegations and maintained that proceedings against him were influenced by political pressure He applied for judicial review of the decision to prosecute him, and for a stay of the criminal proceedings against him pending the determination of the application The judge granted leave and stayed the proceedings In affirming the decision by the Court of Appeal to set aside the judge's order, the Privy Council held that the challenge to the decision to prosecute was in principle susceptible to judicial review but in extremely rare cases Their Lordships were satisfied that the judge had failed, inter alia, to look at the evidence overall and to identify the grounds on which the appellant's challenge was arguable Their Lordships therefore held that the Court of Appeal was justified in making its own analysis of the facts and circumstances*

[48] In arriving at its decision in Sharma's case, Lords Bingham and Walker elucidated the test for the grant of leave in the following terms (2006) 69 WIR 379 at 387-388)

> *'The ordinary rule now is that the court will refuse leave to claim judicial review unless satisfied that there is an arguable ground for judicial review having a realistic prospect of success and not subject to a discretionary bar such as delay or an alternative remedy But arguability cannot be judged without reference to the nature and gravity of the issue to be argued. It is a test which is flexible in its application. As the English Court of Appeal recently said with reference to the civil standard of proof in R (on the application of N) v Mental Health Review Tribunal (Northern Region) [2005] EWCA Civ 1605, [2006] QB 468, at para [62], in a passage applicable mutatis mutandis to arguability*
>
> > *' the more serious the allegation or the more serious the consequences if the allegation is proved, the stronger must be the evidence before a court will find the allegation proved on the balance of probabilities Thus the flexibility of the standard lies not in any adjustment to the degree of probability required for an allegation to be proved (such that a more serious allegation has to be proved to a higher degree of probability), but in the strength or quality of the evidence that will in practice be required for an allegation to be proved on the balance of probabilities '*

It is not enough that a case is potentially arguable, an applicant cannot plead potential arguability to 'justify the grant of leave to issue proceedings upon a speculative basis which it is hoped the interlocutory process of the court may strengthen', Matalulu v Director of Public Prosecutions [2003] 4 LRC 712 at 733 '

[49] In my view this statement did not change the 'arguable case' standard for leave laid down in the Inland Revenue Comrs case It merely qualifies arguable to require a greater degree of arguability The quotation from R (on the application of N) v Mental Health Review Tribunal (Northern Region) seems merely to suggest that arguability cannot be supported on a speculative basis from evidence that may emerge during the course of the interlocutory process It is also indicating that the nature and gravity of the issues must be taken into consideration in determining the sufficiency and cogency of the evidence which will be taken into consideration to justify the grant of leave Thus the court must bear in mind that 'a more serious allegation has to be proved to a higher degree of probability' While the 'balance of probability' remains the test, the strength and quality of the evidence required to prove a serious allegation on the balance of probability will, 'in practice', be higher than that required to prove an allegation of trivial nature This explains the statement 'thus the flexibility of the standard lies not in any adjustment to the degree of probability but in the strength or quality of the evidence' It is on this basis that I do not agree with Mr Astaphan's contention, for which he cited Mass Energy Ltd v Birmingham City

Council, R (on the application of the Noble Organisation) v Thanet District Council and Tanfern Ltd v Cameron-MacDonald as authority, that there are special circumstances in the present case, which require the standard of proof on this application for leave to be more than just an arguable case "

25 Having considered both cases referred to by the respective parties and the principles outlined in *Mitchell* the overriding factor in the court's view is arguability In the Oxford Concise Dictionary 'arguable' is defined to mean, "capable of being supported or sustained by argument." This must necessarily come from the affidavit evidence, by the authorities cited and the Freedom of Information Act.

26 The local authorities which dealt with leave for judicial review generally have relied on the test as outlined in *Sharma,* and the court is of the view that there is no need in these circumstances to depart from same Accordingly the relevant test is whether the "applicant has an arguable ground for judicial review with a realistic prospect of success and not subject to any discretionary bar such as delay or an alternative remedy "

27 At this stage therefore the Court is not concerned with facts but rather with the nature of the evidence for the purpose of arguability and with a view of determining whether any of the arguments advanced reveal arguable grounds which have a realistic prospect of success

28. In order to determine whether there are arguable grounds for judicial review the court considered the purport and effect of the Freedom of Information Act and also consider the arguments advanced as to whether in all the circumstances disclosure would be contrary to the public interest.

29 The Applicant/Intended Claimant in this case says that it requested the information because it had concerns about the legality of the request for proposals process for screening for potential investors initiated by the Minister. The Applicant/Intended Claimant was of the view that the process by-passed the Central Tenders Board Act and thus might not have been in conformity with the law

30 The Respondent/Intended Defendant in its Notice of Refusal dated 16th August, 2013 relied on section 27 of the Freedom of Information Act as the basis for refusing the requested documents.

31 Section 27 (1) provides as follows

> *"Subject to this section, a document is an exempt document if it is a document the disclosure of which under this Act -*
>
> *(a) Would disclose matter in the nature of an opinion, advice or recommendation prepared by an officer or Minister of Government, or consultation or deliberation that has taken place between officers, Minister of Government, or an officer and a Minister of Government, in the course of, or for the purpose of, the deliberative processes involved in the function of a public authority, and*
>
> *(b) Would be contrary to the public interest "*

32. By the said Notice the Respondent/Intended Defendant relying on section 27 informed the Applicant/Intended Claimant that the documents were exempted and gave the following two reasons for this position:

i That since relevant information surrounding the process is now provided disclosure was not justified in the public interest; and

ii. That the decision to move forward with the process and the selection of the three (3) chosen investors were agreed to by Cabinet.

33 By Submissions dated the 7th February, 2013 the Applicant/Intended Claimant submitted that the reasons provided by the Respondent in its letter dated the 16th August, 2012 when carefully scrutinized, are untenable and the Respondent on whose shoulders the burden

lies to demonstrate why the granting of access would be contrary to the public interest has wholly failed to provide compelling reason as to why such access should be withheld

34. The Applicant/Intended Claimant further submitted that it's reasonable and legitimate expectation to gain access to the said document under the Freedom of Information Act far outweighed the explanations that have been provided by the Respondent in its letter dated 16th August, 2012 as to the public interest considerations for withholding such information.

35 The Applicant/Intended Claimant further submitted that the clear intention of the legislation is for information requested under the Act to be supplied save and except in limited exceptions and circumstances which are necessary to protect essential public interests and private business affairs and in this case the public interest exception in withholding the requested information does not apply.

36. In order to determine whether disclosure of the requested document is contrary to public interest a careful examination of the intent and purport of the Freedom of Information must be carried out. The approach to the Freedom of Information Act is set out comprehensively in the decision of the Honourable Justice Moosai in *Ashford Sankar v Public Service Commission Claim No CV2006-00037*, delivered April 2 2007

37 The Freedom of Information Act allows public authorities to refuse disclosure of information requested if one or more of the exemptions contained in the Act are applicable Some of these exemptions are absolute, while others are qualified

38. The exemption provided for under section 27 appears to be qualified In *Ashford Sankar v Public Service Commission CV 2006/ 00037* Moosai J stated as follows:

> *"As is immediately apparent, the requirements of section 27 (1) are twofold, so that a document falling within the definition of s-27 (1) (a) must also be shown to be such that its disclosure would be contrary to the public interest s 27 (1) (b) "*

39 The Applicant/Intended Claimant advanced that the Respondent/Intended Defendant in this case does not have an automatic right to non-disclosure, and that the Intended Defendant must have considered whether the public interest in keeping the information confidential was of greater importance, than the public interest in disclosing the said information

40 The argument is that the onus is on the Respondent/Intended Defendant to show that it is entitled reasonably to rely on an exemption claimed and to not grant access to the documents requested In *Nimmo v Alexander Couran and Sons Ltd. [1968] A.C 107 at 130* Lord Wilberforce stated:

> *"the orthodox principle (common to both the criminal and the civil law) that exceptions etc , are to be set up by those who rely on them "*

41 Additionally, the Applicant/Intended Claimant contends that the Respondent having decided that the document was exempt was required to carry out a section 35 public interest override assessment and analysis to determine whether disclosure was necessary notwithstanding that it may have been exempt

42 Section 35 of the Freedom of Information Act provides

> *"Notwithstanding any law to the contrary, a public authority shall give access to an exempt document where there is reasonable evidence that significant (a) abuse of authority or neglect of performance or official duty or (b) injustice to an individual, has or is likely to have occurred or in the circumstances of giving access of the document is justified in the public interest having regard both to any benefit and to any damage that may arise from doing so "*

43 The Respondent/Intended Defendant submitted that it was under no obligation in this instance to set out reasons relating to the overriding section 35 provision in the public interest as the Applicant/Intended Claimant placed no evidence before it to consider Whether the Applicant/Intended Claimant had an obligation to place evidence before the Respondent/Intended Defendant is an issue that the Court would have to determine on a

substantive hearing At this stage however, it appears to this Court that position advanced that the Respondent/Intended Defendant ought to have undertaken a public interest assessment is an argument that is arguable and has a realistic prospect of success

44 The Respondent/Intended Defendant has also sought to rely on section 29 of the Act and the Court must consider the argument as whether the Respondent/Intended Defendant can rely on section 29 of the Freedom of Information Act as a ground for denying access to the requested information and whether the said position ought not to be considered given the fact that it was raised after the commencement of these proceedings and whether there has been any waiver of privilege

45 The Applicant/Intended Claimant contends that the Respondent/Intended Defendant is not entitled to rely on section 29 of the Freedom of Information Act as a ground for refusal to provide the requested information given that same was not advanced at the time that the decision was made and conveyed to the Applicant in the Respondent's letter of refusal dated 16th August, 2012

46 The Applicant/Intended Claimant also contends that the Respondent/Intended Defendant in this case was statutorily bound to provide reasons for its decision and by its letter of refusal dated the 16th August, 2012 the Respondent refused to disclose the requested information on the basis that same was considered exempt under 27(1) of the Act and disclosed that the revelation of same could not be justified in the public interest since relevant information surrounding the process was now provided and further the decision to move forward with the process and the selection of the three (3) chosen investors was agreed by Cabinet

47. The Applicant/Intended Claimant stated that the reasons outlined in its letter of refusal dated the 16th August, 2012 did not advance the reason that the requested documents are exempted on the ground of legal professional privilege under section 29 (1) of the Act and given that there are no exceptional circumstanced to justify the court accepting any subsequent reason for the Respondent refusing to provide the requested information, as

outlined in its 4th December, 2012 letter, it is just, in all the circumstances of the case for the court to refuse to consider the subsequent reason of the Respondent as contained in its letter dated 4th December, 2012

48 The Applicant/Intended Claimant further contends that the Respondent/Intended Defendant had ample time during the three months limitation period to rely on section 29 as a ground for refusal but failed to do so. It was not until after the application for leave had been filed and served on the Office of the Attorney General on the 16th November, 2012 and re-served on the 23rd November, 2012 that the Respondent/Intended Defendant by letter dated 4th December, 2012 for the first time indicated that its refusal was also based on the ground that the documents are exempted on the ground of legal professional privilege under section 29(1) of the Act

49 In support of its position the Applicant/Intended Claimant relied on the following authorities.

(a) *R (s) v London Borough of Brent [2002] EWCA Civ 693*, in which it was stated that *"it is not ordinarily open to a decision maker who is required to give reasons to respond to a challenge by giving different or better reason;"*

(b) *R v (Goldsmith) v London Borough of Wandsworth [2004] EWCA Civ 1170 (2004) 7 CCLR 472 AT [91]* *"The court has to look at the decision at the time it was made and at the manner in which it was communicated to the person or persons affected by it,"*

(c) *R (D) v Secretary of State for the Home Department [2003]EWHC 155(Admin)* *"it is well established that the court should exercise caution before accepting reasons for a decision which were not articulated at the time of the decision but were only expressed later, in particular after the commencement of proceedings,"*

(d) *R v Secretary of State for the Environment ex p Kingston upon Hull City Council [1996] Env LR 248 at 262* in which the court preferred contemporaneous letters to letters written after the event in response to the application for judicial review,

(e) *R v (Nash) v Chelsea College of Art and Design [2001] EWHC (Admin) 538 at 34* in which Stanley Burnton J held, *inter alia,* that: "*where there is a statutory duty to give reasons as part of the notification of the decision, so that the adequacy of the reasons is itself made a condition of the legality of the decision, only in exceptional circumstances it at all will the Court accept subsequent evidence of the reasons.*"

(f) *R v Westminster City Council, ex p Ermakov [1996] 2 All ER 302* in which the court held, inter alia that there is a statutory duty to give reasons and where there is a failure on the part of the Respondent to provide accurate reasons at the time of the decision a Claimant is prima facie entitled to have the decision quashed

50 The Applicant/ Intended Claimant advocated that even if the court accepts the additional reason provided by the Respondent/Intended Defendant in its letter dated 4th December, 2012, that is, that the requested information is also exempted on the grounds of legal professional privilege, that the action of the Respondent/Intended Defendant in requesting advice on an issue that was raised by the Applicant as a matter of public interest and the subsequent actions of the Respondent in referring to the said advice and voluntarily relying upon the contents of same in the Senate on the 28th February, 2012 amounted to a publication and disclosure of the substance of the advice received and constituted an act of waiver and resulted in the loss of legal professional privilege.

51. The Respondent/Intended Defendant contended that it should be allowed to rely on section 29(1) because it raises a substantive issue of law and having regard to the clear nature of the information sought, the Respondent should be allowed to rely on the exemption especially since no new evidence is required

52 In support of its position the Respondent/Intended Defendant relied on the case of *Birkett v Department for Environment Food and Rural Affairs [2012] Env L R. 24* In that case, the applicant's initial request was refused by the public body on a particular exception After a reversal by the Information Commissioner, the public body appealed to the Information Tribunal seeking to rely on two further exceptions. The issue for the court of appeal to decide was whether the authority could rely on exceptions not previously relied on, "as of right" or only in circumstances where there was "reasonable justification" for allowing them so to do. The Court of Appeal found itself unable to accept the applicant's submission that permitting a public authority to rely on a new exception in the administrative and legal review process deprived the person seeking the information of any effective judicial control and thereby destroying the effectiveness of the process

53. At paragraph 24 of Birkett's case Sullivan LJ stated

> *"suppose a public authority mistakenly fails to rely in its refusal notification upon an adverse effect upon public security or national defence because it did not realize the significance of the information, or it fails to rely on an adverse effect upon a criminal inquiry or upon the ability of a person to receive a fair trial because it is unaware of the inquiry or the impending trial, or if it fails to rely on the commercial confidentiality or information which is only raised as an issue by a third party during the review process, or it fails to rely on exemption (h) because it does not initially appreciate that the release of the information might endanger a rare species, would a purposive interpretation of the Directive preclude the review process under art 6 from considering those exceptions however grave might be the adverse effects of disclosure? In my judgment, the answer to that question must be "No" if the Directive is read as a whole '*

54. With respect to the issue of waiver, the Respondent/Intended Defendant contended there has been no waiver in the circumstances of this case of the legal professional privilege provided under section 29(1) The disclosure to the Senate is not disclosure to the world

at large particularly since leave is often required for persons to refer to contents of proceedings in Parliament

55 The Respondent/Intended Defendant contended that it is imperative that one gives weight to the circumstances in which the Honourable Minister's statement was made. The Minister made the statement in Parliament and in response to a written question that was posed to him and there could have been no intention to waive the privileged nature of the advice since the intention was to fulfill his Parliamentary obligation to answer questions posed to him in Parliament

56 The Respondent/Intended Defendant further contended that it could not be fairly asserted that a Senator answering a question in Parliament by merely stating that he obtained legal advice before embarking on a project would amount to a waiver of legal professional privilege enabling an applicant to obtain the entire legal advice. The purpose of such disclosure was not to disadvantage anyone or create a misleading impression Section 29(1) provides as follows.

> *"A document is an exempt document if it is of such a nature that it would be privileged from production in legal proceedings on the ground of legal professional privilege "*

57 According to *Waterford v Commonwealth (1987) 163 CLR 54, 63—4* professional privilege protects confidential communications between a lawyer and their client, made for the dominant purpose of giving or receiving legal advice, or for use in actual or anticipated litigation

58 The Freedom of Information Act gives rights of public access to information held by public authorities. Public authorities have two basic functions under the Act, that is, to confirm or deny whether requested information is held and to provide the requester with that information If a public authority is refusing to meet either of these duties it is required to issue a refusal notice to the requester explaining the reasons for its decision

59 The Respondent/Intended Defendant provided its refusal notice on the 16th August, 2012 but did not rely on the exemption under section 29(1) as a reason for its refusal. In deciding whether this failure disentitled the Respondent/Intended Defendant from raising the exemption at a later date the court considered the reasoning found at paragraph 42 in the case of *Bowbrick v Information Commissioner App no EA/2005/0006* on this point:

> *"If a public authority does not raise an exemption until after the s 17(1) time period, it is in breach of the provisions of the Act in respect to giving a proper notice because, in effect, it is giving part of its notice late However FOIA does not say that that failure to specify the exemption within the 20 working day time limit means that the authority is disentitled thereafter from relying on the exemption in any way If the intention of FOIA had been that the exemption could no longer apply to the information in such circumstances then it would have been expected that the Act would say this in very clear terms, because otherwise it is a very draconian consequence of the failure to comply with the statutory time limit "*

60 The Court is of the view that the Applicant/Intended Claimant's argument that the Respondent/Intended Defendant is limited to the reasons upon which it relied at the time of the refusal, is also not an arguable ground that has a realistic prospect of success

61 However the issue as to whether the Minister's response to questions posed in the Senate should be taken, impliedly or by imputation of law, to have waived the entitlement of the Respondent to rely on legal professional privilege in respect of the advice received from the Office of the Attorney General must be considered

62. In *Mann v Carnell (1999) 201 CLR 1* it was stated at paragraphs 28, 29 and 34 respectively as follows

> *"[28] At common law, a person who would otherwise be entitled to the benefit of legal professional privilege may waive the privilege It has been observed that "waiver" is a vague term, used in many senses, and that it often requires further definition according to the context Legal professional privilege exists to protect*

the confidentiality of communications between lawyer and client It is the client who is entitled to the benefit of such confidentiality, and who may relinquish that entitlement It is inconsistency between the conduct of the client and maintenance of the confidentiality which effects a waiver of the privilege Examples include disclosure by a client of the client's version of a communication with a lawyer, which entitles the lawyer to give his or her account of the communication, or the institution of proceedings for professional negligence against a lawyer, in which the lawyer's evidence as to advice given to the client will be received.

[29] Waiver may be express or implied Disputes as to implied waiver usually arise from the need to decide whether particular conduct is inconsistent with the maintenance of the confidentiality which the privilege is intended to protect When an affirmative answer is given to such a question, it is sometimes said that waiver is "imputed by operation of law" This means that the law recognizes the inconsistency and determines its consequences, even though such consequences may not reflect the subjective intention of the party who has lost the privilege What brings about the waiver is the inconsistency, which the courts, where necessary informed by considerations of fairness, perceive, between the conduct of the client and maintenance of the confidentiality, not some overriding principle of fairness operating at large

[34] Depending upon the circumstances of the case, considerations of fairness may be relevant to a determination of whether there is such inconsistency

63 In *Grant v Downs (1976) 135 CLR 674 at 685*, the majority of the High Court described the rationale of legal professional privilege as follows:-

"According to traditional doctrine (the rationale) is that it promotes the public interest because it assists and enhances the administration of justice by facilitating the representation of clients by legal advisers, the law being a complex and complicated discipline This it does by keeping secret their

communications, thereby inducing the client to retain the solicitor and seek his advice and encouraging the client to make a full and frank disclosure of the relevant circumstances to the solicitor The existence of the privilege reflects, to the extent to which it is accorded, the paramountcy of this public interest over a more general public interest, that which requires that all relevant documentary evidence is available As a head of privilege, legal professional privilege is so firmly entrenched in the law that it is not to be exorcised by judicial decision. Nonetheless, there are powerful considerations which suggest that the privilege should be confined within strict limits "

64 The factors laid down in the case of *Mann v Carnell (1999) CLR 20* are the relevant factors that ought to be considered namely·

I Whether the privilege information was circulated confidentially;
II The purpose for which the privilege material was created,
III How widely the privilege material has been circulated,
IV. Whether the circumstances of disclosure is inconsistent with the maintenance of confidentiality;
V The nature of the obligation of confidentiality in the recipient

65. In *Goldberg v Ng (1995) 185 CLR 83* Deane, Dawson and Gaudron JJ held that:

"in considering whether there is an imputed waiver of legal professional privilege, the governing consideration is whether fairness requires that the privilege should cease irrespective of the intention of the holder of the privilege "

66 The court also considered the case of *Bennett v Chief Executive Officer, Australian Customs Service (2004) 210 ALR 220* in which (Tamberlin, Gyles and Emmett (dissenting) JJ) applied the reasoning of the majority in Mann v Carnell (supra). It was held that the voluntary disclosure of the gist or conclusion of legal advice in the circumstances of the case amounts to a waiver of the whole advice, including the reasons for the conclusion The substance and the effect of the advice were being communicated

in order to emphasize and promote the strength and substance of the case to be made At para 6, Tamberlin J stated:-

> *"It may perhaps have been different if it had been simply asserted that the client has taken legal advice and that the position which was adopted having considered the advice is that certain action will be taken or not taken In those circumstances, the substance of the advice is not disclosed but merely the fact that there was some advice and that it was considered However, once the conclusion in the advice is stated, together with the effect of it, then in my view, there is imputed waiver of the privilege The whole point of an advice is the final conclusion. This is the situation in this case "*

67 Having regard to the law and the information before the court, the court is of the view at this stage, that the argument that the Minister's conduct in the Senate was inconsistent with the maintenance of confidentiality which the sec. 29 privilege is intended to protect and that the said privilege was waived, is an argument that is arguable and same has a realistic prospect of success

68 In the circumstances, the court finds that the Applicant/Intended Claimant has an arguable ground(s) for judicial review with a realistic prospect of success Accordingly, leave is hereby granted to the Applicant/Intended Claimant to institute an action for judicial review

FRANK SEEPERSAD

JUDGE

JOINT CONSULTATIVE COUNCILFOR THE CONSTRUCTION INDUSTRY

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November 26, 2012

The Honourable Mrs. Kamla Persad-Bissessar, S.C.
Prime Minister of the Republic of Trinidad and Tobago
Office of the Prime Minister
13-15 St Clair Avenue
Port of Spain

Dear Honourable Prime Minister:

We, the undersigned groups, are moved to write you in an attempt to defuse the escalating crisis that has been triggered by the hunger strike on which Dr. Wayne Kublalsingh has embarked on behalf of the Highway Re-route Movement.

We share the common concern that if left unresolved, this stand-off between the Government and the Highway Re-route Movement has the potential to lead to loss of life, heightened social tension and a destabilized economic environment in which the Point Fortin Highway project and other major national development initiatives may become mired.

We note that while the Highway Re-route Movement has been the most vociferous against the Mon Desir /Debe link to the Point Fortin Highway, it has not been alone in expressing concern about aspects of this seven billion dollar-plus project. You may recall the concerns raised by the Joint Consultative Council (JCC) as representatives of the construction industry.

We are aware that we may not be seized of all the facts and that any action as is proposed here can have cost implications with respect to the existing contruction contract. However cognizance must be taken of the following:

a) That those who are affected negatively by any development process need specific attention;

b) That environmental issues are national issues and go way beyond the concerns of a specific community;

c) That this project involves a large consumption of public money thus the efficacy of the process must be clear in the public domain;

d) In addition when peaceful protest takes this extreme form the public needs to be clear on the underlying causes;

Given the heightening public interest in this matter and the crisis conditions that threaten to engulf Dr. Kublalsingh, we propose the following in the interest of bringing the crisis to an immediate end and, thereafter, for proceeding towards an outcome with strong public trust.

We thus propose:

a) That if an independent review exists on matters pertaining to the Hydrology, Drainage, Environmental Engineering, Transport and Highway Engineering and Economic Analysis, then this review should be made public immediately;
b) If such an independent technical review does not exist, then a technical **review committee** should be established with the specific mandate as outlined in the proposal below to enquire into the portion of that link to the Point Fortin Highway which has significant environmental implications.

We strongly urge that if this proposal is accepted by both parties, your government does not initiate construction work in areas under review along the segment outlined above, thus giving the technical committee an opportunity to report on its findings.

We also strongly hope that with acceptance of this approach by your government and giving the proposal outlined below an opportunity to work, it may bring to an end the current stand-off with the Highway Re-route Movement.

Proposal

1) That Independent Senator Dr. James Armstrong be approached to chair the technical review committee;

2) The technical review committee should not involve persons who have had any involvement in the project to date;

3) The technical teams should include personnel with disciplines in Hydrology, Drainage, Environmental Engineering, Highway and Transport and Economic Analysis. The JCC will support Senator Dr. James Armstrong in identifying persons that are independent and have the necessary technical competence in the disciplines outlined above;

4) The technical review committee should be given all existing data, documents, reports drawings, maps etc. related to the project;

5) All persons involved in the project so far should make themselves available to the technical review committee for discussion and clarification;

6) That the terms of reference of the independent review committee be set up and made public within forty eight hours;

7) That all documents submitted to the review committee be made public by means of a web site;

//3...

8) That the independent review committee be mandated to make specific recommendations in the public interest;

9) That the technical review committee be mandated to outline proposals that could be of benefit to the project in social, environmental, and economic terms;

10) That the independent review committee's report be made available to you Madam Prime Minister, the Highway Re-route Movement and the public at the same time;

11) That we the citizens through our Government pay for this independent technical review;

12) That the review team report in a period not exceeding three months.

We look forward to your acceptance of this proposal and if required, an early meeting with you.

Civil Society groups:-

Trinidad and Tobago Transparency Institute (TTTI)

Joint Consultative Council for the Construction Industry (JCC)

Federation of Independent Trade Unions and NGOs (FITUN)

Women Working for Social Progress Working Women

Yours faithfully,
JOINT CONSULTATIVE COUNCIL
FOR THE CONSTRUCTION INDUSTRY

Afra Raymond, BSc, FRICS
President

JCC

JOINT CONSULTATIVE COUNCIL

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HISTORIC ANTI-CORRUPTION INITIATIVE

Accounting For Public Money

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HISTORIC ANTI-CORRUPTION INITIATIVE

Accounting For Public Money

This special is dedicated to the important issue of Public Procurement. It is written by a private sector group headed by the Joint Consultative Council for the Construction Industry (JCC). The JCC consist of:

1. Association of Professional Engineers of Trinidad and Tobago (APETT),
2. Trinidad and Tobago Institute of Architects (TTIA),
3. Board of Architecture of Trinidad and Tobago (BOATT) (Observer Status),
4. Trinidad and Tobago Society of Planners (TTSP),
5. Trinidad and Tobago Contractors Association (TTCA)
6. Institute of Surveyors of Trinidad and Tobago (ISTT) (Land Surveyors, Quantity Surveyors, Valuation Surveyors)

The private sector group consisted of –

- Joint Consultative Council for the Construction Industry (JCC)
- Trinidad & Tobago Chamber of Industry & Commerce (TTCIC)
- Trinidad & Tobago Manufacturers' Association (TTMA)
- Trinidad & Tobago Transparency Institute (TTTI)

The members of that Private Sector group were part of the Working Party on the Public Procurement White Paper, which was published in August 2005 and laid in Parliament the following month.

SPENDING THE PEOPLE'S MONEY

By AFRA RAYMOND
President of the Joint Consultative Council for the Construction Industry

AN OVERVIEW

CIVIL SOCIETY'S SUBMISSION TO THE JOINT SELECT COMMITTEE ON PUBLIC PROCUREMENT

The Peoples' Partnership's manifesto, at page 18, commits to –

"***Procurement***
• Prioritise the passing of procurement legislation and appropriate rules and regulations
• Establish equitable arrangements for an efficient procurement system ensuring transparency and accountability by all government departments and state enterprises."

In keeping with those campaign promises, the Minister of Finance tabled two legislative proposals in Parliament on 25th June 2010. Those were a Bill to amend the Central Tenders' Board Act (originally prepared in 1997, when Ramesh Lawrence Maharaj was Attorney General) and the Public Procurement Bill (originally prepared in 2006, after publication of the White paper). A Joint Select Committee (JSC) was established on 1st October 2010 to examine those proposals, invite submissions and make recommendations.

The stated target of the PP government is to have the new Public Procurement legislation in place by the first anniversary of their electoral victory – i.e. by 24th May 2011.

Our Private Sector/Civil Society group reconvened last year and made a joint submission to the JSC in December

THE CONTRIBUTORS



• Afra Raymond President of the Joint Consultative Council for the Construction Industry (http://www.jcc.org.tt/index.htm.) who outlines the case for procurement legislation.



• Winston Riley immediate Past President of the JCC and Chairman of the JCC's Public Procurement Committee, writes on the history of the campaign to create this new framework.



• Carla Herbert Legal Advisor to the JCC's Public Procurement Committee, writes on the proposed apparatus and the provisions of the draft legislation.



• Lawrence Placide, Director of the International Trade Negotiations Unit of the Trinidad & Tobago Chamber of Industry & Commerce - http://chamber.org.tt/ - explains the ways in which these proposed changes will conform to the emerging 'new normal' of transparent commercial arrangements in the international arena.



• Dr Trevor Townsend and Mark Sandy, of the Trinidad & Tobago Manufacturers' Association -http://www.ttma.com/ - make the case for an increased and clearer emphasis on local content as a key driver of national development.



• Boyd Reid of the Trinidad & Tobago Transparency Institute - http://www.transparency.org.tt/ - locates these proposals as critical instruments in reducing the rampant levels of corruption in public procurement and the use of the Integrity Pact provisions.

2010 – it is available here from the JCC's website. Our Private Sector group has had several meetings with the JSC - which was chaired by Education Minister, Dr. Tim Gopeesingh - but the results of those are not featured in this publication.

This special publication is intended to inform readers of the necessity for new Public Procurement legislation in our country and to set out the objectives of our proposals.

The guiding Principles

These are –

- Transparency
- Accountability
- Value for Money

The Broad Picture

One of the most serious findings of both the Bernard Enquiry (Piarco Airport Project) and the Uff Report (UDeCOTT and HDC) was the extent to which the largest State projects were being executed outside of any normal system of accountability. The very purpose of setting up these companies and procurement methods was to bypass the Central Tenders Board. The natural consequence of that way of proceeding being that if the CTB could be sidelined as a deliberate act of public policy, then other important elements of the regulatory framework are violated as a matter of course. In the case of both UDeCOTT and NHA/HDC, accounts were not filed for years – since 2006 for the former and 2002 for the latter – in flagrant violation of the rules and laws.

These were the largest State projects - often described as being the flagship or centre-piece of this or that government's policy – yet they were breaking the main rules and getting away with it. The 'getting away with it' is the cloudy part of the picture, because we never hear of any penalty being sought against those State Enterprise Directors who broke the governance rules.

But that is the very centre of the puzzle and we need to understand it before we can try to unlock it. So, we are told, time and again, that the only way to really get important and urgent projects done in the correct fashion and in a timely nammer is to go outside the rules. The stated reasons are that the old rules are too cumbersome, slow etc… and yet, we end up, time and again, in the same mess.

Some of the features of these fiascos are –

- Huge cost over-runs on virtually every project.
- Unfinished projects which virtually no one can make sense of – to date there is no proper rationale for the huge and loss-leading International Waterfront Project, apart from Calder Hart's illogical explanation to the Uff Enquiry.
- A gross burden on our Treasury going forward – The continuing delay in completing the accounts for these State Enterprises shows how difficult it is to work out exactly what the State owes and to whom.

What all that tells us is that the existing rule-book seems to be blocking progress and the attempts to bypass it have done little better, if not far worse.

The dismal picture on public procurement is not limited to construction projects and can be found in all the other areas.

A new approach is needed and that is what is at the foundation of these legislative proposals.

What Is Public Money?

Central to the new proposals is that any new Public Procurement system must be in full effect whenever Public Money is spent.

'Public Money' is defined at page 5 of our proposals as money which is either due to, or ultimately payable by, the State.

Our proposals are intended to form part of a financial management reform package to include for a National Audit Office and a Financial Management and Accountability Bill.

The intended move is towards a greater transparency and duty of care in terms of how taxpayers' money is spent. Our citizens, particularly the unborn ones who will have to pay for some of the wasteful schemes which are littering the landscape, deserve no less.

The new equation confronting us is –

Expenditure of Public Money	
minus	Accountability
minus	Transparency
equals	CORRUPTION

We must fix that.

So, What Is At Stake Here?

Our society is beset by large-scale corruption, which sustains wrong-headed decision-making. The wider social consequences of that toxic culture are now hatching, with a vengeance, in the naked violence and wily crimes which pre-occupy our head-space.

The killing-fields of East PoS, the decimation of African urban youths, the URP and CEPEP-realted gang warfare and the battle for turf are all part of this picture.

As long as our society continues to applaud and reward dishonest, corrupt behaviour, we will continue sliding downhill.

The structure of our economy is that most of the country's foreign exchange is earned by the State in the form of oil & gas earnings. The rest of the society relies on the State and its organs to recycle those earnings for the benefit of those of us not directly engaged in the energy sector.

For that reason, the State casts a very long shadow in our country, far more so than in other places. Virtually every substantial business relies on the State and its organs for a significant part of its earnings. A healthy connection with the State is essential for good profits.

But that is where the particular problem is, since the conduct of the State and its organs is often found to be lacking in the basic ingredients of fairplay, accountability and transparency.

If the State is the biggest source of funds in the place and the State is not playing straight at all, a serious question arises: How can we hope to uplift our society?

The State has an over-riding duty to behave in an exemplary fashion in its policy and operations.

Due to its tremendous footprint, the State has to behave in that exemplary fashion if we are to move out of this mess. A positive shift in State conduct will have a salutary effect on the commercial culture and wider society, one that is long overdue.

So, Who Spends Public Money?

We have a vast, expensive and confusing array of organs, all of which are authorized to spend our money. For a country of about 1.4M people, we have 26 Ministries. Just consider that the UK, with a population of about 65 million, has 19 Ministries and the USA, with a population of about 300 million, has 16 Ministries.

For a Caribbean example, Jamaica has twice our population and 16 Ministries.

Quite apart from the number of Ministries, there are two further layers of agencies which also have the power to spend - our country has 73 Government Bodies and 58 State Enterprises.

Given the vast range of operations undertaken by these agencies, any new system would have to be flexible in order to cover all those types of transactions.

The Main Features Of The New System

Three new independent organs will be created –

1. **The Procurement Regulator (PR)**, with the duty to create overall Guidelines and a common handbook to guide the public procurement process. The Regulator is appointed by the President in his own discretion and reports only to the Parliament. Agencies can create their own procurement handbooks, once these conform to the overall Guidelines, as approved by the Procurement Regulator.
2. **The Public Procurement Commission (PPC)** will be the investigative arm of the new apparatus to which complaints will be directed.
3. **The National Procurement Advisory Council (NPAC)** will be purely advisory and comprises 14 members from a broad range of named private sector/civil society organisations – the JCC, Manufacturers' Association, Chamber of Commerce, Transparency Institute – as well as the Ministry of Finance and the Tobago House of Assembly.

All expenses are to be drawn on the Consolidated Fund, with the Procurement Regulator and Advisory Council required to report annually to Parliament.

A vital part of our proposals is that Cabinet, Government Ministers or politicians are prohibited from instructing or directing these new agencies in any way.

They are intended to be entirely independent of political influence, which conforms to the proposals in the White Paper.

That freedom from political influence was also specified in both the 1997 and 2006 draft legislation.

A Complaints Procedure

The proposed system will create clear rights to make complaints or report wrongdoing. Those rights are an important aspect of any modern procurement system and we propose three types of complaints/investigations –

1. Potential tenderers/suppliers can complain, in the first instance directly to the Agency with which the tendering opportunity resides, then, if that is not dealt with satisfactorily, they can complain to the Public Procurement Commission. Ultimately, the right to seek the protection of the High Court is preserved, once the established complaints procedure has been followed.
2. The Whistleblower – We are proposing that whistleblowers be given legislative protection and practical means to bring their complaints direct to the Public Procurement Commission.
3. The Public Procurement Commission can also, on its own initiative, start an investigation into an area of concern.

There are strict time-limits for acknowledgement and resolution of complaints.

Our proposal is for the Public Procurement Commission to have powers to punish both frivolous complainants as well as parties found to be in breach of the new system. Those can range from fines to embargoes, during which offending parties can be banned from tendering opportunities. Offending public officers can be subject to both fines and/or imprisonment.

Concern About The Cost Of The New Apparatus

One of the most frequently expressed criticisms is that as critics of the rationale and operations of significant State Enterprises, we seem to be proposing a new series of State-funded agencies. Some people have pointed out that these offices are unlikely to be cheap, particularly the PPC, which is to be constituted as a standing Commission of Enquiry under those existing legal provisions.

Yes, there will be new agencies and yes, they will cost money.

Given the recent revelations as to the cost of the Uff Enquiry – already estimated to exceed $50M - there are genuine concerns that we could soon have three new state-funded agencies which could absorb, maybe, $100M a year.

The challenge here is to move beyond the obvious and factual observations so that we can consider the decisive factors. Our proposals have the promotion of Value for Money as one of its founding principles and that is good for the public. So, how can we measure the value for money of these proposals, at this stage?

The Scale of Public Procurement Spending

In the case of expenditures direct out of the Ministries, the 2011 Budget has an anticipated capital expenditure for the Ministries of $7.050Bn, as per para 8 at page 4 of the Public Sector Investment Program (PSIP).

Also in that Budget is an anticipated capital expenditure for the State Enterprises of $6.725Bn, as per the Foreword at page 4 of the Supplementary Public Sector Investment Programme (Supplementary PSIP). The combined figure of $13.775Bn is only for projects, so it excludes the salaries, rents and normal running expenses. Please note that other elements in public expenditure, beyond just capital projects, will be covered by these proposals. The guiding principle being that those activities involve the expenditure of Public Money.

There are very limited exemptions from the proposed provisions and those can be viewed at t JCC website.

There are other ways in which Public Money is being expended which are not shown in the national Budget, so the amounts are surely larger than that estimate.

The Potential For Savings

The scale of the public transactions, involving Public Money, which will come under the control of this new system is huge, at least $14Bn in size. Even if the new system saves only 5% of that sum every year, one could easily justify an annual running expense in the $100M range, as mentioned earlier. Five percent of $14Bn is $700M.

In the next three weeks, we expect our Legislators to make the crucial decisions on this series of proposals and

we all need to be vigilant to preserve the key points.

Those key points would include –

- Heads of Independent organs to be appointed by the President
- Separation of the Regulator from the Investigator
- Regulations laid in Parliament for negative resolution, with no Ministerial or Cabinet approval required.
- Independent Organs funded from the Consolidated Fund, with no requirement to seek a Ministerial approval or Budget vote.
- Accountability is ensured by the requirement to report annually to Parliament.
- Private Sector/Civil Society oversight via the National Procurement Advisory Council.
- Proper provisions for complaints and Whistle-Blowers.

The ultimate question, given what we know now, is – **Can we afford not to take this step?**

At this unique and challenging moment in what has been a long, twisted journey, the prospects of more corruption and waste are grim.

For these proposals to succeed, the legislators will have to vote in favour of a new law which reduces their power and discretion. To some, that might be an impossible contradiction and an unreasonable thing to expect, but there will be considerable political credit to the account of those who make this change happen. Our citizens deserve no less.

ON THE CUSP OF A BREAKTHROUGH

The Long History Of Public Procurement in T&T

By **WINSTON RILEY**
Past President of the JCC and Chairman of the JCC's Public Procurement Committee

The term 'procurement' is derived from the Latin prōcūrāre incorporating two Latin words, 'pro" meaning 'on behalf of or in favour of,' and 'Cura' meaning "care, concern, or thoughtfulness". In the modern sense, procurement has the sense of acquiring through best management practices.

Procurement involves more than just purchasing and can be seen as a business management process akin to supply chain management. Supply chain management deals with the management of resources brought into an organisation to support its activities. The resources under the purview of the proposed legislation are property (which includes intellectual property, goods and works) and services. The procurement process includes pre-contract activities such as needs identification, planning, analysis, sourcing and post-contract activities such as contract management, supply chain management, risk management and disposal.

Public procurement brings into play acquisition on behalf of the public, through the use of public money. "Public money" as used in the draft Public Procurement and Disposal of Public Property Act 2006 means money that is –

a. received or receivable by an agency; raised by an instrument that is issued by an agency from which it can be reasonably inferred that the State accepts liability in the case of default;
b. spent by an agency; or distributed by an agency to a person for a specified public purpose

"Agency" means ministry or department of government and includes statutory bodies, and corporate bodies and its subsidiaries in which the state exercises control. Public Procurement thus means procurement involving the use of public money for and on behalf of the public.

The history of public procurement in Trinidad and Tobago is a history:

i. in favour of the liberalisation and privatisation of public procurement through the development of different delivery and financing systems such as design bid build, design build, public private partnership.
ii. of the role played by international lending agencies (IFIs) in the privatisation of the procurement process and the destruction of the public service.
iii. In favour of authority over the procurement process by politicians as elected representatives of the central government.
iv. Which demonstrates the patent lack of accountability for public money through devices such as Government to Government arrangements and the establishment of over 72 publicly-owned private sectors firms such as UDECOTT
v. In favour of the use of the foreign private sector to accelerate the development of infrastructure. As one former minister put it, "the world is our oyster".

The history of public procurement in Trinidad and Tobago reveals also the presence of an entrenched culture acted out by elected representatives and public servants in tandem. It is a culture which perpetuates the mistaken view that control by the central government amounts to regulatory oversight and effective delivery, and which has become the major challenge to implementing an efficient procurement process in Trinidad and Tobago.

Under Crown Colony government, public procurement in Trinidad and Tobago consisted mainly of the use of a Force Account system where materials were acquired through:

1. crown agents in the United Kingdom and
2. bonded suppliers in the colony

Labour was sourced through:

a. department employees in the colony and
b. casual labour in the colony.

Management of the process was the prerogative of the colony's departments and councils.

During the period 1956 to 1960, there was a significant increase in demand for infrastructure facilities which led to the sourcing of finance from international lending agencies and an increase in public sector activity. Capital and recurrent expenditure rose from $87.4 million in 1955 to $155.3 million in 1960.

The increased demand for infrastructure facilities, coupled with the international lending agencies' preference for delivery through the international private sector, and concerns over decision-making in contract awards at the local government levelgave rise to financial management problems, prompting changes in the institutional infrastructure. These changes resulted in the establishment of two new organisations:

1. The Central Tenders Board (CTB); and
2. A Cost Accounting Division in the Ministry of Finance to control and monitor government development expenditure.

The CTB was established by the CTB Act of 1961 which came into operation in 1965.

Sub-Section 3 (4) states that the CTB has the sole and exclusive authority "save as is provided in section 35… to act on behalf of the Government and the statutory bodies." Section 35 enabled the Governor in Council- now the President of the Republic- to "make such regulations as may appear to him to be necessary or expedient for the proper carrying out of the intent and provisions of this Ordinance."

Section 33 says of the CTB that: "In the exercise of its powers and in its performance of its duties the board shall conform to any general or special directives given to it by the Minister". Minister is defined by the Act as "the Minister to whom responsibility for the Central Tenders Board is assigned."

Sections 33 and 35 demonstrate the control the Minister and the Governor in Council (now the President) maintained over the CTB. Sub sections 3 (1) and 3 (2) of the Ordinance left the door wide open for the erosion of the "sole and exclusive authority" of the CTB through deleting or in the case of statutory bodies, non-inclusion in the First Schedule. Sub section 3(1) states: "This act applies to such of the statutory bodies as set out in the first schedule to this act." Sub section 3 (2) states: "The President may by order published in the Gazette amend the first schedule to this act by adding thereto or deleting there from a statutory body."

The CTB Act not only centralised control of public procurement but placed the CTB and thus the procurement process under the control of a Minister. Since 1961 Cabinet thus has had the authority to determine the efficiency, accountability, transparency, value for money, local content and the social return on investment in the public procurement process.

In his autobiography, *Inward Hunger*, Dr Eric Williams, the Prime Minister and Minister of Finance in 1961 states." As Minister of Finance I was very much concerned with the decision to introduce a Central Tenders Board and take away the powers to award tenders from the elected representatives of local government bodies who enjoyed the privilege under existing legislation. This unsound arrangement, bad in principle, was further vitiated by the tendency of local government councillors not to award tenders to the lowest bidder. The opposition saw in this an attempt to emasculate local government bodiesd, deprive them of their rights in law and introduce the principle of centralisation."

Here we have the Minister of Finance in 1961 using a euphemism for corruption to justify the initiating of a process which supposedly would enhance the regulatory framework in public procurement. Regulatory means total control by the CTB which in turn is controlled by an elected representative of the central government at the time through the authority to give general or special directives.

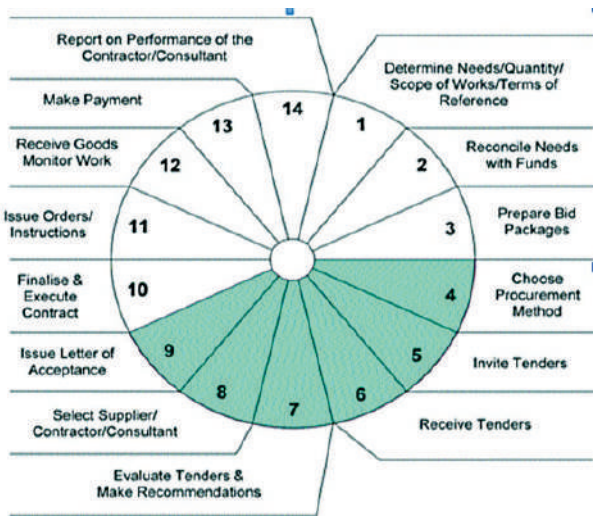
What is also important here is not only how the procurement process entrenches a culture but the emasculating impact of changes in the process on the State's organisations of governance.

The role of ministers in the procurement process is further entrenched by Sub-section 11 (1) which states, "there shall be established for every Ministry or Department of the Government not under Ministerial control a Ministerial or Departmental Committee comprised—

a. in the case of a Ministerial Committee, of a Chairman who shall be the Director or Deputy Director of Contracts and two officers nominated by the Minister responsible for the Ministry concerned and appointed by the Minister responsible for the subject of Finance;
b. in the case of a Departmental Committee, of a Chairman who shall be the Director or Deputy Director of Contracts and two officers nominated by the Head of the Department and appointed by the Minister responsible for the subject of Finance."

The Procurement cycle has at least 14 stages as indicated in Figure 1. The cycle begins when an agency conducts a needs assessment, reconciles its needs with available funds and prepares a bid package. The CTB's involvement is limited to stages 4 to 9. In an efficient and effective procurement process, the factors of accountability, transparency, value for money, local content, sustainability, the social return on investment and environmental effects should influence every stage of the procurement cycle.

Figure 1



This Cost Accounting Division in the Ministry of Finance was given the responsibility in collaboration with other Ministries to:

i. rationalise all aspects of production and services with the view to setting up definite areas of authority and responsibility with concomitant standards of output and related expenditure;
ii. Design a cost accounting machinery with a corresponding reporting

system, whereby management will be enabled to exercise a dynamic control over the cost and efficiency of operations;

iii. Maintain constant supervision to see that control systems, as instituted, are maintained with efficiency;

iv. undertake a constant review of existing systems with a view to their improvement in the light of changes in technology, in size factors, or changing requirements of management;

v. make continuous inspection of development programme projects until such time as ministries can satisfactorily undertake this function themselves, when the Cost Accounting Divisions of this Ministry will restrict its activities to ensuring that requisite control devices as approved by the Ministry of Finance, are being maintained efficiently;

vi. undertake special investigations work on its own initiative or by request;

vii. Collect and disseminate cost data on a local and regional basis;

viii. train cost personnel for Government departments.

The cost accounting unit was established in 1961. The objectives as stated above could not be faulted and contained elements of the role of the Regulator as outlined in the draft Public Procurement and Disposal of Public Property Act 2006. The facts are:

a. the unit has failed.
b. the unit no longer exists; and
c. there is a complete loss of institutional memory.

The placing of the unit in a Ministry investing it with apparently only audit and reporting functions with no authority in law, little autonomy, limited transparency and accountability, determined to a great degree the failure of the unit.

THE IMPACT OF FOREIGN LOANS AND AID FINANCING ON PROCUREMENT POLICY

Subsequent to 1961 the role of multilateral lending agencies in development increased. Their policy of financing only projects with high import content and bilateral aid, which was tied to goods and services of the donor countries, effectively limited local procurement options and accelerated outsourcing to foreign firms.

Nevertheless, in 1969, the Third Five Year Development Plan recognised the need for greater emphasis on pre-planning as one method of reducing delays in implementation. Procurement was thus regarded in the Plan as starting from "the preliminary feasibility stage and ending at the stage when the project comes into operation." This approach underscored the distinction between procurement as a complex of policy choices and procurement as a complex of laws and regulation.

IMPACT OF FOREIGN LOANS AND AID FINANCING ON ORGANISATIONS IN THE PUBLIC SECTOR

Chapter X1 section 9, of the Third Five Year Development Plan states: "*The use of consultants, who will-as far as possible within the limits set by the requirements of foreign aid and loan programs-be nationals…But the use of consultants and outside experts should be complementary to, and not a substitute for, the obtaining of trained staff permanently attached to the Ministry or agency concerned.*"

The demand to shift to the private sector was based, initially, more on the need to satisfy the interest of the donating countries of the IFIs, than on any attempt to secure efficient delivery. The issue of development of local capacity was not a priority of the IFIs. The initial shift to the private sector led to an exponential reduction in the efficiency of the public sector in-house delivery caused by the haemorrhaging of trained human capital to the private sector. Declining performance in the public sector then became the self-fulfilling justification for out-sourcing to the private sector. The decay in the public sector organisations was exacerbated through the following processes:-

i. starving of the public sector organisations of meaningful work which led to trained personnel migrating to the private sector, thus

ii. emptying of the public sector of trained personnel both at professional and sub-professional levels.

iii. Establishment of Project Execution Units within public sector organisations to manage projects funded by the IFIs. This led to the remaining experienced staff from the public sector becoming managers of these units thus further reducing the technical staff available for day to day operations and maintenance.

The net result was decay in the technical capacity of the public organisations.

LABOUR INTENSIVE SCHEMES

In 1971, the Government embarked on an expansion of the labour intensive 'Special Works' approach, using Force Account, mini contractors and bonded contractors. These approaches to delivery of works using public money had as precursors the 1959 Depressed Area Programme and the 1962 Better Village Programme. The utilisation of labour intensive schemes to deliver works represented an example of the use of procurement policy as a tool of social and economic development. This aspect of procurement policy, however, has not to-date been brought into a regulatory framework where efficiency in the use of public funds can be measured. The basic objective of these labour intensive schemes is laudable but the incentives in the procurement system have led more to piracy than efficiency, more towards criminal activity and gang violence than towards the development of trade and entrepreneurial skills.

INCREASED OIL REVENUES AND IMPLEMENTATION PROBLEMS

The Minister of Finance in the 1976 Budget Speech stated: "*Increasing concern has been expressed in many quarters about the slow and cumbersome tender procedures which, it has been argued, are geared to an earlier age of Government expenditures and revenues. Some have used this as an alibi for the increasing tendency to evade, distort, or frustrate the tender procedures… It would seem to be appropriate, however, to have a comprehensive reappraisal at this time of the existing procedures.*"

In the 1977 Budget Speech, the Minister of Finance stated: "*The Central Tenders Board and its Ordinance under which it operates are now being re-appraised. Special attention is being given to the following:*

1. the transfer to the Tenders Board of responsibility for appointment of consultants for architectural and

engineering services (the National Advisory Council considers that consultants should be graded);
2. *the question of recruitment and appointment of experienced technical competence to the staff of the Central Tenders Board;*
3. *the question of providing the Central Tenders Board with funds so that it may, whenever necessary, secure appropriate technical assistance from sources outside of the Government;*
4. *the grading and registration of contractors;*
5. *appropriate incentives to local contractors in their competition with external firms;*
6. *the scope of selective tendering;*
7. *existing provisions related to statutory boards, local government authority and ministerial committees.*"

The sudden demands placed on the local construction sector occasioned by increased revenues from oil in the seventies fuelled the concerns expressed in the 1976 and 1977 Budget Speeches. The period 1974 to 1979 thus saw several studies and reports on the CTB and the construction sector.

In search of greater output from the construction sector, the Minister of Finance in his 1978 Budget Speech announced the introduction of the Design Build delivery method and the use of pre-fabricated systems as ways to increase output. The ground was now fertile for the introduction of the most dramatic changes in the policy and regulatory framework of public procurement in Trinidad and Tobago. Two drastic policy shifts were made:

i. The Government decided to overcome the bottlenecks to the implementation of its development programme by relying on foreign expertise and organisations.
ii. The Government removed the Central Tender Board's sole and exclusive authority in the procurement process giving itself the right to contract directly.

The objectives of the shift in policy were achieved by virtue of the following amendments to the Ordinance:

Act No. 36 of 1979

The term "company" was defined to include "a firm, a partnership or a statutory corporation." Through the addition of section 20A the government relegated onto itself the authority to procure on its own behalf where –

a. "as a result of agreement for technical or other co-operation between it and the Government of a foreign state, the latter designates a company …which is wholly owned or controlled by the foreign state... to supply the articles or to undertake the works or any services…"
b. "it enters into a contract with a company which is wholly owned by the state, for the supply of articles or for the undertaking of works or services therewith…"
c. "it enters into a contract with a company for the purchase of books for official purposes".

Under the government-to-government arrangements, six ministries, four statutory bodies and three wholly state-owned development companies were used as executing agencies. The National Insurance Property Development Company (NIPDEC) was not wholly state-owned but was used nonetheless as an executing agency. This was later regularised by Act No 3 of 1993. This Act also increased the powers of the CTB to give it the authority and responsibility for appointing consultants in connection with any project. Section 27D of the Ordinance sets out the procedure for appointing consultants while section 27E gives the Board authority to negotiate fees.

Act No. 22 of 1987

This amending Act made provision for the handling of matters in the event of an emergency (flooding, hurricane, landslide, earthquake, or other natural disasters) without reference to the CTB. Once a Minister makes a decision to act in accordance with this amendment, the Minister shall report the matter to Parliament at the first sitting thereafter, and within thirty days of the completion of the works caused by the emergency situation, he or she is to submit to Parliament a report of the expenditure incurred. The amendment also provided for the public opening of Tender Boxes.

Act No. 39 of 1991

This amendment provided for a Special Ministerial Tenders Committee to be established at the Ministry of National Security to procure certain items for the Trinidad and Tobago Defence Force and the Protective Services. These items include "arms and ammunition; repair and maintenance of aircraft and Coast Guard vessels; security equipment including scanners, detectors and safe fax machines; uniforms and protective gear; aircraft, marine craft and parts thereof; and wireless equipment and spares including radar systems."

Act No. 3 of 1993

This amending Act empowered the National Insurance Property Development Company Ltd (NIPDEC) as an entity with which the Government could enter into a contract for the supply of articles or for the undertaking of works or services without the intervention of the CTB. This Act validated contracts the Government had entered into with NIPDEC as lawfully made since 1979. The Regulations made by NIPDEC with respect to inviting, considering or rejecting of offers in this regard required that it be laid in Parliament and be subject to negative resolution of Parliament.

DECENTRALISATION TRENDS

Apart from Legislative amendments, the Government continued the trend towards decentralisation of the tendering process through two mechanisms:

i. by providing newly established statutory corporations with their own contracting capability outside the purview of the CTB; and
ii. by removing statutory bodies from the First Schedule of the Ordinance, (e.g. the CTB handled award of contracts for the Port Authority of Trinidad and Tobago which was established by Act No. 39 of 1961. The Port Authority was removed from the First Schedule of the Ordinance, by Legal Notice No. 70 of June 1981. The Authority was no longer subject to the Ordinance, with regard to award of contracts).

A NOTE ON TOBAGO

The Tobago County Council was listed in the First Schedule of the Ordinance and therefore subjected to the provisions of the Central Tenders Board Ordinance. Currently, the Tobago House of Assembly, by virtue of section 78 of the THA Act, 1996, continues to follow the provisions of the Central Tenders Board

THE PRESENT INITIATIVES 2003 To 2011

In 2003 a cabinet committee was established for the reform of the Public Procurement Regime. The cabinet-appointed committee was chaired by the Ministry of Finance and all documentation was produced under the auspices of the Ministry of Finance.

The Terms of Reference of the 2003 cabinet-appointed committee were:

i. to review Government's procurement policy and processes;
ii. to make recommendations for improving Government's procurement regime, including an appropriate procurement model;
iii. to prepare a draft Policy on Government Procurement (a Green Paper including draft legislation and regulations.

A green paper was produced and laid in Parliament in June 2004. The Green Paper was titled "Reform of Governments Procurement Regime".

The Green paper was subject to public discourse through public consultations, public meetings and workshops. In addition, meetings were held with representatives of State-Owned Enterprises and government ministries. A White Paper titled "Reform of Governments Procurement Regime" was produced by the committee and laid in Parliament in August 2005.

Subsequent to the laying of the White Paper, the cabinet-appointed committee prepared a draft bill dated 2006 This draft bill plus a 1997 draft Bill entitled "A Bill to amend the Central Tenders' Board Act" was laid in Parliament in June 2010. A Joint Select Committee (JSC) was established on 1st October 2010 to examine those proposals, invite submissions and make recommendations.

In 2010 the private sector component of the original Cabinet-Appointed Committee of 2003 under the chairmanship of the past president for the Construction Industry (JCC) Winston Riley convened a series of consultations which resulted in a submission a revised version of the 2006 draft bill to the Joint Select Committee entitled "Private Sector Submission to the Joint Select Committee (JSC) on Legislative Proposal on Procurement Reform".

The private sector submission took as a basic assumption that the only policy position which was placed in the public domain for comment and subject to negative resolution by Parliament is outlined in the 2005 White Paper. The private sector group was on March 2nd 2011 invited to meet with the JSC.

CONCLUSIONS

At present Trinidad and Tobago (T&T) has 26 Ministries, 73 Government Bodies and 58 State Enterprises.
In addition the capital and recurrent expenditure in 1960 was $155.3 million. In 2011 our total expenditure is pegged at $49 billion. T&T has been subjected to the Piarco and Uff commissions of enquiry on corruption. Procurement is a major risk area for corruption in the public sector The management of the risk of widespread corruption requires the political will to change the culture which substitutes central government control for good governance.

The issues of regulatory oversight, complaint and investigatory procedures are now centre stage. These issues are addressed in the Private Sector Submission to the Joint Select Committee. It is important to note that although the term decentralisation is used in this submission, only procurement functions were decentralised or outsourced.

The CTB started with decentralisation of functions. Under government-to-government arrangements procurement itself was outsourced to foreign governments. What is important to note is that authority at every step remained centralised and under the control of ministers. Herein lies the vexing problem of the SOEs in the procurement process where:

i. Corporation Sole is the shareholder under the Corporation Sole Act and is the Minister responsible for finance.
ii. the board of directors and the CEOs are political appointees
iii. the SOEs are subject to the regulatory processes under the Companies Act
iv. the minister responsible for a specific SOE can give general and specific directives; thus the CEO reports to the Permanent Secretary of that specific ministry.

It is now clear that although ministers and, by extension cabinet, has since 1962 had complete authority over the public procurement process the vexing problem of proper and productive use of public money remains. The lack of accountability for public money has made a mockery of the relationship between Parliament and the Executive and infested the social fabric with a piratical approach to private progress.

References:

1. *2005 White Paper: Reform of Government on Public Procurement,*
2. *Politics of Procurement 1 and 2 (2002 and 2008) WRiley,*
3. *Private sector Submission to the Joint Select Committee on Legislative Proposals on Procurement Reform.*

A MODERN LAW FOR A NEW CULTURE

By **CARLA HERBERT**
Attorney-at-Law

Government contracts form a significant part of the economy. The contract involving public money, that is, money received or receivable by government or a government agency such as State owned enterprises, is a tool of public administration. A Government contract is the purchase of property and services using public money. A government contract is not quite the same as a contract between parties in the private sector. It is subject to a higher standard.

A government body cannot be fettered if there is a contest between the contract and government's public responsibilities. It is sometimes assumed that because a contract is used no special rules apply and that Government is the same as anyone else. But this assumption becomes questionable if the subject of the contract is being used for Governmental purposes. For example if the contract is to provide human services to third parties, how can a breach that adversely affects the third party be said to cause any loss to the contracting party?

Government also by its very nature is a moral exemplar. "If the government becomes a law breaker, it breathes contempt for the law, it invites every man to become a law unto himself, it invites anarchy." Olmstead vs United States 277US438, (1928). Government's role as a teacher is relevant to its commercial activity and informs the related law. It is incumbent upon Government to ensure its agencies perform impeccably when entering into contracts as well as policy documents, guidelines, codes of conduct or legislation.

Because of the involvement of government in a contract the presence of public law values sometimes lie uneasily with strict commercial rules of private law that inform the contract. The list of public law values includes openness, fairness, participation, impartiality, accountability, honesty and rationality.

The justification for special standards in procurement contracts is that government never spends its own money. It is spending taxpayers' money, public money, yours and mine. In real terms this means we, the taxpayers, are liable for Government's bad spending and conversely we benefit from government spending when transparency, accountability and value for money are apparent. Government therefore must act in a fair and ethical manner.

In Hughes Aircraft Systems International vs Air Services Australia (1997) ALR 1) Finn J, found that a public tender is governed by a "process contract". The terms of this type of contract includes "not only the expressed rules of tender but also implied terms that the government party would conduct its tender evaluation fairly and deal even-handedly with the tenderers in the performance of the process." This statement was influenced by the public nature of the contracting party which was a semi-governmental agency.

In a private contract the company officials are in the business of making profits. If they perform badly the shareholders advise them accordingly. In a public contract i.e. involving public money the accountability to the taxpayers is by a very different route. Taxpayers have a limited avenue of redress for bad management of their money or for poor delivery of services therefore public enterprise is very different from private enterprise – and this difference is to be reflected in the applicable law.

At present, the T&T government has tabled in Parliament two Bills entitled the National Tenders Board Bill, 1997 and the Draft Public Procurement and Disposal of Public Property Bill, 2006. These were referred to a Joint Select Committee who invited comments from the public. The private sector submitted a Draft Bill entitled "Public Procurement and Disposal of Public Property Bill 2011"

This Bill accords with the only Policy statement put out by any government. This Policy, (being the White Paper on Public Procurement Reform) was laid in Parliament in September 2005 by the Manning administration. It was the culmination of Private/Public sector participation and hours of public consultation. The issues canvassed and resolved are grounded in the universal acceptance that good governance in transactions involving public money must manifest the operating Principles of Transparency, Accountability and Value for Money and meet the objectives of economy, efficiency, competition and fair dealing.

In public procurement where the main tool is a contract, the governing law is a fusion of public law and contract law (private). In public law it is standard form for the reference and application of principles such as natural justice and those of transparency and accountability. In contract or commercial law traditionally the law is only concerned with interpreting the strict agreement between the parties and consequential damages.

THE PRIVATE SECTOR SUBMISSION A SYNOPSIS OF DRAFT BILL 2011

Introduction

The design and the content of the Bill with its emphasis on the Guidelines of the Bill provides for continuous review of practices so that there is conformity with best current practice. The norm in Trinidad and Tobago is for administrative processes to be prescribed in regulations made by a Minister which are generally not maintained for relevance and which, by their nature, attract a literal style of interpretation by the courts. While the Private Sector Submission draft law reflects, in principle, the Central Tenders Board Ordinance in that it recognises the need of an independent third party involved in the system, to ensure impartiality, fairness and competition in the award of contract, it avoids the pitfalls of the current system as manifest by the CTB Ordinance and its regulations as

discussed in the White Paper.

The CTB Ordinance and its regulations do not apply to the full range of public bodies spending public money for property and services. It does not apply to the full procurement process. Procurement involves a lot more than going to public tender – procurement involves the process commencing with the identification of the need for the property or services to be supplied to the assessment of the effectiveness of the performance of the parties to the contract. It does not treat with complaints nor does it treat with publication of awards.

While the current law falls short, lessons can be learned.

The prime responsibility for the integrity of public expenditure must be that of the parties to the contract. The parties to the contract operate within an overarching framework which dictates to them how they are to conduct the business of purchase and supply of property and services involving public money.

The expressed intent of the Bill is to maximize economy and efficiency in public expenditure being defined in the Bill to mean "the process of acquiring money or services commencing with the identification of the need of the property or services and with the assessment of the performance of the related contracts.

The Bill reflects the assumption that expenditure involving public money triggers a prime responsibility of the purchaser who uses public funds for a transaction to ensure that the people get value. The Bill does not inhibit the common law doctrines in relation to contract nor does it specify a rigid process. Rather, it establishes the overarching legal framework founded on principles of public law in which contractual rights will operate. It enables customizing and responsibility of the procurement process to reside with agencies while identifying key points in the procurement system to which all agencies must adhere. The relevant design and monitoring of the procurement system within the specified parameters of the principles of accountability, transparency and value for money is the function of an independent Procurement Regulator appointed by the President.

This Bill therefore heralds the Government's stated intention to strengthen the quality of governance by promoting these principles of good governance by systemic re-engineering of the public procurement system, currently residing in the Central Tender Board Ordinance (CTB).

Critical to the proposed new procurement regime is a clear understanding of the concept of 'public money'. This encompasses –

- all money received or receivable by an agency regardless of source
- all money received by a non-public body from an agency

This means the law is to apply to procurement funded by loans or promises for which the taxpayer is liable in case of default. The legal framework will embrace expenditure by an agency which is essentially an organisation using public money for a public purpose:

- a public organization even if for a private purpose
- a private organization for a public purpose regardless of the source or type of funding if it can be identified that the State is ultimately liable

This was in fact a core issue in NH International (Caribbean) v Udecott & Hafeez Karamath HCA No. 3181 of 2004 where the Court of Appeal found Udecott's tender processes to be outside the realm of public law notwithstanding it did find Udecott was a public body, as the tender process was found to be a commercial process, and thus not subject to public law

However Sharma CJ, the dissenting judge allowed the appeal: "*…in a small country which possesses enormous wealth and in which allegations of corruption are rife, the government has proclaimed its commitment to accountability, transparency and integrity in public affairs. The Courts have a special role to play in protecting this ethos particularly in state companies incorporated as private companies with unlimited taxpayers funds at their disposal and the freedom to bypass the Central Tender Board (CTB).*"

He was influenced by the correlating of the use of public money and the protection of the public interest. This Bill, reflecting Judge Sharma's concerns, should assist the Court.

BRIEF DESCRIPTION OF THE BILL

The crux of the Bill is the mandatory compliance with the Operating Principles, Objectives and Guidelines by all parties to transactions related to the procurement of property, services involving public money and the disposal of public property. The details of the procurement process will in general terms be dealt with in the Guidelines whilst the customized details in respect of an agency will be found in Agency Handbooks. All documents are to be publicly available.

The responsibility for the effective operation of the overarching system will reside in an independent Procurement Regulator who directly accounts to Parliament while the accountability for the actual acquisition of property and services and the disposal of property acquired with public money will reside with the agencies.

The Bill requires that all parties to a transaction involving public money for the acquisition of property and services or the disposal of public property will need to ensure that their conduct, processes and documentation conform to stated objectives of–

- Economy, efficiency and competition
- Ethics and fair dealing according to the highest standards of probity and professionalism
- Promotion of national industry in a manner that conforms to the international obligations of Trinidad and Tobago
- Sustainable development taking into account the Social return on investment.

The Operating Principles and the Objectives will inform the National Procurement Guidelines which, in turn, will inform the content of Handbooks for various categories of transaction which are to be prepared by the agency.

The Guidelines will be developed by the Procurement Regulator in consultation with the National Procurement Advisory Council. The Council will comprise a total of 14 persons including representatives of private sector organizations, appointed by the President to represent civil society, and representatives from the public sector including the Ministry of Finance and the Tobago House of Assembly.

The Bill also provides for a Public Procurement Commission, essentially a specialist administrative tribunal, to treat with irregularities and complaints of non-

compliance with the Operating Principles, Objectives and Guidelines. The members of the Commission are to be appointed by the President and are answerable to Parliament.

Apart from the accountability framework, the Bill also prescribes penalties for non-compliance with the Operating Principles, Objectives and Guidelines: a fine of $500,000 and imprisonment for seven years where no other sanction is prescribed. As these penalties indicate an indictable offence, the Bill ensures the applicability of the Proceeds of Crimes Act, 2000. This may be used by the State for the tracing of assets to reclaim public money in the event that there is a breach of the Act.

Where a transaction is found either by a court or by the Public Procurement Commission to be in breach of the Act it is prescribed to be void – the common law result of a contract in breach of public policy.

For the purpose of operational flexibility for local conditions and to take into account the culture of an agency, the Bill enables the Chief Executives of agencies (which include ministries and departments, statutory bodies and their subsidiaries, state-controlled enterprises and their subsidiaries) to issue instructions to treat with the procuring procedures of their respective agencies. These Agency Instructions are to be complied with by all parties to a transaction so long as they do not breach the Operating Principles, Objectives and Guidelines and will include details of the authorized purchasing officers and purchasing responsibilities, including the quanta of their purchasing limits. They are required to be in the public domain.

Apart from the Guidelines and the Agency Instructions of the Chief Executive, the relevant procedures in respect of the transaction to aid purchasers using public money will be provided in support documents as Handbooks. These may be developed by the Procurement Regulator as model Handbooks which can be customized by the agency. The Bill thus enables the internal procuring rules of a state-owned enterprise to be incorporated into the Handbook for the respective agency.

The Bill thus enables the incorporation of existing procedures into the proposed legal and regulatory framework. The Bill enables model Handbooks to be designed for different types of categories of transactions such as those pertaining to construction, consultancy services and Information Technology.

The Procurement Regulator will also have the function of –

- enabling agencies to explore alternative service delivery options thereby saving the taxpayer
- promoting flexible and accountable systems for procurement
- encouraging a streamlined Government procurement framework which will enable compliance with Framework Agreements on a holistic basis
- implementing a procurement system to foster small to medium enterprises which encourages local industry and employment
- providing best practice advice on the conduct of procurement, including promoting electronic transactions which, in the circumstances of operation expects significant savings
- auditing and reviewing the procurement system to ensure compliance with the Operating Principles and Objectives which will require generally the monitoring of award and implementation of transactions all to be in the public domain.

The Procurement Regulator will also be required to prepare an Annual Report to be submitted directly to Parliament identifying inter alia:

- the strengths and weaknesses of the procurement system and steps taken to rectify any weaknesses
- the total value of contracts awarded by agencies so that Parliament can get an idea of the amount of public money involved in procurement
- outcomes of investigations, and lessons learnt which are to be or have been fed back into the procurement system through amendment of the Guidelines.

The Procurement Regulator will be supported by a statutory body to be known as the Office of the Procurement Regulator. The expenses of both offices are to be a charge on the Consolidated Fund.

The Public Procurement Commission has, with a direct reporting accountability to Parliament, the function of investigating breaches of the procurement system by parties to a transaction involving the expenditure of public money.

As an essentially administrative tribunal, it will have the powers of a Commission of Enquiry as if it were a Commission properly constituted under the Commissions of Enquiry Act, Chapter 19:01. The sanctions it may employ are, inter alia, to order a suspension of the contract pending the hearing in a court of law or to find the transaction to be in breach of the Operating Principles and Guidelines resulting in it being voided. It is noted that any decision it makes is subject to the Judicial Review Act, 2000.

However, persons bringing frivolous complaints to this body will be penalized and parties would need to have used mechanisms for redressing complaints at agency level through the processes specified in the contract and tender documents and or as specified in the guidelines.

Where parties comply with the Operating Principles, Objectives and Guidelines it is highly unlikely there will be much recourse to the Public Procurement Commission.

SOME OBJECTIONS ADDRESSED

The law prescribes the application of “Operating Principles of Accountability, Transparency and Value for Money and Objectives” for efficiency, economy, competition and fair dealing. It is argued that these will present a difficulty for the courts to interpret.

However, citation of principles in laws is a modern development in public law legislation such as public service management or that pertaining to financial expenditure management. For example the Public Service Act of Queensland 2005 specifies the Principles of the Public Service to include selflessness, honesty and integrity while the Financial Management and Accountability Act of Guyana recites principles of prudent fiscal management. The prescribed principles and objectives as amplified in the proposed Guidelines avoid the inflexibility of regulations while providing the courts and the users with a comprehensive statement of the outcomes and objectives that apply to all transactions irrespective of size and quantum.

The Guidelines will have force of law and are designed to ensure the application of best current practices in procurement including those relating to Transparency and Publication, Methods of Procurement, Criteria for use of Selective or Limited Tendering Methods, Specifications, Qualifications of Suppliers, Competitive negotiation methods, opening of tenders, information on contract awards, supplier list, framework agreements, bid challenge procedure, time requirements and e-auctions, amongst other matters. As such it is the function of the Procurement Regulator with advice from private and public sector users to keep the Guidelines relevant and effective in accordance with the Principles and Objectives.

All Agencies- meaning Government departments, statutory bodies and state-owned enterprises must publish handbooks and agency instructions so that the public knows who is an authorised purchaser for the agency and the limits of their purchasing power. The law as envisaged should provide sufficient data to aid the courts and other tribunals in the protection of the public interest.

IMPACT OF PROPOSED BILL

This in turn should develop greater public confidence in the quality of Government. The Bill once implemented will address sloppy management practices of public procuring agencies through constant monitoring and auditing by a cross-disciplinary staffed Office of the Procurement Regulator. Specialised procurement units would need to be established in agencies, thus creating a cadre of professionals in public procurement throughout the system.

Given the nature of governance in Trinidad and Tobago as articulated by Sharma CJ, the Bill, by its design, protects a Minister from direct involvement in procurement thereby mitigating allegations of corruption by the Executive. It also reinforces the constitutional duty of Parliament for the quality of public spending. Given the multi-billion dollar nature of the activity, the proposed reforms in the Bill, which provides for the incorporation of inputs at an operational level from both the private and public sectors, reflects concrete and practical support for good governance, savings and an enhanced reputation in international financial circles, all of which augur well for a prosperous Trinidad and Tobago.

A LAW TO TACKLE CORRUPTION

By **BOYD REID**
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Good procurement legislation will not, on its own, protect a society from the ravages of corruption. But it certainly can help.

Parliament can enact laws that set up effective checks and balances on those who have access to the public purse, holding them accountable and providing for the punishment of those who fail to obey these laws.

The current legal framework for public procurement, based on the Central Tenders Board (CTB) Act dating back to before Independence, has become inadequate as a check against corruption.

A Legislative Proposal to provide for Public Procurement and the Disposal of Public Property was laid in Parliament in October, 2010 for the consideration a Joint Select Committee (JSC). An amended version of this document was submitted to the JSC by a committee of representatives of private sector/ civil society organisations convened by the Joint Consultative Council for the Construction Industry (JCC) as a proposed Draft Public Procurement and Disposal of Public Property Bill, 2011. (It is available at: http://www.jcc.org.tt/policy.htm.)

This Draft Bill is designed to be, among other things, an adequate bulwark against corruption in public procurement.

COVERING THE WHOLE PROCESS

A major weakness of the current law is that it does not cover some important parts of the procurement process. As the Government's official policy statement, the 2005 White Paper on Reform of the Public Sector Procurement Regime, says:

> *According to the law, the CTB is the procuring agency of the State but its activities are limited mainly to the tendering stage of the procurement cycle. It is not responsible for the design stage at which the critical decisions involving the spending of public money are taken. It is neither responsible nor equipped for the monitoring of project implementation.* ***(Executive Summary: C.i)***

So the way is made easier, for example, for a decision to run a new highway through property owned by a financier of a party in power so that the financier may benefit from a lucrative sale to the State.

This weakness is common to many procurement regimes around the world and so Transparency International (TI) has made its Minimum Standards for Public Contracting (downloadable from: http://www.transparency.org/global_priorities/public_contracting/tools_public_contracting/minimum_standards) apply to:

… the entire project cycle, including needs assessment, design, preparation and budgeting activities prior to the contracting process; the contracting process itself; and contract implementation.

The Draft Bill has the same scope. It defines 'procurement' as 'the process of acquiring property and services commencing with the identification of the need for the acquisition and ending with the performance of the related contract' (Clause 2).

So it will, for example, make it more difficult for contractors to defraud the State during the course of project implementation.

COVERING ALL WHO SPEND PUBLIC MONEY

A second major weakness of the current law is that it covers mainly Government departments.The other agencies, such as the State-owned enterprises (SoEs), that have actually been doing the bulk of public procurement do not, in effect, fall within its purview.

As the White Paper notes:

> *The exclusion of several significant procuring agencies from the purview of the CTB results in parallel procurement systems about which there are concerns relating to guidance and control, lack of transparency and accountability, and unfair practice.* ***(Executive Summary: Section C.ii)***

You need go no further than the report of the Uff Commission of Enquiry to find examples of these concerns. Clearly, under the present system, the doors at SoEs are wide open to large-scale corruption.

The Draft Bill remedies this by providing a legal and regulatory framework not for specific agencies but for specific transactions. These are procurement transactions that involve public money, defined (in Clause 2) as… money that is-

a. received or receivable by the State, a statutory body or a state controlled enterprise;
b. raised by an instrument from which it can be reasonably inferred that the State accepts ultimate liability in the case of default;
c. spent or committed for future expenditure, by the State, a statutory body or a state controlled enterprise;
d. distributed by the State, a statutory body or a state controlled enterprise to a person; or
e. raised by a private body in accordance with a statutory instrument, for a public purpose;

The same overarching legal and regulatory framework will govern all agencies procuring with public money—including SoEs. (See Clause 4: Application of the Act.)

OVERSIGHT AND CONTROL

A further weakness noted by the White Paper is the lack of general oversight and control:

> *While the Auditor General is responsible for auditing and reporting on public expenditure matters annually, there is no agency charged with the responsibility for systemic monitoring and dispute resolution in relation to public procurement within an accepted policy framework.* ***(Executive Summary: Section C.iii)***

Anyone who followed the public hearings of the Piarco Airport Project and the Construction Sector enquiries could have hardly failed to realise that public procurement in Trinidad and Tobago is sadly lacking in appropriate, effective regulation.

For example, it emerged at the Airport enquiry that it was possible for the CTB to be ignored by the Airports Authority even when the regulations required a representative of the former to sit on the latter's Tenders Committee.

It has become clear that such monitoring mechanisms as exist under the current procurement regime are largely ineffective. The cat is, in effect, often away and, as a result, the mice can have a ball.

As for dispute resolution, this almost always involves lengthy court proceedings—for those who can afford them.

To reduce corruption in public procurement, therefore, appropriate oversight and control are essential. The Draft Bill makes ample provision for this by the establishment of the Office of Procurement Regulator and a Public Procurement Commission.

AN INDEPENDENT REGULATOR

The prime function of the Procurement Regulator (Part IV, Clauses 23 to 28) is to ensure an effective, efficient and relevant procurement system that conforms to the prescribed principles, objectives and guidelines. The Regulator is required to develop, implement and review the guidelines and monitor their implementation by the procuring agencies.

It is very important to note that, in the exercise of his functions, the Procurement Regulator, like the Auditor-General, is not subject to the direction or control of any person. The Regulator is appointed by the President in the exercise of his own discretion [Clause 23(1)] and is directly accountable to Parliament for the performance of his functions and powers [23(2)].

This independence is essential if the new procurement regime is to be effective in the tackling of corruption. In no way could it work if, for example, the Regulator were made accountable to, say, the Minister of Finance.

This accords well with the TI Minimum Standards' requirement that public procurement authorities should:

> *10. Ensure that internal and external control and auditing bodies are independent and functioning effectively, and that their reports are accessible to the public. Any unreasonable delays in project execution should trigger additional control activities.*

A standing commission of enquiry The Public Procurement Commission (Part III, Clauses 11 to 22), appointed by the President and directly accountable to Parliament, is constituted as a standing commission of enquiry. It may investigate any procurement transaction so as to ensure conformity to the prescribed principles, objectives and guidelines. The Commission may, pending the outcome of the investigation, suspend the procurement process and employ mediation techniques. At the end of the investigation the Commission must advise all parties to the transaction of the outcome and report accordingly to Parliament. The Commission may refer matters to an appropriate authority, such as the DPP, for further action.

These provisions of the Draft Bill for oversight and control implement the policy set out in the 2005 White Paper. If they had become law in 2006 or 2007, would we have needed the Uff Commission?

PUBLIC INFORMATION

The fourth weakness of the current procurement system listed by the White Paper is that it lacks transparency.

- *There is no system in place to provide suppliers of property and services as well as the wider public with full, up-to-date and electronically accessible information on tender opportunities, on the status of bids and awards, and the progress of major projects.*
- *There is no single national registry of contractors, consultants and suppliers.*

(Executive Summary: Section C.iv)

Corruption can only thrive in the dark. For obvious reasons, those involved in stealing from the public purse don't want their activities exposed to the light of public scrutiny.

That is why the Draft Bill, in Clause 4, requires all parties to public procurement transactions to comply with the principle of Transparency.

How the procurement process is to be made compliant is set out in general terms in the National Procurement Guidelines [Clause 5(1)(a)]. These are to provide, for example, for the publication of transaction details [5(1)(b)], public consultation on major contracts [5(2)(c)], a process of independent reviews at critical points [5(1)(f)], establishment of a public database [25(4)(c)], agencies' procurement records being made publicly available [35] and the publication by agencies of the award of contracts [36].

Detailed prescriptions on implementing transparency are to be provided in the Handbooks (Clause 6) and Instructions (7), developed by the procuring agencies and approved by the Regulator. All documents are to be publicly available.

The Draft Bill, as far as providing public information is concerned, conforms in large part to TI's Minimum Standards document which states that public procurement authorities should:

6. Provide all bidders, and preferably also the general public, with easy access to information about:

- *activities carried out prior to initiating the contracting process*
- *tender opportunities*
- *selection criteria*
- *the evaluation process*
- *the award decision and its justification*
- *the terms and conditions of the contract and any amendments*
- *the implementation of the contract*
- *the role of intermediaries and agents*
- *dispute-settlement mechanisms and procedures.*

Confidentiality should be limited to legally protected information. Equivalent information on direct contracting or limited bidding processes should also be made available to the public.

INTEGRITY

In TI's Minimum Standards document we read that the public procurement authorities should:

1. Implement a code of conduct that commits the contracting authority and its employees to a strict anti-corruption policy. The policy should take into account possible conflicts of interest, provide mechanisms for reporting corruption and protecting whistleblowers.
2. Ensure that all contracts between the authority and its contractors, suppliers and service providers require the parties to comply with strict anti-corruption policies.

This may best be achieved by requiring the use of a project integrity pact during both tender and project execution, committing the authority and bidding companies to refrain from bribery.

ETHICS AND FAIR DEALING

The Draft Bill in Clause 4(2)(b)(ii) states that "*a person who is a party or seeks to be a party to a (procurement) transaction shall ensure that the transaction … addresses … ethics and fair dealing according to the highest standards of probity and professionalism; …*"

The Mandatory Guidelines spell out some of the implications of this in relation to the elimination of conflicts of interest, the non-disclosure of confidential information, the ensuring of fairness in the pre-qualification and tendering procedures.

Also, Clause 9 of the Draft Bill identifies the persons in procuring agencies who are authorised to execute procurement transactions. The names of such persons are to be published. [9(3)]

Among other things, these persons are "personally liable for the damages incurred by the agency as a consequence of entering a transaction in breach of the Operating Principles, Objectives and Guidelines" [9(5)]. An authorised person is "deemed to be 'a person in public life' for the purposes of the Integrity in Public Life Act, 2000" [9(6)]. "A person who wrongly represents himself as a person authorized to enter a transaction commits an offence." [9(7)]

Neither Cabinet, a Minister of Government nor a person directly instructed by either, is authorised to enter a transaction.

Clause 10 prohibits suppliers from entering into transactions with unauthorised persons under pain of debarment.

Clause 21 enables the Procurement Commission "to make a special report to Parliament in the event that it finds that an officer of an agency is in breach of his duty, commits misconduct or a criminal offence, which report it further refers to the appropriate agency for further action."

OFFENCES

The Draft Bill, Clause 39, determines offences under the Act. These include the exercising of "undue influence which results in a transaction being in breach of the Operating Principles, Objectives or Guidelines" [39(1)] as well as the case of an officer of an agency who "maintains a standard of living above that which is commensurate with his present or past official emoluments; or is in control of financial resources or property disproportionate to his present or past official emoluments" [39(2)].

Where no other sanction is prescribed, the Bill prescribes a fine of $500,000 and imprisonment for 7 years for offences under the Act. [Clause 40(1)]. As these penalties indicate an indictable offence, the Bill ensures the applicability of the Proceeds of Crimes Act, 2000. [40(2)] This may be used by the State for the tracing of assets to reclaim public money in the event that there is a breach of the Act.

WHISTLEBLOWER PROTECTION

Clause 38 requires a person who "has a reasonable belief that collusion between all or any of the interested parties to a transaction, or reasonably believes that an irregularity or a breach of this Act has occurred… to report accordingly to the Procurement Regulator, or the Public Procurement Commission."

Clause 41(1).states that "a person shall not be discharged, demoted, suspended, threatened, harassed, or financially prejudiced or otherwise discriminated against for making" such a report. Clause 41(2) provides for the reinstatement of a person who has been victimised in this way.

The victimiser is liable on conviction to a fine of $150,000 and imprisonment for 6 months. [41(3)]

INTEGRITY PACTS

Clause 5(2)(d) of the Draft Bill states that the National Procurement Guidelines may address "the use of a joint undertaking by all parties (involved in the procurement process) to comply with an agreed code with sanctions."

TI's Integrity Pact (see Minimum Standard 4 above) is precisely this kind of undertaking in that there is a written agreement between the procuring agency and all bidders to refrain from bribery and collusion.

Bidders are required to disclose all commissions and similar expenses paid by them to anyone in connection with the contract.

Sanctions for violation of the agreement may include:

- Loss or denial of contract;
- Forfeiture of the bid or performance bond and liability for damages;
- Exclusion from bidding on future contracts (debarment); and
- Criminal or disciplinary action against employees of the agency.

A monitoring system provides for independent oversight and increased accountability of the process. It aims to ensure that the pact is implemented and the obligations of the parties are fulfilled. The monitor performs functions such as:

- Overseeing corruption risks in the contracting process and the execution of work;
- Offering guidance on possible preventive measures;
- Responding to the concerns and/or complaints of bidders or interested external stakeholders;
- Informing the public about the contracting process's transparency and integrity (or lack thereof).

TI has seen the pact tried and tested in hundreds of contracts in over 15 countries.(For more information see: http://www.transparency.org/global_priorities/public_contracting/integrity_pacts)

INTERNATIONAL CONVENTIONS

Trinidad and Tobago is signatory to the Inter-American Convention Against Corruption (IACAC) and to the United Nations Convention Against Corruption (UNCAC).

(The IACAC is available at: http://www.oas.org/juridico/english/treaties/b-58.html while the UNCAC can be found at http://www.unodc.org/documents/treaties/UNCAC/Publications/Convention/08-50026_E.pdf).

Here are some of the ways in which the Draft Bill contributes to the fulfillment of T&T's obligations under these treaties.

PROCUREMENT REFORM

If the Draft Bill became law we would become compliant with IACAC Art. III(5) which urges State Parties to develop systems of public procurement of goods and services that assure their openness, equity and efficiency.

T&T would also comply with UNCAC Art 9 which requires that States Parties establish appropriate systems of procurement, based on transparency, competition and objective criteria in decision-making that are effective, inter alia, in preventing corruption.

WHISTLEBLOWER PROTECTION

The provisions of the Draft Bill for whistleblower protection (Clauses 38 & 41, outlined above) are in full accord with IACAC Art. III(8) urging the development of systems for protecting public servants and private citizens who report acts of corruption.

They also comply with UNCAC Art 8(4) that urges the establishment of measures and systems to facilitate the reporting by public officials of acts of corruption and with UNCAC Art 33 that calls for protection against any unjustified treatment for any person who so reports.

CIVIL SOCIETY PARTICIPATION

Both IACAC Art III(11) and UNCAC Art 13 urge the promotion of the active participation of individuals and groups outside the public sector, such as civil society … in the prevention of, and fight against corruption.

The Draft Bill in Part V (Clauses 29 to 32) establishes a National Procurement Advisory Council which is a purely consultative body that provides inputs into the design of the system. Among its membership are nominees of three civil society organizations which are publicly acknowledged as having a concern for good governance.

A true anti-corruption Bill

The Draft Bill:

- brings all agencies spending public money under an overarching legal and regulatory framework that effectively covers all stages of the procurement process;
- provides effective mechanisms for oversight and control;
- requires appropriate transparency; and
- ensures as far as possible integrity in the system.

It meets international anti-corruption standards and makes Trinidad and Tobago more compliant with international anti-corruption conventions.

Made into law it would be a powerful weapon in our country's fight against corruption.

A LOCAL CONTENT POLICY FRAMEWORK

By **Dr TREVOR TOWNSEND and MARK SANDY**
Trinidad and Tobago Manufacturers Association

The construction sector is recognised as an essential component in the role of national development. The Government has an obligation to ensure that domestic procurement practices are in compliance with international best practices. Such a policy will guarantee a significant market share to local contractors, providing opportunities for development of the construction sector of Trinidad and Tobago.

This policy framework will act as a guide for a Partnership approach between the local business sector and Government (both Central and Local), specifically, individuals and enterprises engaged in the construction sector, operating within and outside of the country.

Historically, much of Trinidad and Tobago's construction tendering was based on lowest price. However, the construction sector requires a variety of professional skills, expertise, technology, labour, material and capital. In order to ensure continued development of local skills and expertise it is essential to ensure that local participation within the sector is maximised.

It is with maximum local participation that there will be development of local skills and expertise which would result in a more efficient and competitive construction sector in the world marketplace. It is also understood that from time to time it would be necessary to engage foreign expertise with the necessary skills to ensure a satisfactory level of development in the national interest.

The immeasurable value such initiatives can bring to the local construction sector provides compelling reasons for the development and enactment of a local content and participation policy in Trinidad and Tobago.

PURPOSE

This policy framework seeks to identify the guiding principles for partnership between Government and the construction sector that will determine:

- The major mechanisms for local content, participation and capability development
- Where, how and by whom these will be delivered
- The performance measurement, assurance and reporting processes to be used
- Key areas for priority focus

This partnership aims to deliver construction projects to time and to budget, with less defects and accidents on site. The Government of Trinidad and Tobago will benefit from maximising the impact of its construction expenditure, modernising the relevant authority's procurement process and delivering best value from improved knowledge.

VISION & POLICY FRAMEWORK

To achieve the goal of maximizing value for the country, the Government and people of Trinidad and Tobago should participate in the construction sector and engage external participants in a manner that captures and adds value on two fronts:

1. Fiscal Measures – through the use of
   i. Taxation and
   ii. Government expenditure

to capture value from the sector and to extend it by building local capabilities that supports growth of the sector.

2. Non Fiscal Measures – through
   i. Local Participation – maximising the depth and breath of local ownership, control and financing, in order to increase local value-capture from all parts of the value chain, including those activities in which T&T people, business and capital are not currently engaged, both within and outside of T&T.
   ii. Local Content – maximising the usage of local goods and services, peoples, businesses and financing.
   iii. Local Capability Development – maximising the impact of activities within the construction sector, through the transfer of technology and expertise to
      a. Enhance, deepen and broaden the capability and international competitiveness of T&T's people and business within the sector
      b. Provide on-going training programmes to ensure sustainability of the expertise developed with T&T
      c. Provide intelligence and support for T&T's people and businesses within the sector to expand competition within and outside of T&T.

"Local Content and Participation" – collectively referred to as "local value-added" – will be defined in terms of ownership, control and financing by citizens of Trinidad and Tobago.

While, typically, the themes of "local content and participation" have focused primarily on the aspects of in-country activity, Trinidad and Tobago recognises that the construction sector has tremendous potential to develop local capabilities and expertise outside of the country and which, potentially, are not likely to be achieved without specific strategies for doing so.

This policy framework addresses local content and local participation in a manner that:

- Will maximise utilisation and development of T&T nationals, professional firms and businesses owned by nationals in all areas of the construction sector
- Recognises the impact of other mechanisms for maximising local value-added in the short term, while building capability for increased value capture now and in the future
- Seeks to ensure that T&T does not overlook opportunities provided

by activities in and support of the construction sector, so that
- Supporting construction sector policies and strategies on human and enterprise development will be consistent with this policy framework
- All Government, state and quasi-state agencies, regulator bodies, strategies and contracts or agreements are aligned with these policies
- All policies will be vigorously applied to ongoing, proposed and future individual projects, operations and suppliers of goods and services in the construction sector.

LOCAL CONTENT AND PARTICIPATION POLICY STATEMENT

The Government of T&T should take every opportunity to partner with the construction sector on pipeline projects that will maximise the local value-added and value-retention from the activities within the construction sector, whether those activities occur within T&T or not.

The Government should consistently define Local Content and Participation in terms of the level of ownership, control and financing by citizens of Trinidad and Tobago, in conformity with internationally accepted norms, best practices and the key tenets of international conventions, such as GATT and GATS.

LOCAL CONTENT POLICY IMPLEMENTATION

In order to achieve the goal of maximum local content and participation, the Government should ensure that all participants in the construction sector are selected, engaged and managed in a manner that:

1. Identifies WHERE to enable local value-added opportunity capture from the construction sector by
   - Selecting, from time to time, specific goods or services and projects for focusing the local content, participation and supply capability development efforts
2. Determines HOW to enable delivery of maximum local value-added by
   - Managing the programme of activities within the construction sector as a portfolio, so that project pace and scheduling enable maximum opportunity for development of local capabilities and their sustainable utilisation
   - Targeting local capability development by increasing the amount, depth and breath of in-country activities, so as to enable fuller participation of nationals and enterprises in the value chain
   - Giving preference, firstly, to locally owned, controlled and financed enterprise, then to those that demonstrate a clear culture, commitment and capacity for maximising local value-added, participation and capability development, consistent with the country's aspirations and vision
   - Focusing on improving local skills, expertise, technology and financing wealth capture and distribution
   - 3. Ensures DELIVERY of maximum local value-added by
   - Aggressively promoting and rigorously applying this policy wherever State and Local Government projects or resources are involved
   - Facilitating the development of local capability and expertise to enable local value-added
   - Remove barriers for local participation
   - Setting targets of local content and participation that will be aligned to individual projects, operations and/or operators and supporting these targets with appropriate terms of agreement
   - Measuring and reporting on the performance of operations within the construction sector
   - Periodically comparing local content and participation performance amongst operators, between projects and operations and with other countries, to establish benchmarks, targets and opportunities for improvement and for the transfer of best practices

To achieve these ends the Government of T&T should establish a Construction Local Content Committee comprising a balance of interests from State and private enterprise. The Construction Local Content Committee will be responsible for:

- Updating these local content and participation policies, as required
- Developing specific subsidiary policies and strategies, to ensure the transfer of technology and expertise to improve local skills, businesses and capital markets
- Ensure compliance with these policies
- Report to the Minister of Works and Transport and the Cabinet, as appropriate

The traditional approach of "giving preference to local suppliers if the cost, quality and timeliness of delivery of their goods and/or services are of equal quality to the international competitor" has not helped to build local capability, as only those who are already globally competitive will succeed. There is no opportunity to become competitive if the local is not given a chance to do, learn and improve. For this reason "local capability development" will be an important part of the implementation strategy.

Recognising that not all projects, activities, goods or services can be addressed immediately nor can they all be delivered or sustained locally, the Construction Local Content Committee should initially direct efforts to maximise local content and participation in the following way and in the following key areas:

1. Defining Local Content and Participation in terms of the level of
   - Local ownership, control and decision-making
   - Local financing [preferential access to local finance – not just equal access].
2. Requiring preferential treatment of local suppliers of goods and/or services by
   - Ensuring that these are given preference and assurances from the principal operator, which is not deferred to primary or other contractors or prime consultants; these assurances to include access, treatment and re-imbursement for goods and services actually provided
3. People development in key areas that allow locals to take more value-added, analytical and decision-making roles and to ensure the existing regulations and processes, such as work permits, are aligned to ensure compliance with the policies and strategies for developing
   - High value-added skills
   - Technical
   - Project management

- Architecture
- Structural engineering
- Electrical engineering
- Mechanical engineering
- Geo-technical engineering
- Quantity surveying
- Business strategic skills
- Leadership
- Business development
- Project development
- Negotiating
- Commercial
- Service

4. Technology and business know-how that have high value, consistent and sustained demand and which might be transferable to other sectors of the economy. Areas for immediate focus should include:
   - Fabrication
   - IT support
   - Business support services, including accounting, HR and customer services and management
   - Financing
5. Creating and maintaining databases of:
   - Projects and operations work programmes, including their needs for the provision of goods and services and their scheduling
   - Local suppliers of goods and services
   - People development programmes and initiatives of the operators and their international counterparts
   - Including work permits/skill certificates awarded and the related commitments
   - Business development programmes and initiatives
   - The status of activities of in-country operators, State-owned companies and agencies and their contractors, including their
   - Local content and participation policies, strategies and initiatives;
   - Targets, benchmarks and performance metrics;
   - Appropriate legislation, regulations and contracts

Recognising the importance of local value-added to national development and in order to ensure that the Construction Local Content Committee [CLCM] is able to properly deliver on its mandate, the necessary resources [human, financial and technology] should be made available to the CLCM.

A WELCOME REFORM

By **LARRY PLACIDE**
Trinidad and Tobago Chamber of Industry and Commerce

The Trinidad and Tobago Chamber of Industry and Commerce supports the current process to update and reform the system under which the Government of Trinidad and Tobago purchases goods and services on behalf of the people of Trinidad and Tobago. It believes that change to the current system is necessary to improve efficiency, ensure equality of access, improve transparency and oversight, keep abreast with the evolution of procurement activities in Trinidad and Tobago over a number of years and restrict opportunities for corruption of the processes, all to the benefit of the people of Trinidad and Tobago.

The Chamber has been long involved in this reform process. It was a member of the Cabinet-appointed Procurement Reform Committee established several years ago that produced a Green Paper, a White Paper and draft Procurement Legislation under the chairmanship of former Permanent Secretary in the Ministry of Finance, Mr. Kamal Mankee. The Chamber is heartened that some serious attention is now being paid to those recommendations, albeit in a revised form, principally by the Government and specifically by the Joint Select Committee of Parliament.

Procurement reform is critical for the Trinidad and Tobago economy. Modernisation of the existing system will bring significant benefit to our people through more efficient use of the people's money. Greater accountability throughout the process will ensure an adherence to good procurement practice. Increased transparency will allow greater public oversight of procurement activity and ensure broader access to procurement activities. New institutional development is required to support the proposed new rules and regulations. In making these changes, the Chamber fully expects that our country will reduce the opportunity for corruption and place our system at the forefront of global best practice in procurement.

While reform should be undertaken for national benefit, it is useful to consider international and regional developments in procurement policy that support the case for reform at home. This article reviews briefly some of the developments in Latin America and the Caribbean that have either influenced our own proposed reform or support the case for reform.

Jamaica is the country most advanced in the CARICOM in the evolution of the procurement system from the post-colonial model. In 2002, a few years before the Trinidad and Tobago reform process began, the Government of Jamaica issued a statement outlining its policy on public procurement. Several aspects of that policy were also found to be relevant to this country as well. The objectives outlined by the Government of Jamaica were:

- Maximising economy and efficiency in the procurement process
- Engendering fairness, integrity and public confidence
- Sustainable development
- Fostering national growth and development

To achieve these objectives there should be:

- Application of the rules to all public entities, including public enterprises and any entity in which the Government of Jamaica owns "a majority share or otherwise exercises control over the operations of the entity, including any entity acting on behalf of the Government".
- Primary adherence to the principle of Value for Money
- Uniform, transparent and co-ordinated systems
- Commitment to minimize the environmental impact, disaster preparedness and emergency

management
- Opportunity for the involvement of capable domestic companies in the procurement process to promote national development
- Fair implementation of the policy to ensure equal treatment of all contractors
- Flexibility with the primary use of competitive bidding but sole source and selective tendering being appropriate in certain circumstances.

Several of these elements have found their way into our proposed system. One that is certainly worthy of emulation is the comprehensive scope of the system. In recent years we have seen the proliferation of entities that, although funded by Government, are outside the scope of Government procurement rules. The new system should and would ensure that all these entities develop and implement systems that are fully in keeping with national procurement guidelines.

Further, the Chamber is fully supportive of the idea that room can and must be made in the revised procurement system for the participation of national enterprises. There is no conflict between fair application of the system and provision for a minimal percentage of contracts to local firms which are fully qualified and capable of meeting the required standards of performance and quality. Jamaica, for example, sets aside 15% of its contracts for micro, small and medium-sized enterprises.

As our private sector-supported policy proposes, Jamaica sets out a comprehensive Policy Handbook to ensure the uniform application of the system. This Handbook of more than 200 pages in length "provides the procedures and methods to Procuring Entity public officials engaged in planning and managing procurement of goods, works and services on behalf of the Government of Jamaica (GOJ), in accordance with its policy on Public Sector Procurement." Certainly, the work necessary in compiling the Handbook is compensated for by the clarity that it provides for users of the system, from both the supply and demand side.

Support for the further modernisation of the Jamaican procurement system has recently come from the Inter-American Development Bank, IDB, has provided a grant to the Government of Jamaica to implement an e-procurement system. The fact that this is a grant is important, given the public sector financing challenges being faced by Jamaica, as is the confidence that has been expressed in the procurement system in Jamaica as it presently operates.

Similarly, Barbados has made important strides in improving its procurement processes as well. Last year, the Minister of Economic Affairs of Barbados commented on the importance of efficient procurement systems noting that procurement is "an area of activity that is a target for exploitation. It is an area where governments often incur significant overspending as a result of cost overruns, overpricing of bids, non delivery of services and general inefficiencies in the procurement process." The Government of Barbados has concluded that there is room for improving transparency of public bids as well as for reducing the centralisation of the system.

What we have seen in Trinidad and Tobago over a number of years is the de-facto decentralisation of the procurement system, through legal revisions, state practice and the evolution of the economy. The new system proposed by the private sector seeks to recognise this decentralisation, not to re-impose centralisation. At the centre of the system would be the Procurement Regulator. This office would be responsible for ensuring that all the various entities in the system work according to identical guidelines while allowing for adjustment in the particular case based on the key principles of Value for Money, Accountability and Transparency.

Further afield, another of our Caribbean neighbours has been making significant strides in procurement reform. In the case of the Dominican Republic, its reform has been heavily influenced by the country's policy of and commitment to trade liberalization and of the benefits it perceives from furthering the integration of the Dominican Republic into the global economy. It has signed and implemented the Central America and the United States Free Trade Agreement and this has, in turn, required it to make changes to upgrade its procurement systems. Under the CAFTA-DR Agreement, the Dominican Republic is required to provide suppliers of goods and services from Central America and the United States with non-discriminatory access to procurement of goods and services by the Government. It has also undertaken a broad commitment to be transparent with respect to laws and procurement notices and time limits for the publication of such notices. It has agreed not to use the technical specifications of the tender to obstruct trade and sets out procedures in the event suppliers are required to prequalify for tenders. Under the CAFTA-DR, the preferred tendering procedure is an open process and instances are set out where departure from this procedure is possible. Among the transparency provisions is a requirement for prompt publication of information relating to the award of a contract including:

a. the name of the entity
b. a description of the goods or services included in the contract
c. the name of the supplier awarded the contract
d. the value of the contract award; and
e. where the entity did not use an open tendering procedure, an indication of the circumstances justifying the procedure used.

Importantly, the CAFTA-DR Agreement requires all its signatories to establish an independent authority to "receive and review challenges that suppliers submit relating to the obligations of the Party and its entities under this Chapter and to make appropriate findings and recommendations". These review procedures should be "timely, transparent, effective, and consistent with the principle of due process" and must include provision for

a. a sufficient period to prepare and submit written challenges, which in no case shall be less than 10 days from the time when the basis of the complaint became known or reasonably should have become known to the supplier;
b. an opportunity to review relevant documents and to be heard by the authority in a timely manner;
c. an opportunity to reply to the procuring entity's response to the supplier's complaint; and
d. prompt delivery in writing of its findings and recommendations relating to the challenge, with an explanation of the grounds for each decision.

In order to implement these requirements, the Dominican Republic recognized that it would require technical cooperation to modernize its procurement procedures. In particular, it recognized the need for staff training and technological updating in the procurement and purchasing departments of its state institutions and that common guidelines would have to be established for all institutions involved in procurement covered by its obligation

In the case of Trinidad and Tobago, significant training would be required as a result of the proposed revision of the Trinidad and Tobago legislation. Some view this as a cost to be avoided. The Chamber, on the contrary, sees this as an investment in building our human resources to support good governance within the system.

Significant benefit can be demonstrated will accrue to all as a result of the increased transparency and the availability of the appeal procedure for challenging the outcome of a tendering process where non-adherence to the guidelines can be demonstrated. Efficiently implementing this procedure will engender confidence in the new system although the Chamber cautions that clear rules should be in place to avoid frivolous or malicious complaints that could have the effect of delaying the procurement of required goods or services or unfairly disqualifying companies from participation in the process during an investigation.

Opportunities for corruption are present in any human system. However, the Chamber firmly believes that the proposed reform of the system in Trinidad and Tobago currently under way will substantially reduce the opportunities for corruption by increasing accountability throughout the system and strengthening system oversight. In this regard, it is worth remembering that in 1998, Trinidad and Tobago has been a signatory to, and ratified, the Inter-American Convention against Corruption.

Signatories to this Convention recognize that “corruption undermines the legitimacy of public institutions and strikes at society, moral order and justice, as well as at the comprehensive development of people.” States commit themselves to promote and strengthen mechanisms to prevent, detect, punish and eradicate corruption and to co-operate in ensuring the effectiveness of internal measures to punish corrupt activities. The Convention seeks to discipline the offering of bribes, acceptance or solicitation of bribes; the fraudulent use or concealment of property derived from corrupt activity; involvement in the commission of corrupt activity before or after the fact; and any other activity that is accepted as being corrupt between two Member States of the Convention. The Convention also deals with instances of transnational bribery, illicit enrichment and extradition of offenders.

In this article, the T&T Chamber of Industry and Commerce has sought to bring to public attention some of the regional developments in procurement policy and law. Certainly other instances could have been cited as well. However, the Chamber wishes to stress that reform is necessary not because of external developments but because of the requirements of the situation as it obtains in Trinidad and Tobago- our own internal needs.

Some may consider that the changes proposed are too far-reaching and outside of our scale of competence. The Chamber rejects that idea. On the contrary, we feel that the public and private sectors in Trinidad and Tobago are ably equipped to deal with the new system. Certainly, some training would be required as would institutional reform and there will be the expected period of adjustment to the new processes. However, the potential benefits to the country, some of which have been mentioned in this article, and others detailed throughout this issue by the other collaborators, clearly tip the balance in favour of a joint commitment to reform.

RESCUING THE STATE ENTERPRISE SECTOR

By **AFRA RAYMOND**

State Enterprises were created to enhance the pace and quality of Public Procurement, yet they are now the scene of the most bedeviling paradoxes in the entire system of public administration.

Some of the key procurement issues which arise in this arena flow directly from the split character of the governance model.

The basic rationale for the existence of State Enterprises is that they can be more effective because they are not bound by the strict rules which control the conventional Civil Service. The absence of those rules is supposed to allow more latitude in terms of hiring, borrowing and contracting. State Enterprises can hire professional staff at market rates, enter complex commercial arrangements and borrow on commercial terms, all of which should, in principle, amount to significant improvements in public services.

The typical State Enterprise is owned by the State, with the shareholding held by the Corporation Sole, an exceptional legal creature which exists within the Ministry of Finance. Apart from its owner, the State Enterprise will sometimes have a ‘line Ministry’, which would be its sole or main client. For example, the Ministry of Housing & the Environment is the sole client of the Housing Development Corporation (HDC) and the Ministry of Education is the sole client of the Education Facilities Company Limited (EFCL).

State Enterprises can operate within the existing Companies Act or be established by a separate Act of Parliament, as is the case with the HDC. That legal framework ought to ensure that a satisfactory standard of corporate

governance and accountability is maintained.

The fact is that many of the Directors and Officers of State Enterprises are political appointees, which puts the entire rationale onto a doubtful footing. Because the salaries and perks are so attractive, not to mention the commercial opportunities, the State Enterprises are prize targets for political appointments and favours.

Some of the main issues which arise when one is considering this sector are -

- The number of State Enterprises – there needs to be a reduction in the number of State Enterprises.
- If the politicians can instruct the State Enterprise, via the Permanent Secretary, on specifics, what is the purpose of the Board?
- Given the preceding point, do Board members of State Enterprises have the same duties under the Companies Act as other registered companies?
- In terms of our proposed Public Procurement legislation, what is the boundary between the fiduciary responsibility of the Directors and the contracting powers of an 'authorised officer' – i.e. someone identified as having the power to enter certain contracts?

We can proceed along the Procurement Cycle by using the International Waterfront Centre (IWC) as an example –

1. Needs Identification – This is the first stage of the Procurement Cycle and it ought to be an objective assessment of needs. In this case, the IWC was part of a huge, disastrous boom in building new offices in POS – this is all detailed at 'Capital Concerns - New Office Buildings' –(See http://www.raymondandpierre.com/articles/article39/htm).

Before the boom started in 2005, there was 6.5M sq. ft. of office space in Greater POS. At the start of the boom some 3.2M sq. ft., or an additional 50% of the capital's office supply was approved for construction. It should be noted that Nicholas Tower, which took 5 years to fill, is only 100,000 sq. ft. Just under 2.8M sq. ft of new offices was actually built in POS in the last 5 years, with 2.3M sq. ft. of that space (82% of it) actually built by the State. Every State project identified at the outset was executed, but in stark contrast, virtually half the private sector projects stopped before construction began. The obvious consequence of that over-building by the State has been a collapse in office rental levels in the capital, which is detailed in the next point.

2. Reconcile Needs with Funds – This is the stage at which a developer ought to consider critical questions such as the cost of funds, the cost of the project and the returns from it. That is sometimes called a feasibility test and this is where the IWC dissolves into utter confusion. When then PM Manning addressed the Senate on 13th May 2008, he emphasized that every UDeCOTT project was approved by Cabinet and had been vetted by a Finance Committee on Financial Implications. That is the most important address if we are to see the depth of the problem with these State Enterprises – see here (http://www.ttparliament.org).

The break-even point on such projects is the rent at which the project can repay its costs of construction – at minimum, those costs would have to include the cost of land, design, construction and finance. On that 'bare-bones' basis, which makes no allowance for maintenance or periods when spaces are vacant, the break-even rent for the IWC is in the $30 per sq. ft. range. This is the largest single office building ever built in our capital and the best rents ever achieved for space of comparable quality is about half the break-even figure. There is no way that the IWC project could ever have satisfied any proper feasibility test.

Every new office project started in the capital only increased the supply of offices, which reduced the market rent, which, in turn, increased the gap with the break-even rent. Under oath at the Uff Enquiry, Calder Hart tried to rationalize the confusion when he confirmed that only one of UDeCOTT's projects had been subject to a feasibility test and that one was the IWC. He was even so bold-faced as to estimate a break-even rent in the $20 range, but, when pressed, had to admit that he had left the cost of the land out of the calculations! That is the extent of the deformed thinking which typified the best schemes of the leading State Enterprise.

Only one of the State's many office development projects tested for feasibility and in that case, the cost of the land is omitted, yet that same land is included as a part of UDeCOTT's Assets at $224M in that very financial year! Political imperatives were allowed to pervert a process which exists to protect the public interest from this kind of empire-building. But it is in this next part that the full confusion comes to bear.

3. The rest of the procurement cycle – This is the stage at which tenders were invited for design-build and the winning bidder selected, the project built and the complex opened. According to UDeCOTT's statements, the IWC project is its flagship and an outstanding success, having been built on time and within budget. Even if one accepts those assertions, the IWC project is an example of the tragic consequences of a limited application of proper procurement processes.

As a result we have a completed project which is said to have been built on time and under budget, yet makes no economic sense and has a break-even point at some uncertain point in the future, if ever.

Some collateral damage needs to be noted, to quote one of the former PM's notable phrases. Contrary to his statement to the Senate, UDeCOTT has not published its accounts since 2006, which is a breach of both the Companies Act and the Ministry of Finance guidelines. This is a total breach of the elementary norms of good corporate governance, which is the protection that the private sector structure was supposed to give us taxpayers as a safeguard. Because of the political element in the operation, we can see that UDeCOTT was carrying-out the instructions of the Cabinet and those Directors have not been censured in any way, apart from their public dismissal. Given the condoning of breaches at the largest State Enterprises, how does one get the smaller and less visible State Enterprises to conform to good governance?

If the priest could play, who is we?

This is why Trinidad and Tobago needs a complete review of procurement controls.

Joint Consultative Council for the Construction Industry (JCC)

Trinidad & Tobago Chamber of Industry & Commerce (TTCIC)

Trinidad & Tobago Manufacturers Association (TTMA)

Trinidad & Tobago Transparency Institute (TTTI)

JOINT CONSULTATIVE COUNCILFOR THE CONSTRUCTION INDUSTRY

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24th April 2012

The Honourable Kamla Persad-Bissessar, MP,
Prime Minister of the Republic of Trinidad & Tobago,
Office of the Prime Minister,
#13-15, St. Clair Avenue,
St. Clair,
Port-of-Spain

Honourable Prime Minister,

Urgent request for a meeting on Public Procurement issues

The JCC is requesting an urgent meeting with you to voice our growing concern over the serious issues arising in relation to Public Procurement.

The JCC is in full support of your administration's promise to implement new Public Procurement laws to reduce the waste and theft of public money. However, we are greatly concerned over the fact that the 91 recommendations of the Uff Enquiry remain unimplemented. The greater part of those recommendations can be implemented without any need for legislation and the JCC has offered to assist in this exercise, as detailed in the first Appendix to this document.

In administrative terms, the present situation is the same as obtained during the previous administration. This situation offers the same scope for waste, theft and nepotism as well as the inevitable further erosion of public confidence.

An important aspect of our long-term campaign for a new and effective system of Public Procurement controls is the skepticism towards and scrutiny of 'Government-to-Government' arrangements. As far back as the previous 'Petro-Dollar boom' in the 1970's to 1980s, our country was subjected to those arrangements in which the Treasury ultimately had an obligation to repay inflated sums of foreign exchange to external contractors due to cost over-runs. That series of arrangements was detrimental to our national interest in that severe financial burdens were imposed in a scenario which denied opportunities to capable local contractors and increased our foreign exchange liabilities with the 'collateral damage' that none of the promised 'transfer of technology' took place. What is more, poor project controls meant that we were saddled with contentious and ostentatious projects such as the Mount Hope Medical Complex, the Hall of Justice and the Financial Complex, with the most glaring recent example being the NAPA at the Queen's Park Savannah – with unnecessarily burdensome repair and maintenance obligations.

The Chambers administration commissioned a special report into these Government-to-Government arrangements - the '*Ballah Report*'- authored by the late Lennox Ballah, which should be required reading for all senior public administrators and others with a commitment to long-term national development. Our Treasury was effectively targeted by larger 'partner nations' with self-serving agendas for development of their own industrial and contracting sectors with the consequence that our nation was left with a debilitated construction sector and the burden of huge, ill-suited projects to maintain at a time of greatly reduced national income.

The re-appearance of Government-to-Government arrangements is disturbing and the JCC is now openly questioning the rationale for such discredited arrangements.

The recent sod-turning ceremony on March 2nd 2012 for the Couva Children's Hospital is of particular concern to the JCC, raising as it does potent issues of the Needs Assessment in proper procurement practice.

To list just three points of concern –

1. Has there actually been a need established for another Children's Hospital in Trinidad, given the existing facilities at the Mount Hope Medical Complex?

2. Given the high noise and air-pollution levels, is a location along a major highway suitable for a health facility?

3. Given the existence of designs for a Rivulet Road Interchange - designs which have been approved by the Highways Division - it is important to note that the location of the proposed Couva Children's Hospital is in fact exactly the same as that proposed Interchange. If this new project were to proceed as intended it would effectively stifle planned road improvements in terms of access to our country's most significant industrial assets. Has planning permission been obtained?

.....3// Your own address at the sod-turning

Your own address at that sod-turning ceremony was significant in relation to our concerns on the 'Government-to-Government' arrangements -

"...The Couva Children's Hospital initiative has been achieved using the guidance and technical expertise made available to us from the Government of the Republic of China. Today I wish to express my sincere appreciation to the government and people of the Republic of China and in particular to His Excellency the Ambassador of the People's Republic of China

This is the first in a series of projects involving Government to Government collaboration which will yield tangible results that will benefit Trinidad and Tobago in a number of ways..."

This was also borne out by media reports of the event -

"...The Prime Minister said the project would be funded by the Government of China and was one of several government to government projects taking place during her tenure..."

It is an integral part of the Couva Children's Hospital project that the Government of the Peoples Republic of China will nominate the contractor, so it is difficult to reconcile that fact with your statement as to the provision of local jobs at the point of construction.

It is ironic that the sod-tuning ceremony for that $150M USD project should take place a mere month before and a few hundred yards away from the opening of the Couva/Preysal Interchange on 3rd April. Your statements, as reported in the Express of 4th April, were in stark contrast to the real implications of the resumption of these Government-to-Government arrangements by your administration. In fact you were reported to have commended local contractors Seereeram Bros Ltd and Super Industrial Services Ltd (SIS) for helping to restore confidence in the local construction and engineering industry.

....4// You were then quoted as saying

You were then quoted as saying – *"... (They have) given us yet another strong reason to be confident in the work of our people. There was a time before the People's Partnership when our local contractors were perceived as lacking the essential skills and capabilities to deliver projects of this nature. There was a time before the People's Partnership when the local contractors were protesting in the media the widespread belief that large projects were automatically channelled to foreign companies and many local businesses were strangled into bankruptcy. We have set out to change that."..."*

At a time of excess liquidity, our local financial institutions are also being denied the opportunity to participate in national development in a manner which will redound to our long-term interests if precious foreign exchange were more carefully allocated. There is good cause for reflection in this matter as we consider the recommendations of the Uff Report mentioned above –

"...42. The Government's policy on the use of foreign contractors and consultants for public construction projects should be transparent and open to review.

43. Local contractors and consultants who compete with foreign companies should be provided with the same or equivalent benefits as enjoyed by those foreign companies and should be protected from unfair competition through matters such as soft loans..."

Uff's recommendations call for a thorough review of the policy as to the use of foreign contractors and the 'levelling of the playing-field' to introduce a proper measure of equity in the process of national development.

As always, the JCC stands ready to assist in any genuine attempt to resolve these pervasive issues which continue to beset our nation. In accordance with the 42nd Uff recommendation listed above, the JCC is calling on you to halt the present initiatives, and have a broad-based consultation amongst stakeholders in order to establish a proper policy on Government-to-Government arrangements and the use of foreign contractors and consultants.

At this stage, the Public Procurement process is under a damaging triple attack:

- State Enterprises and Agencies continue to operate without implementing the Uff recommendations;
- Ministries continue to circumvent the Central Tenders Board Act in seeking to advance the largest projects; and
- The discredited Government-to-Government arrangements now seem to have returned, effectively outsourcing the basic procurement safeguards.

The JCC considers this contradictory state of affairs to be an unfortunate report on the conduct of our large-scale public affairs in this our 50th Year of Independence. These pressing procurement and developmental issues are further addressed in the Appendices to this document.

The JCC is also taking the opportunity to call on your government, in the interest of transparency, to publish the Reports of other recent construction-related Commissions of Enquiry – the Bernard Report into the Piarco Airport project, the Biche School and the Caroni Bridge collapse. Those recommendations must be shared with the national community whose taxes funded the enquiries and be properly considered by all stakeholders and implemented, where appropriate, so as to avoid us repeating past mistakes and earning the condemnation of our citizens.

We trust that our concerns and proposals will receive your early attention.

Yours respectfully,

.....

Afra Raymond B.Sc., FRICS
President
Joint Consultative Council for the Construction Industry

JOINT CONSULTATIVE COUNCIL

FOR THE CONSTRUCTION INDUSTRY

19-04-12

URGENT REQUEST FOR A MEETING ON PUBLIC PROCUREMENT ISSUES

Narine Singh
PRESIDENT
Association of Professional Engineers of Trinidad and Tobago

Dr. Charisse Charles-Griffith
PRESIDENT
Institute of Surveyors of Trinidad and Tobago

Mervyn Chin
PRESIDENT
Trinidad and Tobago Contractors Association

Mark Raymond
PRESIDENT
Trinidad and Tobago Institute of Architects

Arnim Cozier
IMMEDIATE PAST PRESIDENT
Trinidad and Tobago Society of Planners

Tyrell Melville
IMMEDIATE PAST PRESIDENT
Trinidad & Tobago International Facility Management Association

APPENDIX 1

Public Procurement system and the JSC

The JCC welcomes the declared commitment of this administration to creating a new Public Procurement system to properly control the expenditure of Public Money. The Private Sector/Civil Society group convened by us submitted an entire draft '*Public Procurement and Disposal of Public Property Bill*' to the Joint Select Committee in December 2010.

Our group made presentations to the JSC on four occasions, which permitted a welcome exchange of views and the opportunity to refine our proposals. We have met the challenge to improve our proposals and made several revised submissions, the last being on 27th January 2012, under the signatures of our members –

- JCC
- TTMA
- TTCIC
- TTTI

We lobbied for the return of the Opposition to the JSC process and it is encouraging to note that they have now re-engaged this process.

Finally, we take the opportunity to point out that our proposals for a new Public Procurement system have now been fully endorsed by two additional, important Private Sector/Civil Society bodies –

- Federation of Independent Trade Unions and NGOs – FITUN and
- American Chamber of Commerce – AMCHAM

The JCC has serious concerns on the implementation of this administration's Public Procurement agenda and we are now detailing those for your consideration.

APPENDIX 2

UFF REPORT recommendations

This fact that this matter was a leading part of the discussion at the very first post-Cabinet Press Briefing hosted by this administration on 1st July 2010 speaks to its prominence - as reported in the Express - see http://www.trinidadexpress.com/news/97562054.html -

"...Minister of Justice Herbert Volney has been given the responsibility of developing an action plan over the next six weeks for the implementation of the 91 recommendations of the report of the Uff Commission of Enquiry into the Urban Development Corporation of Trinidad and Tobago (UDeCOTT) and the construction sector.

Speaking at the first post-Cabinet news conference hosted by the People's Partnership government, Prime Minister Kamla Persad-Bissessar stated: "To date, there is no indication of any significant action having been taken to deal with the recommendations of this report and this has been viewed with great concern by members of the construction industry and citizens at large..."

The JCC has now written to the Minister of Justice on three occasions in 2011 (4th March, 4th June and 8th August) to offer our assistance in the important matter of implementing the 91 recommendations of the Uff Report. We have had neither an acknowledgment of or reply to our letters, hence this renewed attempt to engage you on the matter.

The JCC is enquiring whether the Ministry of Justice has developed the 'action plan' mentioned by the PM? If so, is it being implemented? If not, is there any way in which our organisation could be of assistance to you in this matter?

In addition to our offers to assist in this important task, we also suggested to the Attorney General and the Minister of Justice that the proceedings and evidence of the Uff Commission needed to be made available for research purposes. The website for the Uff Enquiry has now been disabled and the actual testimony – comprising written evidence, accounts, plans, transcripts of hearings and so on – is not available to the public.

The Uff Enquiry was an historic and wide-ranging examination of how our nation conducted its large-scale public affairs at a particular stage of national development. As such, the evidence which was examined in that Enquiry offers a priceless window into the conduct of our nation's affairs for students of engineering, surveying, law, management, economics, accounting, public administration and project management. We have no doubt that our list of subject areas could be expanded, but the point is that although in excess of $60M of Public Money was reportedly spent on the Uff Enquiry, those documents are now unavailable.

It would be a considerable irony if an administration which came to office due to public outrage at that unfortunate period of maladministration and excess, were to preside over what is effectively a suppression of those invaluable documents and their insights. The JCC developed a proposal for those documents to be housed within NALIS, which would also be responsible for re-activating the Uff Enquiry website.

The consequences of ignoring/non-implementation of the Uff Report's recommendations

The JCC has set out a few examples for consideration.

Invader's Bay – The JCC has already placed on public record its serious concerns with the process being used by the Ministry of Planning and the Economy in soliciting development proposals for the 70 acres of reclaimed public land at Invader's Bay. One of our concerns is the lack of proper consultation in the entire process, which is in violation of one of the Uff recommendations –

"17. User groups and other interest groups should be properly consulted on decisions regarding public building projects, to ensure that relevant views can be expressed at the appropriate time and taken into account before decisions are made."

In addition the RFP process for the Invader's Bay project is fundamentally flawed because, as detailed below, the rules for the evaluation of proposals were not available until after the closing-date, which renders that process voidable. That flawed process is also in breach of another of the Uff recommendations –

"38. It should be the responsibility of all Government Agencies and of Ministers to ensure that, in any tender situation, it is clear beyond doubt what rules are applicable to the tender process and that those rules are readily available and clear."

Eteck valuations – In its 4th January 2012 '*Invitation to Bid Package*', Eteck solicited tenders for the valuation of their Industrial Estate real estate portfolio, under terms which gave them the right to select a successful bidder without being obliged to give any explanation of its decision. Clause 14 of Eteck's ITBP (at page 4 of 10) states -

"...e Teck will not divulge details or entertain any queries or protests whatsoever concerning its Tender Evaluation process or the results of the process..."

UDECOTT Invitations to Tender – Despite the repeated statements that UDECOTT is now fully 'Uff-compliant', in UDECOTT's 16th November 2011 RFP for the fitting-out of the Customs & Excise Bldg, at page 7 of 85 -

"...UDeCOTT reserves the right to reject any and all proposals and is not bound to provide explanations for its decisions..."

Both those examples are in direct violation of Uff's recommendation –

"39. The reviewing of tenders and the making of decisions upon the award of contracts should be undertaken in as transparent a manner as possible, including demonstrating clear compliance with procurement rules, so as to allay suspicion of improper actions or potential corrupt influences."

The implementation of recommendation #39 is vital if some of the more flagrant episodes of corruption are to be curbed, yet we are still awaiting the elementary changes which would ensure its enforcement.

It is a matter of the most urgent concern that we have as yet been unable to engage in any meaningful process to implement these 91 critical recommendations made in the Uff Report. We urge you to set such a process in train so that we can collaborate in putting an end to this turbid period in our nation's history.

APPENDIX 3

Invader's Bay RFP

The JCC has been making strenuous objections to the misguided and ill-advised process now set in train by the MPE for the development of these valuable public lands.

Most recently we considered the MPE reply of 1st March to our letter of 14th December 2011.

Our letter pointed out that the RFP published by the MPE in respect of the proposed Invader's Bay development did not comply with the provisions of the Central Tenders Board Act.

The MPE's interim reply of 21st December stated that they were seeking legal advice on that point from the Attorney General. We take the opportunity to record our continuing deep concern that an RFP for a project of this magnitude was published without first obtaining legal advice on such an elementary and essential point.

We note from the MPE letter of 5th March and recent statements recorded in Hansard, that the AG has now advised that the publication of the RFP was not required to be in conformity with the Central Tenders Board Act. The AG spoke on this point in the recent no-confidence debate, on Saturday 3rd March, by stating that his Office had advised that the MPE had not breached the CTB Act in their actions *thus far* in this Invader's Bay matter. The AG emphasized those words in his second intervention in that debate.

Given that we made specific assertions as to the relevant provisions of the CTB Act with respect to property disposals and the fact that the RFP is framed around leasing these lands to the chosen developer/s, it is entirely unsatisfactory that our well-founded concerns should be dismissed in a single, bald sentence.

In addition, to the CTB issue, we pointed out that the evaluation process for this RFP was deeply-flawed, since the rules - called *the Invader's Bay Development Matrix and Criteria Description* - were introduced ex-post, being yet another illegal element in this situation. In addition to Dr. Tewarie's confirmation of this when we met at his office on 25th September 2011, our assertion was confirmed by his statement in the Senate sitting of Tuesday 28th February 2012 at which, in response to a question on that document, Dr. Tewarie stated that "*...the criteria were publicly articulated at an awards dinner of the contractors association...*". The closing-date for responses to that RFP was Tuesday 4th October 2011. The RFP stipulated, at clause 3.1, that a choice of successful proposer/s would be made within one month of that closing-date. The Annual Dinner and Awards ceremony of the TTCA, at which Dr. Tewarie was the keynote speaker, was on Saturday 5th November 2011, over one month after the closing-date for this RFP.

On this point alone, this process is voidable, yet the MPE's reply is silent on this. Did they seek legal advice on this point? If not, why not? If so, what is that advice?

The MPE's letter of 1st March also advised that the Invader's Bay property had been valued at $1.28Bn, which reinforces our assertion that the disposal or development of such a valuable and pivotal property should only be carried out in the most transparent manner, with full public participation.

The JCC received an email invitation on 27th March from the office of Carolyn Seepersad-Bachan MP to a public consultation on the *San Fernando Waterfront Development Project* on Monday 2nd April 2012 at Naparima Bowl at 7.00pm. This is yet another example of the inconsistent and improper conduct which is now guiding these important proposals. The JCC fully supports widespread public consultation on these large-scale projects, as per the 17th recommendation of the Uff Report. It is unacceptable in terms of good Public Administration for there to be Public Meetings on the *San Fernando Waterfront Development Project* - which is several years away from implementation - and none for Invader's Bay which we are repeatedly told will start construction within the next 12 months.

The Minister of Planning & the Economy was reported in the Guardian of 6th April to have said, in relation to the competing proposals for development of the San Fernando Waterfront

"...I am backing development, and there is no need to argue about this," he said. "All the parties need to do is get together within the Government and all stakeholder groups and work out a plan that is in the best interest of San Fernando..."

That is a statement with which the JCC fully concurs, but those sentiments are incompatible with the process which is being followed by the MPE in relation to the Invader's Bay development. The MPE has made no proposals for public consultations or meetings with stakeholder groups before working out a plan for Invader's Bay that is in the best interest of Port-of-Spain.

It is our view that the proper handling of this development process requires that MPE operate in an open and transparent manner so as to ease public concerns on possible corruption.

Given the high level of public concern, we are now calling on the government to publish the legal advice given to the MPE in this matter on the CTB and Assessment Criteria aspects.

Since October 2011 the JCC has also been attempting to confirm reports that there has been a lease or agreement for lease in respect of the Invader's Bay property. We have made enquiries with the Ministry of Food Production, Lands and Marine Affairs, the Commissioner of State Lands and the Port Authority of Trinidad & Tobago. Apart from the Port Authority confirming that those lands were not ever within their control, there has been no substantive response to our several queries, which includes applications under the Freedom of Information Act. The JCC views this pattern of behaviour as being incompatible with the levels of transparency and accountability promised by this administration. Accordingly, we are requesting that you order the release of this information without any further delay. Copies of the correspondence are also attached for ease of reference

The present legislative proposals before the JSC are in respect of '*Public Procurement and Disposal of Public Property*'. The proposed reforms clearly envisage that, like acts of public procurement, all acts of disposal of public property, and especially those of the scale of the development of Invader's Bay, must be governed by an adequate legal framework and guided by the core principles of Transparency, Accountability and Value for Money. We expect that all parties to the transactions involved in the Invader's Bay project will be clearly seen to conform both to the letter of the current law and to the spirit of the proposed reforms.

APPENDIX 4

Proposed Port Expansion

The Ministry of Transport issued an invitation for Expressions of Interest on 23rd March a proposed project to create a new port at La Brea in a situation in which parties are required to "*...ensure that the lands proposed are owned by the State...*" Hence there is a significant investment from the State in the form of the required land. The proposed port is to be financed, designed, built, owned and operated by the successful proposer. That format will make this project a Public Private Partnership (PPP), which is said to require only minimal State funding. This proposed port is stated to be handling trans-shipment of cargo with 450m-berths.

A further notable point is that the advertisement stated that proposals are due on 10th May, offering a mere 6 weeks for that. In a variation of the Invader's Bay RFP conditions in that no Letter of Guarantee is required in respect of the financing, so proposers are asked to demonstrate how they intend to finance the project. This amounts to an indefinite specification for this critical item.

The JCC is also concerned that this is process raises even more pressing questions on the number and purpose of State Enterprises/Statutory Corporations. The development of a new Port is clearly an addition to the nation's infrastructure, but there does not seem to be any role for the Ministry of Works & Infrastructure or their related SOE, National Infrastructure Development Company (NIDCO). What is more, there is no role ascribed to the nation's Port Authority in relation to the operation of the proposed La Brea port.

In addition, the fact is that the National Energy Corporation of T&T (NEC) operates a Port (with DryDock) at La Brea, as per this 2011 Press Release.

"...The Port at La Brea Industrial Estate has seen a continuous increase in utilization since 1997, moving from 15% berth occupancy in 2004 to peaking at 91% in 2009 and ending 2010 at 78%. Port activities include cargo handling, rig/vessel repairs, platform fabrication and offshore support services. The La Brea Port is certified in accordance with the International Ship and Port Facility Security Code (ISPS)..."

The NEC is also involved in the development of Port Galeota and the Port of Brighton in La Brea, the latter said to be under development as an expansion of existing port facilities.

At this time the JCC is also concerned at the PLIPDECO advertisement of 4th April 2012 for Expressions of Interest to significantly expand the Point Lisas port facility. This project is also intended to be executed on the finance, design, build and operate basis, as a PPP, with a required minimum 350m-berth. In this case the stated closing-date is 30th April, which is barely four weeks.

What is more, the PLIPDECO EoI also states that its rationale is the prospect of increased trans-shipment of cargo.

The JCC has four areas of concern as to these proposed port expansions –

1. Needs Assessment – The major question is whether there has been a need established for all these proposed port expansions, particularly given that two of the examples are being advanced on the same rationale.
2. Investor Confidence – Following from the previous point, the JCC is also concerned that investor confidence could be adversely affected by the emergence of apparently competing large-scale developments at the same time. The State is seeking to execute these large-scale PPP developments with minimal investment and without issuing Letters of Guarantee or Letters of Comfort, since those would increase its contingent liabilities. When one considers the competing developments and the requirements of the private sector it is unlikely that the intended limitation of the nation's contingent liabilities could be maintained.
3. Land Use Planning – The JCC is also concerned at the extent to which the proposed port expansions are compliant with the existing local plans in respect to land use.

4. Local Content – Finally, the JCC would once again note its serious concern at the fact that these, being some of the largest physical development proposals in the country are silent as to any requirement for local content in supply, design, finance, construction, labour and other services. At a time when the State should be dedicating its limited resources to the benefit of its citizens, the lack of local content requirements in large-scale projects is incompatible with any meaningful move towards real development of all our nation's people and resources.

APPENDIX 5

CDA Master Plan

The Chaguaramus Development Authority (CDA) published an RFP to prepare a Master-Plan for the 14,572 acres in the North-Western peninsula of Trinidad.

That RFP invited the participation of firms in preparing a concept and outlining a Master Plan for the land uses in this relatively undeveloped, invaluable part of our country. There is a lack of clarity, despite repeated requests, as to whether the conceptual designs will be required at this stage and also whether proposers will be paid for the preparation of those. In consequence there are important issues in relation to the scope of the initial exercise as well as the ownership of any designs submitted. At a time when local design practices are under pressure due to limited work and delayed payment, these issues must be resolved now in order to foster participation.

In addition there is a lack of clarity as to the process for assessment of the proposals, with no information being provided as to the identity of the assessment panel, which is accepted international best-practice.

The RFP document is being sold at $1,000 USD and there are no provisions for prospective teams to view those. This is a counter-productive arrangement in the JCC's view, since it would prevent teams from examining the RFP package to decide if they can usefully participate in the exercise. An alternative arrangement could be to have the RFP package available for inspection and limit participation in the RFP process to those teams which had actually purchased the package.

It is in the public interest for these issues to be resolved so that there can be an improved number and quality of proposals for the CDA to select from in this important exercise.

APPENDIX 6

UWI DEBE

In May 2011, the UWI invited Expressions of Interest (EoI) for the design and construction of a South Trinidad campus on a 100-acre parcel of land at Debe. The proposed campus would comprise a built area in excess of 150,000sf and can be considered a large-scale project.

That project was inaugurated at a sod-turning ceremony on 30th January 2012, with addresses being given by the UWI principal and the Honourable Prime Minister.

The JCC is registering its concern at these aspects of this large-scale development –

- Needs Assessment – The question is whether Trinidad is really in need of yet another university campus.
- Land Use Planning – A regional plan was completed in 2010 under the auspices of the Ministry of Local Government for the municipality of Debe-Penal and nowhere in that document is the proposal for such a facility which will have significant impacts upon the future development of the area. The ongoing approach of expediency taking precedence over principle will cost our country dearly; it has always done so in the past.
- Local Content – Finally, the JCC would once again note its serious concern at the fact that this is one of the largest physical development proposals in the country, yet it is silent as to any requirement for local content in supply, design, finance, construction, labour and other services. At a time when the State should be dedicating its limited resources to the benefit of its citizens, the lack of local content requirements in large-scale projects is incompatible with any meaningful move towards real development of all our nation's people and resources. That exclusionary approach to this huge project is at odds with UWI's stated purpose in respect of the development of our human resources and regional enterprise.

- Regulatory Consents – Even thought the sod was turned on 30th January, the designs had not been submitted and as such, there can have been no regulatory approvals either in respect of planning approvals or building approvals, to name just two aspects.

This project is being executed with Public Money and we call for it to proceed in accordance with best procurement practice to include proper public and stakeholder consultation.

APPENDIX 7

JUDICIAL CENTERS

The Ministry of Justice has announced plans for four Judicial Centres to be designed and constructed in the East-West Corridor, Central and South Trinidad. The Minister of Justice is reported in the Express of 18th May 2011 to have stated –

"...Volney said the architectural drawings for the centres which are to be built in three years have been delivered and will be before the Cabinet for consideration later this week.

"And I anticipate the ground will be broken and the sod turned in just a matter of weeks," he said..."

The Trinidad & Tobago Institute of Architects has enquired into this series of large-scale developments and was informed by the Permanent Secretary of the Ministry of Justice that no professional services were procured or any architects selected in respect of those.

This statement is clearly at odds with the Minister's earlier announcement and the recent publication of an RFP for these Judicial Centres only adds to the turbid situation. At best, it would appear that conceptual designs have been commissioned as shown in the Ministry of Justice's publication for the first year of the Peoples Partnership government. In the absence of any advertisement inviting proposals, those conceptual designs would appear to have been commissioned without any element of competition, which is a serious breach of the most elementary public procurement safeguards.

APPENDIX 8

EFCL Investigation

The JCC welcomes the long-overdue probe recently announced into the operations of the Education Facilities Company Limited (EFCL).

Given the allegations which have emerged and our long-standing concerns over the delays in settling certified payments due to our members, the JCC is seeking clarification of these important points –

1. Which are the EFCL Divisions to be investigated?
2. Who will be the person/s responsible for this investigation?
3. What is the period of time to be investigated?

One of the obvious limitations of an audit-type investigation is that it can be frustrated by delay in providing or just with-holding of documents, without any penalty being levied against the guilty parties. That is the reason the JCC is calling for the exercise of legal/ judicial powers in this investigation. A relevant recent example of the specific terms is the Discovery Order issued by the Uff Enquiry into UDECOTT, a copy of that document is attached for your consideration. The JCC is recommending its adoption in this situation.

We have recently witnessed the smooth execution of search warrants by the Police Service against the media to seek certain evidence, yet what remains in question is the disposition of the Police Service to use its powers in taking action against large-scale '*White Collar Crime*'. The gathering of evidence in investigating these allegations of bid-rigging, 'back-fitted' tender evaluation procedures, self-dealing and nepotism needs to be of similar broad scope as that of the recent media episodes to include the cell phones, email accounts and laptops/PCs/tablets of the parties under suspicion.

The JCC is most concerned at unconfirmed reports that the EFCL investigation will be include a process audit to be conducted by Price Waterhouse Coopers, since that firm was providing audit services in every one of the highly questionable corporate fiascoes which have recently caused tremendous and well-deserved public concern, leading to high-level investigations – UDECOTT, CL Financial group and Hindu Credit Union.

To quote the Minister of Finance from page 8 of the 2011 Budget, in reference to the CL Financial collapse –

"*...This crisis was caused by an absence of risk management, excessive borrowing internally and externally to fund high risk speculative investments, and* ***wrong financial reporting****...*" The emphasis is ours.

If the purpose of this exercise is to get to the root of the problem and in so doing restore a necessary measure of public confidence, we urge that another choice of auditor be made.

The JCC is also taking the opportunity to point out that under our proposed new system for Public Procurement, allegations of this kind would be investigated by the Public Procurement Commission (PPC), which would have the legal powers of a standing Commission of Enquiry. The PPC is intended to be the investigative arm of the new Public Procurement system and our proposals also require that any report of the PPC be published. That is to avoid recurrence of the unacceptable fact that so many important Commissions of Enquiry, conducted at public expense and stated to be on behalf of the public, remain unpublished, for whatever reason.

In the matter of corruption and the abuse of Treasury funds, we repeat our call for the publication of the Bernard Report into the Piarco Airport fiasco and the implementation of the 91 recommendations of the Uff Report. It is the JCC's position that the publication of the Bernard Report and the implementation of the Uff recommendations would have reduced the scope for the large-scale corruption with which our nation is once again beset.

The JCC is therefore calling for this EFCL Probe to be under the control of a legal or judicial officer with the powers to effectively penalise any attempts at delay or cover-up. In addition, the JCC is calling for the results of that investigation to be made public, immediately upon completion.

Public confidence is an important element in maintaining good order, so every effort must be made to restore the trust of the public in relation to this all-too-familiar issue of alleged improper behaviour of public officials.

APPENDIX 9

Programme for Upgrading Road Efficiency (PURE)

The JCC is also concerned that an operational and important arm of the State, charged with responsibility for repairs and maintenance of our nation's roads and bridges, appears to have become hamstrung by an investigation into allegations of corruption.

The JCC has always stood firmly against any sort of corruption in the construction sector, yet it seems that the prolonged and inconclusive enquiry into the operations of PURE is now further slowing efforts to engage the construction sector in promoting economic activity.

If there are charges or other consequences to emerge from that enquiry, those need to be pursued, but further delay in publishing that report is to the detriment of our common cause.

The Minister of Finance is reported in the Guardian of Friday March 23rd 2012 to have said -

"...Asked if there was any evidence to support the claims of corruption in PURE, Dookeran said: "No, there was no such evidence in the report, it was systemic." He said the report was internal and there was no obligation to present it in Parliament because "I don't think it will add anything at this point."

The Report of the PURE Investigation must now be published.

In addition to the lack of clarity in relation to PURE, there have also been published reports of a statement from you as Prime Minister that a new Agency or Program - '*National Road Rehabilitation Programme*' – is to be established to intensify road repairs.

In light of those mixed signals and the recent advertisements for both programs – PURE and NRRP - the JCC is also requesting clarification on this matter.

APPENDIX 10

FLOODING MEMORANDUM OF UNDERSTANDING

The inauguration of this administration in May 2010 was marked by yet another episode of the serious flooding which had become a hallmark of our inadequate infrastructure. The perennial flooding of significant parts of our country is a national problem in need of a strategic solution.

With that in mind, the JCC proposed to the Minister of Works & Transport in July 2010 that a tripartite, innovative approach be adopted to develop real solutions to this problem. Our proposal was for a Storm Water Management Committee to be established under the Chairmanship of UWI leading hydrologist, Dr. Vincent Cooper, with participation from the JCC and officials from the MoWT's Drainage Division.

The proposed mandate of that Committee was –

- Examine the several drainage reports to make recommendations for staged implementation of the projects outlined.
- Propose packages of contracts for construction and maintenance of existing watercourses and drains in a manner which would facilitate participation by local contractors.
- The work of the Committee was to be carried out at no expense to the State and the Secretariat was to be hosted by the MoWT.

The Storm Water Management Committee met on seven occasions, until the MoWT requested that its work should be guided by a MoU to outline the respective roles/responsibilities. The JCC prepared a draft MoU, which was submitted to the MoWT in October/November 2010.

We have never had a response to that requested MoU and we believe that it will be to the nation's benefit if the work of the Storm Water Management Committee is put onto an official footing as proposed. The JCC stands ready to work on this important initiative in the nation's interest.

FEDERATION OF INDEPENDENT TRADE UNIONS AND NGOS
(FITUN)

c/o Oilfields Workers' Trade Union
99a Circular Road
San Fernando
Trinidad and Tobago

tel: (868) 652-2701/3
fax: (868) 652-7170
email: fitun_tt@yahoo.com

February 6, 2012

Senator Dr. Bhoendradatt Tewarie,
Chairman,
Joint Select Committee on Public Procurement,
The Red House,
Abercromby Street,
POS

Dear Dr. Tewarie,

Re: Private Sector/Civil Society Proposals on Public Procurement

The Federation of Independent Trade Unions and NGOs (FITUN) is formally registering its full support for the Private Sector/Civil Society proposals on Public Procurement. Our organization has maintained an active interest in this aspect of public administration in our country. FITUN shares the view of many other civil society organizations in Trinidad and Tobago that proper procurement practice is critical in ensuring that public expenditure is at all times characterized by transparency and accountability.

Our commitment to this important issue has been demonstrated on several occasions, including the hosting of a public forum jointly with the Private Sector/Civil Society group at OWTU's Paramount Hall on Thursday August 11th 2011. At this forum, the proposals developed by this group were presented to our membership and other affiliates. After a robust and interactive discussion with our members, we are now pleased to confirm FITUN's full support of these proposals.

Yours sincerely,

Joseph Remy
Deputy President
FITUN

x.c: Mr. Afra Raymond – President, Joint Consultative Council

AMERICAN CHAMBER OF COMMERCE OF TRINIDAD AND TOBAGO

Street Address: 62 Maraval Road, Port of Spain
Mailing Address: P.O. Bag 150, Newtown, Port of Spain
Tel: (868) 622-4466/0340/628-2508; Fax: (868) 628-9428
Email: inbox@amchamtt.com
Website: www.amchamtt.com

February 7th 2012

Senator The Honourable Dr Bhoe Tewarie
Chairman
Public Procurement Joint Select Committee
Office of Parliament
Tower D, Level G7
International Waterfront Centre
1A Wrightson Road
Port of Spain

Dear Senator Tewarie,

On behalf of our Board of Directors I wish to confirm the support of American Chamber of Commerce of Trinidad and Tobago (AmCham T&T) for public procurement legislation which addresses the concerns of transparency, certainty and fairness. AmCham T&T therefore supports the proposals outlined in the *Bill for Public Procurement and Disposal of Public Property Act, 2010 prepared by the Joint Consultative Council* as a means of enhancement of the procurement practices and policies of the public sector.

In this regard, AmCham T&T would be pleased to work more closely with the Joint Select Committee in the pursuit of its objectives.

Respectfully

Desiree Gobin-Seecharan
Executive Director

cc. President JCC

JOINT CONSULTATIVE COUNCILFOR THE CONSTRUCTION INDUSTRY
The Professional Centre Building
1st Floor Unit B202, 11-13 Fitzblackman Drive, Wrightson Rd. South Ext.,
Port of Spain
Tel: (868) 623-9396 Fax: (868) 628-2563/ 625-5749
jcctt1@gmail.com www.jcc.org.tt

3rd March, 2011

Ref: CO/AG/Mar-11/001

Senator the Honourable Anand Ramlogan
Attorney General of the Republic of Trinidad & Tobago,
Cabildo Chambers
Corner St. Vincent and Sackville Streets
Port-of-Spain

Honourable Attorney General:

The JCC welcomed the appointment of the Uff Commission of Enquiry into the Public Sector Construction Industry, as a means of addressing widespread public concerns over perceived corruption in those operations of the State.

The Uff Report was completed and published in March 2010, which was a real landmark in our history as the first Commission of Enquiry report to be published.

The JCC is writing to seek your intervention on an important matter arising from the Uff Commission. Our concern is not, on this occasion, related to the aspects of possible criminal charges and convictions. We are here pursuing the educational and historic imperatives arising from this important national exercise.

Our concern is with the contribution which the Uff Commission itself represents to our nation and indeed, the wider world of learning. A major advance was made in the actual conduct of the Uff Commission, in that the hearings were televised and the sworn testimony was accessible on their website – www.constructionenquiry.gov.tt.

For whatever reason, that website, which was formerly run by your Ministry, is no longer accessible. The information which was recorded as evidence in the course of the Uff Commission offers a deep, unprecedented insight into the state of affairs and the conduct of our substantial business dealings.

2// That evidence....

That evidence, even those parts which were hotly contested, is literally an indispensable part of our nation's history.

To have those insights now become unavailable would be a serious loss in terms of public knowledge and literally a case of '*One step Forward, two steps Backward*' which future generations would rightly deplore.

It would be a situation rich in irony to have those testimonies vanish from public view while this administration were in office, having promised to implement the Uff Report recommendations.

We are proposing that the actual hard copy documents and the virtual website be hosted by National Library and Information Systems Administration (NALIS), being the most appropriate home for this collection.

If those documents were curated at NALIS, they would form an important repository for research and teaching in critical fields such as Government, Engineering, Surveying, Planning, Social Sciences, Law, Management and other associated fields.

We have taken the initiative of discussing this proposal with NALIS' Executive Director, Ms. Annette Wallace. Ms. Wallace has indicated that NALIS would be supportive of this JCC proposal.

We look forward to yourearliest response to our request as outlined above.

Yours respectfully,
JOINT CONSULTATIVE COUNCIL
FOR THE CONSTRUCTION INDUSTRY

Afra Raymond B.Sc., FRICS
PRESIDENT
Joint Consultative Council for the Construction Industry

JCC

JOINT CONSULTATIVE COUNCIL FOR
THE CONSTRUCTION INDUSTRY

Ref: CO/AG/Mar-11/001

Richard Saunders
PRESIDENT
Association of Professional Engineers of Trinidad and Tobago

Aidan Gregoire
PRESIDENT
Institute of Surveyors of Trinidad and Tobago

Mikey Joseph
PRESIDENT
Trinidad and Tobago Contractors Association

Mark Raymond
PRESIDENT
Trinidad and Tobago Institute of Architects

Arnim Cozier
PRESIDENT
Trinidad and Tobago Society of Planners

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jcctt1@gmail.com www.jcc.org.tt

4th June, 2011

Senator the Honourable Anand Ramlogan
Attorney General of the Republic of Trinidad and Tobago
Cabildo Chambers
Corner St. Vincent and Sackville Streets
Port of Spain

Honourable Attorney General:

The Joint Consultative Council for the Construction Industry (JCC) wrote to you on 3rd March, 2011(copy attached) seeking your intervention to facilitate the educational and historic imperatives which arose from the publication of the Uff Report in March, 2010.

We are of the considered opinion that the Uff Enquiry made an invaluable contribution to our nation and the wider world of learning, given that the sworn testimony was accessible on their website www.constructionenquiry.gov.tt which gave an unprecedented insight into the state of affairs and the conduct of our substantial business dealings. However, we have also noted that the website which was overseen by your Ministry is no longer accessible.

As stated above we believe that the evidence given to the Uff Enquiry is of educational and historic importance, so we are proposing that actual hard copy and the virtual website be hosted by National Library and Information Systems Administration (NALIS).

Moreover, if these documents were curated at NALIS, they would form an important repository for research and teaching in critical fields such as Government, Engineering, Surveying, Planning, Social Sciences, Law, Management and other associated fields.

We have taken the initiative of discussing this proposal with NALIS' Executive Director Ms. Annette Wallace. Ms. Wallace has indicated that NALIS would be supportive of this JCC proposal.

We look forward to your earliest response to our request as outlined above.

Yours respectfully,
JOINT CONSULTATIVE COUNCIL
FOR THE CONSTRUCTION INDUSTRY

Afra Raymond B.Sc., FRICS
President

From: **Samraj Harripaul** <sharripaul@ag.gov.tt>
Date: Tue, Jun 14, 2011 at 3:37 PM
Subject:
To: afraraymond@gmail.com
Cc: anand@tstt.net.tt

Dear Mr. Raymond

I have been directed by the Honourable Attorney General to respond to your letter of 3 March and e-mail of 11 May in relation to the UFF Commission of Enquiry.

Please note that all the evidence, submissions, and other material concerning this Enquiry is now within the portfolio of the Ministry of Justice. You thus advised to direct your request to that Ministry.

Thank you.

Sincerely

Samraj Harripaul
Chairman
Law Reform Commision
6th Floor, Cabildo Chambers
23-27 St.Vincent Street
Port of Spain
Trinidad, WI

PBX:(868) 623-7010, Ext. 2632

Direct/Fax: (868)627-5562

sharripaul@ag.gov.tt

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THE CONSTRUCTION INDUSTRY
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South Ext., Port of Spain
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jcctt1@gmail.com www.jcc.org.tt

4th March, 2011

Ref: CO/Jus V/Mar-11/001

The Honourable Herbert Volney, MP,
Minister of Justice
Level 16, 17, 20 and 21,
Port of Spain International Waterfront Towers,
#1 Wrightson Road,
Port-of-Spain

Honourable Minister,

Re: The Uff Report

The Joint Consultative Council for the Construction Industry (JCC) welcomed the appointment of the Uff Commission of Enquiry into the Construction Industry, as a means of addressing widespread public concerns over perceived corruption in those operations of the State.

The Uff Report was completed and published in March 2010, which was a landmark in our history as the first Commission of Enquiry report to be published.

The JCC is writing to seek your update on an important matter arising from the publication of the Uff Report. Our concern is not, on this occasion, related to the aspects of possible criminal charges and convictions. We are here pursuing the implementation aspect.

Firstly, the ninety-one (91) recommendations of the Uff Report were a clear statement as to the necessary steps to ensure that such monumental waste of public resources never again takes place in our country. So much so, that the present administration has on several occasions given its public commitment to ensuring the implementation of those recommendations. That commitment is fully endorsed by the JCC.

We understand that the implementation of the Uff recommendations is now the responsibility of the Justice Ministry. This letter serves as our formal request for a public update as to what progress has been made in that exercise.

//2 In that connection ...

In that connection, we are enquiring whether an implementation working party has been established. Has separate funding been identified and/or made available? What bottlenecks or technical hurdles have been identified?

In the event that such a working party has not yet been established, we would invite your attention to one of the most important of the 91 Uff Report recommendations to prevent the recurrence of corruption and wastage in procurement.

No. 49 reads as follows:

It should be assumed that the construction industry is vulnerable to potential corruption and steps should be taken to avoid actual corruption following the guidelines and recommended practices laid down by Transparency International and its affiliates.

We urge you to invite the Trinidad and Tobago Transparency Institute (TTTI), the National Chapter of Transparency International, to be part of any implementation working party or committee you may set up so as to ensure that you have the benefit of an authoritative exposition of the "guidelines and recommended practices" that Professor Uff had in mind when that recommendation was written.

In furtherance of achieving a broadly-based and effective implementation working party, we are also offering to delegate two JCC representatives as members, so that the intended exercise can benefit from the necessary expert input.

We look forward to your earliest response to our concerns as outlined above.

Yours respectfully,
JOINT CONSULTATIVE COUNCIL
FOR THE CONSTRUCTION INDUSTRY

Afra Raymond, B.Sc., FRICS
PRESIDENT

JCC

JOINT CONSULTATIVE COUNCIL FOR
THE CONSTRUCTION INDUSTRY

Ref: CO/Jus V/Mar-11/001

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JOINT CONSULTATIVE COUNCILFOR THE CONSTRUCTION INDUSTRY

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4th June, 2011

The Honourable Hebert Volney, MP,
Minister of Justice
Level 16, 17, 20 and 21
Port of Spain International Waterfront Towers,
1 Wrightson Road,
Port of Spain

Honourable Minister,

Re: The Uff Report

With reference to the subject at caption, the Joint Consultative Council for the Construction Industry (JCC) wrote to you in the first instant on 4th March, 2011 (see copy attached) seeking your update on an important matter arising from the publication of the Uff Report. We indicated in that missive, that we are pursuing the implementation of the Ninety-One (91) recommendations, which we believe to be necessary in ensuring that such monumental waste of public resources never again takes place in our country.

Furthermore, we enquired whether or not an implementation working party has been established with the requisite funding to execute its mandate and if any technical hurdles have been identified. Of particular concern to us was recommendation 49 which reads as follows:

It should be assumed that the construction industry is vulnerable to potential corruption and steps should be taken to avoid actual corruption following the guidelines and recommended practices laid down by Transparency International and its affiliates.

In light of the foregoing, we urged you to invite a member of the Trinidad and Tobago Transparency Institute (TTTI), the National Chapter of Transparency international, to be part of any implementation working party. Additionally, the JCC was of the view that in order to achieve a broad-based and effective implementation working party we would offer two delegates from our organization as members who would extend expert advice.

The implementation of the UFF recommendations is the responsibility of the Ministry of Justice, so your early response would be appreciated.

Yours respectfully,
JOINT CONSULTATIVE COUNCIL
FOR THE CONSTRUCTION INDUSTRY

Afra Raymond, B.Sc., FRICS
PRESIDENT

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8th August, 2011

The Honourable Herbert Volney, MP,
Minister of Justice
Level 16, 17, 20, and 21
Port of Spain International Waterfront Towers,
#1 Wrightson Road,
Port of Spain

Honourable Minister,

Re – The Uff Commission

The JCC has written to you twice on this matter, setting out our concerns and proposals on the implementation of the 91 recommendations of the Uff Report. Those letters – 4th March and 4th June 2011 are attached for ease of reference.

During the same period we were also in correspondence with your colleague, the Honourable Attorney General, on the evidence and the Uff Enquiry website. We were informed on 14th June that the evidence, submissions and other material concerning the Uff Enquiry were now the responsibility of the Justice Ministry. Our letters – 4th March and 4th June 2011 – and the AG's email of 14th June, are also attached for ease of reference.

//2...We have not had a response

8th August, 2011

The Honourable Hebert Volney, MP,
Minister of Justice
Re – The Uff Commission

We have not had a response to our concerns and would point out that the implementation of those recommendations would only be possible with dynamic and well-grounded leadership. The JCC is once again offering our expert members as delegates to work along with your own nominees in any implementation or working group.

We trust that we can have your early attention to this matter.

Yours respectfully,
JOINT CONSULTATIVE COUNCIL
FOR THE CONSTRUCTION INDUSTRY

Afra Raymond, B.Sc., FRICS
PRESIDENT

The Office of the Minister of Planning and the Economy

December 21, 2011

Mr. Afra Raymond
President
The Joint Consultative Council for the Construction Industry
The Professional Centre Building
1st Floor Unit B202
11-13 Fitzblackman Drive
Wrightson Road South
PORT OF SPAIN

Dear Mr. Raymond

Thank you for your letter of December 14, 2011. Your concerns are duly noted.

I am aware of the fact that your public procurement proposal have been taken into account during deliberations of the Joint Select Committee on this matter and will be taken fully into account as that Committee proceeds to complete its work.

On the matter you raise with regard to the Central Tenders Board, I have asked the Attorney General for his advice on the matter.

With Sincere Best Wishes for a Merry Christmas and a successful 2012.

Sincerely

Dr. Bhoendradatt Tewarie
Minister

Ministry of Planning and the Economy

Level #14, Eric Williams Finance Building,
Independence Square, Port of Spain,
Republic of Trinidad and Tobago

Tel: (868) 623-3716
Fax: (868) 627-4195
Website: http://pesrga.gov.tt

SCHEDULE

(Section 13)

THE FREEDOM OF INFORMATION ACT. 1999

Request for Access to Official Document(s)

(pursuant to section 13)

1. Name of Public. Authority COMMISSIONER OF STATE LANDS .....

2. Name of Applicant JOINT CONSULTATIVE COUNCIL FOR THE CONSTRUCTION INDUSTRY .....

3. Address of Applicant PROFESSIONAL CENTRE, 11-13 FITZBLACKMAN DRIVE, PORT OF SPAIN .....

4. Telephone Number of Applicant 623-9396 OR 627-2522 .....

5.	Doc. No.	Description of Document Requested	Form of Access
	1.	A COPY OF THE LEASE OR AGREEMENT FOR	COPY
		LEASE OF THE PROPERTY NAMELY; 28HECTARES	
		AT INVADER'S BAY AS PER THE MINISTRY O□	
		PLANNING AND THE ECONOMY, REQUEST FOR	
		PROPOSALS (RFP) PUBLISHED ON 31ST AUGUST,2011	
		http://www.jcc.org.tt/invadersbay/MPE_InvadersBay_RFP_Notice.pd□	
	2.		
	3.		

[Note: Applications Shall identify the document(s), or provide sufficient information to enable an officer/employee of the public authority who is familiar with the relevant documents, to identify the documents, to identify the document(s) with reasonable effort.

Continue on a Separate Page if necessary.

Subject to the provisions of the Act access to a document ay be granted by supplying a printed copy of it or by making it available for inspection or, if appropriate, by supplying a copy of a tape, disk, film or other material containing the information, by supplying a transcript of such tape, film or other material or by making arrangements for the hearing or viewing the such tape, disk, film or other material].

6. Assuming that all documents requested are exempt documents, give the Document Number of the documents described above of which you would like to have access to an edited version, if possible.

The making of this request is free of charge, but where access to a document is to be given in the form of a copy (printed or otherwise), the applicant shall be required to pay the prescribed fee.

Date of Application 2nd February 2012

Signature of Applican□ .....

SCHEDULE

(Section 13)

THE FREEDOM OF INFORMATION ACT. 1999

Request for Access to Official Document(s)

(pursuant to section 13)

1. Name of Public. Authority MINISTRY OF FOOD PRODUCTION, LAND & MARINE AFFAIRS.....

2. Name of Applicant JOINT CONSULTATIVE COUNCIL FOR THE CONSTRUCTION INDUSTRY .....

3. Address of Applicant PROFESSIONAL CENTRE, 11-13 FITZBLACKMAN DRIVE, PORT OF SPAIN .....

4. Telephone Number of Applicant 623-9396; 627-2522.....

5.	Doc. No.	Description of Document Requested	Form of Access
	1.	A COPY OF THE LEASE OR AGREEMENT FOR	COPY
		LEASE OF THE PROPERTY NAMELY; 30.5 HECTARES	
		AT INVADER'S BAY AS PER THE MINISTRY O□	
		PLANNING AND THE ECONOMY, REQUEST FOR	
		PROPOSALS (RFP) PUBLISHED ON 31ST AUGUST,2011	
		http://www.jcc.org.tt/invadersbay/MPE_InvadersBay_RFP_Notice.pd□	
	2.		
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[Note: Applications Shall identify the document(s), or provide sufficient information to enable an officer/employee of the public authority who is familiar with the relevant documents, to identify the documents, to identify the document(s) with reasonable effort.

Continue on a Separate Page if necessary.

Subject to the provisions of the Act access to a document ay be granted by supplying a printed copy of it or by making it available for inspection or, if appropriate, by supplying a copy of a tape, disk, film or other material containing the information, by supplying a transcript of such tape, film or other material or by making arrangements for the hearing or viewing the such tape, disk, film or other material].

6. Assuming that all documents requested are exempt documents, give the Document Number of the documents described above of which you would like to have access to an edited version, if possible.

The making of this request is free of charge, but where access to a document is to be given in the form of a copy (printed or otherwise), the applicant shall be required to pay the prescribed fee.

Date of Application... 2nd February 2012

Signature of Applican□.....

The Office of the Minister of Planning and the Economy

RECEIVED
05 MAR 2012

March 1, 2012

Mr. Afra Raymond
President
The Joint Consultative Council for the Construction Industry
The Professional Centre Building
1st Floor Unit B202
11-13 Fitzblackman Drive
Wrightson Road South
PORT OF SPAIN

Dear Mr. Raymond

Re: Invader's Bay Development

Further to my letter of December 21, 2011 on the Invader's Bay Project, I write to let you know that based on advice from the Office of the Attorney General I can say that the publication of the Request for Proposals for screening of potential investors making an investment proposal on State Lands located at Invader's Bay was not required to be in conformity with the Central Tenders Board Act. I trust that this will be of some comfort to you.

For your further comfort, I wish to indicate that said lands have been valued at 1.280 billion Trinidad and Tobago dollars and this is being fully taken into account by the Technical Committee charged with the responsibility of engaging potential investors.

Sincerely

Dr. Bhoendradatt Tewarie
Minister

Ministry of Planning and the Economy

Level #14, Eric Williams Finance Building,
Independence Square, Port of Spain,
Republic of Trinidad and Tobago

Tel: (868) 623-3716
Fax: (868) 627-4195
Website: http://pesrga.gov.tt

MEMORANDUM OF UNDERSTANDING
between
THE MINISTRY OF WORK AND TRANSPORT
DRAINAGE DIVISION
and
THE UNIVERSITY OF THE WEST INDIES
CIVIL AND ENVIRONMENTAL ENGINEERING DEPARTMENT

and

THE JOINT CONSULTATIVE COUNCIL OF THE CONSTRUCTION INDUSTRY OF TRINIDAD AND TOBAGO (JCC)

. PARTIES

The purpose of this Memorandum of understanding (MOU) on water and coastal engineering management (WCEM) is to provide a framework for initiatives which will lead to improvement of (WCEM) in Trinidad and Tobago. This ("MOU") is the result of an initiative of the Storm Water Management Committee of the Joint Consultative Council of Trinidad and Tobago (JCC) and is here entered into between the University of the West Indies ("UWI") of which the Civil and Environmental Engineering Department ("UWICEED") will be the executor of this MOU on behalf of the UWI and the JCC a non-profit non-partisan body representing the interests of all professional bodies operating within the Construction Industry. .

DRAFT (1st)

II. PURPOSE

This MOU is entered pursuant to the Water Works and Water Conservation Act, Chap. 54:41 and any other future Act detailing out the jurisdiction of the MOWTDD. Any agreements entered pursuant to this MOU will be authorized by and be consistent with these Acts or other applicable statutes and regulations. This MOU is designed to provide a linkage between the MOWTDD the UWI and the JCC towards creating mechanisms for continuous and sustainable technical assistance, research and development and capacity building in the water and coastal engineering management focusing on

- Flood management
- Drainage and irrigation
- Coastal engineering and management
- River engineering and management
- Hazard awareness, prevention and mitigation was
- Fluvial processes, sedimentology and geomorphology
- Geographic Information Systems technology
- Decision support
- Any other related field

Teams of professionals from the MOWTDD and UWICEED will work together within the framework of this MOU. A Management Team (MT) comprising professionals from the Parties

and any other stakeholder agencies to facilitate the fulfilment of the goals and objectives identified in this MOU.

Effective cooperation and collaboration promoted through this MOU is expected to improve the level of service provided by the MOWTDD in keeping with its mandate to enhance the quality of the lives of the citizenry of Trinidad and Tobago, as well as to significantly advance the individual missions of the MOWTDD the UWICEED and the JCC

This MOU reaffirms the desire of MOWTDD the UWICEED and the JCC for close working relationships that promote the development of research and technology, education and capacity building towards conservation, improvement, and sustainable development of the nation's resources and environment.

III. BACKGROUND OF THE PARTIES AND AUTHORITY TO ENTER THIS MOU

1) The MOWTDD is responsible for the development and maintenance of main watercourses and irrigation systems; design and construction of hydraulic and coastal structures; provision of advisory services, to ensure efficient and effective flood, erosion and sedimentation control, drainage and irrigation, coastal protection and reclamation; in keeping with its mission to improve the quality of lives of the citizenry of Trinidad and Tobago. The MOWTDD is empowered to act under the Waterworks and Water Conservation Act, Chap. 54:41

2) The UWICEED is a department within the Faculty of Engineering ("FOE"). The mission of the FOE is to (i) be a provider of world quality education, (ii) provide research and development programmes in support of Caribbean business, industry and infrastructure and (iii) position the human resources assets of the nation at the forefront in propelling growth, development and innovation in the region.

3) The JCC is a non-profit, non-partisan body consisting of at present:

   i. The Association of Professional Engineers of Trinidad and Tobago;
   ii. The Board of Architects of Trinidad and Tobago;
   iii. The Institute of Architects of Trinidad and Tobago;
   iv. The Institute of Surveyors of Trinidad and Tobago;
   v. The Trinidad and Tobago Contractors Association;
   vi. The Trinidad and Tobago Society of Planners.

   The JCC has as some of its objectives the obligation "to make representation to Government Bodies on matters which pertain to the national interest"..and 'to improve all aspects of the construction industry." The JCC is also the Industry Training Organisation (ITO) under the national Training Agency (NTA). The JCC in conjunction with FIDIC is

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also the provider of professional training in FIDIC forms of contract and has trained over 2500 professionals in the Caribbean

IV. PARTICIPATION IN THE MT

The MOWTDD, JCC and UWI agree to participate in the MT,. The MT will endeavour to achieve MOWTDD, UWICEED and JCC objectives by doing the following:

i. developing a shared JCC/MOWTDD/UWICEED vision through the setting of goals to develop support and capacity for storm water and coastal engineering management in a sustainable manner taking into account the nation's resources and the environment;

ii. supporting the developing and the utilization of institutional policies, organizational structures, and operational procedures to focus resources to formulate and achieve sustained technical support and assistance, research and development and capacity building in the fields of herein identified within this MOU;

iii. ensuring that research and technology development and capacity building is responsive to present and emerging stakeholder needs and national priorities;

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iv. promote the developing of detailed research and technology proposals, including funding and personnel requirements and educational programmes in the fields of water management identified within this MOU; to address stakeholder needs and national priorities..

v. commenting on the implementation and completion of proposals with respect to their timely and substantial completion, technology development and transfer process that is synchronized with existing and anticipated management, education, training and outreach requirements.

vi. The detailed Research, Technology Development and Management proposal under this MOU will be developed and agreed upon between THE MOWTDD AND UWICEED only. The JCC's role will be limited to activated on the MT. The research and technology proposal will be developed incrementally and will form appendices to this MOU.

V RESEARCH, TECHNOLOGY DEVELOPMENT AND MANAGEMENT PROPOSAL BETWEEN THE MOWTDD AND UWICEED.

Proposals are to be developed through Standard Project Proposals identified as appendices to this MOU in which the MOWTDD AND UWICEED responsibilities are as follows:

a) MOWTDD agrees to:

    i. Identify as part of the MT projects or areas in which technical support and assistance is required from the UWI facilitated by the UWICEE

ii. Participate in setting technical support and assistance, research and technology development and capacity building priorities as part of the MT and to communicate these priorities the MT, the Ministry of Works and Transport ("MOWT") and other stakeholders.

iii. Provide or recommend, if possible and consistent with MOWTDD's authority and priorities, funding to facilitate technical assistance and support and carry out research plans and implement educational programmes developed by the MT.

iv. Participate, when feasible and consistent with MOWTDD's authority and priorities, in the transfer of research findings into technologies useable by MOWTDD, UWICEED and other stakeholders, including the general populace.

v. Assist in life cycle monitoring of the effectiveness of technologies and practices implemented and provide feedback to help make any necessary improvements in technologies and practices.

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b) UWICEED agrees to:

i. Provide the requisite professional and support personnel and resources to enable the provision of technical support and assistance for projects or areas identified by the MOWTDD.

ii. Participate in setting of technical support and assistance, research and technology development and capacity building priorities as part of the MT.

iii. Provide, if feasible and consistent with UWICEED's authority and priorities, funding and personnel to support and carry out research, technology development, and education activities and training.

iv. Participate, when feasible and consistent with UWICEED's authority and priorities, in the transfer of research findings into technologies useable by MOWTDD, UWICEED and other stakeholders, including the general populace.

v. Provide leadership in training MOWTDD's professional and support staff, including field personnel in the application of new and revamped technologies and practices; as prioritized by the MT.

vi. Provide leadership in development of education programmes and activities within the fields of water management identified within this MOU; as prioritized by the MT.

vii. Transfer research and technology findings into formats useful to the MOWTDD's professional and support staff, as well as other stakeholders, including the general populace.

viii. Assist in life cycle monitoring of the effectiveness of technologies and practices implemented and provide feedback to help make any necessary improvements in technologies and practices.

V. Implementation

The responsibility for implementation of this MOU is expected to be shared between the MT and the MOWTDD and will take the form of the following:

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i. The MT will have the overall responsibility for carrying out aspects of this agreement as outlined under **IV. PARTICIPATION IN THE MT**

ii. The MOWTDD through the Director of Drainage will be responsible for the development (or delegation of such development) of Project Sub-Agreements (PSA) if and when such sub-agreements are deemed necessary or appropriate to the successful implementation of specific projects or activities. Standard Project Proposal

Assumptions:

- Every project proposal needs to be approved by the Signatory at MOWT (Minister, PS, and Director of Drainage) depending if and what budget required
- Each project proposal will have to be written in the format here outlined and in collaboration with the Drainage Division,
- Each project proposal needs to clearly state which goals and objectives mentioned in the MOU are supported by this particular project

In order to define a general project proposal the following are identified:

- UWI offering independent specialized technical assistance (in-depth reviews / recommendations)
- UWI offering training for MOWT personnel (specific courses, seminars, symposia, access to UWI courses)
- MOWTDD to offer students practical experience in related fields (design, construction)
- MOWTDD to offer thesis projects in areas covered by this MOU

- UWI supporting MOWTDD with improving population awareness through the developing of materials such as booklets, TV ads, etc…
- The MT to identify and aid in developing professional platform in areas covered by this MOU.
- The MT to support development of national database in collaboration with other stakeholders
-

Some projects can be done within the context of the existing responsibilities of each party and will require no extra budget. Others, which require input beyond the normal activities, will have to identify responsibilities, input and budget for each particular project. Financing will be provided via the MOWT.

Proposed Standard Project Proposal Set-up

The following are the items proposed for the standard proposal (see excel table for more details)

1 Introduction
2 Justification
3 Background
4 Scope of Work
5 Approach
6 Project Planning
7 Responsibilities
8 Output
9 Resources
10 Project Management
11 Budget

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iii. Establishing internal processes, procedures and relevant review criteria to include continuous review of program plans, the development and monitoring of success benchmarks regarding the MOWTDD-UWICEED collaborations and project plans; and evaluation of projects supported under this MOU.

iv. Periodically assessing the success and progress of projects launched pursuant to this MOU and recommending improvements to this MOU and/or implementing procedures.

v. Preparing periodic status reports on each of the projects undertaken through Project PSA under this MOU to the Permanent Secretary, Ministry of Works and Transport.

VI. Designated Points of Contact

The primary contact and liaison to each Party to this MOU is as follows:

For MOWTDD:

Director of Drainage
Ministry of Works and Transport
Drainage Division
41-43 Sackville Street
Port of Spain
Trinidad, W.I.

Telephone: 868-623-7729
Facsimile: 868-627-4780

For UWICEED:

DRAFT (1st)

Head of Department
University of the West Indies
Civil and Environmental Engineering Department
St. Augustine Campus
St. Augustine
Trinidad, W.I

Telephone: 868-662-2002 ext 2504
Facsimile:

For JCC

The President of the JCC
The Professional Centre Building
Unit 202, Fitzblackman Drive, Wrightson Road Extension, Port of Spain,
Trinidad, West Indies.
Tel: 868-623-9396 or 622-2722
Fax: 625-5749
Email: jcctt1@gmail.co

The primary contact and liaison to each Party to this MOU may designate a secondary contact and liaison to be a member of the PM

VII Duration

i. This MOU will become effective upon the date of the last signature of a party's approving official and shall remain in effect for 5 years from the effective date. This MOU may be terminated by mutual written agreement or by any party at any time and for any reason. A party wishing to terminate this MOU should endeavour to give the other party 90 days written notice.

ii. This MOU will be reviewed annually and may be amended at any time by mutual written consent of the authorized representatives of the parties to the MOU. It may be subject to reconsideration at other times as may be required and as agreed to by the authorized representatives of the parties to the MOU.

IN WITNESS THEREOF the Parties, each acting through their duly authorized representatives, have caused this MOU to be signed in their names and delivered.

Ministry of Works and Transport

_____
(Signature)

Name: Date: Month Day, 2010
Title:

DRAFT (1st)

University of the West Indies
Civil and Environmental Engineering Department

_____
(Signature)

Name: Date: Month Day, 2010
Title:

The Joint Consultative Council

_____
(Signature)

Name: Date: Month Day, 2010
Title:

JOINT CONSULTATIVE COUNCILFOR THE CONSTRUCTION INDUSTRY

The Professional Centre Building
1st Floor Unit B202, 11-13 Fitzblackman Drive, Wrightson Rd. South, Port of Spain
Tel: (868) 623-9396 Fax: (868) 628-2563/ 625-5749
jcctt1@gmail.com www.jcc.org.tt

28th May, 2012

The Honourable Kamla Persad-Bissessar, MP,
Prime Minister of the Republic of Trinidad & Tobago,
Office of the Prime Minister,
#13-15, St. Clair Avenue,
St. Clair,
Port-of-Spain

Honourable Prime Minister,

Urgent request for a meeting on Public Procurement issues

The JCC wrote to you on 24th April to seek an urgent meeting to discuss our serious concerns on Public Procurement issues.

We have not received an acknowledgment of that letter and we are once again asking, as a matter of urgency, that you please schedule a meeting with us to discuss these issues of growing national concern.

We trust that this will receive your early attention given the JCC's growing concerns regarding some current developments, and the importance of this topic to the entire National Community.

Yours respectfully,
JOINT CONSULTATIVE COUNCIL
FOR THE CONSTRUCTION INDUSTRY

Afra Raymond BSc, FRICS
President

JOINT CONSULTATIVE COUNCILFOR THE CONSTRUCTION INDUSTRY
The Professional Centre Building
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Tel: (868) 623-9396 Fax: (868) 628-2563/ 625-5749
jcctt1@gmail.com www.jcc.org.tt

20th June 2012

The Honourable Kamla Persad-Bissessar, MP,
Prime Minister of the Republic of Trinidad & Tobago,
Office of the Prime Minister,
#13-15, St. Clair Avenue,
St. Clair,
Port-of-Spain

Honourable Prime Minister,

Urgent request for a meeting on Public Procurement issues

The JCC wrote to you on 24th April and again on 28th May to seek an urgent meeting to discuss our serious concerns on Public Procurement issues.

We have not received an acknowledgment of those letters and we are once again inviting your urgent attention to these issues of growing national concern.

We trust that this will receive your early attention.

Yours respectfully,
JOINT CONSULTATIVE COUNCIL FOR THE CONSTRUCTION INDUSTRY

.....
Afra Raymond B.Sc., FRICS
President



Ministry of Planning and the Economy

INVADER'S BAY DEVELOPMENT

(Design and Build)

REQUEST FOR PROPOSALS (RFP)

1.0 INTRODUCTION AND OBJECTIVES

1.1 INTRODUCTION

The Government of Trinidad and Tobago, through the Ministry of Planning and the Economy (MPE) is inviting expressions of interest for the development of that portion of the Invader's Bay, south of Movietowne. This Request for Proposals (RFP) has been assembled to provide potential developers (hereinafter referred to as the "Developer") with the information to prepare a competitive design and build proposal. This information has been developed by the MPE. The MPE, through the Town and Country Planning Division, will provide direction throughout the development process.

The proposals solicits creative, high quality design and build proposals for the proposed uses, as expressed in the site layout, the architectural and conceptual designs, financing and construction. It is expected that elements of green technology will also be included given our need to prepare for the inevitable impacts of climate change.

1.2 The Ministry of Planning and the Economy

The Ministry of Planning and the Economy is the arm of Government responsible for

- The country's medium and long term economic policy planning
- Development and monitoring
- National human development
- National statistics
- Public sector investment
- Land use planning
- Technical co-operation
- Population planning and development

These functions serve as important instruments of sustainable development policy, resource mobilization, coordinated economic management, national human development and urban and regional development. The Government recognizes the value of long term planning as well as problems created when long term planning is ignored. In order to ensure balanced development and restore lagging areas, care must be taken in the development of new areas. The focus of this government and its agencies is delivery of the product.

2.0 BACKGROUND AND THE NATURE OF THE PROJECT

The development of Invader's Bay, Port of Spain, which is 28 ha (70 acres) in area and located about 1.6km from the downtown area of the city and across from the Hasley Crawford Stadium and the National Sports Complex will be one of the most significant urban development projects to be undertaken in this period.

The Movietowne component of the site already developed includes a wide variety of recreational, entertainment and commercial facilities. Development of this southern site must be complimentary to this existing development while bringing value in money, cultural enhancement and social interaction to the area. The extensive coastline also lends itself to the development of waterfront friendly activities as well as transportation opportunities. The successful completion of this waterfront transformation will entail the following stages:

1. Inception
2. Feasibility
3. Strategy
4. Pre Construction
5. Construction
6. Design Services & Commissioning
7. Completion, Hand Over and Occupation
8. Post Completion Review / Audit

For Trinidad and Tobago this is a "major waterfront transformation" along the line of other signature waterfront developments such as Darling Habour in Sydney, Baltimore Inner Habour, the Habour-front in Toronto, London Docklands and Teleport City in Tokyo. Although the genesis of the projects may vary, the result has generally been bold and dramatic. With the change in the manner in which ports operate and cargo is transported, waterfront property is now more valuable for its residential, retail and recreational function than simply for port activity with heavy industry, docks and fenced off warehouses, as is the case currently in Port of Spain.

Research has shown that the popular and in some cases unprecedented success of waterfront development on a global scale is a tangible sign of the vitality of cities, even in a world

increasingly dominated by suburbs. The development of the Invader's Bay area will definitely benefit the country both during its construction and operational phases, whilst at the same time producing a significant effect on the civic psyche by giving renewed pride to our nation.

It is expected that the project will:

1. Generate both temporary jobs (albeit over several years) during the construction phase and permanent jobs during the operational phase;
2. Add value to the service sector, and contribute to improving the living conditions of the area, and target local companies and subcontractors for the supply of certain components of goods and services;
3. Generate foreign exchange earnings;
4. Facilitate an expansion of the skills base and the extension of services to the country inclusive of a transfer of technology, especially in "green building technologies" and so develop local entrepreneurship and technical skills;
5. Have a demonstrable effect on the other countries in the region, which might follow this example;
6. Transform the capital city's coast line and herald a new age in the development of waterfront urban centres in the region;
7. Boost property values in the area
8. Assist the Government of Trinidad and Tobago in realizing our vision of making this country a world class destination for business and tourism, providing opportunities for greater economic inclusion and facilitating an era of prosperity for all;
9. Ensure synergies with the surrounding development and add vitality to adjacent sites including those in Port of Spain city centre and East Port of Spain;

3.0 IMPLEMENTATION

3.1 TENURE ARRANGEMENT

The proposed Developer will be chosen via this RFP process and shall then enter into a Memorandum of Understanding (MOU) with the Government of Trinidad and Tobago (Ministry of Planning and the Economy) for an agreed lease rate. It is expected that this activity would be finalized within one (1) month of the submission of the said RFP.

Developers are required to clearly indicate what proportion of the seventy (70) acre Invader's Bay property would be required for the projects.

3.2 STATUS OF APPROVALS

The reclamation license and the approval for the subdivision to create the parcel of land for commercial and recreational uses have all been granted. The Head Lease for the lands rest with

the State. The lands are therefore development ready. Any other approvals for construction of buildings or installation of infrastructure on the site will be the responsibility of the Developer/s.

3.3 DEVELOPMENT PROCESS

Notwithstanding the guidelines provided by this RFP, it is desirable that the structure plan and proposal for site specific development be agreed at an early stage with the Town and Country Planning Division prior to submission of final plans. An Intersectoral Committee made up of the various regulatory agencies and chaired by the Town and Country Planning Division will be set up to review the proposals, agree in principle on the structure plan and work with the Developer/s to ensure the approval process moves forward smoothly. This preliminary approval will be accepted by financial institutions and support the financing of the project since it indicates that the proposed development is acceptable in principle and consultations with the regulatory agencies is ongoing. The Developer will also be mandated to showcase the use of green technology in the Caribbean context and to ensure that designs take into consideration designing for earthquake and hurricane hazards. With respect to the operationalization of the project it is expected that the Developer will provide a preliminary marketing plan that would demonstrate an understanding of the development/business' target market, including the tenant or customer profile and ensure synergies with the surrounding development and add vitality to adjacent sites including those in Port of Spain.

3.4 PHASING

Given the size and nature of the project, it is advisable that the said scheme be planned in phases. Phased development does not preclude, that works may be carried out concurrently.

3.5 PROJECT ASSESSMENT

Whilst there is no prescribed format, Developer must submit "Design and Build Proposals" which at a minimum address the requirements listed below. Proposals will be scored using the "Invader's Bay Development Matrix and Criteria Description". The Developer/s will be required to provide a business plan illustrating the Developer's track record and how the financing of the project is proposed to be undertaken. If government input is expected at any stage, the level of input is to be clearly identified. In addition the concept for the development and how it is proposed to attract investment both local and foreign and the challenges for doing this must be included in the justification of the project.

3.6 FINANCIAL REQUIREMENTS

The Developer is to provide:

1. A preliminary budget estimate for the design presented
2. An identification of the source of any required equity or other information providing evidence of financial capabilities. If financing has to be sourced from an external source, the Developer MUST submit a letter of guarantee from the financier as well as a profile of the financier. Failure to comply with this requirement will result in disqualification
3. A timetable that includes financing and duration of construction
4. A summary of the overall economic impact to the Invader's Bay development in terms of construction value, business start up costs, number of employees and similar economic and social indicators

Through this RFP, the MPE seeks to obtain from interested Developers:

1. A rational and comprehensive guide for the Invader's Bay area which shall foster sustainable economic growth, and encourage compatible and high quality land development
2. The promotion of sustainable development measures that will utilize green buildings, aesthetically pleasing design standards and land use combinations
3. A realistic execution strategy
4. A successful Private Finance Initiative where the Government and by extension the nation benefits

It is expected that submissions will be on par with current global standards for similar type projects and thus catapult Trinidad and Tobago further towards our goal of leapfrogging development and ushering in an era of prosperity for all.

August 2011

MINISTRY OF PLANNING AND THE ECONOMY

SEND PROPOSALS TO:

Permanent Secretary
Ministry of Planning and the Economy
Level 14
Eric Williams Finance Building
Independence Square
Port of Spain

DEADLINE FOR SUBMISSION: Tuesday October 4, 2011 at 4pm

NIDCO'S COMMENTS

on the Armstrong Report prepared for the Joint Consultative Council for the Construction Industry and submitted to NIDCO for its Consideration

NOVEMBER 2014

National Infrastructure Development Co. Ltd.
3 Melbourne Street, Port-of-Spain
Tel. 1 (868) 624-5543
www.nidco.co.tt

NIDCO
National Infrastructure Development Co.

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Background

This document has been prepared in response to a request made by the Joint Consultative Council for the Construction Industry (JCC) via a letter dated October 10, 2014 addressed to the President of the National Infrastructure Development Company Limited (NIDCO).

Following this formal request, NIDCO convened a meeting with representatives of the JCC and its own external consultants to discuss the matter. At the meeting, NIDCO agreed to prepare and submit a report to the JCC, containing its comments on what is commonly referred to as the 'Armstrong Report'.

This report is prepared for the consideration of the JCC only. Both the JCC and NIDCO are very conscious of and respect the fact that there is pending before the High Court a constitutional motion CV2012-03205 filed by Dr. Wayne Kublalsingh and six (6) other Claimants. This report is produced at the request of the JCC and is not intended for use in the proceedings before the High Court and neither the JCC nor any other party is at liberty to use this report for such purpose.

This document is structured in two parts. Part One contains the several responses made by NIDCO to the JCC, upon receipt of the Armstrong Report in February 2013.

Part Two presents an account of the actions taken by NIDCO, subsequent to the publication of the Report.

PART ONE:

1 Response to the Armstrong Report by NIDCO and its Consultants upon Receipt of the Report

On February 13, 2013, NIDCO, through its President, Dr. Carson Charles, received an electronic version of a report from the JCC entitled *'Report of the Independent Review Committee of the Debe to Mon Desir Segment of the San Fernando to Point Fortin Highway'*. The Report, submitted under the sole signature of Dr. James Armstrong, the Review Committee Chairman, was presented as the output of a 60-day technical study undertaken on behalf of the JCC to determine whether the State had carried out the relevant studies in respect of the Debe to Mon Desir section of the Solomon Hochoy Highway Extension to Point Fortin (SHHE) project.

At a meeting held on December 3, 2012 NIDCO had undertaken to make available to the JCC all relevant documentation in respect of the Debe to Mon Desir section of the SHHE and the JCC had undertaken to examine all the documentation on the project provided by NIDCO and all other relevant documentation and to produce a Report within 60 days to NIDCO for its consideration and its publication thereafter. It was expressly agreed and understood among the parties attending that meeting that work would continue on the sites of the Highway released to the Contractor.

Following the meeting, the JCC proceeded to settle its own Terms of Reference for the Committee to be chaired by Dr. James Armstrong. Neither NIDCO nor the Government had any input into these Terms of Reference.

NIDCO has considered the Report.

Immediately upon receipt of the electronic version of the Armstrong Report, NIDCO assembled an internal technical team which included the Vice President of Engineering and Programme Management (Civil Engineer), the Senior Project Manager (Civil Engineer), and the Valuation Consultant (Chartered Valuation Surveyor). This internal team made an in-depth analysis of the Reports, including its conclusions and

recommendations. Further, NIDCO's President forwarded the Report to the company's external consultants, namely, Dr. Rae Furlonge (Partner, APDSL); Dr. George Sammy (EcoEngineering); and Andrea Abel (Trintoplan) seeking their urgent comments on the Report's findings. The Report was also sent to the Head of the Environmental, Health and Safety Unit of the Ministry of Works and Infrastructure (MOWI).

On February 14, 2013 NIDCO sent the first response letter to the President of the JCC, acknowledging receipt of the emailed Armstrong Report and explaining the immediate steps NIDCO had taken to review the Report. The letter further requested the JCC to delay publication of the Report to allow for time to address several inaccuracies and inconsistencies that were observed in the Report. These initial concerns included:-

- several statements being factually incorrect;
- some conclusions made did not correlate with the analysis and conclusions of the respective consultants;
- some statements could be easily misconstrued, based on the manner in which they were presented.

NIDCO also expressed its concern that the Report appeared to have been complied by the Committee Chairman, without the benefit of review and consensus by all members of the Committee.

In addition to this first response of February 21, 2013, NIDCO's President also contacted the President of the JCC by telephone and requested him not to publish the report until the matters of concern raised by NIDCO were addressed. It should be noted that the agreement contained in the press statement issued on December 3, 2013 was that the Report was to be produced within 60 days for NIDCO's consideration and its publication thereafter. In this telephone discussion, the JCC was also advised that NIDCO and its external consultants were studying the Report, which, from preliminary review, had already revealed several factual inaccuracies. It would therefore have been negligent to have published the Report with these errors. The JCC President agreed to allow NIDCO to submit its comments.

Subsequent to NIDCO's internal review of the Armstrong Report, NIDCO responded to the JCC in other letters, one dated February 21, 2013 and another dated February 25, 2013 indicating that the organisation had given in-depth consideration to the Report and clearly outlined NIDCO's position on the findings of the Report. In this correspondence, NIDCO outlined the recommendations that had merit, those that it disagreed with and the reasons for its objections.

The concerns expressed by NIDCO in the letter to the JCC dated February 21, 2013 included the following:-

1. The Report was a collection of working papers prepared independently by various consultants with an Executive Summary prepared by the Chairman. This was procedurally flawed as there was no Report of the Committee. The several papers prepared should be considered working papers and a single, cohesive document representing the findings, analyses and recommendations of the Committee as a whole should have been prepared and signed by all Committee members before transmitting to NIDCO.

2. No consideration was given to the fact that there was in place a $5.2 Billion construction contract between NIDCO and the Contractor. It was neither proper nor reasonable for the consultants to conduct analyses or arrive at recommendations without giving consideration to the very significant financial and other consequences of suspending or truncating any portion of the contract.

3. There was no protest or appeal against the grant of the CEC by members of the HRM. There was also no protest consequent upon the announcement of the project by the Government in 2010, the turning of the sod in January 2011 or the well-publicized signing of the contract by NIDCO in July 2011.

4. There was no evidence that NIDCO had proceeded with the project in violation of any law.

5. NIDCO agreed with the HRC's view that the entire Highway needed to be planned as part of a comprehensive land use/transportation planning exercise for south Trinidad and confirmed that this was indeed done. NIDCO cited the National Physical Development Plan and South West Regional Plan.

6. NIDCO noted that the HRC had concluded that the EIA was not acceptable although it acknowledged that it addressed the requirements of the TOR. It was not acceptable for the HRC to make an accusation that the EMA improperly "relented" without having given the EMA an opportunity to respond in this matter.

7. In respect of Human Settlement, outline approval had been granted by the Town and Country Planning Division for the Petit Morne Site and Cabinet had already approved the site for the relocation of persons affected by the Highway. The MOWI was in the process of preparing an application for final planning permission and NIDCO did not intend to commence relocation until these approvals were received.

8. The Debe to San Francique Highway Action Committee had identified potential sites for relocation and selected Petit Morne as the preferred alternative. It was

not appropriate for the HRC to select its own site at Golconda having regard to the view expressed by the aforesaid group.

9. Although the primary purpose of the Highway was to reduce traffic and meet the transportation needs of the public, this was treated as a minor issue in the report.

10. The comments under Hydrology and Hydraulics were inappropriate in that they pertained to the Design/Build approach and reflected opinions on procurement policy rather than Hydrology and Hydraulics.

11. There was no instance of entry onto property without legal authority. Due process was at all times followed and the constitutional rights of persons are not being abrogated during the acquisition or other process.

12. The recommendations constitute a list of instructions to cease all work along an entire section of the roadway, which does not itself constitute a single community. It pays no regard to the consequences for the existing contract and the cost to Government and tax payers.

13. There was no identification of the areas of the section where there may have been no significant environmental or other danger.

14. No account was taken of the balance to be made between the risks associated by not proceeding, stopping all work or proceeding only in particular areas.

The letter of February 25, 2013 was sent to update the previous letter, by replacing the comments in respect of Land Tenure and Acquisition, as follows:

1. In respect of Land Tenure and Acquisition at page 8 of the Report, NIDCO assured that there was no entry onto property without legal authority and that under section 3 of the Land Acquisition Act, authority is granted to carry out surveys and investigations. It was also common practice for investigations and studies to be done prior to the start to the acquisition process for the purpose of acquiring a CEC, preparing project estimates or conducting feasibility studies. In such situations, entry was not made onto property without the permission of the owner or occupier. Section 4 notices had been published for all areas released to the contractor.

2. The HRM was not in existence six or even three years ago and no complaint was ever received from community groups of improper conduct.

3. At no time was entry made for construction purposes without Section 4 authority.

4. There was a difference of opinion between the HRC consultants and NIDCO over policies which should govern the treatment of trespassers and/or squatters and these bear no relationship to the issue of due process insofar as the acquisition process is concerned. The law was and has been followed scrupulously.

5. In respect of the statement that NIDCO had not provided written documentation on land acquisition and resettlement measures, no such request had been made.

6. All acquisition procedures followed and all settlements arrived at were done in accordance with the law and was the process previously followed for other Highway acquisitions and all negotiations were carried out by the Commissioner of Valuations, up to that time.

Attached for easy reference, at Appendix 1, are the following documents that constituted NIDCO's response to the JCC following the receipt of the Armstrong Report:-

(1) Letter from NIDCO dated February 14, 2013, addressed to the President of the JCC (referred to previously);

(2) Letter from NIDCO dated February 21, 2013, addressed to the President of the JCC (along with comments from both internal and external experts who reviewed the Report on NIDCO's behalf), also referred to previously;

(3) Letter from NIDCO dated February 25, 2013, addressed to the President of the JCC, amending one (1) item of the previous letter and articulating further concerns;

(4) Letter from NIDCO dated February 25, 2013, addressed to the President of the JCC, consolidating the previously expressed concerns;

(5) Detailed technical comments from EcoEngineering Consultants;

(6) Detailed technical comments from Trintoplan Consultants Ltd;

(7) Detailed technical comments from Kelvin Ramkissoon, Attorney-at-Law;

(8) Detailed technical comments from the Ministry of Works and Infrastructure, HSE Unit;

(9) Comments from NIDCO's Vice President of Engineering and Programme Management.

Part Two

2 Actions Taken Subsequent to the Receipt and Consideration of the Armstrong Report

Since the publication of the Report in March 2013, NIDCO has continued consideration of the matters raised in the Report. In respect of the recommendations made, NIDCO has carefully considered them and where applicable and appropriate, has taken steps to address same.

As Project Manager, NIDCO is responsible for ensuring that the people of Trinidad and Tobago receive value for money from this major infrastructure investment. NIDCO has therefore continued to engage in consultations and technical studies, from which adjustments have been and are being made to the design and construction works being carried out under the SHHE project.

Below is an account of how the recommendations of the Report were considered by NIDCO, as part of the ongoing process of consultations, reviews, re-engineering and project evaluations in the construction of the Highway:

Recommendation No. 1:

IT WAS RECOMMENDED THAT no further work be undertaken on the Highway site until all of the conditions contained in the CEC have been fulfilled, including the need for all plans (including Storm Water Management Plan and the Water Management Plan) specified in the EIA to be submitted to the EMA, and for approvals to be obtained from the relevant agencies.

NIDCO ADVISES THAT:

- The Flood, Water Quality and Sediment Management Plan, was submitted to the EMA on August 7, 2012 in accordance with the conditions stipulated in the CEC. Further, the EMA has raised no queries or concerns in relation to this issue.

- All regulatory approvals for the Debe to Mon Desir alignment have been obtained and all conditions as required by the Town and Country Planning Division have been fulfilled, inclusive of approvals from the Regional Corporations.

- All regulatory approvals for all three relocation sites[1] for the Project have been obtained. These include - Certificates of Environmental Clearance, Town and Country Planning Permission, Highways Division Approval, Drainage Division Approval, Fire Services Approval, Water and Sewerage Authority, Regional Corporation Approvals.

- The construction of the Highway is being implemented using the Design-Build Model. This procurement model allows for design and construction activities to occur simultaneously. It is common industry practice that certain plans, such as the traffic management plan, storm water management plan and others are developed not for the entire alignment of the Highway but for various sections and sub-sections as the construction schedule stipulates.

Recommendation No. 2:

IT WAS RECOMMENDED THAT no further work be carried out on the site until all of the conditions attached to Notice of Grant of PP referenced T7M:0440/2007 and Notice of Grant of PP referenced T8N:0443/2007 are fulfilled.

NIDCO ADVISES THAT:

- Without exception, all required final planning permissions from the Town and Country Planning Division, the Regional Corporation approvals and Certificates of Environmental Clearance for all segments of the Highway have been obtained in the legally required sequence.

Recommendation No. 3:

IT WAS RECOMMENDED THAT a proper Social Impact Assessment (SIA) be undertaken before a decision is made whether or not to continue with the Debe to Mon Desir segment of the Highway, given the potential for severe adverse impacts on the resident population and other stakeholders within the immediate and wider area of impact, including the potential severing of extended family ties. In this regard non-relocated residents, and the agricultural stakeholders who would be affected by the loss of their

[1] The sites identified for the relocation of farmers, displaced residents, and landless residents (referred to as 'squatters') are Golconda; Petit Morne, Ste. Madeleine; and Picton, Debe, respectively.

lands, as well as the non-relocated business people who would be affected by the Highway, also need to be drawn into the study.

NIDCO NOTES THAT:

- The HRC Consultant, Mr. Eden Shand, attested to the adequacy of the SIA in satisfying the requirements of the Terms of Reference for the EIA. He further indicated that there was sufficient information to enable a decision to be made on the SHHE project. The Consultant concluded that the EIA complied with the social components of the TOR.

- In March 2013, NIDCO was instrumental in forming a multi-stakeholder Community Working Group for the Debe to Mon Desir section, in fulfilment of a CEC requirement. The Group is comprised of senior and technical officers of the MOWI, NIDCO, AECOM, OAS Construtora, as well as civil society and local government representatives. The Group meets on a monthly basis to discuss social, developmental and construction matters in relation to the SHHE project. The Group has had six meetings to-date and no issues regarding adverse social impacts have yet been raised.

- In respect to the latter part of this Recommendation No. 3, that *"SIA studies should include attention to the alternate routes proposed by the HRM and by MOWT/NIDCO"*, it should be noted that eminent Transportation Consultants, Dr. Rae Furlonge of APDSL and the HRC Consultants, Dr. Philbert Morris and Dr. Trevor Townsend, all agreed that the HRM proposal is not the preferred alternative as it does not provide sufficient capacity for future traffic growth in the area.

NIDCO ADVISES THAT:

- NIDCO has always maintained its sensitivity towards the communities and individuals affected by the construction of the Highway. Hence notwithstanding the HRC Consultant's favourable opinion on the adequacy of the SIA conducted, NIDCO has proceeded to develop and implement a Social Impact Mitigation Plan, utilizing all information gathered to-date on the Debe to Mon Desir section of the SHHE project. The Plan addresses the social, psycho-social, cultural, economic and environmental issues that impact individuals and the communities in this part of the SHHE project.

  The policy objectives behind the Social Impacts Mitigation programme are as follows:

a. Involuntary resettlement is to be avoided, where feasible, or minimised, exploring all viable alternative project designs.

b. Displaced persons are to be consulted and will have opportunities to participate in the planning and implementing of resettlement programmes

c. Suitable locations(s) are to be provided to accommodate displaced persons in an effort to preserve or improve their livelihoods and standards of living.

d. Fair compensation will be provided for all persons displaced by the SHHE project.

e. Relocation of communities are to be done in a holistic way so as to preserve their social, recreational and cultural activities.

f. Opportunities for economic activity are to be provided, where feasible, for stakeholders within the relocated communities.

g. Special provisions will be made for disabled/differently-abled persons.

h. Environmental degradation of ecosystems is to be avoided, where feasible, or minimized so as to sustain the availability of goods and services from them.

- The following measures have been implemented to-date to mitigate the adverse impacts of the construction of the Highway:

a) **Reduction of the Right-of-Way (ROW)** - of the Highway from an originally proposed 100m to 60m in some areas in the Debe to Mon Desir section, where feasible. This measure has resulted in a significant reduction in the number of residential structures to be acquired from some 315 originally to approximately 215 in the optimised ROW.

b) **Establishment and maintenance of a Community Outreach Centre** in Debe (2011) and a second Outreach Centre in Fyzabad (2014). These centres represent NIDCO's commitment to providing the community with information, physical and psychological support and a channel for ongoing consultation. The Centres operate as a channel for submitting claims for compensation; receive and respond to residents' concerns, individually and collectively; disseminate information through various means such as open houses, town hall meetings and in-office meetings.

c) **Provision of free Counselling Services** by a professional psychologist, operating out of the Debe Outreach Centre.

d) **Acquisition of land by Private Treaty**, through which mutually agreed settlements are reached prior to the acquisition of properties and demolition of structures. To date, a total of 156 of the 275 claims received from residents in the Debe to Mon Desir communities have been fully settled after negotiations.

e) **Provision of land for the resettlement of displaced residents**. Displaced residents have been provided with fully developed housing lots at Petit Morne, Ste. Madeleine, at a significantly subsidised price of TT$50,000. In addition, similarly developed housing lots in Picton, Debe have been allocated to previously landless residents; while farmers will receive 2-acre parcels of agricultural lands in Golconda. The housing development sites have been designed to Town and Country Planning requirements and include spaces for commercial activity, community centres, schools, religious facilities and playgrounds.

f) **Provision of suitable rental accommodations** to relocated residents for a period of approximately one (1) year to allow for persons to make new permanent living arrangements.

g) **Making provision for family units to remain intact** during the relocation process by providing families with the option to select relocation lots in blocks.

h) **Convening of a Community Working Group** for the Debe to Mon Desir section, which fulfills a requirement of the CEC received from the EMA. This multi-stakeholder Committee, which is comprised of project personnel, representatives of local government and community representatives, meets monthly to address residents' concerns, share project information and receive community feedback/input – a structured mechanism that allows for the ongoing engagement of the community throughout the construction process.

- Further, with the support of NIDCO and the MOWI, the main Contractor has initiated the following social activities within the Debe to Mon Desir section and the wider region:

  a) Publication and circulation of newsletters on providing information on project progress and other useful information.

  b) Meetings with stakeholders and communities every two (2) months

  c) OAS Job Recruitment Drive in Penal, Siparia, Point Fortin, La Brea and Fyzabad, in conjunction with the Ministry of Labour to offer employment to residents along the alignment of the Highway.

Recommendation No. 4:

IT WAS RECOMMENDED THAT a Resettlement Plan (showing compliance with the CEC condition that the applicant should pursue resident relocation and resettlement utilising best industry practices) should be prepared and submitted to the EMA before any decision is finalised regarding the resettlement of affected persons.

NIDCO ADVISES THAT –

- The EMA did not and does not require a resident relocation and resettlement plan as a condition precedent to starting work on the Debe to Mon Desir section.
- Notwithstanding, the Government, by way of Cabinet Minute No. 2075-2011/08/11, agreed to make provisions for lands to be utilised for the relocation of affected persons due to land acquisition for the San Fernando to Point Fortin Highway Extension. Specific provisions were made for –
    - The allocation of 5,000 sq. ft. of residential lands at Hermitage to each affected resident
    - The allocation of two acres of agricultural lands at Hermitage to active farmers
    - The allocation to squatters of residential sites at either Housing Development Corporation or Land Settlement Agency sites.
- In keeping with best industry practice and the objective of the Social Impact Mitigation Plan, the selection of the relocation sites was made in an agreement between the government and representatives of the affected community. The Debe-San Francique Highway Action Committee at a meeting on March 3, 2011 between government representatives and residents (including farmers) indicated that the preferred area for relocation was Hermitage. In a subsequent meeting on May 9, 2011 the Action Committee identified alternative sites for relocation, due to the lack of readiness of the Hermitage site, and selected Petit Morne as the preferred alternative for residents and Golconda as the alternative for farmers.
- As noted previously, the relocation of residents has been progressing in accordance with the government's mandate. Displaced residents have been provided with fully developed housing lots at Petit Morne, Ste. Madeleine, at a significantly subsidised price of TT$50,000. In addition, similarly developed housing lots in Picton, Debe have been allocated to previously landless residents;

while farmers will receive 2-acre parcels of agricultural lands in Golconda. The housing development sites have been designed to Town and Country Planning requirements and include spaces for commercial activity, community centres, schools, religious facilities and playgrounds.

Recommendation No. 5:

IT WAS RECOMMENDED THAT no further engineering operations are to be undertaken on the land at Petit Morne, St. Madeline on which it is proposed to relocate persons residing in the path of the alignment until all necessary approvals are obtained from the relevant agencies.

NIDCO ADVISES THAT –

- Final planning permission for the Petit Morne sites has been obtained from the TCPD and the Regional Corporation. Final planning permission has also been obtained for the Golconda agricultural site and no CEC is required for the relocation of farmers.
- All regulatory approvals for the Picton site has been granted in the form of final planning permission from the TCPD, the Water and Sewerage Authority, the EMA, the Trinidad and Tobago Fire Services, the Drainage Division, the Highways Division, T&TEC and the Regional Corporation.

Recommendation No. 6:

IT WAS RECOMMENDED THAT a quantitative surface and groundwater hydrology model and study of the wetland as a hydrodynamic system should be undertaken in the public interest as part of Best Practice before an informed decision can made as to whether or not this segment of the Highway should proceed as proposed.

NIDCO NOTES THAT –

The HRC's own Hydrology Consultant indicated that previous studies had met the requirements for the SHHE Project. Further, Dr. Armstrong also concluded that "In the area of hydrology and hydraulics it was felt that the Hydrology Report of 2007 fulfilled the objectives of determining the hydrologic information required for inputs to the hydraulics for bridge and culvert preliminary designs at points of intersection of the highway and river crossings" (pg. 8).

NIDCO ADVISES THAT –

- The Highway is being built using the Design-Build model. As part of its work, the Contractor is undertaking further detailed hydrological and hydraulic studies to ensure that the Highway does not negatively impact the existing drainage system along its alignment. The Drainage Division is required to approve all drainage studies and designs on an on-going basis.

- Further, NIDCO has awarded a contract to Royal Haskoning BV of the Netherlands in association with Haskoning Caribbean Ltd. to conduct feasibility studies and detailed design consultancy services for the South Oropouche River Basin Flood Mitigation and Integrated Watershed Management Project. The objectives of this Study are to develop alternative solutions (i.e. adaptation of drainage infrastructure, water resources uses and overall watershed management) and best management practices, in order to -

  a) Reduce the frequency and severity of flooding in the basin, thus reducing the risks to lives and livestock and preventing damage to public and private properties and infrastructure;

  b) Increase the potable water supply, i.e. to capture approximately 3 million imperial gallons per day of storm water (through a process of flood control) for treatment and use for domestic, agricultural and other purposes;

  c) Reduce the impact of flooding on the socio-economic activity in the watershed e.g. losses to the productive sector as a result of flooding disruption;

  d) Mitigate environmental degradation and health hazards caused by floods;

  e) Stabilise the riverbanks;

  f) Control sedimentation and erosion in the rivers;

  g) Optimize the use of water resources within the basin;

  h) Increase agricultural land acreage by controlling saltwater intrusion and reducing flooding.

- A key component of this consultancy will be the development of four (4) hydrological models, each describing the hydrological regime of this Basin. To this end, the consultant will undertake comprehensive analyses of the hydrological and hydraulic characteristics of the river basin, aimed at determining the present operating conditions and design parameters to be applied. The

hydrological analysis will be done taking into consideration the construction of the SHHE Project.

Recommendation No. 7:

IT WAS RECOMMENDED THAT an Environmental Economic Study of this Project must also be undertaken to inform a decision whether or not to proceed with this Highway segment. This should include a cost-benefit analysis, comparing the economic costs of the various alignment alternatives that were assessed to demonstrate the costs of the adverse effects compared with the projected benefits.

NIDCO NOTES THAT –

- A detailed feasibility study was in fact conducted for the SHHE project in 2006 by LEA Trintoplan Consultants Ltd. In that study, an adequate economic evaluation was done for the project. A cost benefit analysis was done as part of the feasibility study. NIDCO has given due consideration to this recommendation and does not see it necessary to undertake a new environmental economic study.

Recommendation No. 8:

IT WAS RECOMMENDED THAT off-site impacts, such as the impact of removing and transporting extraordinarily large quantities of aggregate to be sourced from areas far removed from the Project Area, for example, quarries in the Northern Range, also need to be determined and measures designed to mitigate any negative impacts.

NIDCO ADVISES THAT –

- NIDCO has been working with the Contractor to minimise the impact of the mining and transportation of large quantities of aggregate on the communities along the Highway alignment. In this regard, the Contractor has been purchasing aggregate from established and licensed quarries. Such quarries are regulated by the Ministry of Energy and Energy Affairs and are operated in accordance with their respective CEC conditions.

- Aggregates used on the SHHE project will be taken from locations in Central and South Trinidad, the Northern Range and imported from overseas suppliers.

- In the event of damage to local/community transportation infrastructure caused by the Contractor, the contract provides for such repairs to be effected by the Contractor at its expense.

- It should be emphasized that the Highway route chosen presents the least impact on the wetlands, as well as on the built communities established in these areas over many years. The Contractor is required to protect and maintain existing watercourses and prevent mud, debris and other construction by-products from causing environmental damage and affecting residents.

- It is important to note that no mangroves are to be removed in the Debe to Mon Desir area. Where this has been necessary in other sections, a mandated Mangrove Rehabilitation Plan has been implemented by the Contractor and overseen by the EMA.

- NIDCO continues to be guided by the Certificates of Environmental Clearance for this and other sections and works in continuous collaboration with officers of the EMA who make regular visits to the work sites to provide feedback and guidance, as required.

- This is consistent with current industry best practices which call for an interactive and ongoing relationship between the design builders and the authority responsible for environmental management.

Recommendation No. 9:

IT WAS RECOMMENDED THAT the APDSL studies be continued and that consideration be given to staging highway improvement for the south western peninsula to allow the phased development of the transportation system and minimize the potential for "overbuilding" the road network at the expense of competing land uses and to the detriment of the communities within the direct or indirect range of the alignments.

NIDCO ADVISES THAT -

NIDCO engaged Transportation Consultant, APDSL, to continue its previous traffic management studies in the south-western peninsula. (see under Construction Schedule/Phasing below)

In their report submitted in January 2013, APDSL concluded and recommended the following:

(1) **Optimum Route**. The conclusion of Dr. Bheshem Ramlal, GIS Specialist and Lecturer in the Department of Engineering at the University of the West Indies, is that, based on the best available spatial data sets obtained from government agencies and GIS consultants and criteria provided by professionals with

significant expertise in physical planning, transportation planning, engineering, the results of the spatial analysis suggest that the route proposed by LEA Trintoplan is valid (see Appendix 2 – *Traffic Feasibility Study and urban Traffic management plan for Debe to Siparia and Surrounding Areas: Least Cost Path Analysis Report,* pg. 12)

(2) **Primary Arterial Road System is Needed.** An urban primary arterial system is urgently needed to connect the South-Western peninsula to improve accessibility to the major urban centres in the region including Debe, Penal, Siparia, Fyzabad, La Romaine, Oropouche, La Brea and Point Fortin. In order to facilitate the high traffic demand on both the Eastern and Western sides of the region, it is necessary to adjust the new arterial system to be closer to these urban centres from which the high traffic is generated.

(3) **The Alignment of the Highway is Valid.** It is necessary to continue the new highway through Penal, Siparia, Fyzabad onto Point Fortin with the alignment as suggested.

Construction Schedule/Phasing

Further APDSL Studies (see report of March 2013) made recommendations on the order in which construction should take place in order to systematically address the traffic demands in the south-western region of the country:

(1) **Completion by December 2013** - a new four lane divided highway from Debe Interchange to Penal Interchange, including Penal connector road, the upgrade of the Cross Crossing Interchange and road geometric improvements to M2 Ring Road between SS Erin Road and Southern Main Road near Paria Suites.

(2) **Completion by December 2015** - a new four lane divided highway from Point Fortin (Dunlop) Roundabout to Mon Desir Interchange; a new connector road from the new four lane divided highway at Mon Desir to St. Mary's Junction, including interchanges; Southern Main Road with four lanes divided road between St. Mary's Junction and Paria Suites; new four lane divided highway from Penal interchange to Siparia interchange including Siparia connector road; two way two lane single carriageway roadway of the new highway between Siparia interchange and Mon Desir interchange, with a roundabout intersection at Fyzabad and including the Fyzabad connector road and the upgrade of the Connector road to a four lane divided carriageway.

(3) **Completion by 2020** - the other two lanes of the four lane divided highway between the Siparia and Mon Desir interchanges should be available for public

use. This implies that a delay of three to four years may be considered for the upgrade to four-lane status. There is no significant benefit to be had from such a postponement of the two-lane to four-lane upgrade, considering that the procurement and construction time required for this may be two to three years and will have to be started immediately upon completion of the initial two-lane roadway. However, phased construction of the interchanges at Siparia and Fyzabad is currently being considered and incorporated into 'value engineering' decisions to be implemented.

NIDCO continues to engage the services of APDSL on an ongoing basis with respect to traffic planning within the communities to be serviced by the Highway.

Recommendation No. 10

IT WAS RECOMMENDED THAT all relevant state agencies (including the Commissioner of State Lands (COSL), MOWI, the Valuation Division (VD), and the Ministry of Food Production) together review their policy for the assessment of damage at Section 3 of the LA Act. It was further recommended that the Institute of Surveyors of Trinidad and Tobago (ISTT) be consulted and that consideration be given to including the Agricultural Society and the Law Association. It was also recommended that the Commissioner of Valuation (CoV) ensures proper compliance with the law and Land Economy principles.

NIDCO ADVISES THAT –

- The process of land acquisition is being conducted in accordance with the provisions of the Land Acquisition Act. In this regard the Commissioner of Valuations conducts negotiations for land acquisition on behalf of the MOWI which is the Client Ministry, for this project. In addition, NIDCO has been authorised by Cabinet to conduct the acquisition of lands by private treaty. NIDCO utilizes independent licensed Valuers to determine the market values of the lands. Title searches are performed and background information obtained on the lands and their occupants by independent Consulting Attorneys. Before any settlement can be arrived at, NIDCO undertakes the following procedures and steps:

  a) Residents are invited to submit a Claim prepared for a professional valuer or such other person as they may choose. The cost of this service is met by NIDCO.

  b) NIDCO obtains a valuation report on the property, done by an independent professional Valuer, licensed to practise.

c) Negotiations are conducted with the Claimant or his/her representative. NIDCO is represented at these negotiations by an independent Legal Consultant and an independent Valuer. The Claimant is allowed his/her own professional Valuer and Legal Advisor.

d) Monitoring of the process is undertaken by NIDCO's internal Consultant Valuer.

e) Any proposed settlement is considered by a Cabinet-appointed Land Acquisition Oversight Committee, comprising professional representatives from several Government Ministries and Departments.

f) Any settlement proposed is considered by NIDCO's Tenders Committee as well as Board of Directors, where necessary, before approval.

g) Settlements are referred to consulting Attorneys-at-Law for title conveyancing and payment.

The Politics of Procurement Part II

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Abstract

This paper sets out to develop a perspective for looking at procurement in the construction industry in T&T in the context of construction in developing economies. This paper recounts essential aspects of the historical review of procurement methods and construction delivery systems in T&T as outlined in Part 1 of this work in progress. Part 1 was delivered (as an unpublished power point presentation) at CIBW92 Procurement Systems Symposium 2002 and had as its main objectives the following:

- To show how source of funds determined procurement methods and delivery systems that in turn acted as drivers for change in the public sector procurement in T&T.

- To highlight some of the negative impacts of procurement methods on development in T&T.

The Politics of Procurement Part 11 draws heavily on selected developments in the new Institutional Economics and some recent developments in cognitive science with a view to providing a conceptual framework to underpin the purely descriptive approach of Part 1.

In Part 11, the thesis under consideration is that procurement systems define the institutional matrix in the construction industry. In this section definitions of development and growth are cast in institutional terms thus setting the agenda for Part 111 of this work in progress.

In Part 111 cognisance will be taken of the fact that productive entrepreneurship is now being recognised as the foremost variable driving economic growth. Part 111 will set out to show how procurement systems affect the development of genuine productive entrepreneurship. *The emphasis here is on those activities that benefit both the entrepreneur and society at large. Different incentive systems lead to different kinds of entrepreneurship."*[1] In Part 111 concepts of Value Analysis (VA) and Social Return on Investment (SROI) in public sector investment programs will be introduced. Part 111 will thus bring finally into focus the crucial role procurement systems, with their incentive structures; can play in the development process.

[1] Coyne and Leeson The Plight of Underdeveloped Countries The Cato Journal Volume 24 2004

Introduction

In order to come to terms with construction in developing economies it is important to understand *"that infrastructure development and economic development cannot be separated for analytical purposes. They are as inseparable as opposite sides of the same coin"*[2]. Infrastructure development includes the development of human and institutional systems/structures to meet needs such as the movement of people, goods and information in addition to the provision of water, sanitation and shelter. The development of human and institutional infrastructure is symbiotically linked to economic development.

When one takes into account that the iconic examples of recent economic development, - Singapore, South Korea, China, Malaysia and India, are examples of countries that made great strides in developing not only their physical infrastructure but developed their existing institutions as pillars of economic growth and development; then in looking at construction in developing economies it becomes imperative that we focus on how institutions in the construction sector are affect the development process and vice versa.

The role of institutions in economic development is highlighted in the words of Nobel Prize winner Ronald Coase *"Economists have never considered until recently the role that institutions play in the working of the economic system. In fact, the institutions determine the way in which the economic system works"*[3] The institutional context determines the stage of development attained by a given country.

The role of institutions in making a success of Capitalism is detailed by Hernando De Soto in the Mystery of Capital sub-titled *'Why Capitalism Triumphs in the West and Fails Everywhere Else.'* De Soto identifies as one of the mysteries of capital the fact that most of the poor already possess the assets they need to make a success of capitalism. The value of savings among the poor is in fact immense - one hundred and fifty times greater than all the foreign investments received since Haiti's independence from France in 1804. However, the assets of the poor are dead capital. The institutions that give life to capital, that allow for the re-presentation of capital so as to secure the interest of third parties with work and assets, do not exist or accessibility by the poor provides major challenges.

The western nations, De Soto states, invented the key conversion process 150 years ago, and their economies began to soar into wealth without their ever realizing what they had done. [4] It should be noted that the process by which capital is acquired should be taken into account for societies that emerged out of slavery and indentureship.

The following distinctions are important for our deliberations - distinctions between:-

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[2] Principles of Public and Private Infrastructure Delivery John B Miller MIT

[3] Interview with Ronal Coase about New Institutional Economics September 17th 1997

[4] Hernando De Soto The Mystery of Capital sub titled Why Capitalism Triumphs in The West and Fails Everywhere Else

Institutions and Organisations

Procurement Processes and Delivery Systems.

Development and Growth

Institutions and Organisations

- **Institutions** are the humanly devised constraints that structure human interaction, and function as the rules of the game, the governance structures, within which individuals operate. Institutions make up the formal constraints such as rules, laws, and constitutions as well as informal constraints such as norms, conventions and codes of conduct with their respective enforcement characteristics and mechanisms. The main purposes of institutions are to reduce uncertainty that pervades all societal interaction and to set the framework for continuity of ideas and experience.

- **Organisations** are the players. Organisations are made up of groups of individuals bound by some common purpose to achieve specified objectives. An organisation may be a family, a clan, a firm, a regulatory agency, a trade union, a political party or any of the many and varied community and non-governmental bodies.

  "The relationships between organisations and institutions are such that the organisations that come into existence reflect the opportunities provided by the institutional matrix… Institutions form the incentive structures of a society and the political and economic institutions, in consequence, are the underlying determinants of economic performance. .If the institutional framework awards piracy, piratical organisations will come into existence; and if the institutional framework rewards productive activities then organisation/firms will come into existence to engage in productive activity. "[5]

Procurement Processes and Delivery Systems

- **Procurement processes** are the rules, the institutional framework, for the accomplishment of a specified acquisitive purpose such as the acquisition of property, works and or services by a public or private entity. Procurement processes begin with the identification of a need and end with the fulfillment of a contract.

- **The term Delivery System(s)** is used to identify project delivery methods used in the construction industry. Delivery systems include:-

  - In House Delivery (Force Account)
  - Sequential Design-Bid-Build
  - Design Build

[5] Economic Performance Through Time Douglass C North's Nobel Prize Lecture 1993

- Design Build Finance Operate and
- Other combinations of designing, building, operating and financing.

The important issue is that different delivery methods require different procurement processes and different institutional and organisational arrangements. The relationship between procurement systems and delivery systems is such that procurement systems set the rules of the game in which organisations and delivery systems are chosen and operate.

Procurement systems are the institutional matrix, the governance structure within which a specific procurement strategy, procurement route and contract strategy operates. The procurement route is determined by the delivery system and contract strategy. The procurement route determines the operational relationship between organisations in the supply chain. Delivery systems, on the other hand are differentiated mainly in terms of risk allocation, constraints and the integration of the processes in the supply chain.

Development and Growth

Development is conceived to be a process of institutional evolution in the context of uncertainty. Complexity and the emergence of new properties are defining characteristics of the evolutionary process. *"Favorable institutions are thus those cultural elements that encourage the development of the key-variables for economic growth: - trade, productive entrepreneurship, individual responsibility and individual preferences, risk taking, and competition."*[6]

Growth is the result of enabling institutional environments where chances are exploited and individuals succeed in improving their living conditions. Economic growth is meant to concern changes in consumer's surplus, rather than in purchasing power. Economic growth does not depend on the rate of scientific innovation, but on the ability to transform technological advances into productive undertakings addressed to satisfy or create demand.

Institutional Development and Change

Institutional change is a direct result of the choices made by decision makers with inherited institutions and cognitive propensities as background. Institutions if used creatively can function as adaptive processes that help decision makers to cope with systemic uncertainty and pervasive negotiation cost arising from opportunistic and difficult to circumscribe informational asymmetry. It is thus important for decision makers to be cognisance of the need and the capability to develop and nurture institutions and modes of thought that can bring about the emerging development paradigm. In this context in T&T our colonial past and our validatory modes of thought are major constraints on our cognitive processes. In the construction sector institutional change are changes in the procurement systems which affect organisations and determining delivery systems and contract forms.

The source of funds as highlighted in Part 1, the symbiotic relationship between institutional and economic development coupled with the role of those who have the power to attempt to

[6] **Enrico Colombatto on Growth and Development** Springer Science+ Business Media, LLC 2006

change the rules, determine the incentives in the procurement processes that map the thrust to efficiency, social equity, and piracy. The overarching issues affecting construction in emerging economies are thus issues that are captured by the phrase ***the politics of procurement*** - issues that deal essentially with:-

- The restraints, opportunities and agendas associated with the financing of infrastructure development
- The decision maker's considerable influence over the incentive arrangements in procurement systems.
- The local decision maker concept of development
- The local decision maker's attitude to the demands of the polity
- The lack of sensitivity to institutional issues by decision makers

The literature on procurement deals essentially with methods to improve efficiency, social equity and avoidance of corruption. There is however a dearth of literature that focuses on the mental maps and computational power of the decision makers in construction in developing economies.

Decision Making and Decision Makers

An analysis of a decision maker's knowledge of the prevailing conditions requiring change necessary for the construction industry in developing economies, should take into account the mental maps and cognitive power of the decision makers in the context of the perceived speed of delivery required. In such situations, the underling prevailing condition is uncertainty. Uncertainty fueled by the understanding that:-

i. Choice is made by decision makers with historically and culturally determined mental maps.

ii. Knowledge and analytical power of decision makers are severely limited,

iii. Information is asymmetrically held among the different actors involved.

iv. *"That the process of institutional change is largely path dependent. In particular, institutional change starts to occur when, the parties to an exchange become aware that to be better off they need to ….restructure the existing rules. However when a path is set on a particular course, the network externalities, the learning process of organisations and the historically derived subjective models reinforce the course in a path dependent way."* [7]

[7] N C North 1990 Institutional Change and Economic Performance

ϖ. Institutional development and change require a learning process which takes place over time in the context of uncertainty. The speed of delivery will thus affect the quality of learning and the efficiency of organisations.

One of the major issues raised by Nobel Prize winners Coase and North on the issue of decision making and change is that development should start with an understanding of the institutions in one's country and one should build from where one is.

Contributions from Cognitive Sciences

John Dewey's distinction between "**know how** and **knows what"**[8] refined by the new trends in cognitive science shed new light on the learning process and the environment in which choices are made by decision makers. *"Cognitive science is waking up to the full importance of the realization that perception does not consist in the recovery of a pre-given world, but rather in the perceptual guidance of action in a world that is inseparable from our sensory-motor capacities, and that higher cognitive structures also emerge from recurrent patterns of perceptually guided action. Thus cognition consists not of representations but of embodied en-action."*[9]

Cognitive Science recognises two cognitive modes of behavior:-

- A mode of spontaneous coping
- A mode in which detachment, deliberation and analysis take place (conscious reflection)

Spontaneous coping and recurrent patterns dominate our mental lives and give rise to our habits, to our 'know-how'. 'Know-how' transparent, stable and grounded in our personal history. We know how to do most things in our lives without conscious reflection. During spontaneous coping we are in fact experts in the context of the seven-stage skill acquisition model developed by Hubert and Stuart Dreyfus[10]. The seven stages of skills acquisition are as follows:

1. Novice
2. Advanced Beginner
3. Competent
4. Proficient
5. Expert
6. Mastery
7. Practical wisdom

[8] John Dewey Human Nature and Conduct

[9] Ethical Know-How Action Wisdom and Cognition Francisco J Varela

[10] Mind over Machine. Hubert and Stuart Dreyfus

However, it is in the moments of breakdown when spontaneous coping does not work that detachment occurs and the space for deliberation and analysis is created; world is objectified and gives rise to the processes by which we come to 'know-what.' It is at the inception of that detached mode that we are at the level of the novice. Novices make judgments using strict rules and features.

When we are coping normally as experts we do not solve problems. When we are coping normally as experts, we do not make decisions. When we are coping normally as experts we 'simply' do what normally works. The expert gathers his or her skill through talent, intense involvement and experience-based, holistic discrimination-association derived from embodied en-action that produces deep situational understanding. If time permits, an expert will deliberate before acting. But the deliberation does not require the application of rules, principles, theories or calculative problem solving but rather an intuitive grasp of the phenomena. Chess players, like people who drive cars, understand this clearly.

What is posited is the need for **a** thinking which is an embodied en-action, a matter of remaining receptive to the phenomena, to our historically derived conditions, a remaining resistant to the imposition of theories and models, so that what is not yet thought can emerge through intense involvement and commitment with a deep sense of the risk involved. In the words of Niels Bohr *"every great and deep difficulty bears in itself its own solution. It forces us to change our thinking in order to find it."*[11]

Decision Making for Change in Construction in Trinidad and Tobago (T&T)

Part 1 of The Politics of Procurement showed that;-

- Source of funds determined procurement methods and delivery systems that in turn acted as drivers for change in the public sector procurement in T&T.

- The increased demand for infrastructure facilities 1956-1960 led to an increase in public sector in-house activity giving rise to financial management problems. Two organisations were set up as response to these problems.

    1. A Central Tenders Board (CTB) with the sole and exclusive authority over government procurement and

    2. A Cost Accounting Division in the Ministry of Finance to control and monitor government development expenditure.

The emphasis was then on the development of native capacity through institutional reform and training. Skills training consisted of the setting up of the Faculty of Engineering at St. Augustine and the establishment of the John Donaldson and San Fernando Technical Institutes. The result was the development of a cadre of young engineers and technicians in the public sector through training and direct experiences the going beyond 'know what' (theoretical and methodical approaches) to 'know how'.

[11] Niels Bohr Nobel Prize winner in Quantum Physics

- The inability of the government to fund its development programme in the 1960's led to sourcing finance from the International Funding Agencies (IFIs). The procurement approaches of the IFIs were not ideologically free. Out-sourcing of infrastructure delivery to the private sector became lender conditionality for loans.

  The demand to shift to the private sector was based initially, more on the need to satisfy the interest of the donating countries of the IFIs, than on any attempt to secure efficient delivery. The issue of development of local capacity was not a priority of the IFIs. The flow of foreign exchange back to the donating countries through the sale of goods and services to borrowing countries was the primary objective of the IFIs. The donor country manufacturing and services sectors were thus enhanced.

- The initial shift to the private sector led to an exponential reduction in the efficiency of the public sector in-house delivery caused by the haemorrhaging of trained human capital to the private sector. Declining performance in the public sector then became the self-fulfilling justification for out-sourcing to the private sector. The decay in the public sector organisations was exacerbated through the following processes:-

  - Starving of the public sector organisations of meaningful work

  - Emptying of the public sector of trained personnel both at professional and sub-professional levels.

  - Setting up of Project Execution Units within public sector organisations to manage projects funded by the IFIs. This led to the remaining experienced staff from the public sector becoming managers of these units thus further reducing the technical staff available for day to day operations and maintenance. The net result was decay in the technical capacity of the public organisations. Young professionals were now without mentors. Organisational know-how was lost. Young professionals in their quest for advancement were also catapulted into management and the opportunity to develop sound technical expertise was lost.

- The cyclical nature of construction led to the migration abroad of trained professional and technical staff, mainly from the private sector during the period of reduced construction activity.

- In T&T and other Caribbean islands the increased demand for infrastructure facilities, the long delivery times associated with financing from IFIs coupled with the requirement for off balance sheet financing led to local banks and insurance companies becoming major players in the financing of public sector infrastructure.

- In T&T the oil bonanza of the 1970's gave the government increased financial capability which led to the acceleration of infrastructure delivery. The process was

not structured and the resources of the public and private sector were unable to cope with the speed of implementation imposed. The planning process was flawed.

- In 1970, decisions for local capacity development were foisted on the administration by the polity. T&T's economy is fuelled mainly by the rents from oil and gas. The 1970 riots led to localising of the banks, oil and sugar companies resulting in the development of local skills and entrepreneurship in the petrochemical, banking and construction sectors to the extent that skills and entrepreneurs are now exported from these areas.

- The Government of T&T (GOTT) in the 1970s in its haste took the unprecedented step of outsourcing its responsibility for procurement, outsourcing governance to foreign governments in Europe, Canada and the Far East through government to government arrangements. Not one single project was completed on time and within budget. Inflation in construction and in other areas of the economy spiralled. The gain to the construction industry was in small measure, the development of the local construction and consulting sectors.

- From 1985 to 2000 a period of scarcer financial resources, the developed local capacity in private sector construction was in the main sufficient to deliver the infrastructure requirements and compete with the foreign private sector.

- It is important to note that both the need for imported finance and the excessive availability of local finance to fund infrastructure activity had little impact on the choices made for the implementation of construction delivery. The stance of the local decision makers could only be described as 'douen-like'[12] in the sense that their feet are in T&T but their heads and hearts are either in Europe or Asia depending on the latest foreign trip made.

- A feature of public procurement in T&T after 1970 was the continued decentralisation of the procurement process without an oversight agency. This decentralisation without oversight opened the way for excessive piracy. The situation at present has not been rectified because the promised new procurement legalisation, after six years, has not been implemented.

The Present Conditions

At present because of a boom in the oil and gas sectors, the present administration has embarked on a combination of free market conditions and the direct handing of projects to companies out of China, in an effort to accelerate the speed of infrastructure delivery. The labour, health and safety practices of Chinese firms are of such a nature that they go against all trade practises enshrined in international conventions and the laws of T&T.

[12] An expression in our folk lore popularised by artist Leroy Clarke meaning feet forward head turned backward...or stillborn

What is even more alarming is that T&T, outside the petroleum sector, has embarked on a 'tourist' view of development while paying lip service to the development and progress taking place in the Far East particularly China. The deficiencies in the mental maps of the decision makers and the intelligentsia are patent.

In T&T as well as in other parts of the Caribbean, construction has been used as a tool for balancing social equity through employment. The basic objective is laudable but the incentives in the procurement system have led more to piracy than efficiency, more towards criminal activity and gang violence than towards the development of trade and entrepreneurial skills. In addition the measurement method is deeply flawed. In Part 111 the use of VA and SROI in public procurement will be developed as a corrective.

The Development Policy Department of the International Labour Organisation (ILO) suggests that *"employment-intensive works programmes should lead to the development of local productive capacity, through cost-effective instruments targeted at the poor and be placed in the perspective of longer-term economic growth. Investment policies should then be steered towards employment creation and social objectives, and most importantly, be accompanied by measures to ensure cost-effectiveness, quality results and local capacity building in both public and private sectors."*[13]

In 2003, the Cabinet of the Government of T&T (GOTT) appointed a committee to reform its public procurement system. The JCC was represented on that Cabinet appointed committee.[14] The work of the committee which came exclusively from local resources culminated in a White Paper and a draft Act. The White Paper which was laid in Parliament in 2005 took into account the historical background of the existing procurement regime, the quality of governance envisioned in the GOTT Vision 2020 policy statements, deficiencies in the existing legislation governing the CTB, deficiencies in the CTB's operations, proliferation of State Owned Enterprises (SOEs) with their own procurement systems, the lack of central oversight, the impact of technology and different delivery systems on the procurement regime, the requirements of the Caribbean Single Market and Economy and the promotion of national development.

The White Paper accepted the decentralized nature of the existing system and took the operating principles of Value for Money, Transparency, Accountability and the Promotion of National Development as its guiding principles.

After reviewing several regional and international models effecting current best practice in public procurement the committee settled on the Principled Model. "The underlying philosophy of the Principled Model is that the responsibility for delivery should rest solely with the implementing agencies. However once an agency is spending public money that agency has to operate in accordance with the principles set out in law-principles of Transparency, Accountability and Value for Money. Value for Money by definition

[13] D Tajman and J de Veen, Employment Incentive Infrastructure Programme: Labour policies and practices (Development Polices Department, International Labour Office, Geneva 1998)

[14] Winston Riley. Chapter 2 of the White Paper drew extensively from Part 1 of the Politics of Procurement

encompasses efficient and effective delivery of the property or services for which public money is spent.

Public money in this context includes "*money received by a public body regardless of source, or money received by a non-public body from a public body. The legal framework will embrace expenditure by –*

(a) a public organisation for a public or private purpose; or

(b) a private organisation for a public purpose regardless of the source or type of Fun ding where it can be reasonably inferred that the State is ultimately liable"[15]

The use of 'public money' immediately brings all agencies using public money under the purview of the law. Organisations undertaking Programs for Employment Relief, Non Governmental Organisations will also have to conform to the operating principles.

The introduction of the public money concept was influenced by Lord Sharman 2001 report Holding Account which examined then current audit and accountability arrangements for the central government of the United Kingdom. The recommendations in the 2001 report had as an"*...underlying assumption that, where public money is involved, some level of public accountability is required, regardless of the status of the body handling that money*"[16] Accountability in Lord Sharman's context includes accountability for performance and the promotion of innovation and efficient management of risk.

The major elements of the T&T White Paper on Public Procurement are as follows:

- The placing of the prime responsibility for procurement at all stages of the procurement process with the purchasing agencies
- The prescribing in law the operating principles underlying procurement that promotes best practice.
- The establishment of a central regulatory agency headed by a Regulator to formulate operating policies and guidelines to amplify the operating principles.
- The establishment of a central agency under the Regulator to develop and modify procedure manuals for specific types of transactions for purchasing agencies
- The establishment in law, that purchasing agencies comply with the principles, policies, and guidelines of the Regulator.

[15] Reform of the Public Sector Procurement Regime A White Paper 2005

[16] Lord Sharman Holding To Account The Review of Audit and Accountability for Central Government 2001

- The establishment of a National Procurement Advisory Council, drawn from civil society to support the operations of the Regulator. This provision is unprecedented and has the advantage of increasing public confidence in the quality of governance, by the involvement of civil society as a check and balance to ensure transparent practices.

Although the White Paper laid in parliament represents government policy there is at present a reluctance to bring the relevant legislation to parliament. This reluctance is based on the misguided notion that the proposed legislation will slow the pace of infrastructure development in T&T. The Principled Model allows for each implementing agency to be responsible for its own level of efficiency once the guiding principles of Value for Money, Transparency and Accountability are adhered to, thus the objection is without merit.

In the energy sector where foreign multinational firms are responsible for the establishment of petrochemical facilities the decision makers in an approach which establishes schizoid responses relative to the non energy sectors have supported the development of local skills and entrepreneurship.

- Negotiating concessions to have off-shore gas platforms constructed in T&T and financing the necessary infrastructure for same

- *"Establishing a permanent local content committee to continually and closely monitor the various activities in the energy sector to ensure that, as far as possible, all energy projects include opportunities for the development of the expertise of nationals and maximize the level of local content and local participation"* [17]

Conclusions

It is important to re-emphasise that uncertainty is a necessary condition for creativity. The human condition is such that knowledge and cognitive capacity is always circumscribed by culture and information asymmetry. Choices are made which affect the society for generations to come. In-depth understandings of our history, together with a sympathetic view of our culture are essential pre-requisites for acquiring know-how and making decisions in the context of uncertainty. In the words of Nobel Prise Winner in quantum physics Niels Bohr. *"What we want to do is to move people from being logical to thinking."*[18]

[17] Cabinet Minute No.751 2004

[18] Interview with Ronal Coase about New Institutional Economics 1997

RECOMMENDATIONS TO THE COMMISSION OF ENQUIRY ON THE PIARCO AIRPORT 2002

Preamble

The Joint Consultative Council of the Construction Industry (JCC) in making recommendations to the Commission of Enquiry on the improvements that should be made to the procurement process in the state sector will go beyond the shenanigans that took place on the Piarco Airport Terminal Building Project and bring to bear on these proceedings our knowledge of procurement generally.

Needs Identification

Procurement is a process, which starts when a need is identified, and services or works are to be undertaken, or goods are to be purchased. In several cases, the project to be undertaken and services or works to be undertaken or goods to be purchased are not properly defined.

In the case of the Piarco Airport Terminal Building Project, definition of need initially cantered on the size of the terminal facility required to meet traffic demand. Subsequently the supply chain aspect of the procurement process was corrupted.

Under Project Pride, the technical staff at the Airports Authority undertook a needs assessment process. This process culminated in the Lea-Tra report. The Lea-Tra report clearly identified our immediate needs and proposed a flexible approach to design, an approach which would have allowed expansion of the facility to be subject to traffic demand requirements.

The Lea-Tra report was undertaken assuming an environment of fiduciary care and responsibility, an environment, which would have attracted public and private funding. Under Project Pride, the proposed utilisation of private funds determined that the project be feasible. The Piarco Terminal Project was constructed using state funds without regard to the financial or economic feasibility of the project.

Source of Funding

The lesson learnt is that source of funding influences the procurement process. Source of funding can play a vital role in

determining the procurement process to the extent that funding itself becomes a procurement issue. This is self-evident when the delivery systems such as design finance build operate are taken into account. It should be noted that the present Central Tenders Board Act does not address the issue of procurement taking into account finance.

In more recent times, source of funds have led to radical changes in the procurement processes, in almost all countries. These changes were caused by-:

- **The increasing frustration occasioned by the perceived long delivery times associated with financing from multilateral lending agencies such as the World bank and the Inter-American Development Bank.**

- **The need by some countries for off balance financing**

These two facts have led to

- **The aggressive entry by the private sector agencies such as banks and insurance companies into the funding of infrastructure projects and**

- **The innovative linking of private sector funding with fast delivery method by developers and contractors to gain competitive advantage.**

In other words, financing and fast delivery systems are changing the face of the construction industry. It is thus imperative that our approach to procurement be not mired in the morass that surrounds the Piarco Airport Terminal Building Project but is visionary and flexible while at the same time maintaining that public procurement is to be conducted in a manner above reproach, with complete impartiality and with preferential treatment for none. Transactions relating to the expenditure of public funds require the highest degree of public trust and an impeccable standard of conduct.

Involvement of Ministers and Cabinet in the Procurement Process

In looking at our procurement system specifically with the example of the Piarco airport fiasco before us, the issue of the degree of

interference by ministers either individually or collectively as a Cabinet in the process is alarming. . It is on record that

- **The then Minister of Finance wrote in July 1996 the Prime Minister of Trinidad and Tobago, Basdeo Panday, informing him that he (Kuei Tung) "would like to proceed *unofficially* to Miami to see a firm called "Birk Hillman," preferring it to be a private trip for 'obvious reasons'."**

- **The then Minister of Works in September 1996 stated publicly … [*the Task Force] would map out a fast-track programme for implementation of the Development Concept for Piarco as determined by the Airports Authority of Trinidad and Tobago and its consultants who were retained utilising United States Exim Bank loan facility.*[1] *The Development Concept was done by Birk Hillman***

- **A task forces and a Cabinet appointed committees took over the tendering processes of the Airport's Authority and acted as a law on to themselves.**

- **Those employees of the Airports Authority who disagreed with the process were fired. The technical unit the Planning and Development Unit of the Airports Authority were disbanded.**

- **That Cabinet took decisions which resulted in the direct engagement of Birk Hillman and Northern Construction by NIPDEC,**

- **That civil servants appointed to a Task Forces and a Cabinet Appointed Committees wittingly or un-wittingly supervised processes that were blatantly corrupt**

With respect to use and abuse of public office the House Lords Judgments - Magill v. Porter Magill weeks In looking at the *underlying legal principles* stated in December 2001

- ***"Statutory power conferred for public purposes is conferred as it were upon trust, not absolutely - that is to say, it can validly be used only in the right, and proper way, which Parliament when conferring it is presumed to have intended . . ."***

[1] **Sadiq Baksh, Minister of Works and Transport, Speech at the opening day of the First Caribbean Intermodal Cargo Conference on 9 September 1996.**

- **The principle is routinely applied, as by Neill LJ in *Credit Suisse v Allerdale Borough Council* [1997] QB 306 at 333 who described it as "*a general principle of public law*".**

  "Such powers are exercised by or on the delegation of councillors. It is misconduct in a councillor to exercise or be party to the exercise of such powers otherwise than for the public purpose for which the powers were conferred. Where public powers are conferred on a council, it is the body of elected councillors who must exercise those powers save to the extent that such exercise is lawfully delegated to groups of councillors or to officers. All will act in the name or on behalf of the council. It follows from the proposition that public powers are conferred as if upon trust that those who exercise powers in a manner inconsistent with the public purpose for which the powers were conferred betray that trust and so misconduct themselves. This is an old and very important principle. It was clearly expressed by the Lord Chancellor of Ireland in Attorney General ex rel Rea v Belfast Corporation (1855) 4 IR Ch"

- ***"Powers conferred on a local authority may not lawfully be exercised to promote the electoral advantage of a political party. Support for this principle may be found in R v Board of Education [1910] 2 KB 165 at 181 where Farwell LJ said: "If this means that the Board were hampered by political considerations, I can only say that such considerations are pre-eminently extraneous, and that no political consequence can justify the Board in allowing their judgment and discretion to be influenced thereby."***

- ***"Municipal Corporations would cease to be tangible bodies for any purpose of redress on account of a breach of trust, if the individuals who constituted the executive, and by whom the injury has been committed, cannot be made responsible. They are a collection of persons doing acts that, when done, are the acts of the Corporation, but which are induced by the individuals who recommend and support them; and this Court holds that persons who withdraw themselves from the duties of their office may be rendered equally answerable for the acts of those whom they allow, by their absence, to have exclusive dominion over the corporate property . . . As the trustees of the***

corporate estate, nominated by the Legislature, and appointed by their fellow citizens, it is their duty to attend to the interests of the Corporation, conduct themselves honestly and uprightly, and to see that everyone acts for the interests of the trust over which he and they are placed."

The above underlying legal principles were quoted because the events we are dealing with predate our Integrity in Public Life Act and Integrity In Public Life Act does not address the broad range of issues identified in the underlying legal principles applicable to the House Lords Judgments - Magill v. Porter Magill Weeks December 2001. Further, the judgment underscores the following-:

- **The reason why Ministers and persons in public office should not be just rubberstamps for a decision made by others, and**

- **The reason why the decisions of Cabinet should be limited to policy issues and not the making of day to day decisions on procurement issues.**

On the issue of conflict of interest the Integrity in Public Life Act 2000 under the laws of Trinidad and Tobago states -:

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

The Cabinet Machine

Since we suggest there are problems with Cabinet's involvement on this project, it is only fair to describe how Cabinets under the Westminster system operate.

The business of the Cabinet and Ministerial Committees mainly consists of:

1. **Questions, which significantly engage, the collective responsibility of the Government because they raise serious issues of policy or because they are of critical importance to the public;**

2. **Questions on which there is an unresolved argument between Ministries. When such a difference occurs, it should not be referred to the Cabinet until other means of resolving it have been exhausted, including personal correspondence or discussions between the Ministers concerned.**

Collective Responsibility

Decisions reached by the Cabinet or Ministerial Committees are binding on all members of the Government. They are, however, normally announced and explained as the decision of the Minister concerned. On occasions, it may be desirable to emphasise the importance of a decision by stating specially that it is the decision of the Government. This, however, is the exception rather than the rule.

Collective responsibility requires that Ministers should be able to express their views frankly in the expectation that they can argue freely in private while maintaining a united front when decisions have been reached. This, in turn, requires that the privacy of opinions expressed in Cabinet should be maintained.

Matters wholly within the responsibility of a single Minister and which do not significantly engage collective responsibility as defined above need not be brought to the Cabinet or to a Ministerial Committee unless the Minister wishes to inform his colleagues or to have their advice. A precise definition of such matters cannot be given: in borderline cases a Minister is advised to seek collective consideration. Questions involving more than one Department should be examined interdepartmental, before submission to a Ministerial Committee, so that the decisions required may be clearly defined.[2]

Ministerial Committees

Ministerial Committees (both standing and ad hoc) support the Cabinet, which have a two-fold purpose. Cabinet Committees provide a framework for collective consideration of and decisions on, major policy issues and issues of significant public interest. First, they relieve

[2] **© Crown Copyright, http://www.cabinet-office.gov.uk/cabsec/2000/guide**

the pressure on the Cabinet itself by settling as much business as possible at a lower level or, failing that, by clarifying the issues and defining the points of disagreement. Second, they support the principle of collective responsibility by ensuring that, even though an important question may never reach the Cabinet itself, the decision will be fully considered and the final judgement will be sufficiently authoritative to ensure that the Government as a whole can be properly expected to accept responsibility for it.

If the Ministerial Committee system is to function effectively, appeals to the Cabinet must be infrequent. Those who chair Committees are required to exercise their discretion in advising the Prime Minister whether to allow appeals to Cabinet. The only automatic right of appeal is if the Finance Minister is unwilling to accept expenditure as a charge on the reserve; otherwise the Prime Minister will entertain appeals to the Cabinet only after consultation with the Minister who chairs the Committee concerned. Departmental Ministers should normally attend in person meetings of Committees of which they are members or to which they are invited. Unless they make it possible for their colleagues to discuss with them personally issues which they consider to be important, they cannot - except where their absence is due to factors outside their control - expect the Prime Minister to allow an appeal against an adverse decision taken in their absence.[3]

Preparation of business for Cabinet and Ministerial Committees

It is the responsibility of the initiating section of Government to ensure that proposals have been discussed with other interested sections and the results of these discussions reflected in the memorandum submitted to Cabinet or a Ministerial Committee. Proposals involving expenditure or affecting general financial policy should be discussed with the Ministry of Finance before being submitted to the Cabinet or a Ministerial Committee. The result of the discussion together with an estimate of the cost to the Treasury should be included, along with an indication of how the

[3] **© Crown Copyright, http://www.cabinet-office.gov.uk/cabsec/2000/guide**

cost would be met (e.g. by offsetting savings). Proposals involving legal implications, especially if there is a risk of successful legal challenge, should be cleared with the appropriate legal officers. Memoranda should also include any significant costs or benefits to the environment; any change in local government responsibilities; consequences for international obligations; and presentational aspects including, where appropriate, a draft statement or announcement. If, exceptionally, papers are circulated as minutes addressed to the Prime Minister, they are subject to the same requirements.

This does not limit the right of Ministers to submit to the Cabinet memoranda setting out their views on general issues of policy.

Memoranda for the Cabinet and Committees of the Cabinet should be as clear and as brief as possible. They should not normally exceed four pages at most, and the Cabinet Office may not accept an over-long memorandum for circulation. Time spent in making a paper short and clear is saved many times over in reading and in discussion; and it is the duty of Ministers to ensure that this is done and that, where necessary, papers submitted to them are revised accordingly. The model memorandum explains at the outset what the problem is, indicates briefly the relevant considerations, and concludes with a precise statement of the decisions sought. Paragraphs should be numbered for ease of reference. Detailed analysis and argument, together with supplementary detail, should be dealt with, where necessary, in annexes.[4]

Cabinet Conclusions and Ministerial Committee minutes

The record of Cabinet and Committee proceedings is limited to the conclusions reached and such summary of the discussion as is necessary for the guidance of those who have to take action.

Ministers are mainly responsible for instructing their ministries to give effect to the conclusions of the Cabinet

[4] **© Crown Copyright, http://www.cabinet-office.gov.uk/cabsec/2000/guide**

or of one of its Committees, and for telling subordinate units or branches about decisions affecting them. [5]

The Legal Officers

The appropriate legal officers must be consulted in good time before the Government is committed to critical decisions involving legal considerations. It will normally be appropriate to consult the Law Officers in cases where:

1. **The legality or constitutional propriety of a matter or legislation which Government proposes to introduce;**

2. **The vagaries of the proposed matter;**

3. **The legality of proposed administrative action, particularly where that action might be subject to challenge in the courts by means of application for judicial review;**

4. **Ministers, or their officials, wish to have the advice of the Law Officers on questions involving legal considerations, which are likely to come before the Cabinet or Cabinet Committee;**

5. **There is a particular legal difficulty which may raise political aspects of policy;**

6. **Two or more governmental agencies disagree on legal questions and wish to seek the view of the Law Officers.**

When advice from the Law Officers is included in correspondence between Ministers, or in papers for the Cabinet or Ministerial Committees, the conclusions may if necessary be summarised but, if this is done, the complete text of the advice should be attached.[6]

Trinidad and Tobago Cabinet's Constitutional Responsibilities

[5] **© Crown Copyright, http://www.cabinet-office.gov.uk/cabsec/2000/guide**
[6] **© Crown Copyright, http://www.cabinet-office.gov.uk/cabsec/2000/guide**

Cabinet should not be intimately involved in procurement. Under the Constitution it has the following responsibility:

75.- 1. *"There shall be a Cabinet for Trinidad and Tobago which shall have the general direction and control of the government of Trinidad and Tobago and shall be collectively responsible, therefore, to Parliament.*[7]"

It is crystal clear Cabinet is to be involved in the "general" direction and control of the Government and setting government policy. "General" does not mean intimate involvement, particularly in something that requires specialised expertise like government procurement. General means a "general" instruction. We simply have to move away from the type of mind-set that thinks there is a need for the direct involvement of Cabinet at this level in the day-to-day administration of Government procurement.

During the Project PRIDE situation, former Minister John Humphrey had it right when he said:

> "… ***all we should get from Cabinet is an instruction that Piarco be modernised on the basis of concepts, on the basis of its own resources, and without the involvement of any foreign partner.***[8]

It was quite funny to see Minister Humphrey chairing the Ministerial Committee meeting with contractors and deciding on tile and artwork, among other things of minutia with the project. In fact, this had to have NIPDEC's project team wondering what their role was.

Cabinet's policy to Government procurement should be simply a review to see that the A-list methodology below is used by the contracting agency in coordination with the Central Tenders Board when Cabinet's approval is sought for projects:

1. **APPROACH to the project**
2. **AFFORDABILITY determination**
3. **ACHIEVABILITY**
4. **ACCOUNTABILITY**

[7] **The Constitution of the Republic of Trinidad and Tobago.**
[8] **Kamla Rampersad,**

5 ATTAINMENT

6 AUDIT, AUDIT, AUDIT throughout

Notwithstanding all of the above, Ministers are responsible to Parliament for the operation of all Government Boards and agencies within their portfolios. They have the authority either directly to make appointments to Government Boards, or indirectly to recommend appointments to Cabinet or the Governor in Council. The authority of a Minister to give directions to a Board is spelled out in the enabling legislation, if any

Procurement Objectives

The main procurement objectives are transparency, accountability, equal opportunity and efficiency. Government procurement is actually a science in which specific procurement criteria is set up; where the procurement objectives can be assessed systematically to offer an assurance of quality, transparency, objectivity, cost benefits, proper cash flows and time considerations; with prospective contractors treated fairly and impartially and standards of procurement integrity maintained.

While Government need not know how to produce the products or services it needs, it does need to do seven things to enable performance-based services acquisition:

1. **Establish integrated solutions team, a team that integrates all stakeholders' efforts toward one goal: mission accomplishment, defining rules of conduct and defining roles and responsibility.**

2. **Decide what problem needs solving and develop a business strategy (looking at choices of procurement and finance), defining (at a high level) desired results and what constitutes success, determining the current level of performance.**

3. **Conduct a job analysis by examining solutions, meeting with industry groups.**

4. **Develop a Performance Work Statement (PWS) (conduct a job analysis and/or a Statement of Objectives (SOO), writing performance objectives, identifying constraints and maintaining perspective.**

5. **Decide how to measure and manage performance by developing a quality assurance plan, choosing an incentive-type contract with on-going honest assessment.**

6. **Transparently select the right contractor, by competition among contractors, using due diligence in emphasising past performance, assessing conflict of interest and making sure the playing field is level.**

7. **Manage performance with a surveillance plan, assigning accountability for contract performance.**

These skills are called "contracting management" and all Government personnel responsible for procurement should be trained in them.[9]

The JCC is of the view that in order to come to terms with the procurement issues a detailed study is required. The study should be placed in a historical context. The historical context will reveal how different procurement strategies have affected institutions and organisations in both the public and private sectors. The study should look at the following:

The advantages and disadvantages of the current system with particular reference to the legal framework, knowledge gap between the Central tenders Board and other state agencies, the degree of centralized control, limitations on spending, lack of standardization of forms of contracts and measurement methods, lack of dispute resolution procedures and, bottlenecks,

Review the various amendments to the Central Tenders Board Act that allowed the proliferation of procurement agencies NIPDEC, UDECOTT, NEC, MTS< PIDCOTT, VIMCORTT etc.

Identify the drivers and constraints on the procurement process such as the source of funding, demand for quick delivery, and prevailing law.

Review past project to determine the efficiency of needs identification and definition, the validity of the time frames set, the validity of the initial budgets, the level of preparation of tender documents, the levels of transparency and accountability, the

[9] **Steven Kelman, "Remaking Federal Procurement, Working Paper, No. 3," The John F. Kennedy School of Government, Visions of Governance in the 21st Century.**

resources and ability of state intuitions to manage modern procurement approaches and the need for training.

Recommendations to Improve the Procurement Process

- **Revise legislation based upon international guidelines. The legislation should allow for the procurement of finance and the use of different delivery systems. The legislation should be facilitative rather than restrictive.**

- **The procurement process should be decentralized so that procurement could take place at source. The Central Tenders Board should have jurisdiction over all procurement processes in the state sector. All procurement procedures in the public and quasi-public sector should be subject to the Central Tenders Board Act and Regulations. The Central Tenders Board should function as a regulatory agency undertaking training and audit functions. The CTB should have the powers to investigate and subpoena.**

- **A clearly defined procurement policy needs to be articulated. There should be a single national procurement system. Each Ministry, Regional Co-operation, State Board, state owned company and any other institution handling or managing state funds should adhere to the national procurement system.**

- **A Code of Conduct (in addition to the professional codes of conduct) should be created and adhered to by state agencies, companies or individuals who wish to participate in the procurement process.**

- **The Integrity Pacts as originated by Transparency International on projects over a specified amount should be intuited.**

- **A clearly defined and credible conflict of interest policy should be instituted to ensure impartiality in the decision-making process.**

- **The CTB's regulations should be revised to meet the following**

a) **Publication of general procurement guideline**

b) **Publication of evaluation criteria and standard evaluation format**

c) **Setting up a review mechanism for appeals**

d) **Publication of a set of standardised procurement documents for goods, services, contracting**

e) **Publication of sets of standard methods of measurement for works**

f) **Establishing continuing training on procurement for private and public sectors**

g) **Undertaking of audits without notice on the operations of the procurement system at any source.**

h) **Pre-qualify in categories twice per year contractors, consultants and suppliers for use by government agencies. The list should be published**

International Chamber of Commerce Rules of Conduct

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Below are suggested Rules of Conduct of the International Chamber of Commerce, which are, in addition. to the local Rules of Conduct of the professional organisations.

> **These rules will work only if the commitment to ethics and integrity starts at the top. In any event, no company should be allowed to tender on government projects unless they have such a policy and it is evidenced that it is signed by each member of the management team who will be employed on any project for which a company is attempting to be pre-qualified and/or tender.**
>
> **These Rules of Conduct are intended as a method of self-regulation by business. Their voluntary acceptance by business enterprises will not only promote high standards of integrity in business transactions, whether between enterprises and public bodies or between enterprises themselves, but will also form a valuable defensive protection to those enterprises which are subjected to attempts at extortion.**

These Rules of Conduct are of a general nature constituting what is considered good commercial practice in the matters to which they relate but are without direct legal effect. They do not derograte from applicable local laws, and since national legal systems are by no means uniform, they must be read subject to such systems.

The business community objects to all forms of extortion and bribery. It is recognised, however, that under current conditions in some parts of the world, an effective programme against extortion and bribery may have to be implemented in stages. The highest priority should be directed to ending large-scale extortion and bribery involving politicians and senior officials. These represent the greatest threat to democratic institutions and cause the gravest economic distortions. Small payments to low-level officials to expedite routine approvals are not condoned. However, they represent a lesser problem. When extortion and bribery at the top levels is curbed, government leaders can be expected to take steps to clean up petty corruption.

Basic principle
All enterprises should conform to the relevant laws and regulations of the countries in which they are established and in which they operate, and should observe both the letter and the spirit of these Rules of Conduct.

For the purposes of these Rules of Conduct, the term "enterprise" refers to any person or entity engaged in business, whether or not organised for profit, including any entity controlled by a State or a territorial subdivision thereof; it includes, where the context so indicates, a parent or a subsidiary.

Basic Rules

Article 1 : Extortion

No one may, directly or indirectly, demand or accept a bribe.

Article 2 : Bribery and "Kickbacks"

No enterprise may, directly or indirectly, offer or give a bribe, and any demands for such a bribe must be rejected.

Enterprises should not (i) kick back any portion of a contract payment to employees of the other contracting party, or (ii) utilise other techniques, such as subcontracts, purchase orders or consulting agreements, to channel payments to government officials, to employees of the other contracting party, their relatives or business associates.

Article 3 : Agents

Enterprises should take measures reasonably within their power to ensure:

- **That any payment made to any agent represents no more than an appropriate remuneration for legitimate services rendered by such agent;**
- **That no part of any such payment is passed on by the agent as a bribe or otherwise in contravention of these Rules of Conduct; and**
- **That they maintain a record of the names and terms of employment of all agents who are retained by them in connection with transactions with public bodies or State enterprises. This record should be available for inspection by auditors and, upon specific request, by appropriate, duly-authorised governmental authorities under conditions of confidentiality.**

Article 4 : Financial Recording and Auditing

All financial transactions must be properly and fairly recorded in appropriate books of account available for inspection by boards of directors, if applicable, or a corresponding body, as well as auditors.

There must be no "off the books" or secret accounts, nor may any documents be issued which do not properly and fairly record the transactions to which they relate.

Enterprises should take all necessary measures to establish independent systems of auditing in order to bring to light any transactions which contravene the present Rules of Conduct. Appropriate corrective action must then be taken.

Article 5 : Responsibilities of Enterprises

The board of directors or other body with ultimate responsibility for the enterprise should:

- **Take reasonable steps, including the establishment and maintenance of proper systems of control aimed at preventing any payments being made by or on behalf of the enterprise which contravene these Rules of Conduct;**
- **Periodically review compliance with these Rules of Conduct and establish procedures for obtaining appropriate reports for the purposes of such review; and**
- **Take appropriate action against any director or employee contravening these Rules of Conduct.**

Article 6 : Political Contributions

Political party financing and political patronage are problematic in the fight against corruption, and we need to tighten the rules on lobbying.

Contributions to political parties or committees or to individual politicians may only be made in accordance with the applicable law, and all requirements for public disclosure of such contributions shall be fully complied with. All such contributions must be reported to senior corporate management. All such contributions in aggregate totalling over $5,000.00 by company management, immediate family and employees in any given year must be reported at the time of pre-qualification. Political contributions include in kind contributions and purchases of anything that benefits a particular political party.

Article 7 : Company Codes

These Rules of Conduct being of a general nature, enterprises should, where appropriate, draw up their own codes consistent with the ICC Rules and apply them to the particular circumstances in which their business is carried out. Such codes may usefully include examples and should enjoin employees or agents who find themselves subjected to any form of extortion or bribery immediately to report the same to senior corporate management. Companies should develop clear policies, guidelines, and training programmes for implementing and enforcing the provisions of their codes.[10]

Code for a Statutory Body:

Each statutory body shall:

- **Ensure that its operations are carried out efficiently, effectively and economically;**
- **Cause funds and accounts to be established and faithfully and properly kept;**
- **Ensure that liability for expenditure is incurred for lawful purposes only, and expenditure is made in compliance with any prescribed requirements;**
- **As far as possible having regard to the limits of its powers and control, ensure reasonable value is obtained for moneys expended by it;**
- **Ensure that its procedures, including internal control procedures, afford at all times adequate safeguards with respect to the correctness, regularity and propriety of payments made, the prevention of fraud or mistake, and the assessment, levy and collection of revenue and other amounts receivable;**
- **Ensure that fees and charges for services or goods supplied to any person are properly assessed and levied and are adequate;**

[10]**International Chamber of Commerce, http://www.iccwbo.org/home/extortion_bribery/rules.asp.**

- **Ensure the prescribed requirements are met regarding preparation, certification and rendering of annual financial statements;**

- **Establish and maintain an adequate internal audit function.**

Hopefully, the recommendations of this Commission of Enquiry will go down in history as identifying some of the solutions to our problems and eventually an administration with true concern and love for people will act

Winston Riley B.Sc. FAPETT
President
Joint Consultative Council for the Construction Industry