



ISTT perspectives of the Public Procurement and Disposal of Public Property Act, 2015 and its Amendment Act of 2016

[Abstract](#)

A brief analysis of the Public Procurement and Disposal of Public Property legislation with emphasis on the areas where Land, Valuation and Quantity Surveyors can add their unique perspectives and value.

Background:

The Institute of Surveyors of Trinidad and Tobago (ISTT) is a Non-Profit Organization of over two hundred Surveying and Property Professionals engaged in the main disciplines of Land, Valuation and Quantity Surveying. The purpose of this document is to present unique perspectives from the Land Surveyors, the Valuation Surveyors and the Quantity Surveyors within our organization, after having reviewed the Public Procurement and Disposal of Public Property Act No. 1 of 2015 and its Amendment Act No. 5 of 2016 with emphasis on the Disposal of State Lands (the “procurement legislation”).

We note other previous reviews and comments on the procurement legislation including, but not limited to, concerns about the government’s apparent intention to “amend the Act to significantly alter or remove Sections 7 and 24”¹; as well as the work written by ISTT Valuation Surveyor member (and Past President of both the ISTT and Joint Consultative Council (JCC)) Afra Raymond² who has written extensively on the procurement legislation.

The ISTT acknowledges the efforts and contributions of several contributors to the development and partial proclamation of the procurement legislation which is the first of its kind in Trinidad and Tobago. As a Professional Body, the ISTT also supports the principles espoused in the procurement legislation - accountability, transparency, integrity, value for money, efficiency, fairness, equity, public confidence, local industry development and sustainable development.

Nevertheless, while we appreciate that the procurement legislation is designed to encompass a broad swathe of both tangible goods /real property and intangible services / assets, we feel that our respective niches have not been adequately addressed. Our respective niches of real property and physical development should be more fully understood with the brief descriptions of our major roles outlined hereunder –

- The Land Surveyor (LS) is engaged in the measurement, mapping and management of elements in physical space in land (surface and sub-surface), marine and aerial environments on or in which all physical development and real property is designed and constructed. The LS may specialize in any of the sub-disciplines of land surveying (many of which are defined in the Land Surveyors Act 1996), including but not limited to cadastral surveying, cartography, engineering surveying, geodetic surveying, geomatics, hydrographic surveying, land management, photogrammetry / aerial surveying and topographic surveying. Therefore the LS ought to be one of the first professionals engaged to measure, map and gather data for any potential physical development design; or for a completed project or property.
- The Valuation Surveyor (VS) assesses the value of Real Property primarily based on the property’s location, condition and current or potential use within a particular economic environment. The VS will usually outline certain assumptions and review similar recent arms-length property transactions in order to arrive at an opinion of a particular value. The value so determined is not necessarily the same as the cost of the real property. Besides property values, the most critical role that the VS plays within the procurement legislation is determining ‘value for money’.

¹ https://trinidadexpress.com/opinion/editorials/assault-on-the-procurement-act/article_320c895e-3b26-11ea-bcef-87a97b70e504.html

² <https://afaraymond.net/category/politics-and-public-affairs/public-procurement-reform/>

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- The Quantity Surveyor (QS) is trained in accounting for building materials, construction costs and contract procedures. The QS is concerned with the evaluation of construction work. The basic function of estimating has evolved into offering cost and procurement advice on alternative designs, materials and construction methods, considerations of life-cycle costs and feasibility studies.³

Land and Valuation Surveyors both play significant roles in the measurement, management and disposal of real property. Conversely, Quantity Surveyors play a major role in measuring and managing construction materials, costs and contracts.

³ OUTRIDGE DI; **A Historical Perspective of the Development of the Quantity Surveying Profession in Trinidad & Tobago**; 2016; UWI; St. Augustine Trinidad.

GENERAL COMMENTS:

1. The composition of the Procurement Board and the Review Board -

In general we found an absence of Surveyors as members of either the Procurement Board or the Review Board. However, we note that the Amendment Act No. 5 of 2016 amended the original Section 51 to include a chartered accountant OR QS as a member of the Public Procurement Review Board. With this 'either/or' situation, there is a real possibility that there could be no QS on either of the two Boards. This would be a great disadvantage to the purpose and intention of the Act insofar as it pertains to the construction industry. In the said Amendment Act No. 5 of 2016, Part VIA is wholly concerned with the disposal of State Lands, yet no Land or Property professional is included on either of the Boards. The current composition of the Boards will see accountants, finance specialists, engineers, procurement specialists and attorneys/judges presiding over the disposal of State lands matters in which they are likely to have no experience.

If there is a possibility to amend the procurement legislation at any future point we propose that the ISTT be allowed to nominate a member to each of the two Boards. In the interim we will lobby to have an ISTT member, nominated by the ISTT, to fill positions on the Procurement Board as part of Civil Society (Section 10 (h)) and the Review Board (Section 51A in Section 6 of the Amendment Act No. 5 of 2016)

2. Draft Regulations -

We also lament the absence of publicly available Draft Regulations for comment up to October 2020. As such, we reviewed the Handbooks and Guidelines as published by the Board with attention to those speaking directly to the construction industry: For the disposal of real property we also reviewed the Regulations of the Turks and Caicos Islands Crown Land Ordinance 2012 and recommend a similar approach for the Regulations of this procurement legislation.

3. No penalty for by-passing the procurement legislation -

No penalty is included for persons by-passing the Act e.g. a Chairman requesting a view of, and vetting, a tender report prior to the report being submitted. This could be viewed as perverting the course of the tender process and that not only the Chairman but all persons involved should be penalized.

CONSTRUCTION AND WORKS:

In the General Guidelines: Procurement of Works (Works being defined in the Act to include "construction and engineering works of all kinds") there is a solitary mention of a QS in the entire document (section 8.2-page 66 para 2).

The only mention of a QS in the entire Act is as an option on the Review Board. Here, the statement "a quantity surveyor's project check estimate of the tender documentation" shows a complete lack of understanding of the value, role and expertise that the QS brings to the procurement process.

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Section 5.4.2 page 22 to 24 details the pre-design study and calls out by name the Architect, the Civil / Structural Engineer, the Electrical Engineer and the Mechanical Engineer. The absence of the QS is noted.

The Role of the QS:

The British study, the Egan Report – Rethinking Construction, was commissioned to improve the quality and efficiency of the UK construction industry⁴. The report suggested six (6) key steps for clients to consider when considering whether or not to go ahead with a project. They are:

1. Verifying the need (for the project)
2. Assessment of options
3. Develop the most appropriate procurement strategy
4. Implement the most appropriate procurement strategy
5. Project delivery
6. Post project review

The QS is the construction professional ideally suited to participate in all six (6) stages identified above. The QS's skill, training and expertise can be brought to bear in the early decision-making process - in the beginning when the project is first being conceptualized and initial decisions are being made. The QS's inherent knowledge base of construction costs and economics, construction methods and methodology along with procurement strategies are critical to be employed and utilized in the conceptualization of a project.

Definition of Procurement:

The Guidelines in Section 7.1.2 Key definitions has 'procurement strategy' defined as "the process used to take a project from its early planning phases to completion". This is a lack of understanding of what procurement in the context of construction really is. Wikipedia defines it as "the act of acquiring, buying goods, services or works from an external source". But Ashworth and Hogg⁵ defines it as "the process that is used to deliver construction projects." The procurement method (or strategy, path, methodology, choice as it is called by many names) dictates how the construction process is organised, the structure; whereas the form of contract determines the roles and responsibilities of the parties in the construction project. Owing to the intimate relationship between project structure (procurement method) and role of the participants within that structure (form of contract) it is critical that these two – correct procurement path and correct form of contract – are in sync. The Guidelines fall short here as well.

In the Guidelines, Section 7.6 (Procurement Methods for Significant Works Projects) list the following procurement methods commonly used in construction projects as:

- Traditional fully documented – lump sum
- Design and construct – lump sum
- Managing contractor – design and construction management
- Alliance
- Bundling

⁴ Egan J, **Rethinking Construction**, (1998), London

⁵ ASHWORTH, A., & HOGG, K., (2006), **Willis's Practice and Procedure for the Quantity Surveyor**, 12thEd., Blackwell Publishing, London

We must note that some of these names are not found in any regular texts on the subject. However, we must highlight a clear misunderstanding of “Managing Contractor”. The proper name is “Management Based Contracting” and there are two (2) versions, namely Management Contracting and Construction Management. The difference between the two is the contractual links between the works packages sub-contractors. This form of procurement is seldom used in the local construction industry (as found in the most recent ISTT research). The incorrect definition here proves the validity and conclusion of our research.

The explanation given on Section 7.6-page 61 Item C (of the Guidelines) of “how” the Management Contractor works is completely incorrect. The Management Contractor does NOT “complete the design, makes final tenders with prices and manages the construction of the project”. The proper placement of the Management Contractor in the project team is shown below in Figure 1. Note the Management Contractor does NOT “complete the design” but rather works alongside the project team specifically to manage the construction process.

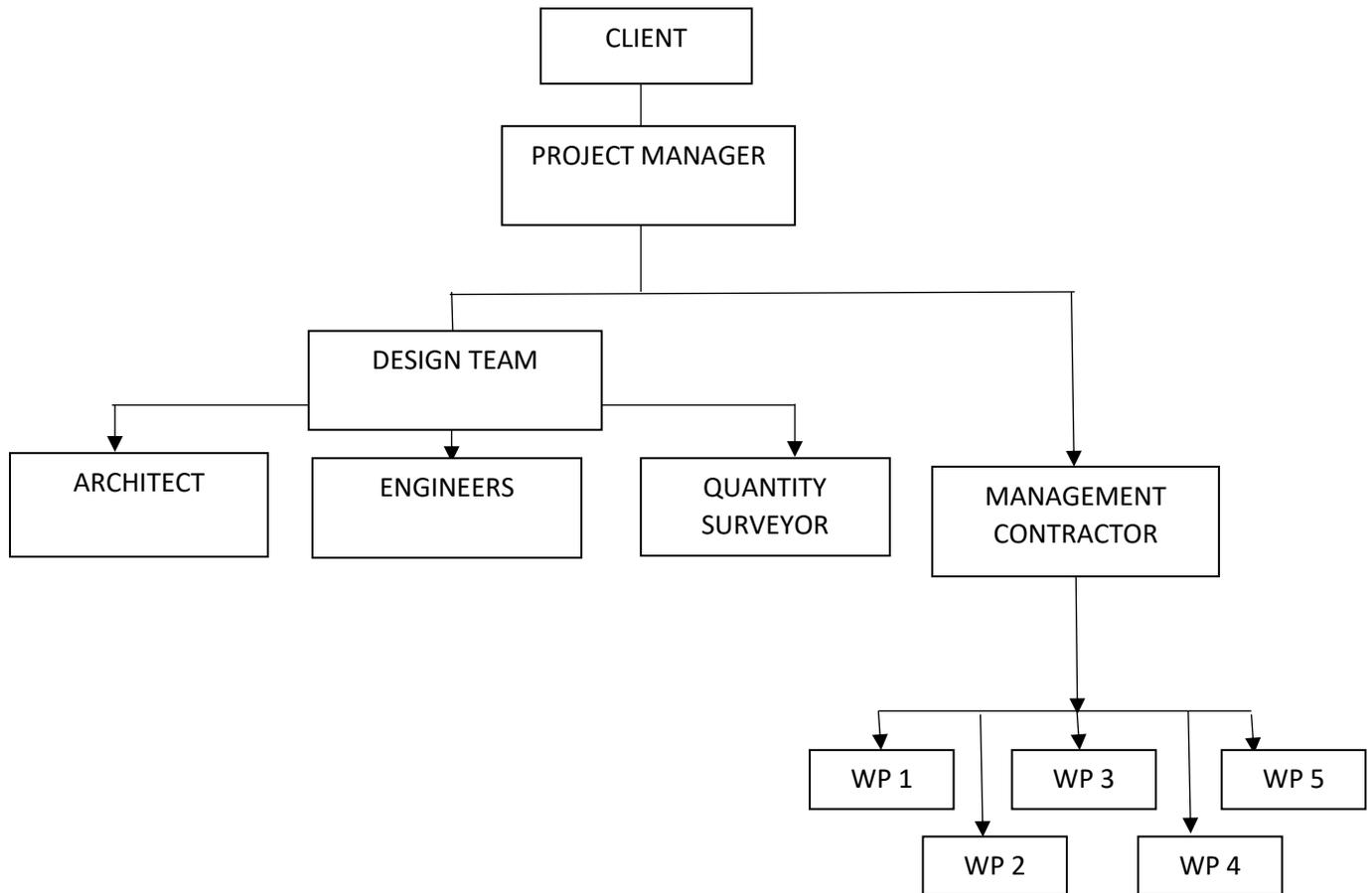


Figure 1: Functional links in Management Contracting

ASHWORTH, A., & HOGG, K., (2006), Willis’s Practice and Procedure for the Quantity Surveyor, 12thEd., Blackwell Publishing, London

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This lack of understanding is worrying in that one of the main benefits of Management Contracting is the separation of design from management⁶. Therefore, to say that they are responsible for the design is completely off-track of what this form of procurement entails. The Guideline goes on to state “best suited to major or significant projects where there is some uncertainty regarding the specific project requirements” brings us to our next point.

Lack of Understanding of the Benefits of Different Procurement Methods:

In Section 7.6 Procurement Methods for Significant Works Projects the Guideline highlights supposed best uses of different procurement methods. Again, this is not correct. For example, the Design and Construct procurement method is described as the best method “where the need to achieve defined time and cost outcomes outweighs the need for quality”. When one considers that Wembley stadium in London, the largest stadium in the UK and second largest in Europe, was constructed by Multiplex, an Australian firm using the Design and Build procurement method, then one would understand that the statement included in the Guideline is totally incorrect.

The statement regarding “Managing Contractor” where it says “best suited to major or significant projects where there is some uncertainty regarding the specific project requirements” again is not accurate. There are many advantages of speed (this is the FASTEST form of procurement) allowing for maximum overlap between design and construction where quality can be assured. But this is done at the expense of price certainty and having the client take all the risk.

Traditional Fully Documented – Lump Sum. This is Traditional contracting also known as General Contracting. There are two (2) types, Sequential and Accelerated; the Guidelines make no mention of this. The statement of “best suited to projects where there is a high degree of certainty regarding the specific project requirements” is again not quite correct. Since this is the slowest of all procurement methods it is best used when there is ample time to fully detail the brief and complete the full designs. It is unarguably the best form of procurement to administer as the designs would have been totally completed prior to engaging the contractor thereby minimizing the incidents of variations.

We are unfamiliar with the term “Alliance” as a procurement method - unless this is intended to be Partnering. Egan Report⁷ defines Partnering as involving “two or more organizations working together to improve performance through agreeing mutual objectives, devising a way for resolving any disputes and committing themselves to continuous improvement, measuring progress and sharing the gains”. This was touted as a potential solution to disputes in the British construction industry.

Factors in the Selection of the Procurement Path:

The Guidelines lists the following as the “factors which will determine the most suitable procurement method for the project” (Section 7.3.2 page 54):

- a) the key objectives and constraints of the project;
- b) the risks that may arise during the delivery of the project and how those risks might best be dealt with;
- c) the level of complexity of the project;

⁶ MURDOCH, J., & HUGHES, W., (2000), **Construction Contract Law and Management**, 3rdEd., Spon Press, London

⁷ https://constructingexcellence.org.uk/wp-content/uploads/2014/10/rethinking_construction_report.pdf

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d) the nature and operation of the relevant supply market.

These four factors are insufficient as they do not include other pertinent considerations identified by experts in construction - namely Ashworth⁸ and Murdoch and Hughes⁹ - whose criteria as highlighted below.

Ashworth's criteria	Murdoch and Hughes factors
<ul style="list-style-type: none"> • Cost certainty • Cost reduction • Contract period • Reduced contract period • Quality and standards • Constructability • Litigation 	<ul style="list-style-type: none"> • Involvement of the Client with the process • Separation of design from management • Reserving the Client's right to alter the specifications • Clarity of the Client's contractual remedies • Complexity of the Project • Speed from inception to completion • Certainty of Price

We would like to propose the following chart. It consists of multiple-choice answers in each question. When all questions have been considered the total is then summed up in each column. The procurement paths with most crosses would then be worthy of further consideration. See figure 2 below:

Filling out the chart
Consider the multiple choice answers in each question. Note the number of the answer which comes closest to your opinion. Cross the dots on the chart along the line with that number. When all questions have been considered sum up the number of crossed dot

			Traditional		Design & Build			Management	
			Sequential	Accelerated	Direct	Competitive	Develop & Construct	Management Contracting	Construction Management
A Timing	How important is early completion to the success of the project?	Crucial		•	•			•	•
		Important		•	•	•	•	•	•
		Not crucial	•						
B Controllable Variation	Do you foresee the need to alter the project in any way once it has begun on e.g. to update machinery layouts?	Yes	•	•				•	•
		Definitely not			•	•	•		
C Complexity	Does your building (as distinct from what goes in it) need to be technically advanced or highly serviced?	Yes	•	•	•			•	•
		Moderately so		•	•	•	•	•	•
		No, just simple			•	•			
D Quality Level	What level of quality do you seek in the design and workmanship?	Basic competence			•	•			
		Good but not special	•	•	•	•	•	•	•
		Prestige	•	•				•	•
E Price Certainty	Do you need to have a firm price for the project construction before you can commit it to proceed?	Yes	•		•	•	•	•	•
		A target plus or minus		•					•
F Competition	Do you need to choose your construction team by price competition?	Construction work only				•			•
		Construction & management	•				•	•	•
		No, other factors important		•	•				
G I Responsibility Division of	Can you manage separate consultancies and contractors, or do you want just one firm to be responsible ?	Separate firms	•	•	•			•	•
		One firm for everything.			•	•	•		
G II Responsibility Professional	Do you want direct professional responsibility to you from the designers and cost consultants?	Not important			•	•	•		
		Yes	•	•				•	•
H Risk Avoidance	Do you want to pay someone to take the risk of the cost and time slippage from you?	No, prefer to retain risk	•						•
		Prepared to share risks		•				•	
		Yes			•	•	•		
Total									

Figure 2: Procurement Selection Chart

⁸ ASHWORTH, A., (2006), **Contractual Procedures in the Construction Industry**, 5thEd., Pearson Education Ltd, Essex

⁹ MURDOCH, J., & HUGHES, W., (2000), **Construction Contract Law and Management**, 3rdEd., Spon Press, London

The Section 7.3.2.3 - Level of Complexity - on page 56 of the Guidelines again reinforces the lack of understanding of construction procurement. Firstly, the “market conditions” do not dictate the complexity of the project. Secondly is the notion that the additional resources required to administer a complex (procurement) method may be wasted on a complex project if a simple (procurement) method may achieve the same outcome.

The Methods of Procurement^{10 111213}are:

- Traditional
- Design and Build
- Management

It is clear from all authoritative sources that there are no “simpler” procurement methods. The authors of the Guidelines apparently misunderstood the essence of procurement for construction.

Contract Selection:

The last area of concern is found in Section 7.5 - Contract Selection. While we are pleased that the Guidelines propose to “select the contractual form that is optimal in the circumstances” there are three (3) major points of concern.

Firstly, we note the absence of the General Guidelines: Forms of Contracts which ought to provide additional details of forms of contracts and their uses. We understand that not all the Guidelines and Handbooks are completed and as such we await the same for our collective review.

Secondly is the fact that the only form of contract mentioned by name is FIDIC (International Federation of Consulting Engineers). While there is a phrase - “other specifically drafted form of contract” – this simplicity reflects the ignorance of the availability of forms of contracts for construction currently available and in use in the local construction industry. The ISTT survey on Contracts and Procurement in the local industry showed the wide range of forms of contracts currently in use in the industry. See Figure 3 below.

FORMS OF CONTRACTS CURRENTLY IN USE IN THE INDUSTRY:

FIDIC:	44%
TTIA:	28%
JCT:	22%
NEC:	4%
AIA:	2%

¹⁰ ASHWORTH, A., (2006), **Contractual Procedures in the Construction Industry**, 5thEd., Pearson Education Ltd, Essex

¹¹ ADRIAANSE, J., (2005), **Construction Contract Law: The Essentials**, Palgrave Macmillan, Hampshire.

¹² MURDOCH, J., & HUGHES, W., (2000), **Construction Contract Law and Management**, 3rdEd., Spon Press, London

¹³ ASHWORTH, A., & HOGG, K., (2006), **Willis’s Practice and Procedure for the Quantity Surveyor**, 12thEd., Blackwell Publishing, London

Figure 3: Forms of Contract Currently in use in the Local Industry

Other than FIDIC, there is TTIA (the Trinidad and Tobago Institute of Architects) forms 2015 – With Quantities and 2017 – for Minor Works; the JCT (Joint Contracts Tribunal) out of the UK; the NEC (New Engineering Council) suite of contracts and the AIA (American Institute of Architects) suite. The lack of knowledge of what is both available and in use is cause for concern.

The third and final point is included in the phrase “suitably modified FIDIC”. This speaks to a disturbing yet highly prevalent trend in the local construction industry, the bastardization of the rights and responsibilities associated with usage of FIDIC forms of contract. Currently there is an incorrect usage of the Particular Conditions of the FIDIC forms of contract.

The Particular Conditions are supposed to allow for the editing the contract to the Conditions that are Particular to the jurisdiction in which it is being used.

The common practice now is to amend the main clauses in the contract whereby the end result is that the essence and balance of the contract is erroneously and grievously changed. One example we have seen throughout the industry is with FIDIC Construction Contract 1st (1999 Red Book) which is for use with Client commissioned designs, and where the Particular Conditions being amended to place the risk, responsibility and liability for design and documentation on the contractor. This speaks against the spirit and essence of the contract and should not be encouraged. Many different authors have written about the need to use standard unedited forms of contract. The phrase “suitably modified” could be seen as a validation by the Board and therefore an implied acceptance of unjustly and largely incorrectly, amended FIDIC contracts and at the very minimum should be removed from the Guidelines.

Contractor Solicitation and Evaluation Process:

The idea of having the total cost of tendering being minimized when speaking about open tendering is a misnomer. Adriannse¹⁴ says it is costly and likely to attract inexperienced tenderers.

The mention of only two (2) forms of tendering in the Guidelines – Open and Selective - shows a short-fall of this document. Tendering methods for construction procurement include¹⁵:

- Open
- Single Stage Selective
- Two Stage Selective
- Selective Tendering for Design and Build
- Negotiation
- Joint Ventures

¹⁴ ADRIANSE, J., (2005), **Construction Contract Law: The Essentials**, Palgrave Macmillan, Hampshire.

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Design and Construct is close enough in terms of the number of preferred tenderers: The international best practice is between 3 – 6 preferred tenderers, whereas the Guidelines says 3 – 5 preferred tenderers.

The timelines set out in Section 8.3 Tender Framework does not match with international best practices¹⁵. The international best practice timeline is a MINIMUM of twelve (12) weeks for Design and Build tendering. In the Guidelines, four (4) weeks is completely unacceptable if one is following international best practice.

Similarly, the time for the tender period of four (4) weeks for Traditional is again way under the international best practice recommended time of eight (8) weeks: The minimum time of three (3) weeks as included in the Guidelines is a lack of understanding what tenderers are required to do in producing a compliant tender.

While the Guidelines make mention of the use of Bills of Quantities (BQ) where applicable, we believe they are doing a disservice if no mention is made of who should prepare such. The BQ was born from the quantity surveying profession¹⁶ and its use, while denigrated much by those not qualified, is still considered one of the better tools in contract administration. The Bills of Quantities provides the best basis for estimating, tender comparisons and contract administration¹⁷. It provides an even, level playing field for all tenderers to be assessed on a like-for-like basis as they have identical documentation. It makes assessing the value of work done at any given time easy, valuing variations, and the settlement of final accounts easy. At present in the local construction industry there is a proliferation of unqualified persons producing two (2) page documents and calling them “bills of quantities”. We fear that if the Guidelines do not address who should prepare the BQ, it may be seen as an acceptance by the Board of an already pervasive and corrupt practice in our industry. We recommend that only QS members of ISTT be allowed to prepare BQ.

Qualification and Invitation:

The main purpose of the tender process is two-fold¹⁷, to find:

- The most suitable contractor at the best time, and
- To get the most suitable offer from the contractor at the most appropriate time.

The NJCC outlines the tender process as inclusive of;

- Pre-qualification;
- Preliminary enquiry;
- Tender.

The fact that the Guidelines make no mention of the process, especially the inclusion of the preliminary enquiry, shows a lack of understanding of the total tender process.

¹⁵ National Joint Consultative Committee for Building, (1996), **Code of Procedure for Single Stage Selective Tendering**, London.

¹⁶ MURDOCH, J., & HUGHES, W., (2000), **Construction Contract Law and Management**, 3rdEd., Spon Press, London

¹⁷ ASHWORTH, A., & HOGG, K., (2006), **Willis's Practice and Procedure for the Quantity Surveyor**, 12thEd., Blackwell Publishing, London

Tender Evaluation:

Section 8.9.3 Tender Evaluation Committee calls out a minimum of three (3) persons including

- a) an officer who was involved in preparing the tender documents for the project;
- b) an officer with a sound and current technical knowledge of the construction process capable of fully understanding and interpreting the tenders;
- c) an officer with sound knowledge of procurement and related policies.

If (a) only requires someone who “was involved” in preparing the tender documents, could that be any administrative or junior staff? We believe this should be reworded to the PERSON who prepared the tender document; and for tenders for building construction this PERSON has to be, at the very least, the QS. We strongly believe that the failure of the Guidelines to specify such will appear to be an acceptance of reduced quality and competence.

The Section 8.9.4 Evaluation of Tenders has shown the lack of comprehension of the purpose of having a pre-qualification process and the benefits of the Selective Tender process. The purpose of the pre-qualification process is to assess the potential tenderers for their general skills and competence and to establish their suitability to undertake given types of construction work within pre-determined ranges of value. It is premised against general, rather than project-specific criteria, and can be used to compile an approved list of service providers who may be invited to tender for a particular type of work. It is intended to ensure that all contractors invited to tender are capable of performing with the required skill, integrity, responsibility and competence. Therefore, this would negate the need to evaluate “contractors submitting tenders to confirm their qualifications, capability and capacity to perform the contract”.

Consultant Solicitation:

Section 9 of the Guidelines deals with Consultant Solicitation and Evaluation Process. The inclusion of a “copy and paste” from elsewhere. In this regard we would recommend the use and application of FIDIC Client / Consultant Model Services Agreement (the White Book) as the basis of contractual engagements between consultants and procuring agencies.

Analysis of the Guidelines on the topic of invitation, assessment and selection of consultants appears lacking. There are other templates that could have been better references for the purpose of producing these Guidelines. The Royal Institution of Chartered Surveyors (RICS) and the Royal Institute of British Architects (RIBA) both have excellent and well detailed procedures and guidelines that could be amended to local conditions and adopted.

Contract Management:

Section 10 - Contract Management Plan, Table 9, page 104 - Penalties or Disincentives. This goes on to state “Describe any penalties that may be included in the contract and how they are to be calculated and applied e.g. liquidated damages”. While liquidated damages and penalties are used interchangeably in construction it may surprise many that in construction contracts penalties are illegal and therefore unenforceable in the courts¹⁸. The distinction between a penalty and liquidated damages is the intention of the parties. If the intention is to secure performance by the imposition of a penalty or fine it is a penalty,

¹⁸ ADRIAANSE, J., (2005), **Construction Contract Law: The Essentials**, Palgrave Macmillan, Hampshire

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but if the intention is to assess damages for breach of contract it is damages. Keating on Construction Contracts also notes that if a clause is a penalty clause, regardless of whatever it is called, it will not be enforced by the courts.¹⁹

The mere inclusion of the term “penalty” in the Guidelines as it relates to construction contracts again show up the lack of information on the subject matter and the absence of a qualified QS on the Board.

DISPOSAL OF REAL PROPERTY / STATE LANDS:

The nature of land as a commodity does not lend itself to fit neatly in legislation that was initially designed for ‘goods and services’. Goods and services are inherently discreet entities, or can be described as such. However, although land may be described as discreet parcels, there are usually overlapping or straddling interests of parcels in the real world, especially in the marine environment and with overhead / underground utility corridors or aviation parcels that may not be visible or obvious on an otherwise ‘vacant’ parcel of land. As such, uncoordinated decisions by Public Bodies disposing of State land may result in compromised or detrimental contracts, thereby defeating the principles espoused in the procurement legislation.

The subsequent addition of the Disposal of State Lands in Act No. 5 of 2016, creates disharmonies in the original legislation, namely –

- The absence of experienced Land or Real Property Professionals as members of the oversight Boards and Committees; and
- The absence of the Minister / Ministry with responsibility for State Lands in managing a commodity under its purview; and
- The legal responsibility for disposal of Real Property resting with the OPR instead of with the landlord (Section 13 (o)) “*[the OPR] acts for, in the name of, and on behalf of the State to dispose of real property owned by the government..*”). It also contradicts current responsibilities of the Corporation Sole with respect to high value property / assets where “The Corporation Sole has the power, with the permission of the President, to acquire, purchase, take, hold and enjoy movable and immovable property of every description, and to convey, assign, surrender and yield up, mortgage, demise, re-assign, transfer or otherwise dispose of, or deal with, any movable or immovable property vested in the Corporation Sole upon such terms as the Corporation Sole sees fit”²⁰.

Act No. 5 of 2016, Part VI A, Section 57A – Disposal of State Lands:

¹⁹ Bath and North East Somerset District Council v Mowlem Plc [2004] BLR 153

²⁰ Regis, Kyron. “The Government’s unpatriotic blunder”. Sunday Business Guardian, pgs SB4&5, 8th November 2020

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Act No. 5 of 2016 appears to be a 'lagniappe' that does not address the acquisition of State land which ought to be scrutinized under the principle 'value for money' especially when procured by private treaty. This omission may be an oversight.

We find it **deeply concerning** that the relevant Section commences with "*Notwithstanding the State Lands Act or any other written law to the contrary..*" which implies that disposal activities can take place by various Public Bodies without the knowledge or input of the landlord - the Commissioner of State Lands (COSL) and / or the Director of Surveys. This will result in an ad hoc cadastre on which surveyors rely to complete surveys accurately. This will also create challenges with respect to maintaining land inventories if the budget to do so does not reside with the COSL.

We had hoped to have long overdue Draft Regulations on which we could comment more specifically. Nevertheless we feel that any Regulations must be driven by updated Land Distribution Policy.

Recommendations:

1. The amendment of the legislation to include a member of the ISTT, nominated by the ISTT, with experience in Real Property and/or State Lands, for the following Boards –
 - a. Section 10 – Procurement Board
 - b. Section 51A in Section 6 of the Amendment Act No. 5 of 2016 – Review Board
2. The amendment of the legislation to include the acquisition of land and other Real Property, especially as it relates to private treaty agreements.
3. The amendment of the legislation to include the input from, or consultation with, the Commissioner of State Land (COSL) **as the landlord** in all procurement and disposal activities involving State land in order to avoid fragmentation of public land inventories and to promote currency.
4. The 1992 Land Distribution Policy is the only current guide for State land disposal but urgently needs updating. A **comprehensive Land Policy and updated Land Distribution / Disposal Policy** are needed as a precursor to arrive at the best protocols or any Regulations for the procurement and disposal of Public Real Property including State land. These Policies will inform which pieces of legislation need to be amended and/or proclaimed to ensure a well-coordinated approach that will meet all the principles espoused in the Act. The Land Policy/ Policies should be first developed by a technical committee (spearheaded by the ISTT and including public technical officers) and then subjected to public consultations before being adopted.

As we emerge into the post-Covid-19 pandemic period with food security foreseen as a challenge in the coming years, the Policies are needed to prioritize some land uses and certain land reserves so as to –

- prevent alienation by unauthorized changes of land use, adverse possession and other negative factors; and
- improve the State's revenue collection (currently ad hoc) from the disposal of Public Property.

5. **Land legislation should be made current.** The State Lands Act should be updated and made central to the disposal of State Land with greater enforcement capabilities and penalties. The Land Adjudication Act and its associated legislative package need to be proclaimed in order to assist with updating land inventories.
6. After updating and harmonizing Policies and Legislation as stated in the preceding points, Regulations for the disposal of Public Property may be modeled on the Regulations contained in the Turks and Caicos Islands Crown Land Ordinance 2012.
7. A **National Spatial Data Infrastructure (NSDI)** or some other model of centralized database/inventory should be formally established to provide accuracy, harmony, currency, standardization, reasonably unrestricted public access and transparency for the various (ad hoc) distributed Public Property databases and digital inventories, using contemporary geospatial and mapping technologies. This will allow for due diligence (field observations, cadastral and valuation surveys) to be carried out on available parcels ahead of disposal (analogous to pre-packaged meals). The NSDI must be supported by the necessary budget to maintain retained data and acquire new data periodically. Key databases / inventories to be included are –
 - a. Digital cadastre
 - b. Valuation Roll
 - c. Registrar General's Department – Land Registry
 - d. COSL inventory (including seabed and aerial inventory)
 - e. Inventory from all Public Bodies which hold Public Property

LOOKING AHEAD

With our brief review of the procurement legislation and the Guidelines we have highlighted discrepancies in comparison to international best practices; the lack of knowledge of the subject matter insofar as it pertains to construction procurement and tendering by the authors; the shortcomings arising from the absence of a QS or the absence of input from QS; and the disharmonies treating with real property and the disposal of State Lands.

Looking ahead, the ISTT is both willing and available to lend our knowledge and expertise in addressing the deficiencies outlined; the policies that need to be updated; the spatial data infrastructure required; and the training of persons who are required to effect the processes in order for the procurement legislation to be able to realize its fullest potential.