

## **Public Procurement and Contract Administration Bill 2012**

### **1. Definitions:**

- a. Works: the definition of services associated with works is not consistent with usual practice. For example, site preparation, excavation, demolition are all actual works, and not services.

### **2. Regulations:**

For such and important Act, and given some 15 months since the first reading, a significant amount of regulations should be drafted and be up for public consultation before this reading.

### **3. Part 1, Purpose**

- a. **Sec 3 (d): It is suggested that should include some specific mechanism:**

***to foster and encourage broad participation in the procurement proceedings by persons in Dominica by, among other things,***

(i) providing information about pending, current and past procurement activities to the general public, and

(ii) encouraging the development of a cadre of skills and local entities in order to provide the competitive base for procurement activities;

### **4. Part 1, Sec 4: Application**

- a. **The Act should cover procurement by**

- i. companies in which the Government is the majority shareholder which are not necessarily department of Government or Statuary bodies,
- ii. procurement for which the government guarantees funding or otherwise provides the finances to private companies or utilities.

### **5. Division 2, Sec 8:**

- a. **Subsection 8(1)(f).** *In consultation with representatives Builders' and Contractors' Association of Dominica (BCAD) and DAIC, it was agreed with the Financial Secretary that the representative of Civil Society would be jointly appointed by Dominica Association of Professional Engineers (DAPE) and DAIC. (See Bill read in 2011).*
- b. **The preference of the private sector entities was for one member each taken from DAIC and the Construction sector.**
- c. **The compromised position, though agreed and confirmed in written, was removed from the 2012 version of the Bill without any communication to these organisations.**

### **6. Part 111 - Exemptions**

- a. **Sec 21(1) (d) - Part Exemption of utilities.** *Allowing these to be subject to the Act would create opportunities for new licenses and growth in these*

sector fostering entrepreneurships. The following would result if these were subjected to the act

- i. Fostering growth in renewable energy sector by allowing new players to be able to provide alternative energy and water supply to government agencies, especially in remote locations.
  - ii. Creating further competition in these sectors.
- b. **Sec 21(1) (e).** - Exemption of catering –There should be a threshold, however it should fall under small procurement, Sec 40.
  - c. Exemption of services – Sec 21 (2) (d), (e) (f) and (h) should be governed by Sec 21 (2) (i).

## 7. Part V - Procurement Procedures.

### 7.1

- a. Sec 34 requires that “ ... **a procuring entity shall use open competitive bidding as the principal method of procurement.**” Therefore some of these justification for restrictive bidding given in Sec 33 needs tightening up to ensure competition. Some are simply not grave enough!
- b. **Sec 33(3) (a) and Sec 33 (4) (a).** That is the problem here ... if there is a limited set of known players, to foster greater competition, every opportunity should be used to encourage the coming forward of those developing skills and capacity in that area. Hence there should be opportunity to upgrade that list by post-qualification. In addition to direct solicitation of known players, therefore, there should also be general solicitations by advertising in accordance with Sec 41 (with amendments as suggested). ***Advertise it in the usual way, even if those known are invited.*** There may just be a new player who may bid, or someone else may be stimulated to develop capacity to meet a similar opportunity next time.

*Not sure what 33(3) (a) (ii) is directed to capture: If it is small procurement, then 33 (3)(b) deals with that.* The aim is to get value for money and allow opportunities that foster and encourage participation and growth in the private sector ... **purposes of Act Sec 3, especially (b), (c), (d), (h) should always be at the fore.**

**33(3) (a) should be deleted and left to open tender in accordance with 34 (1).**

- c. **Sec 33(3) (b) and Sec 33 (4) (b).** Some reference should be made here to Sec 40 – small procurement. Importantly, no reference is made here to the source of the “five suppliers” in Sec 33(4)(b). This should include reference to the list from Sec 10.(1). Also it ought not be limited to “suppliers” but include contractors and service providers.

***In the spirit of the Act taken as a whole, there is no requirement for Sec 33 (3) (b) given subsection 33(3) (c). Therefore, Sec 33(4) (b) should rightly make reference to the current or renumber Sec 33 (3) (c).***

- d. **Sec 33 (4) (d).** Sec 13 of the 2010 version of the Bill had that “*the Board has the sole responsibility for making procurement having a value equal or greater than a prescribed value*”. This section was removed, however, this responsibility should have been given to the Central Procurement Unit under Sec 14 (i) subject to Sec 10 (1) (e). Further, these large public procurements should only be done through competitive bidding if there is a chance to get the

best value for money. For Large procurement events, a small percentage in bid or contract price is a large magnitude. Therefore, this sub-section 33 (4) (d) should be deleted, as there is unclear justification and defeats the very purposes set out in Section 3, and control under Sec 10 (e). The procedure for dealing with large value or complex procurement is also well covered in Sec 45(1) and continuing – pre-qualifications.

## 7.2 Sec 34

- a. While *Sec 34(1)* is lofty, the *Sec 34(2)* and *34(3)(b)* significantly limits the competitive environment that would otherwise be created under Open Competitive Bidding.
- b. *Sec 34(2)(b)* actually dictates that restricted open competitive bidding is to be used ***ONLY after restricted*** bidding is attempted within the local market comprising Dominica and the OECS! In other words, the procurement norm should be restricted bidding, and if that fails, open competitive bidding is used to attract players from outside Dominica *as well as those inside who were not invited to bid.*

While this may in theory augur well for the local players, the recent practice, and the lack of consultation on any draft regulations to govern the management of the list under section 10(1), including the fair rotation of those to be invited to bid from these lists, this subsection may afford the creation of an environment where non-transparency and absence of competition may legally be permitted to exist within the local market.

- c. *Sec 34(2)(c)* is simply not necessary as Open Competitive bidding is available to all players, domestic or otherwise unless restricted to domestic players under sec 33(5). If the occasion of 2(c) comes up, then further broader advertisement in the re-bid process is all that is necessary. These two sub-clauses (b) and (c) should be deleted and replaced by the reconstructed sub-clause suggested below.
- d. ***New Subsection: 34(7): Where there is no response from domestic suppliers and contractors to open competitive bidding under subsection (3) and the goods, services or works can be obtained from international suppliers and contractors, the procuring entity shall publish the invitation to re-bid or further pre-qualify in a selected international media with wide circulation and in any newspaper with wide circulation in Dominica or any other Member State of the OECS.***
- e. *Sec 34(2)(b)(i)*: Therefore this section should be only concern with advertisement within Dominica and the OECS, given that anyone can have access to any print media from anywhere by subscription or otherwise. It probably could read

***“on the Government Website and in any newspaper with wide circulation in Dominica and/or the OECS or selected international media”<sup>i</sup>***

- f. **Sec 34(4):** This exception does not necessarily secure the best opportunity for the State. Where a potential of commercial production is possible, open competitive biddings should also be the route. Take the example of *West Indies Power* in Soufriere ... a well thought out open tender for geothermal research and production could probably have landed a better deal from a license. The regulations should address this.

### 7.3 Sec 35

- a. **Sec 35 (3) & (4).** Essentially, the revision of these subsection should ensure
- a. that this form of bidding should normally be done under open competitive bidding,
  - b. that small procurement (for consultancy services) should consistently be done in accordance with section 40
  - c. that there should be maintained only **ONE** shortlist of consultants for Public Procurement compiled and managed by the CP Board under section 10 (1). *If amendments are not made, there will be a multiplicity of lists and lack of transparency, and hence the purposes under Sec 3 (b), (c), (e), (h) and (i) would not be realised.*
- b. **Sec 35(6)(c):** this subsection should be specified to separately capture weighted rating for local knowledge and expertise. Local knowledge and expertise is standard criteria in many international consultancy procurement, including EU projects let locally. This is non-discriminatory and is different from participation captured in Sec 35(6)(f). A citizen or national of Dominica does not necessarily has professional expertise in the local environment.
- c. **Sec 35(8) (a) and (b):** Sub-section (8)(a) is concerned with acceptable quality, marked by attaining a minimum score, and thereafter best (lowest) priced. Therefore reference should be made to Subsection (2)(b),(c), or(d).  
*Similarly*, Sub-section (8)(b) is concerned with highest quality, marked by attaining a highest technical ranking or score, and price becoming irrelevant. Therefore reference should be made to Subsection (2)(a), quality only.
- d. **Sec 35(14):** Except in the case where there is an existing consultant who knows the details of the requirements, it will take the same time to prepare the information under request for one or few bidders. The capacity and *efficiency of return of proposal* should be allowed to determine the practicality; this should not be pre-empted. Not sure why this subsection is necessary when one considers the context of Subsection (2) and (7).

### 7.4 Sec 37

- a. That there has to be a clear method to ensure that every sole source procurement event *is advertised* in the usual manner for open competitive bidding and time given to parties who can supply the requirement in another manner.
- b. This will allow *otherwise unknown players* to come forward, thereby increasing competition. The knowledge that someone else can put a proposal can only benefit the government and allow growth.

### **7.5 Sec 38:**

- a. Notwithstanding subsection 39(4), the section should provide more control and oversight by the Board or Central Procurement Unit. There should be a short period in which the procurement entity ought to submit a written explanation/report to the Board or CPU. The Board/CPU should be able in quick response after review of documentation, to approve, request modification of, or terminate any emergency procurement event.

### **7.6 Sec 38:**

- a. **Section 40(5)(a):** Correct reference to list kept by Board to Section 10(1)

### **7.7 New Sec 40.X: Bidder Initiated Procurement.**

- a. Public Private Partnerships and or similar procurement methods have been used throughout the world to provide services to the public or government. The Act does not address any bidder-initiated procurement.
- b. The suggested procedure can generally be as follows:
  - (1) Where a procurement effort is initialled by a contractor, supplier, or service provider to fulfil an actual or perceived need, or present a solution to a problem, including any of various proposals submitted as public private partnership, the procurement entity shall not enter into any procurement contract with that contractor, supplier, or service provider unless:
    - i. It has required the presenting contractor, supplier, or service provider, if it has not done so as part of its proposal, to provide the brief or salient facts of the proposal with associated specifications which are developed to fulfil the need or present the solution contemplated,
    - ii. It has carved out from the presentation or the further information presented in (i) above, a bidding document it would have itself developed to fulfil the need or present a solution to a problem,
  - (2) Seek competitive alternative bids using the documents developed in (1) ii. above in accordance with section 34 and 41 of this Act, giving a response time of not less than X months, paying due attention to the extent of the requirement.
  - (3) Where the Board has approved the implementation of the procurement action to full fill the need or provide a solution, the procurement entity shall enter into a contract with a contractor, supplier, or service provider in accordance with section 45, giving a N% advantage to the initiator of the procurement process.

## **8. Part VI – Bidding Processes**

### **8.1 Sec 41 – Advertisement.**

- a. **Sec 41 (1) (a) & (b): Advertising – to encourage local participation, competition and growth.**

Local print publication ought to be mandatory, at least as provide for in Subsection 12(1)(d), a notice of publication on Government website. Gazette publications has limited circulation *and are often late*. Example, Gazette of 28 April 2011 reach post office sorting section on 11 May 2011. Gazette is reading material in very few Government offices, if any.

- b. Advertising should also be for public information and to encourage transparency.
- c. Bid events which follow pre-qualification (two stage process) should be advertise. This creates avenues for sub-contract work and formation of alliances.
- d. Results of all bid events should be published, including all awards of contracts. This helps in transparency and help in movement of skills locally.

### **8.2 Sec 45 – Pre-qualification.**

- a. It is assumed the request to pre-qualify is a request for bids, hence these should be advertised as a bid event.
- b. **Sec 45(6).** Bearing in mind the concerns of subsection (c) to (e) that persons who prequalify may either not continue to prequalify or shall not be available, the result of any prequalification process should have a finite life. Hence after a period of 6 months (if Sec 51(1) applies to pre-qualification bids), the State should avail itself of new players and likewise, new players should be given an opportunity to pre-qualify. This would ensure that when the works are presented for bidding there are sufficient players to allow a fair level of competition. *This is taken care of if Section 51 applies.*

### **8.3 Sec 49 – Closing and time for Submission of Bids.**

- a. **Sec 49(2) (a)** makes the action of (b) impossible unless the bidder identification is on the outer envelop. (Regulations needed)

### **8.4 Sec 58 – Cancellation of Bids.**

- a. **Sec 58(1) (b):** “Substantially” - A more finite or tangible term is preferred. This would simplify the operations by the procurement entity which would seek the Financial Secretary’s blessing if more funds can be made available. This also provides a status guideline to bidders at opening. Above **X** % over the applicable estimate the bids are rejected. (regulations needed)

### **8.5 Sec 60 – Qualification for Award**

- a. **Sec 60(6):** Error with cross-reference.

### **8.6 Sec 62 – Maintenances of Records**

- b. **Sec 62(1) &(3):** There should be at least a time limit in subsection (1). Subsection (3) nullifies the responsibility and permits “shredding” material when convenient. Is the failure to keep then to be considered as breach, with associated penalties, under Part IX? This legalised irresponsibility should be struck out! Legitimate reason will be acceptable in a court.

## **9. Part VII – Contract Administration**

### **9.1 Sec 70 – Termination**

- a. **Sec 70(2) & (3):** The Act provides for the Government compensation and remedy for a contractor’s default but limits any other law to allow the

contractor's remedies except for reimbursement of costs. This provides a situation where:

- a. **This provision can be abused, and**
- b. **Normal provisions in internationally accepted forms of contract is set aside.**

There should be cost implication for termination for convenience of either party. This has to be over and above actual cost incurred and should include a percentage of the value of the unexecuted part of the contract.

## **9.2 Sec 72 – Dispute resolution**

- Amicable settlement shall be encourage
- Final resolution should be by arbitration – needs to be stated.

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***Comments by a BCAD-DAPE Team reviewing the Bill before its final reading  
Nov 2012.***

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<sup>i</sup> Publications in Dominica is accessible to anyone anywhere in the world, and therefore does not limit the participation of international players. Any regional or international player who wishes to participate in public procurement in Dominica simply has to subscribe to or keep abreast with local publications and websites. However, if initially procurement events are always deliberately advertised internationally it may cause domestic players a certain unfair level of increased competition. It is imagine that there is a desire to fulfil the purpose in Sec 3 (d). **Hence justification for the desire and cost to publish outside Dominica should only arise when there are no responses to a local publication.**