JUDICIARY
TRINIDAD AND TOBAGO

Public Procurement and Disposal of Public Property (Amendment) Act No. 27 of 2020

[Comments by the Judiciary in its administrative capacity]

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Public Procurement and Disposal of Public Property (Amendment) Act No. 27 of 2020

[Comments by the Judiciary in its administrative capacity]

By letter dated April 12, 2022, The Attorney General and Minister of Legal Affairs, Senator The Honourable Reginald Armour S.C. requested a checklist of the steps which are necessary to ensure that the Judiciary is fully ready for compliance with the Public Procurement and Disposal of Property Amendment) Act, No. 27 of 2020 upon its proclamation.

The Judiciary in its administrative capacity has reviewed the Public Procurement and Disposal of Public Property Act, No. 1 of 2015 (as amended), as well as the Regulations issued by the Minister of Finance on July 1, 2021. The Judiciary has identified critical issues relative to the operationalisation of the legislation in its current form.

Observations

The following observations are made by the Judiciary, both as a public body in accordance with the Act as well with regard to matters that may be brought before the Courts and other responsibilities placed on the Judiciary by the Act-:

1. Scope of the Act:

   A) The Act applies to all levels of procurement and makes no distinction in process, or liability under the Act between the purchase of a dustbin and the construction of an overpass. All procurement is subject to the provisions of the Act unless specifically exempted by the Minister.

   B) The Act applies to a vast number of bodies and persons at all levels of activity. Caught by this legislation are public bodies, private bodies using any public funds and private-public partnership arrangements. There are three definitions which together illustrate the number and level of bodies and persons which are required to conduct all of its procurement in this way and to report in detail extensively:

"public body" means—

(a) the Office of the President;
(b) the Parliament;
(c) the Judiciary;
(d) a Ministry or a department or division of a Ministry;
(e) the Tobago House of Assembly, or a division of the Tobago House of Assembly;
(f) a Municipal Corporation established under the Municipal Corporations Act;
(g) a Regional Health Authority established under the Regional Health Authorities Act;
(h) a statutory body, responsibility for which is assigned to a Minister of Government;
(i) a State-controlled enterprise;
(j) a Service Commission established under the Constitution or other written law; or
(k) a body corporate or unincorporated entity—
  (i) in relation to any function which it exercises on behalf of the State; or

(ii) which is established by virtue of the President's prerogative, by a Minister of Government in his capacity as such or by another public authority; or

(l) *a body corporate or unincorporated entity in relation to any function, project, scheme or arrangement which involves the use by it, of public money*;

"**public money**" means money that is—

(a) received or receivable by a public body;

(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 a public body;

(d) distributed by a public body to a person;

(e) raised in accordance with a written law, for a public purpose; or

(f) appropriated by Parliament;

"public-private partnership arrangement"
includes an arrangement between a public body and a private party under which—

(a) the private party undertakes to perform a public function or provide a service on behalf of the public body;

(b) the private party receives a benefit for performing the function or providing the service, either by way of—

(i) compensation from a public fund;

(ii) charges or fees collected by the private party from the users of a service provided to them; or

(iii) a combination of such compensation and such charges or fees; and

(c) the private party is generally liable for the risks arising from the performance of the function or the provision of the service depending on the terms of the arrangement;

The combined definition of public body and public money expands the scope of the Act to activities of otherwise private entities which receive public money. This includes schools, children's homes, NGO's FBO's and CBO's and a host of other organisations and individuals which do not yet realise that the Act will affect their operations.

The definition of public-private partnership arrangement catches private parties (corporate or individuals) performing public functions or services on behalf of a public body. In this regard, the legislation is not clear as to who has the duty to adhere to the provisions of the Act, but it appears that any procurement at any level and of any size that the private entity does in pursuance of the performance of the function must be done in accordance with the Act.

In this regard, the Judiciary considers inter alia funeral agencies, psychologists, mediators, other judiciaries, banks, certain international software suppliers. The Judiciary is fairly sure that none of these private entities or persons are aware that their operations will be caught by this Act. It may have the undesirable effect of limiting their interest in performing these functions.

2. No separation of powers

The legislation in its current form suggests that there is minimal adherence to the principle of separation of powers which is of grave concern for the Judiciary given that the legislation provides for the Office of Procurement Regulation (OPR) to undertake the following:

- make rules for public procurement and disposal of all public bodies;
- determine its own procedure;

- conduct investigations;
- conduct searches;
- enter;
- undertake audits; and
- adjudicate and decide on matters before it.

The OPR's procedure for hearing and determining matters can, according to the legislation, be conducted without the need to adhere to rules of evidence including rules relative to weight and admissibility of evidence or treating with hearsay. The Act does not require the OPR to provide the specificity needed to assure due process. The Act does not take into account the effect of case law and the principle of precedent, nor the principles of natural justice. While the legislation was passed by a special majority owing to its declaration of being inconsistent with sections 4 and 5 of the Constitution, the question arises as to the wisdom of having such wide and unfettered powers concentrated in the hands of one office.

Please note that in no way are any aspersions being cast whatsoever on the present holders of offices within the OPR, but we respectfully caution that legislation and procedures should provide appropriate checks and balances to ensure that the rules of natural justice are maintained and that due process is adhered to in perpetuity and regardless of who holds office.

It is noteworthy that the Act appears at times to seek to oust the jurisdiction of the court and at other times to limit the court's ability to enquire. When for example no requirement of reasonable suspicion is made a condition precedent to search and seizure, the court's ability to enquire is limited.

Prerogative writs and procedures traditionally reserved for the Judicial Arm and National Security have been given in effect to the Office. These include the right to issue injunctions, as well as the right to enter, and search premises and seize goods (see section 43(1)(b) and (c). With such wide jurisdiction and power of the OPR there is a danger of its role and the Act lending to the opportunity for mischief.

The Judiciary notes that the OPR is itself a public body and thus subject to public law challenges, even by public law bodies and persons. This will be litigation by which the State will be against the State and funding both sides of legislation which can all be destined for the Privy Council as of right.

3. <u>Wide Authority of the OPR.</u>
   There are several instances including for example, where the legislation places into the hands of the OPR, decision making authority relative to, and an exceedingly wide authority over all other public bodies including the Judiciary, the Parliament and the Office of the President, the Trinidad and Tobago Police Service, Ministry of National Security and Health and related agencies and the Office of the Director of Public Prosecution (DPP). This includes the power of entry without notice, search, and removal. This power is not limited to the premises of the public body but extends to the property of the public authority and to "persons". This conceivably includes property such as computers, data and vehicles.

4. <u>Insufficient assurance of due process.</u>
   The legislation does not sufficiently provide for due process in the exercise of the powers of the OPR or its procedures. The OPR has investigatory powers and the discretion to suspend the

procurement process (see section 50(7)) or certain components of it for the purpose of investigation without respect of the principles of due process. Investigators and adjudicators are authorised to take into account extra judicial statements and hearsay in its deliberations. The conveyance of said authority, even involuntarily conveyed is in stark contrast to the adjudicator's role in the judicial system. For good reason, no adjudicator in a common law system may "inform itself on any matter in such manner as it thinks just" when adjudicating or even when investigating. The OPR however is permitted to do this in the Challenge Proceedings.

It is unfortunately made too easy by this act for someone to mischievously "throw a spanner in the works" in an effort to delay or frustrate the work of a public body.

5. <u>Issues of Local Content</u>
   It must also be noted that the extent of "local content" may be challenged by another state. If that state is a CARICOM member State, it may be a challenge to the CCJ and may be seen to be contrary to the provisions of the Revised Treaty of Chaguaramas.

6. <u>Reliance on Policies- with penalty for failure to adhere</u>
   It is also noted that the Act seeks to rely in some instances on policies. These are not statutory and are subject to interpretation, elucidation and application as well as to change without notice. It must in this context be noted that general failure to adhere to the Act carries personal and real penalties.

7. <u>Power to assess and order damages</u>
   Under section 50(10), the Office in making a decision with respect to any application it entertains, may take a number of actions including requiring payment of compensation for any loss or damages [sic] suffered. This appears to have given the Office the power to assess damages.

8. <u>Can halt public body's procurement activity</u>
   We have also observed that the Act gives supplier/contractors/members of the public numerous opportunities to challenge the procurement activities of a public body (see section 51) . We note that this right may be subject to abuse and can bring the operations of a public body with respect to its procurement activities to a halt.

9. <u>Framework and its adaptability to non-construction/ infrastructure type procurement.</u>
   Despite Regulations for Consultants and other such regulations, the framework of The Act and its processes and requirements have in the main contemplated and been designed to cater for construction type projects. This is hinted by the mention of engineers specifically and the focus on local content and how it is assessed etc. In this regard, we are concerned about the adaptability of this legislation to the procurement of other types.

10. <u>Real potential of the Act to frustrate and hinder the functioning of the courts and other public bodies.</u>
    The legislation does not effectively cater for day to day and low cost or ad hoc procurement, and the operationalisation of some of these clauses run a real chance of hindering and frustrating the functioning of the Judiciary and probably most public bodies. Limiting the application of the Act to very large infrastructure projects at least in the first instance while the operability of the processes and procedures are reviewed and considered may, with respect, be a viable option if there is insistence on proclamation of the Act.

11. Increase in costs to be borne by the State.

Along with the increase in litigation, will no doubt be an increase in awards of costs to be borne by the State. Perhaps a legislative limit to award of costs for these matters may be required. It is to be remembered that many of these matters have the potential to go to the Privy Council as of right.

12. Judiciary mindful of obligations as public body but procurement unit remains unstaffed.

The Judiciary is mindful of its obligations as a public body with respect to the Act and is of the view that its procurement unit which at present consists of one member of staff and one officer, is not resourced to undertake the requirements of the legislation with regard to its own procurement. The Judiciary settled on the design of its unit a little over a year ago after studying its internal processes and developed e-procedures, but its request for procurement unit staff positions has not yet been addressed by the Finance and General Purposes Committee of Cabinet.

13. Judiciary using proper procurement procedures but additional requirements and attraction of mischief are real potential concern

While the Judiciary has been operating with clear procurement processes and systems that will no doubt meet the requirements of the Act, the requirement for reporting, especially in a case in which the details of the reports are not yet clear, the permission granted by the legislation to attract any mischief maker who may actually hinder and delay not only the development of the Court and the operations of the Court, but may invite inappropriate search and non-circumscribed audit are matters of grave concern to an organisation such as the Judiciary and should be to the public at large whose information the Judiciary holds. It is not to be presumed that the procedural provisions in the Act are required for proper procurement.

Potential impact on the Court System

14. Great increase in public law litigation

The operationalisation of the Act will lead to a plethora of disputes of public law including Judicial Review, and of commercial disputes. The Judiciary anticipates and must prepare for an increase in said matters. The Judicial Review Act enables matters to be taken to the Privy Council as of right. The decision making of the OPR is conceivably subject to Judicial Review at every step. It is fairly obvious to the Judiciary that the subject of this legislation will require adjudication without any delay and possibly a dedicated and resourced Commercial Court in the Civil Division. Without this, the functioning of the nation's public bodies may be so hindered as to affect the operations of the State. This we anticipate will require special Rules of Court to be prepared by the Rules Committee.

15. Increase in number of State attorneys available to support the speedy hearings

To support the court's need to move with great alacrity in these matters, there will be a need to increase the complement of the Office of the Ministry of Legal Affairs and to increase the ability to brief private counsel including senior counsel.

16. Small Claims Court with built in mediation and agreements as to service

As the legislation does not have a lower financial limit to its applicability, we have also observed that some civil matters will have to be dealt with in the Petty Civil Court/Small Claims Court. In the circumstances, there is an urgent need for the Small Claims Court with built in mediation and agreements as to service.

17. <u>Reversion to unmanageable workload</u>
After 25 years of seeking to handle its workload by removing from its responsibility matters which it should not have had to undertake, the Judiciary is finally is beginning to be able to implement systems to manage its caseload. These extraneous matters had put an unnecessary strain on the Judiciary's resources. The improvement has been aided by definitive action such as the removal of its massive traffic cases workload and a large number of criminal charges for small amounts of marijuana. It is also seeing steps albeit still gradual, towards being relieved of its licensing portfolio.

The expected workload due to expected adjudication and provision of services to all public bodies arising from this Act, will negative these gains and improvements. This means that the judiciary will require far more resources. Without this, the delays in adjudication in procurement related matters fighting for the same resources as the rest of the Court's caseload can conceivably easily bring the Public operations of the State to a dead halt. The failure and delay will also be placed at the foot of the Judiciary.

We venture to say that even the OPR challenge procedure as it is, without an application for judicial review will delay the Public operations by about six months per procurement challenged.

18. <u>Circumvention of Provisions of Mediation Act inclusive of standards and ethical standards therein</u>
It appears that the OPR is being mandated by the Act to circumvent the Mediation Act and the Mediation Board as no reference is made to mediators being certified under the Mediation Act (see section 13(1)(r). Certification ensures the maintenance of standards and adherence to the Code of Ethics. Also no mention is made of the OPR being an Approved Mediation Agency and thus being subjected to the standards, rules and the code of ethics. This is of grave concern. The purpose of the Mediation Act was to protect the population.

19. <u>Extensive effect on internal processes and operations and need for dedicated legal focus</u>
The legislation appears to be geared to large infrastructure procurement and not to the lower end day to day procurement undertaken by The Judiciary and other public bodies on a regular basis. It is the view of the Judiciary that the effect of this legislation on the processes and operations of the Judiciary (and other public bodies) has not yet been truly understood and that the level of bureaucracy, record keeping, paperwork as well as the staff needed to ensure its proper application are not yet properly assessed. The policy requiring existing staff to undertake this work is unrealistic. There must be recognition of the need for in house attorneys to handle the drafting of contracts and review the preparation of tender documents for every procurement. The responsibility placed on the Procurement Officer and the Accounting Officer is immense and to require them to address it without sound legal support at risk of grave penalty is unwise.

20. The Judiciary is aware that the OPR has put much time and effort into studying and planning its operations, and has addressed certain public bodies along the way. The OPR has probably presumed that public bodies have taken the time and opportunity to develop their internal processes and procedures and their record management and reporting procedures in preparation

for the implementation of this Act. While that may be so for some public bodies, many have not been able to so focus their attention and their change management on it as yet. Further, many organisations and persons are yet unaware of their responsibility on proclamation of this Act. Proclamation without everyone being ready is a recipe for disaster. This is not a piece of legislation that one can implement on the fly. It must be planned for and resourced and at the very least, organisational re-engineering of some kind will be necessary. The Judiciary would respectfully suggest that if proclamation be first limited to procurement over a certain significant value while the operations in public bodies are studied and regulations and possibly amendments are studied for lesser expenditure.

A specific note of interest to the Judiciary

The Judiciary must respectfully note that while all attempts by the Judiciary to be given the opportunity to determine its necessary staffing, job descriptions and structure and to be afforded a greater say in terms and conditions of staff holding unique positions have been met with negative responses, the OPR has been provided with this opportunity. Section 18 states the following,

(1) "The Office shall appoint such staff as it considers necessary for the efficient performance of the functions of the Office.
(2) The staff of the Office shall be appointed on such terms and conditions as the Office may determine."

The Judiciary considers Section 18 of the Act to be appropriate to ensure the independence and efficiency of the OPR and is in agreement with this section. It however notes that the independence of the Judiciary and its need to be afforded this administrative independence is not recognized despite the fact that the Judiciary deals with a far wider remit than does the OPR, requiring independence in fact and de jure.

The following tables itemise comments made according to some of the various provisions.

Section		Comment/Concerns
s. 4	“public money” means money that is— (a) received or receivable by a public body; (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 a public body; (d) distributed by a public body to a person; (e) raised in accordance with a written law, for a public purpose; or (f) appropriated by Parliament;	This definition of “public money” appears to go further than before. include Trust Funds in the care of the Judiciary or other public body. It also at Subsections (b) and (a) infers that it could be extended to grants.
s. 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.	*Application of the Act* a. The CARICOM aspect of the Act’s application must be considered. How does it stand with the Revised Treaty of Chaguaramas? b. There is concern with regard to the need to keep a record of the procurement – how detailed would the information be required to be? There is concern that this borders on micro-management. There is also a concern with regard to reports being laid in the House. It presumes that procurement of this nature is of high financial value. That is not necessarily so. For the judiciary, judicial consultants, court administration consultants, court ICT solutions, judicial training facilitators are selected under agreements such as these including agreements between

Section		Comment/Concerns
	(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 of the House of Representatives who shall cause the report to be laid in Parliament at the earliest opportunity.	and among members of the Conference of Heads of Judiciary, the Commonwealth Magistrates and Judges Association, the National Centre for state Courts, the European Union, the Canadian Fund, and various US and UK funding agencies as well as brother judiciaries. These can carry micro costs or even honoraria. Surely the intent could not be for the bureaucracy of a section 29 report and laying in Parliament to extend to such procurement or to the receipt of two laptops by a public body by a donor agency. It must be noted in this regard that the definition of public bodies would include schools, NGO's, FBO's and CBO's receiving subventions, Do they have to do sec 29 reports for gifts given by donor agencies or have the donor agencies do these section 29 reports? On reading of the legislation, they each have to be laid in Parliament. c. Local content – how does one determine local content? This is wide open to legal challenge. This provision can also be challenged by another state. d. S. 7(3) – If the public body is not doing the procurement, who is required to submit the report? What does "doing the procurement" mean?

Section		Comment/Concerns
s. 13(1)(a),(h) (o), (r)	s. 13(1) The functions of the Office are to— (a) establish a comprehensive database of information on public procurement, including information on tenders received, the award and value of contracts, and such other information of public interest as the Office thinks fit; s. 13(1)(h) audit and review the system of procurement and disposal of public property to ensure compliance with the objectives of the Act; s. 13(1)(r) prepare and maintain a list of pre-qualified mediators, arbitrators and experts for the purposes of alternative dispute resolution under this Act; and	*Functions of the Office* (a) s. 13(1)(a) - What would " other information in the 'public interest"' mean? By a unilateral power to decide this "as the Office thinks fit" being given to the OPR which has constitutional protection, does this give greater credence to the OPR's view than to others? Can this not cause conflict? (b) s. 13(1)(h) - The term 'audit' is extremely wide – can there be a review of this term and can limits be placed on it? (c) S. 13(1)(r) – i) There is no reference to certified mediators. Nor to the OPR being deemed to be a Approved Mediation Agency. The Mediation Act is being ignored by this provision. This circumvents the standards and the codes of ethics of mediators and of Approved Mediation Agencies
s. 14(1)(c)	*Powers of the Office* (1) In the performance of its functions, the Office may - c) issue directions to public bodies to ensure compliance with this Act;	s. 14(1)(c) – what is meant by issuing directions? This scope is extremely wide.
s. 23	*Exemptions* The Office shall be exempt from stamp duties, corporation taxes, customs duties, value added taxes, motor vehicle taxes and all other taxes, charges, levies and imposts.	The OPR appears to have greater exemptions than the Judiciary.

Section		Comment/Concerns
s. 24(2)(c)(v)	*Report of the Regulator* s. 24*(2)(c)(v)* with respect to the procurement for a project, a brief description, the awardee, the value, the scope of works and the expected deliverables of the project;	Should this subsection perhaps be read 'procurement "in" or "on" a project' and not 'procurement for a project'?
s. 28	(1) A procuring entity may limit participation in procurement proceedings to promote local industry development and local content. (2) A procuring entity, when first soliciting the participation of suppliers or contractors, shall declare whether the participation of suppliers or contractors is limited pursuant to this section and the nature of, and reason for the limitation. (3) A declaration made under subsection (2) shall not be altered.	*Participation by suppliers or contractors* How does this comply with the Revised Treaty of Chaguaramas establishing the CARICOM including the CSME?
s. 29(b), (c)	Due diligence s. 29(1) A procuring entity shall ensure that suppliers and contractors— (b) are not insolvent, in receivership, bankrupt or being wound up, their affairs are not being administered by a court or a judicial officer, their business activities have not been suspended and they are not the subject of legal proceedings for any of the foregoing; (*(c)* have not been convicted within the past ten years of corruption or fraud related offences locally or internationally—	*Due diligence* S29 (1) (b) places an onerous task on the Judiciary to provide this type of information for almost every procurement being undertaken by any public bodies. The Judiciary will have to resource this. 29 (1) (b) Business competition can be nasty and the opportunity for a competitor to initiate legal proceedings against someone in order to oust their competitor is not far-fetched. This requires ensuring that the person who may be the subject of legal proceedings has a right to be heard, be given the benefit of doubt, and to seek an expedited trial. For this the Commercial Court and special rules will be required.

Section		Comment/Concerns
	(i) as individuals; or (ii) as directors or officers of a company;”.	29 (1) (c) –While this section was amended to limit it to corruption or fraud related offences locally or internationally in the last ten years, this may still run counter to what we are seeking as a nation to do with rehabilitation. It locks people out of work and rehabilitative activity if it does not distinguish between minor offences such as bouncing a cheque or other such thing and major offences. There are no limits given in the section to the type of offences for which people may have been convicted. There may be the need to also limit this to allow them to be involved in a bid for small values such as under 20,000. Providing this information required under 29 (1)(c) to public bodies for almost all procurement is a formidable task and it must also be expected that the Judiciary may be required to use its good office to address international queries in countries in which the source of this information would be brother judiciaries.
s. 36(2)	*Public notice of the award of a procurement contract or framework agreement* s. 36(1) Upon the entry into force of a procurement contract or conclusion of a framework agreement, a procuring entity shall promptly publish on its website or in any other electronic format, notice of the award of the procurement contract or the framework agreement, specifying the name of any supplier or contractor with	s. 36(2) – the words “or in any other electronic format” do not explain nature of publication. While publication on its website is publication to the world at large, “in any other electronic format” is not. Who would the complaint be made against? What is the effect of such a complaint? Can this not lead to coordinated efforts to complain about a procurement thereby delaying it or bringing it to a halt.

Section		Comment/Concerns
	whom the procurement contract or framework agreement was entered into, the goods or services to be supplied, the works to be effected and, in the case of procurement contracts, the date of the award of the contract and the contract price. (2) Where the information referred to in subsection (1) is unavailable, a complaint may be made to the Regulator.	
s. 39	*Confidentiality* (1) In its communications with suppliers or contractors or with any person, a procuring entity shall not disclose any information if non-disclosure of such information is necessary for the protection of essential security interests of the State or if disclosure of such information would be contrary to law, would impede law enforcement, would prejudice the legitimate commercial interests of the suppliers or contractors or would impede fair competition, unless disclosure of that information is ordered by the court and, in such case, subject to the conditions of such an order. (2) Other than when providing or publishing information pursuant to this Act, a procuring entity shall treat submissions in such a manner as to avoid the disclosure of their contents to competing suppliers or contractors or to any other person not authorized to have access to this type of information. (3) Any discussions, communications,	Is this subjective or objective? – who makes the determination?

Section		Comment/Concerns
	negotiations or dialogue between a procuring entity and a supplier or contractor shall be confidential, unless the disclosure is ordered by the court or required by law. (4) Subject to subsection (1), in procurement involving classified information, a procuring entity may— (a) impose on suppliers or contractors requirements aimed at protecting classified information; and (b) demand that suppliers or contractors ensure that their sub-contractors, directors, officers and employees comply with the requirements aimed at protecting classified information.	
s. 42	*Power to obtain information and documents* (1) Where the Office considers it necessary or desirable for the purposes of performing or exercising its functions, powers, or duties under this Act, it may, by written notice served on any person, require the person— (a) to supply to the Office, within the time and in the manner specified in the notice, any book, record, document or information specified in the notice; (b) to produce to the Office, or to a person specified in the notice acting on its behalf in accordance with the notice, any book, record, document or information specified in the notice within the time and in the manner	(a) The powers listed appear to be so wide as to cause concern. This is akin to an anton pillar order which is made by a court in the very rarest of circumstances and which has protections afforded by common law. (b) This however seeks to give to the OPR apparent unlimited power to summon, subpoena both ad testificandum and duces tecum. It does not take into account relevance nor the laws of evidence or privacy. It is unwise that such a power be given to a person or body without the preliminary supervision and clearance of a court of law. (c) Privilege of the Judiciary must be taken into account. (d) In the wrong hands, these powers can be extremely dangerous.

Section		Comment/Concerns
	specified in the notice; (c) if necessary, to reproduce, or assist in reproducing, in usable form, information recorded or stored in any book, record or document within the time and in the manner specified in the notice; or (d) to appear before the Office, or a specified person, at a time and place specified in the notice to provide information, either orally or in writing, and produce any book, record or document specified in the notice. (2) Information supplied in response to a notice under subsection (1)(d) shall, if given in writing, be signed in the manner specified in the notice. (3) If a book, record or document is produced in response to a notice under subsection (1), the Office, or the person to whom the book, record or document is produced may examine and make copies of the book, record or document or extracts thereof. (4) The Office may require a person to give orally or in writing, information on oath or affirmation and may administer an oath or affirmation at any place. (5) A person who is required to provide information under this section may be represented by counsel and may claim any privilege to which the person is entitled. (6) Where a person who is required to appear before the Office or give information fails or refuses to appear or provide information without lawful justification, the Office may make an application to the High Court to compel the person to do so.	

Section		Comment/Concerns
s. 43(3)	*Investigations by the Office* **Any officer in the service of the Office and authorised by the Regulator in writing** (hereinafter referred to as an "authorised officer") may, for the purpose of conducting an investigation into any alleged or suspected breach of this Act— *(a)* examine and inquire into the affairs of a public body or person in respect of whom the investigation is being conducted; *(b)* examine and make copies of, or remove from the premises, all such books, records and documents or other things relating to the subject of the investigation, whether or not they are in the possession or control of the person in respect of whom the investigation is ordered or of any other person; or *(c)* subject to subsection (3), **enter the premises of a public body or person during reasonable hours.** (2) Any book, record or document removed under subsection (1)*(b)* shall be returned to the public body or person from whom or to the premises from which it was removed, as soon as practicable. (3) An authorized officer shall not enter the premises of a public body or person, unless the Office first obtains, on an *ex parte* application to a Judge of the High Court, an order authorizing him to enter the premises to conduct an investigation under subsection (1). (4) An authorized officer shall provide the Office with a full and complete written report of the investigation including any transcript of statements	If this is civil search, it is extreme powers given to the Regulator and to the "authorised officer". Powers of civil search are closely circumscribed by the law and managed by courts. While mention is made here of not being allowed to enter except by order of the court, there are no limits which are stated to which a court has recourse to deny such a request made exparte. The mention of the court's order seems to be merely giving lip service to the involvement of the court. If it is towards criminal action, There is no requirement for the "authorised officer" to show any reasonable suspicion of a criminal act. It places in the hands of an "authorised officer" simply appointed by the Regulator to purport to gather evidence in a criminal matter without any proper procedure. If a criminal matter is subsequently pursued, the evidence may have been tainted and probably deemed inadmissible. This will render criminal actions impossible. A Machiavellian mind may even consider doing it to undermine a criminal investigation. These are powers of search which are greater than those given to the police! The removal of books, records, documents from a public body unlike the power to enter the premises of a public body **or person,** is completely unfettered by the requirement to make application to the court. It is completely in the hands of the "authorised officer"!

Section		Comment/Concerns
	and any material in his possession relating to the investigation. s. 43(3) An authorized officer shall not enter the premises of a public body or person, unless the Office first obtains, on an ex parte application to a Judge of the High Court, an order authorizing him to enter the premises to conduct an investigation under subsection (1).	In sum, NB. This gives to anyone authorised by the Regulator power to remove books, records or documents or other things that they subjectively feel to be the subject of an investigation that they choose to conduct, wherever these books records, documents, or other things are and to return them when they consider it practicable. Please be reminded of the definition of public bodies and public-private partnerships. Public bodies include the Office of the President, The Cabinet Secretariat, the Office of the Prime Minister, the Ministry of National Security, the Office of the DPP, the Judiciary etc. Public–Private partnerships apparently includes banks.
s. 44	*Outcome of investigation* s. 44 After conducting an investigation under this Act, the Office shall without delay, in writing, inform the affected parties and the Minister, the Chief Secretary or public official having responsibility for that body, of the result of that investigation and make such recommendations as it considers necessary in respect of the matter which was investigated.	It would appear that the investigating body is also the adjudicating body.
s. 50(3)	*Application for review by the Office* s. 50(3) Within fourteen days after receiving the recommendations of the disposal committee, the accounting officer shall give the committee a written notice as to whether the accounting officer accepts or rejects the recommendations of the committee and	S. 50(3) needs further consideration – there is a concern about confidentiality.

Section		Comment/Concerns
	where the accounting officer rejects the recommendations, he shall include in the notice written reasons for the rejection.	
s. 56	*Procedure for disposal* 1) A public body shall refer all matters relating to the disposal of unserviceable, obsolete or surplus stores or equipment to its disposal committee. (2) A public body shall comply with subsection (1) within a reasonable time after the stores or equipment become unserviceable, obsolete or surplus. (3) Within fourteen days after receiving the recommendations of the disposal committee, the accounting officer shall give the committee a written notice as to whether the accounting officer accepts or rejects the recommendations of the committee and where the accounting officer rejects the recommendations, he shall include in the notice written reasons for the rejection. (4) If the accounting officer accepts the recommendations of the disposal committee, the stores and equipment shall be disposed of in accordance with those recommendations. (5) If the accounting officer rejects the recommendations of the disposal committee, he shall,	This section does not contemplate public bodies not under ministerial control.

Section		Comment/Concerns
	after consultation with the Minister with responsibility for the public body, determine the manner in which the stores or equipment shall be disposed of and give the Office a copy of the notice under subsection (3) and inform the Office, in writing, of his decision under this subsection and his reasons therefor.	
s. 59(5)	*Conduct influencing public officer* s. 59(5) A procuring entity shall not include in a solicitation document any condition or specification which is likely to favour a particular supplier or contractor.	S. 59(5) may need further examination. Compatibility issues exist. These sometimes need to be taken into account.

Public Procurement and Disposal of Public Property, Records of Proceedings (No. 2), Regulations 2021 - *3114*

	Section	*Comment/Concerns*
s. 5	1) A record shall be prepared and disclosed in a manner that avoids the disclosure of proprietary commercial information. (2) A record shall, upon request, be made available to any person after a submission has been accepted, unless any portion of the record is required to be disclosed earlier pursuant to law, or by order of the Office, Public Procurement Review Board, a competent court or a duly appointed arbitrator. (3) A record shall be kept for a minimum period of seven years following completion or termination of the contract or the cancellation of a procurement proceeding save and except for any investigation, litigation or review by the Office or any competent authority.	*Disclosure and retention* (a) S. 5(2) there is concern over the word ‘shall. What is the record that is available? – is it that we produce a full copy of the record as required in section 4? (b) Sec 5 (2) what is a duly appointed arbitrator? Who decides whether it goes to court or to arbitration? (c) There does not appear to be any procedure for making the request. Will there be any scope to refuse disclosure for any particular reason? (d) S. 5(1) is wide in scope

Section		*Comment/Concerns*
s. 7	Representation A party to a review may appear in person or may be represented by an Attorney-at-law or such other suitably qualified and experienced person, including an engineer, quantity surveyor	There are concerns about the adaptability of this section to other types of procurement as this section would imply that the focus is on procurement in the construction industry.
s. 9(1) and s. 9(4)	Submission of reply s. 9(1) Pursuant to section 50(5) of the Act, the procuring entity against whom the application for review is made shall, within three working days of the receipt of the notification from the Office, submit to the Office the following documents: (a) a written reply to the application for review prepared and signed by the Accounting Officer or its equivalent in a public body; (b) a copy of documentary evidence relied upon in support of the reply; and (c) any other document referred to in the application for review which is in its possession but not available to the supplier or contractor who made the application for review.	S. 9(1) – three working days appears reasonable but given s. 9(4) there is concern of when one receives the notification and how it is served. This section may result in a procurement and all its activities coming to a halt pending a review. It also gives the Office the right to determine which state procurement are urgent and which are not – the office does not appear to have this power and should not have such power. The procuring entity and or the Cabinet should be the only ones with the power to make a determination of priority of a procurement.
	s. 9(4) The Office may, if it is satisfied that the application for review was duly served on the procuring entity against whom the application for review is made and the procuring entity failed to submit a written reply without good cause, the Office may proceed with its deliberations on the basis of the evidence before it as if such proceedings had been conducted in the presence of all parties.	The question of service is a technical one and is grounded as well internationally in various treaties. Nothing here speaks to the manner of service that will be deemed good service.

Section		Comment/Concerns
s. 11	*Suspension* 1) Within three working days of the receipt of an application for review, the Office shall convene to consider whether or not the procurement proceedings should be suspended. (2) The Office shall comply with the provisions of the Act, and in particular sections 50(4) and 50(7).	*Suspension* (a) There are concerns of a procedural issue as a decision by the Office will be ex parte. The objecting entity will not have all of the relevant information when making their application. As the Office is not a court, they will not be bound to adhere to rules of evidence, or to binding precedent nor to the common law contractual or tortious principles.
s. 14(5) and s. 14(6)	*Evidence* (5) The standard of proof to be applied in challenge proceedings shall be that required in a Court in civil matters. (6) In the hearing of any matter before it the Office may act without regard to technicalities and legal form and shall not be bound to follow the rules of evidence stipulated in the Evidence Act, but the Office may inform itself on any matter in such manner as it thinks just and may take into account any generally recognized scientific or technical fact, information or opinion within its area of expertise and such facts as it considers relevant but in any such case, the parties shall be given the opportunity, if they so desire, of adducing evidence in regard thereto.	Sec. 14(5) and s. 14(6) appear to be in conflict: on one hand the standard of proof is that in a civil court matter yet the Office may act without regard to technicalities and legal form and shall not be bound to follow the rules of evidence. While section 14(7) appears to remedy the conflict in ss. (5) and (6) however the provision only speaks to ‘privilege under the law of evidence’. This section, along with others sees the Office shifting its role from that of the regulator to the adjudicator.

Ineligibility proceedings – *3116*

Section		*Comment/Concerns*
s. 2	Definition of 'Senior Officers' "senior officer" means a managing director, chief executive officer, chief operating officer, deputy managing director, president, vice-president, secretary, treasurer, chief financial officer, financial controller, general manager, deputy general manager, corporate secretary, chief accountant, chief auditor, chief investment officer, chief compliance officer or chief risk officer;	The definition of senior officers, suppliers and contractor is very wide. It includes most of the senior positions in a company. It however can be avoided by using terminology that is not captured here since this cannot b an exhaustive list
Consideration for s. 2	Please see comment.	Although the parent Act, s. 16, defines 'Committee' it should ideally also to be defined in the regulations.

	Section	*Comment/Concerns*
s. 4	*Price Factor* (1) A submitted price may be adjusted for the quantifiable evaluation criterion if it is specified in the bidding document. (2) A quantifiable evaluation may include: (a) the period for completion of the work or service or delivery of the good; (b) the life-cycle operating costs; (c) the need for after-sale service or technical assistance; (d) the need for the supply of spare parts related to the use of the good; (e) the payment terms; (f) the optional items required in the bidding documents; and (g) the extended warranty. (3) A life-cycle costing method, which establishes the total cost of ownership, should be used whenever possible, and in particular where the cost of operation or maintenance of the good or work, over its specified lifetime – (a) is estimated to be considerable when compared with its initial cost; and (b) may vary among different submissions.	The set up as is, is for a certain type of procurement at a certain value. If this is required for all the procurement that is done, the entire system will come to a halt.

	Section	*Comment/Concerns*
	(4) A life-cycle costing method, is evaluated on a net present value (NPV) cost basis. (5) Where a procuring entity uses a life-cycle costing method it shall specify the following information in its bidding document: (a) the number of years used in determining the life-cycle cost; (b) the discount rate, in percentage, to be used to calculate the net present value of future costs over the life-cycle period as specified; (c) the factor and methodology to be used for calculating the operation, maintenance, or disposal cost of the good, work or service; and (d) the information to be provided by a supplier or contractor in his bid.	
*Other general comments		The word ‘may’ appears frequently –clarify needed: if this type of evaluation Is not used, what is the impact or the repercussions?

	Section	*Comment/Concerns*
s. 4	(1) The Office may, by guidelines, establish different thresholds to be used for different methods of procurement. (2) A procuring entity may establish specific threshold values in special guidelines and handbooks. (3) The total value of a procurement shall be estimated as stated in items (a) - (d), below, or as from time to time may be specified by the Office: (a) in the case of the procurement of works, the total value of works and related services required to fulfil an economic and technical function shall be taken together, in order to ensure transparency of the total expenditure; (b) in the case of the procurement of recurring goods or services which are to be awarded over a given period of time, the total aggregate value of the contracts with similar characteristics to be awarded within twelve (12) months following the first award; (c) in the case of a framework agreement, the estimated value of all contracts to be awarded under the framework agreement; and	Clarification is needed on this section as it seems to suggest that the procurement method should be determined by the estimated total value of the lots: i.e. one still has to do an invitation to bid. This section seems to have a different intent than what is expressed in section 5 on the procuring entity dividing the procurement.

	Section	Comment/Concerns
	(d) where options are specified, the estimated value of the options are to be included in the total estimation. (4) A procuring entity shall not divide the procurement of goods, works, or service which can be procured as a single contract with the intention of avoiding a particular method of procurement, or the benefits of economies of scale, or avoiding the obligations under the Act, including, where the award of several separate contracts would: (a) create problems of compatibility or interchangeability between items procured as separate lots, or would unduly strain contract administration resources; (b) invalidate or otherwise restrict any provider's warranty or liability; or (c) increase the cost of servicing, maintenance or similar requirements. (5) A procuring entity may divide procurement or disposal requirements allocated to a single procurement process into separate lots where: (a) the requirements are broadly similar or related and the division offers clear and calculable economic or technical advantages; or (b) it is anticipated that the award of several separate contracts would result in the best overall value for the	

	Section	Comment/Concerns
	procuring and disposing entity, in keeping with the objects stated in section 5 of the Act. (6) Where procurement or disposal requirements are divided into lots which may result in separate contracts: (a) the choice of a procurement method shall be determined by the estimated total value of all the lots; and (b) the procuring entity shall permit tenderers to tender for a single lot, any combination of lots or all lots. (7) Without limitation to sub-regulation (6), the choice of the procurement method may be determined by the estimated value of each individual lot where market conditions determine that alternative procurement methods would better achieve the objects of the Act.	

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