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THE UNIVERSITY OF ZAMBIA
SCHOOL OF LAW

I recommend that the obligatory essay prepared under my supervision by Sitali Collins Mabuku entitled: “***PROCUREMENT OF CONSTRUCTION PROJECTS IN ZAMBIA: a legal overview of the public sector approach***”

be accepted for examination. I have checked it carefully and I am satisfied that it fulfills the requirements relating to the formality laid down in the regulations governing obligatory essays.

Date:

8th May 2000

Signed:

Mr. Leonard Kalinde

Mr. Leonard Kalinde

SUPERVISOR

QUOTATION

“Law is law ... and as in such and so forth, and hereby, and aforesaid, provided always, nevertheless, notwithstanding. Law is like a country dance, people are led up and down in it till they are tired. Law is like a book of surgery, there are a great many terrible cases in it... Law is like a homely gentlewoman, very well to follow. Law is also like a scolding wife, very bad when it follows us. Law is like a new fashion, people are bewitched to get into it; it is also like bad weather, most people are glad when they get out of it”.

Per George Alexander Stevens (1799)

PREFACE

The role that the construction industry plays in the economy is significant not only in terms of investment but also in terms of output and employment. Construction is an investment industry; its products are wanted not for their own sake but for the goods and services which they can help create.

Since independence, the public sector in Zambia has played a major role in the construction industry. Unfortunately, it seems apparent that implementation of construction projects by the public sector has become an expensive and risky adventure with work taking a long time to get started and delays, disputes and extra costs prolonging the agony.

Several factors have made the subject matter of public procurement of construction projects prominent in recent discussions among government policy makers, academics and the business community, particularly the construction companies and consultants in private sector such as Architects, Engineers and Quantity Surveyors. In addition bilateral donor agencies and international financing institutions such as the World Bank, are demanding economic and efficient procurement of construction projects funded by them.

With all the above factors in mind, is the legal framework surrounding the procurement of construction projects by the public sector in Zambia a positive factor in achieving the projects' objectives in particular and the public procurement policy objectives in general?

In this regard, it is hoped that, this paper will make a meaningful contribution to the consolidation of the laws relating to the procurement of construction projects by the public sector in Zambia.

DEDICATION

To mum and Dad for making me what I am: and to my wife for coping with that which I am.

ACKNOWLEDGMENT

My heartfelt gratitude go to my supervisor, Mr. Leonard Kalinde of the faculty of Law at the University of Zambia, without whose guidance this paper would not have been completed.

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INTRODUCTION

This paper is divided into five chapters. In the first chapter a discussion of the construction industry in Zambia has been undertaken. Emphasis is laid on its importance in relation to the national economy; its composition and its past and present performances.

Chapter two analyses the concept of procurement as applied to the public sector generally and to the construction industry in particular. The discussion centres most on the various public procurement policy objectives typical to most governments. The term public procurement has been defined and the various bodies subjected to public procurement have been highlighted.

The third chapter discusses the construction project procurement cycle; specifically examining the organizational structure used by the public sector to acquire construction projects.

The main thrust in the fourth chapter is on the legal environment surrounding the project procurement process. It has been shown that the project procurement process together with the institutional and administrative structure upon which it rests cannot exist in a vacuum. It is supported by a legal framework. All the existing laws that impact on public procurement of construction projects have been examined. Particular emphasis has been put on the Zambia National Tender Board Act together with its subsidiary legislation encompassed in statutory instruments.

The fifth and last chapter is an attempt to summarize the entire research in very few words. It begins with a number of recommendations which, in the view of the writer can add to the perfection of the legal environment surrounding the procurement of construction projects by the public sector. The idea is to come up with a legislation that will address the subject matter of public procurement in a manner more reflective of the current situation in our country. It ends up with conclusions drawn from the research.

CHAPTER I

THE CONSTRUCTION INDUSTRY IN ZAMBIA

1.1 INTRODUCTION

This chapter discusses the construction industry in Zambia. It looks at its composition, importance, past and present performances, and outlines the constraints that have been associated with its level of performance. The importance of this chapter lies in the fact that this research hinges on the products of this particular industry.

1.2 COMPOSITION

Construction is a complex process, not for technological reasons but because of the great number of participants involved and the conflicts arising out of their differing requirements and attitudes.¹

The main participants in the construction industry are the following:

1. the design team;
2. the contractor and subcontractors;
3. the manufacturers of building materials and components;
4. the materials and equipment suppliers;
5. the client; and
6. the user.

To the above list may be added other participants such as the authorities that under statutory laws are empowered to approve the proposed structures like the Town and Country Planning Department and Local Authorities like Lusaka City Council. The latter (Local Authorities) in collaboration with the Ministry of Lands and Natural Resources are also crucial in providing an effective land delivery system which is critical for the execution of construction projects and programmes.

The design team which constitute the design sub-sector usually includes the Architects, Engineers and Quantity Surveyors and their principal function is to prepare a set of instructions for the contractor by way of Architectural and Engineering drawings, Bills of Materials and Technical Specifications.

The contractors and subcontractors constitute the Assembly sub-sector of the construction industry. "The contractor is the person or organization responsible for the assembly on site of the materials and components required to produce the building. He must be given instructions sufficiently clear and precise to enable him to quote a firm price for his services. ... In most building work, and sometimes even in civil engineering, the main contractor handles only the bulkiest operations connected with the substructure (excavation, earth-moving, foundations) and the superstructure of the building. He

delegates the more specialized activities connected with finishes and equipment to separate specialized firms acting as subcontractors.”²

Manufacturers of building materials and components also constitute a very important sub-sector of the construction industry. This sub-sector comprises enterprises involved in the manufacture of inputs for the construction industry such as cement, roofing sheets, doors, door frames and others.³ Many of these material inputs and components are produced away from the construction site. Building materials and components contribute between 50 and 60 percent of the total value of construction output.⁴

Another sub-sector is that of the materials and equipment suppliers. This sub-sector “plays a major role in a construction project. It sets the price and the delivery commitment for all the materials and equipment items the contractor must install. The supplier’s reliability and actual delivery dates have a major effect on the performances and profitability of the contractor, the reputation of the designer, and on the ultimate satisfaction and utility of the owner.”⁵ This sub-sector acts as an intermediary between the Manufacturing sub-sector and the Assembly sub-sector. It stocks a large number of materials, components and fittings; it provides the small and medium scale contractors with valuable technical and commercial information; most importantly of all, it gives short-term credit facilities to the contractors.

“The main justification for the role of this sub-sector lies in the discrepancy between continuous production process, which characterize modern manufacturing industry, and the discontinuous requirements of material inputs, which are a special feature of traditional construction work.”⁶

The clientele sub-sector comprises the public sector i.e. government ministries, departments and parastatal bodies, and the private sector. This sub-sector “plays an essential role in construction, since it is the one that initiates the whole operation, appoints advisers, commissions the contractors to carry out the work, and, throughout the process, advances most of the capital necessary to keep the operation going. The client is responsible for assessing and approving the activities of all the other participants. He may delegate some of this work to the professional advisers he has appointed”.⁷

It is not always the case that the client in a construction project is the end user of that product. In many cases the end user is different from the client. Private investors, for instance, may invest in an office block or housing units with a clear intention of letting out, at a profit, to would be tenants. In the public sector the user may be the community at large or a particular section of the community composed of individuals not known in advance to the client ministry; although an attempt ought to be made to assess their needs. “Many of the mistakes that have occurred in the provision of publicly owned

housing, schools and hospitals may be attributed to the fact that insufficient attention was paid by the authorities acting as clients to the actual requirements of the ultimate users of the building.”⁸ This fact emphasizes the need for a systematic study of user requirements in the construction industry.

1.3 IMPORTANCE

The role that the construction industry plays in the economy is significant not only in terms of investment but also in terms of output and employment.⁹ Construction is an investment industry; its products are wanted not for their own sake but for the goods and services which they can help create.¹⁰ In this regard the general development of a country cannot be separated from the advance of its construction industry; it is an important unit of the overall economic system.

From the point of view of function, the construction industry belongs to the final branches of the national economy and hence reflects the level of development of other branches; on the other hand, as a participant of investment the industry itself influences the technical and economic level of development of other branches.¹¹ This, in itself, emphasizes the fact that within the national economy construction has an important role to play in the realization of structural changes demanded by the economic plan and concerned with both production and consumption. Therefore construction as an industry

should be given adequate consideration in planning economic strategies for a developing country like Zambia.

The role of the government in relation to the construction industry in Zambia is complex and varied. At one level it acts as the legislative authority imposing external constraints on construction and on the other as participant at different levels in the construction

process. "In the most general terms the primary role of the government is the welfare of the people. At this level, construction is a sector of the economy that contributes to the national product and accounts for a large proportion of investment ... it is obvious that all governments are concerned with construction inputs, in particular materials and manpower and with its outputs, since practically all human activities take place in, on or around the products of construction."¹²

With the foregoing factors coupled with the fact that the government appears to be a large client of the industry¹³, the importance construction has assumed in relation to the national economy can not be over emphasized.

1.4 PERFORMANCE

“Over the past three decades Zambia has experienced one of the worst economic performances in the entire world. From the mid 1970s the Zambian economy entered into an extended period of economic decline. Average annual growth in Gross Domestic Product in real terms fell from 2.4 percent in the decade after independence to 0.7 percent in the next 15 years to minus 5.1 percent in 1994. The consequence of this decline has led the country to lag well behind others in Sub-Saharan Africa. The unfavourable economic performance was a result of the implementation of inappropriate economic policies, worsening terms of trade and decreasing levels of investment”.¹⁴ Since the construction industry’s performance generally reflects the level of economic activity in any country it is most unlikely that the industry would have performed any better considering the above stated dismal performance of the economy as a whole.

From 1965 to 1974 the average annual growth of the construction industry was around 9 percent. Between 1979 and 1985 this average annual rate dropped to minus 1 and it declined further to ^{minus} 2.6. percent between 1985 and 1991. In 1999 the construction sector grew by 11.2 percent from a decline of 10.1 percent the previous year. This positive development is attributed to continued expansion in government road maintenance and construction activities, development of prime new commercial real estate such as Manda Hill and housing construction under schemes such as the Presidential Housing Initiative (PHI)”.¹⁵

However, the growth experienced in 1999 does not seem to amount to anything tangible considering the fact that in 1971 the construction industry was ranked fifth in its contribution to Gross Domestic Product; in 1994 it fell to tenth position and in 1999 it dropped further to thirteenth position.¹⁶

In terms of formal employment the construction industry has not done any better. In 1971 it employed 70,100 thus making it the second largest employer, but by 1993 only 27,300 were employed in the industry. This downward trend continued and by 1999 only 12,900 were in formal employment in the construction industry.¹⁷

Generally speaking the performance of the construction industry in Zambia has been on the decline and if the above figures are anything to go by the trend might continue unless positive steps are taken to save this very important industry from total collapse.

1.5 CONSTRAINTS

Generally speaking construction industries in developing countries have problems

associated with inadequate capacity, high prices and lack of technical expertise.¹⁸

Zambia is no exception.

In addition a number of government policies have had a negative impact on the positive growth of the construction industry. These include imposition of high tax and import duty on equipment for local construction firms; prohibitive taxes on local construction materials and inadequate funding for capital expenditure. The larger part of this capital expenditure is in fact borrowed capital. In the 2000 budget 81 percent of the envisaged capital expenditure is borrowed capital and only about 19 percent is domestic capital.¹⁸ It must be noted that government policy can stimulate or stifle growth of the construction industry in any country. In this regard the above factors have really constrained the construction industry in Zambia.

1.6 CONCLUSION

What has been discussed in this chapter shows that the construction industry in Zambia comprises various participants with differing requirements and attitudes. Although this factor presents a 'fertile ground' for conflicts, in reality it sets a good stage for 'unity in diversity'. Without unit and proper coordination amongst all the participants construction would be a taxing task.

It has also been seen that the importance of the construction industry in the Zambian economy cannot be over-emphasized. Its role is central in terms of investment, output and employment.

With the dismal performance of the Zambian economy in the recent past it has been seen that the construction industry too has had a pathetic performance. This is a clear testimony that the construction industry's performance generally reflects the level of economic activity in any country.

This chapter has also outlined the constraints that have had a negative impact on the growth of the construction industry in Zambia.

The next chapter analyses the concept of procurement as applied to the public sector generally and to the construction industry in particular.

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CHAPTER II

THE CONCEPT OF PUBLIC PROCUREMENT

1.1 DEFINITION

The word public is indeed a wide term. It can assume a number of meanings depending on the context under which it is used. In broad terms however, the term is used when referring to people in general.¹ When used with reference to the public sector it signifies that part of the country's economy which is controlled or supported financially by the government.²

On the other hand the word procurement, according to the English Language Dictionary,³ means "... *the act of obtaining something such as supplies for an army or other organisation*".

In the context of this research the phrase public procurement, therefore, is taken to mean obtaining or purchasing something by the government and its subsidiary agencies. These subsidiary agencies include parastatal bodies created by an Act of Parliament or a company in which the government has majority or controlling interest. Local Authorities such as City and Municipal Councils are also viewed as agencies for the government in this regard.

"Form of ownership has often been taken as a significant aspect which differentiates organisations... public ownership imposes obligations with regard to public accountability, which lead to prescribed methods of purchasing and prescribed policies towards the treatment of suppliers".⁵ This calls for transparency which requires that procurement be done in full public view under scrutiny of the public in general and the press in particular. Unlike private sector procurement practices which strives for efficiency and quality of the purchase as it relates to the firm's profits, public procurement practices incorporates social and political objectives besides economy of the purchase itself. It seeks to ensure the delivery of services to the public in a timely and efficient manner as part of a national, regional or local policy adopted in accordance with the ruling political system.⁶ On the contrary private procurement is more focussed on serving the organisation's interest in making a profit. In this regard the emphasis is on price and quality and the rules are made flexible. This is in sharp contrast to public procurement practices which call for full compliance with laid down rules and forms of contract.

Going by the above analysis it is clear that a distinction between private and public procurement practices exist. For instance, National Legal requirements and government policies with respect to competitive tendering procedures are obvious examples that seem to lend substance to the separation of the two forms. *"However, others argue that the differences have been exaggerated and that both public and private sector purchasing*

and supply management can also share some common concerns and techniques. The need to obtain value for money in purchasing is just one example".⁷ This is true in a way - "good buying is good buying, whether in the public or private sector. In both sectors a cycle of planning, setting of purchase objectives, solicitation of offers, selections, contract award and execution is followed. So are matters such as standard general conditions, development of knowledge of sources of supply and containing costs".⁸

1.2 PUBLIC PROCUREMENT POLICY OBJECTIVES

"Typically, governments seek to attain all or most of the following objectives in the process of public procurement:

- 1. economy;*
- 2. efficiency;*
- 3. non-discrimination;*
- 4. transparency;*
- 5. accountability;*
- 6. promotions of domestic industry and employment; and*
- 7. other special objectives".⁹*

ECONOMY

It is common knowledge that when suppliers of goods and building contractors are made to compete, their offers tend to be generally lower than when they are single sourced. It is for this reason that in public procurement competitive tendering is the norm. This helps to achieve economy. Governments are said to strive for 'value for money' in public procurement.¹⁰ *"Considerations of economy also affect the choice of technology or the specification of requirements"*.¹¹ This may call for standardisation of the product requirement for instance standard building housing units would ensure economy both in terms of consultancy costs and actual construction costs.

EFFICIENCY

It is usual to hear complaints about the serious levels of 'red tape' in government's administrative structures. Unfortunately this 'red tape' is also to be found in public procurement to an extent that governments' delivery of public services has been seriously hampered. *"The World Bank, for instance, recently created a high level task force to look into ways and means of speeding up project implementation. Procurement was noted as a bottleneck to fast and efficient execution of Bank-funded projects"*.¹²

Efficiency calls for speed and accuracy and this can only be achieved if decision making is decentralised and procurement procedures streamlined.

NON-DISCRIMINATION

"Non discrimination in public procurement means equal opportunity to compete for public contracts and equal treatment of bidders throughout the procurement process".¹³

In this vein the tool of competitive tendering becomes handy. However, this may not be enough. There is need to ensure that specifications are neutral to avoid giving a competitive advantage to one tenderer. Non-discrimination also call for a pre-determination of the 'Award Criteria' which should in all cases be stated in the tender documents. This helps to give the tenderers a clear picture of how the contract will be awarded.

TRANSPARENCY

In a literal sense transparency means the ability to allow light to pass through so that objects behind can be clearly seen. For example plain glass is transparent. Therefore, when applied to public procurement the term means no more than the undertaking of procurement in accordance with laid down procedures and under public scrutiny. The

public must at all times be free to verify, at all levels, the integrity of the process. *"Public bid opening is an example of the kind of feature which is added to the public procurement process in order to ensure transparency".¹⁴* However, it must be mentioned here that a line must be drawn between transparency and the need to maintain confidentiality of the evaluation process before contract award.

ACCOUNTABILITY

Basically to be accountable means to be responsible for one's actions or in simpler terms to be answerable. In procurement this means that public procurement officials must be held responsible or accountable for their official decisions. *"Under most systems of government this means exposure to disciplinary measures or even more severe punishment for intentional or negligent infraction of the rules applying to public procurement".¹⁶*

PROMOTION OF DOMESTIC INDUSTRY AND EMPLOYMENT

The government and its agencies constitute a large market for goods and services generally and for construction works in particular.¹⁵ By awarding contracts to local manufacturers, suppliers and contractors the government can stimulate growth and

development of the local industry and employment. This is a pre-requisite to “*stable, and self-sustaining full employment economy in which poverty will be alleviated through higher incomes throughout the population*”.¹⁷

It is because of the above that preference of local manufacturers, suppliers and contractors has become a prominent feature in public procurement. In its 1996 manifesto,¹⁸ the movement for Multi-party Democracy recognised this fact and stated thus, “*beyond 1996 the MMD government will ... give preferential treatment to micro and small enterprises in government and parastatal procurement*”.

Therefore to strengthen such a policy the government may enact laws to buttress the position of the local suppliers, manufacturers and contractors participating in public tenders.

OTHER POLICY CONCERNS

There are other policy concerns that public procurement may have to embrace. Issues such as public security are of paramount importance. For instance it may not be wise to float an open tender for the renovations and refurbishment of the main kitchen at state house. It may also not be wise to purchase Military Equipment for the Zambia Army using an open tender.

Sometimes the objective may be social in nature as is the case in Zambia for services rendered by an educational or training institution. Such institutions are favoured in order to strengthen them in their endeavours to provide particular services to the community as a whole.

1.3 SUMMARY

This chapter has defined what public procurement is all about. The various bodies subjected to public procurement have been highlighted. It has become clear that public procurement is primarily the province of the government and its various agencies.

Further, the Chapter has also looked at the various policy objectives associated with public procurement. It has been seen that the objectives are varied and are in a way different from those associated with the private procurement. Nevertheless, it has also been shown that the two share a lot in common.

The next chapter will discuss the construction project procurement cycle; specifically examining the organisational structure used by the public sector to acquire construction projects such as building, roads, dams and bridges.

REFERENCES AND END NOTES

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- ³ Ibid.
- ⁵ Malcom Saunders (1997), Strategic Purchasing and Supply Chain Management, 2nd edition, Pitman Publishing, at page 9.
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- ⁷ Op cit; Strategic Purchasing and Supply Chain Management at page 9.
- ⁸ Op cit; Improving Public Procurement at page 20.
- ⁹ Ibid; at page 11.
- ¹⁰ Turpin, Colin (1989), Government Procurement and Contracts, Longman, Essex.
- ¹¹ Op cit; Strategic Purchasing and Supply Chains Management at page 10.
- ¹² Ibid; at page 12.
- ¹³ Ibid:
- ¹⁴ Ibid: at page 13.
- ¹⁶ Ibid.
- ¹⁵ As it has already been pointed out in chapter one the government, in the 2000 budget, has set aside K889,520,000.00 for capital project
- ¹⁷ Movement for multiparty Democracy (1996) Manifesto: at page 9.

CHAPTER III

THE PROJECT PROCUREMENT PROCESS

1.1 THE PROJECT CYCLE

The project procurement process constitutes a series of steps and actions which results in the user Ministry, Department, Local Authority or Parastatal Body acquiring the project that it envisaged. It involves, at various stages, the overall planning, control and coordination of a project from inception to completion. In the main, the focus is to achieve the client Ministry's¹ requirements in terms of the overall objectives and in particular ensuring completion on time, within cost and to required quality standards.

The series of steps and actions necessary in sourcing a construction project by the public sector largely depend on the institutional and administrative structure on which public procurement is modelled.. These steps and actions can be broken down into respective stages identified as follows:

- (1) pre-contract;
- (2) contract; and
- (3) post-contract.

1.2 PRE-CONTRACT STAGE

"The pre-contract stage in the procurement process is a planning and programming stage".² Usually this stage will deal with the following aspects:

- (1) identification of the need to have a particular project;
- (2) selecting the appropriate method of procurement;
- (3) preparation of tender documents;
- (4) floating of the tender;
- (5) evaluating the tenders received; and
- (6) recommendation for award of contract.

Identification

The identification of projects in Ministries lie with the controlling officers. The term controlling officer is defined under the Finance (control and management) Act, Chapter 347 of the Laws of Zambia, Section 4(1) of this Act states that, "*The Minister shall designate, in respect of any head of expenditure provided for in any financial year, an officer who shall be a controlling officer*". Section 4(2) goes further to stipulate the main duty of the controlling officer by stating that "*every controlling officer shall be charged with the duty of controlling subject to any direction by the Permanent Secretary, the expenditure on any service in respect of which public funds have been appropriated under that head*".

In practice however, the controlling officer is usually the Permanent Secretary of that respective Ministry. For Parastatal bodies it is normally the Chief Executive and for Local Authorities such as city or municipal councils it is the Town Clerk. For Ministries the procedure of identification is more complicated as compared to parastatal bodies and

local authorities, which depend on their own corporate plans and authorization to spend given by their Boards of Directors.

Once the controlling officer in a Ministry is satisfied that a particular project should be undertaken he arranges for its inclusion in the Capital Expenditure Budget. The project must be in line with the particular ministry's priorities and programmes which almost invariably reflect government policy. Upon receiving the Capital Expenditure Budget request, the Planning Division of the *"Ministry of Finance then evaluates the proposal and assigns priority for the project in accordance with overall Government Policy objectives and priorities"*.³ Once approved the Planning Division will then request the Budget Office to decide on the type and source of funding for the project.

"Where direct Government funding is involved, the project proposals are included in the Capital Expenditure Budget and assigned a new budget head allocation for the Ministry. Where donor funding is required, a decision is made on the possible donor and the controlling officer or chief executive is requested to submit an appropriate project proposal in accordance with the donor requirements through the Economic Cooperation Division for grant aid projects or treasury for loan funded projects".⁴

At the conclusion of the above procedure the respective project is then included in the Capital Expenditure Budget presented to and debated by parliament annually. It now becomes the responsibility of the Minister of Finance and Economic Development to defend the Capital Expenditure Budget before parliament. Usually the Capital

Expenditure Budget is in two parts: the first is the foreign financial capital which for and the second is the Domestic Finance Capital.⁵

Selection of the Appropriate Method of Procurement

"The choice of an appropriate procurement system is crucial to the success of building projects".⁶ The choice of a procurement system depends on the client's objectives in terms of function, quality, value, time, cost and certainty. Thus at a second level of analysis, the choice depends on key features of the end product and the design, management, manufacturing and construction process required to realize the clients' objectives".⁷

When the procuring establishment is a public institution the choice of an appropriate procurement system or method even becomes more complicated. This is so because, as has already been seen in the previous chapter, the objectives and policies behind public procurement are varied and subject to change depending on the Government-in-power's political, social and economic aspirations. The selection of an inappropriate method of procurement can lead to misapplication of public funds, over-spending, poor quality of the end product and longer project implementation programmes.

Preparation of Tender Documents

"The procurement system establishes the roles and relationships which make up the project organization. It establishes the overall management structure and systems".⁸

This is however, true for private sector driven projects which are usually a one-off-issue. On the contrary, the public sector procures construction projects on a continuous basis. Schools, hospitals, roads and much more forms of infrastructure need to be procured constantly to keep pace with the ever growing population and technological changes. In view of this it would not be possible to create a new management structure for each project.

It is because of the above that the Government has established a permanent structure to take care of all procurement concerning construction projects. The Ministry of Works and Supply is part of this structure. It is the consultancy wing of Government on construction matters. The Ministry has a department of roads which specifically handles all projects to do with roads and bridges. The Department of Buildings handles all projects to do with public buildings such as schools, hospitals, office blocks and so on. The two departments together house separate professional disciplines working within established procedures. These include Architects, Quantity Surveyors and Engineers.

The establishment of the structure is based on the traditional¹⁰ method of procurement. This is where the client (in this case a ministry) appoints consultants (in this case the Ministry of Works and Supply) for the design and cost control of a particular project (say a school). The contractor is then selected after tendering a completed design and cost documents.

With this kind of structure it means that usually the Ministry of Works and Supply has to finish all the tender documents before contractors are invited to tender. This means that the working drawings, specifications and bills of quantities must be completed before contractors are requested to tender.

This approach has advantages in that,

- “1. *both parties have a clear picture of the extent of their respective commitments.*
2. *the unit rates in the bills provide a sound basis for the valuation of any variations to the design.*
3. *a detailed breakdown of the tender sum is readily available”.*¹¹

Such an approach is cardinal for third world economies where resources are limited and governments are struggling to make ends meet. Therefore, in practice the Ministry of Works and Supply is responsible for the preparation of the tender documents for constructions projects in the public sector. The Tender documents normally comprise the following:

- “1. *The invitation to tender;*
2. *Instructions to Tenderers;*
3. *Conditions of Contract;*
4. *Specifications;*
5. *Drawings;*
6. *Bills of Quantities; and*
7. *Other enclosures such as the Form of Agreement, Tender Security Form and Performance Security Form”.*¹²

Floating of the Tender

After the Ministry of Works and Supply concludes the preparations of the tender documents it forwards them to the Zambia National Tender Board¹² for review. This review is important and precedes the production of the final tender documents. Its main purpose is to ensure that the Zambia National Tender Board satisfies itself that the documents reflect the government's established objectives in the process of public procurement such as non-discrimination, promotion of domestic industry, transparency and so on.

It is after the review and subsequent production of the final tender documents that the particular tender is floated. The floatation of the tender is primarily the responsibility of the Zambia National Tender Board.¹⁴ The Board ensures that the tender is advertised in the press. The advertisement must be brief but clear. It should state the closing date of the tenders; the description of the works to be undertaken; the price of the tender

documents; the name and address of the office from which the documents can be obtained and subsequently deposited on the due date; the reference number of the tender; and further it should state who is eligible to participate in the tender. All this information is vital because it helps a prospective tenderer make up his mind as to whether he or she should participate in that particular tender.

Evaluation of tenders Received

After the tender flotation period the tender box is closed at the appointed date and time and subsequently opened by an authorized officer from the Zambia National Tender Board. Tenders are then opened in the presence of tenderers who wish to be present and each tender is serially numbered and the page on which the tender sum and completion period are stated is date stamped and signed. Soon after, all other pages of each tender are also stamped and signed. A Tender Opening report is then prepared and forwarded together with the tenders to the Ministry of Works and Supply for evaluation.

The evaluation process is basically the last activity in the pre-contract stage of public procurement. It involves analyzing and comparing all the tenders received. The aim is to identify the tender which meets the procurement objectives of a particular project. This will be assessed against the evaluation criteria as set out in the tender documents. Usually the tender which is consistent with the terms of the tender documents and is reasonably priced gets recommended for contract award.

Recommendation for Contract Award

After the Ministry of Works and Supply has completed the evaluation of tenders it will produce an evaluation report showing clearly its recommendations and how it has arrived at such recommendations. The evaluation report together with all the tender documents are then submitted to the Director General, Zambia National Tender Board. On the basis of the evaluation report and any other information that may be deemed necessary the secretariat of the Zambia National Tender Board will make further recommendations to the Central Tender Committee. The Central Tender Committee will then deliberate on the matter and authorize accordingly. It is thereafter the duty of the Board Secretary to advise the Controlling Officer, Ministry of Works and Supply of the outcome of the Central Tender Committee's deliberations.

1.3 CONTRACT STAGE

The Ministry of Works and Supply on receipt of the Board's authorization issues to the successful tenderer a Letter of Acceptance. *"This acceptance should be conveyed to the successful bidder within the validity of the offer. Legally, the contract is concluded the moment this acceptance is conveyed and received by the supplier (tenderer). In practice, this is usually followed by a properly executed award or contract document".*¹⁵ This stage is very important inasmuch as the signing of the contract establishes the rights and

obligations of both the contractor and the Government. *"The care with which this is carried out will often determine the ease with which the last stage of the procurement is implemented"*.¹⁶

1.4 POST-CONTRACT STAGE

The last stage in the project procurement process is that of implementation over the period of construction. *"Supervision is the least glamorous part of project work, but in several respects it is the most important ... All projects face implementation problems, some of which cannot be foreseen. The problems may stem from difficulties in the development process or from more specific causes such as changes in the economic and political situation, in project management or even in wealth. As a result, although the ... objectives of a project remain constant, its implementation path often varies from that which was envisaged"*.¹⁷

Between signing of the contract and final hand-over of a project there are a number of activities which the Ministry of Works and Supply have to carry out. Basically it is responsible for the contract administration of the project. It monitors and ensures that the project is being carried out in accordance with the Architectural and Engineering drawings, Bills of Quantities and Technical Specifications and recommends payment for work done until completion of the project. The inspection department of the Zambia

National Tender Board Secretariat usually comes in at this stage also to ensure that the project is being implemented in accordance with authority given by the Central Tender Committee.

1.5 SUMMARY

This chapter has focused on the project procurement process and has clearly shown that this process has various stages. These stages are pre-contract; contract; and post-contract. Each stage is also made up of a series of activities which together culminate in the production of the envisaged project.

It has been seen that this procurement process is centered around an established structure with the Ministry of Works and Supply, Ministry of Finance and Economic Development and the Zambia National Tender Board taking a centre stage. The structure is unique to government and is nowhere near what obtains in the private sector.

Evidently the process is much longer and in practice inefficient. However, from a conception perspective it may be the best arrangement for public projects in terms of satisfying certain objectives of public procurement such as transparency and

accountability. Therefore the division of responsibilities that has resulted due to the prevailing institutional and administrative structure influences the flow of the steps and activities which result in the user department or ministry getting the project that it envisaged.

This project procurement process together with the institutional and administrative structure upon which it rest cannot exist in a vacuum. It is supported by a legal framework. This legal framework is the main focus of the next chapter. All the existing laws which impact on public procurement of construction projects will be examined and analyzed accordingly.

REFERENCES AND END NOTES

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- ¹ The term Ministry here is used in a representative capacity because in real terms every department, Local Authority and Parastatal Body falls within a respective Ministry. The main difference is merely that Parastatal bodies are responsible to their Board members administratively and Local Authorities to the elected councilors.
- ² International Trade Centre UNCTAD/GATT (1990), Basic Guidelines on Government Procurement, Guide No. 1, Geneva, at p7.
- ³ Zambia National Tender Board (1997), Procurement Guidelines, Part Three, Formal Tenders in the Procurement of Works at p16.
- ⁴ Zambia National Tender Board, Op.Cit. at p17.
- ⁵ See Budget Speech, by Honorable Katele Kalumba (2000), at (pause)14 Foreign financial capital is estimated at K712.52 Billion and the Domestic Capital at K165.00 Billion..
- ⁶ Brandon P.S. (1990), Quantity Surveying Techniques. New Directions, BSP Professional Books, 1st Edition, Oxford at p252.
- ⁷ Ibid.; at p252.
- ⁸ Ibid.; at p243
- ¹⁰ The Other procurement Methods for Construction Works include Design and Build, Management Contracting, Construction Management, and Design Manage.
- ¹¹ Ramus J. W. (1989), Contract Practice for Quantity Surveyors. 2nd Edition, Biddles Limited, Britain, at p11.
- ¹² Zambia National Tender Board; Op.Cit; at p22.
- ¹³ The Zambia National Tender Board is a statutory Board created by chapter 394 of the Laws of Zambia. The Act states its main functions as, "to regulate and control the procurement of good and services for the government and Parastatal bodies; to consolidate the law relating for matters connected with or incidental to the foregoing.
- ¹⁴ Suffice to mention here that only formal tenders i.e. those whose value is above K15,000,000.00 and K25,000,000.00 for Government Ministries and Parastatal Bodies respectively are channelled through the Zambia National Tender Board. Informal tenders i.e. those below the above threshold are dealt with by the respective tender committees established in Ministries and Parastatal bodies as the case may be.
- CAP 394 defines a formal tender as one which is advertised in the Government Gazette.
- ¹⁵ International Trade Centre UNCTAD/GATT; Op.Cit at p51.
- ¹⁶ Ibid.; at p8.
- ¹⁷ Warren C. Baum (1994); The Project Cycle, 7th Edition, IBRI/The World Bank, Washington, D.C. United States of America, at pp19-20.

CHAPTER IV

THE LEGAL FRAMEWORK

1.1 ENACTMENT OF PROCUREMENT REGULATIONS

It has already been discussed in Chapter two that there are particular objectives which governments seek to attain in the process of public procurement and that public procurement is primarily the province of the government and its various agencies.

Further, chapter three has highlighted the fact that the public procurement process is centered around an established institutional and administrative structure and that the procurement process together with such a structure upon which it rests cannot exist in a vacuum. It ought to be supported by a legal framework. To be effective, the legal framework must consist of regulations which carry the force of law, enacted by a respectable body such as parliament and mandatory in nature. Such regulations need to be comprehensive in scope so as to cover all matters connected and incidental to the procurement process. Without such regulations, anarchy is likely to prevail in public procurement. In this regard the government in 1982 passed the Zambia National Tender Board Act which it was hoped would add efficiency to the process of procurement of goods and services by the public sector.

1.2 THE ZAMBIA NATIONAL TENDER BOARD ACT, CAP 394

Objectives and Extent of Application

The objectives of this piece of legislation are cited in the Act itself. Basically it provides

*“for the establishment of the Zambia National Tender Board; to regulate and control the procurement of goods and services for the Government and parastatal bodies; to consolidate the law relating to tenders generally; and to provide for matters connected with or incidental to the foregoing”.*¹

To achieve these objectives the provisions of the Act are tailored in a manner that addresses the above objectives as well as some of the policy objectives which the government seek to attain. These include economy; efficiency; non-discrimination, transparency; accountability; promotion of domestic industry and employment; and other special policy concerns such as social and security.

Section 7(1) of the Act read together with section 2 defines the extent of application of the Act. Section 7 (1) states that, *“The functions of the Board shall be to regulate and control the procurement of goods and services for the Government and Parastatal bodies”*. Section 2 defines a *“parastatal body”* as meaning *“a statutory corporation or body, or a company in which the Government has a majority or controlling interest, and includes a local authority”*. It is therefore clear that the extent of application of this Act is limited to the Government Ministries, departments, and agencies meeting the criteria prescribed under section 2.

Background

The Zambia National Tender Board Act was initiated in 1982 after his Excellency the president Dr. Kenneth Kaunda, had announced in March the same year, the intention to establish the Board. His indication was that *"Tender Board will regulate and control the procurement of goods and services by the Government, Parastatal organizations, statutory boards and district councils"*.²

For a long time before His Excellency the President made his announcement, the Party³ and Its Government had been concerned at the lack of uniformity in procedures relating to procurement of goods and services by various Tender Boards, particularly in the parastatal sector. This was compounded by the fact that in some parastatals there were neither tender boards nor any prescribed rules and regulations to follow. *"As a result, decisions relating to procurement of goods and services are often made by individual officers, to the detriment of the organizations themselves"*.⁴

In trying to correct the anomaly, cabinet office tried to issue circulars instructing Chief Executives of various parastatal organizations to comply with standard tender procedures laid down by the Central Supply and Tender Board. Unfortunately, the circulars did not have the desired effect; they were ignored as they were considered purely administrative and not having the force of law. In other cases, the organizations took cover behind the

provisions of the Company Law under which their companies were registered and which permitted them to regulate and follow their own separate and individual procedures.⁵

It is therefore clear from the foregoing that the scenario that existed before the Act was put in place was not conducive enough to meet the objectives of public procurement such as transparency, accountability, non-discrimination, efficiency, and promotions of domestic industry and employment. There was need therefore to create appropriate legislation which among other things would make it mandatory for all parastatal organizations and Government institutions to comply with normal tender practices on a uniform basis. It is in line with this need that the Zambia National Tender Board Act was created.

Basic Contents

The Act is divided into four parts. Part one addresses preliminary issues being the citation for the Act and the interpretation of various terms used in the Act. Part two contains provisions related to the establishment of the Zambia National Tender Board. Part three looks at the administration aspects of the Board and part four stipulates the financial aspects and other provisions related to and incidental to the foregoing. In all,

the provisions are many but only those considered directly relevant to the subject matter will be examined.

Section 3 establishes the Zambia National Tender Board as a body corporate with perpetual succession and a common seal, capable of suing and of being sued in its corporate name, and with power, subject to the provisions of the Act, to do all such acts and things as a body corporate may do by law. The functions of the Board are laid down under section 7, and are quite broad in nature. They emphasize the supervisory role of the Board in that it has power to regulate and control the procurement of goods and services for the government and parastatal bodies⁶. Further, section 7(2) empowers the Board to formulate rules and regulations and conditions under which such rules and regulations may be varied and waived. It also has powers to regulate the procedures relating to the award of contracts and to advertise both locally and abroad tenders for the procurement of goods and services.

There is nothing in the above functions that suggests that the Board is responsible for awarding contracts but that it should regulate procedures relating to the award of contracts. This power is supervisory in nature. It is interesting to note that the

procedures to be regulated are not in fact laid down in the Act. They are produced separately by the Board as procurement guidelines,⁷ and by the Minister of Finance under statutory instruments.

The Board regulates its own procedure and the validity of its decisions is protected in that it shall not be affected by any vacancy in the membership of the Board or by any defect in the appointment of any member or by reason that any person not entitled so to do took part in the proceedings.⁸ To form a quorum at any meeting one-half of the members are required to be present and decisions on any matter are made by voting; a simple majority vote is enough to carry the day and in the event of any equality of votes, the person presiding at the meeting shall have a casting vote in addition to his deliberative vote.¹⁰

The Board consists of a chairman and twelve other members of whom the following are ex officio members:

- (a) The secretary to the cabinet;
- (b) The Director-General of Zambia Industrial and Mining Corporation Limited;
- (c) The Chairman of the Zambia Consolidated Copper Mines Limited;
- (d) The Governor of the Bank of Zambia;
- (e) The Permanent Secretary in the Ministry of Finance;
- (f) The Permanent Secretary in the Ministry responsible for planning; and
- (g) The Permanent Secretary in the Ministry responsible for works and supply.

The chairman and the other members, other than the ex officio members, are appointed by the president; making the total number of board members to be thirteen.

Going by the fact that one half of the total number of the board members can form a quorum and that decisions are by simple majority of the members present it means that about 31 percent of the total number of board members can make decisions at any given time. This does not appear to be a safe number for decision making considering the amount of power the Board has been entrusted with. It is suggested that the number be at least raised to three-quarters of the membership for a quorum to be formed.

From the administrative point of view, the Board is headed by a Director who is the chief executive officer and is appointed by the president.¹¹ This fact makes this position more of a political one and one that does not enjoy a security of tenure. On the contrary the position of secretary to the Board is appointed by the Board itself.¹² The secretary is responsible for the day-to-day administration of the Board¹³ and suffice to note that under section 15 (3) the Board has power to appoint other staff as it may consider necessary for the performance of its functions.

In order to ensure compliance with the provisions of the Act, the Board has been empowered to establish an inspectorate unit, under its umbrella, to monitor the performance of the various tender committees established in accordance with the Act.¹⁴

The Act further stipulates the powers that the inspectors have in the course of carrying out their duties. “...any inspector or member of staff of the inspectorate unit shall have -

- (a) *access to all books, records, returns, reports and other documents relating to the work of any Government Department or parastatal body which is under inspection;*
- (b) *access at all reasonable times to the premises of any Government Department or parastatal body which is under inspection;*
- (c) *power to call for any relevant information from persons responsible for the financial administration of any Government Department or parastatal body which is under inspection ... ”.*¹⁵

These powers are, however, not absolute. There is a provision under section 17 to the effect that an inspector is not allowed to have access to information relating to any component of the Defence Force or the Zambia Security Intelligence Service. Further no access is allowed to an inspector if such access is likely to -

- “(a) *prejudice the security, defence or international relations of the Republic or the Investigation or detection of offences; or*
- (b) *involve the disclosure of any matters or deliberations of a second or confidential nature of the Cabinet or any sub-committee of the cabinet”.*

Another notable feature in the Act is that the Board may, for the purpose of carrying out its functions under the Act, establish committees and delegate to any such committee such of its functions as it may think fit.¹⁶ According to this section it appears that the

Board, because of the huge size of the public sector, can only operate effectively through committees. Such committees according to Section 8(3) may regulate their own procedures. There appears to be some danger in this approach in that prior to the enactment of the Act, there were no standard rules and procedures to be followed by the various tender boards that existed then in respective parastatal bodies and this was seen as an anomaly. Therefore, to allow the Committees to regulate their own procedures would be inviting lack of uniformity in procedures by the various tender committees. It is submitted that the Board must prescribe the actual procedures to be followed by all the tender committees. Such procedures must be made part of the regulations and not mere guidelines so that they can have the force of law.

Section 9(1) also brings out an interesting aspect. If a person is present at a meeting of the board or any committee of the Board at which any matter is the subject of consideration and in which matter such person or his spouse is directly or indirectly, interested in a private capacity, he shall, as soon as practicable after the commencement of the meeting, disclose such interest and shall not, unless the Board otherwise directs take part in any consideration or discussion of, or vote on any question touching upon, such matter. There is nothing in the section that suggests that the person with interest should leave the board or committee meeting . This seems to be unrealistic. Those with interest should leave the room when discussion is taking place on which they have an

interest. The presence of such a one may discourage the other members from debating freely over such a matter.

The provision relating to the immunity of members is also an important feature of the Act. It is stated in Section 10 that, "*No action or other proceedings shall lie or be instituted against any person for or in respect of any act or thing done or omitted to be done in good faith in the exercise or purported exercise of his functions under this Act*". Generally speaking this section entails that a board or committee member cannot be personally sued in his official capacity. The only issue here is that the phrase 'good faith' has not been defined. The decision as to whether one acted in good faith or not is left to the court to decide. W.J. Stewart and Robert Burgess (1996),¹⁷ defines good faith as a "*requirement in the law, importing an absence of bad faith more than anything, which can be treated as equivalent to 'honesty and decency!'*". This provision is important because it allows the board members or committee members to participate in the deliberations without fear of being prosecuted.

The Act also creates offences. This feature is equally important because without the creation of offences people would choose to ignore most principles of public procurement. Section 13(1) creates an offence relating to the prohibition or disclosure of information to unauthorized persons.

“No person shall, without the consent in writing given by or on behalf of the Board, publish or disclose to any person, otherwise than in the course of his duties, the contents of any document, communication or information whatsoever, which relates to, and which has come to his knowledge in the course of his duties under the Act”.

Contravening section 13(1) calls for a penalty of a fine not exceeding twelve thousand five hundred penalty units or to imprisonment for a term not exceeding three years or to both. This same penalty is extended to any other person having information which to his knowledge has been published or disclosed in contravention of the provisions of Section 13(1) but unlawfully publishes or communicates any such information to any other person.

The provisions of Section 13 though good in principle have a difficult side in real terms. In public procurement information passes through a lot of people and offices at various stages of the procurement circle as seen in chapter III. It is therefore usually very difficult to point in practice who is responsible for the publication or disclosure of information to an unauthorized person. This problem is compounded by the fact that in Zambia criminal offences must be proved by the prosecution beyond any reasonable doubt; and that any doubt created must fall in favour of the accused.

Another offence created relates to failure to comply with prescribed procedures.

According to Section 18(1) the duty to ensure that procedures are followed is placed on the controlling officer or chief executive as the case may be. Subsections (2) and (3) emphasizes this duty but further suggests that if the controlling officer or chief executive delegated his duty, which usually is the case, to any other person or committee then such other person or committee shall also be held accountable for any failure to comply with the provisions of subsection (1). Subsection (4) protects the controlling officer, or chief executive officer if he satisfies the Board that he is, under the provisions of any written law, subject to the control or directions of any other person, board, committee or other body, and that it was such control which caused the failure to comply with prescribed procedures. It will instead be such other person or every member of the board, committee or other body who shall be accountable for such failure to comply with prescribed procedures. This failure to follow prescribed procedures will invite the Board in accordance with Section 18(5) to take such appropriate corrective or punitive measures as it may consider necessary. The problem here is that the Act together with the statutory instruments¹⁸ issued under the Act are almost silent on the main procedures to be followed when procuring construction tenders. The procedure available is by way of guidelines issued by the Board which do not carry the force of law. A breach of prescribed procedures which results in a financial loss arising from one's recklessness, misconduct or willful default of laid down procedures may cause the Board to surcharge such a person with the amount of such loss or any part thereof, and certify in writing to that effect.¹⁹

One other important offence that the Act prescribes relates to the powers of the inspectors. Without this particular offence the powers of the inspectors would be meaningless. Section 21 states that, *“any person who assaults, resists or obstructs any inspector or member of staff of the inspectorate unit in the exercise of his powers of access or power to call for relevant information under this Act shall be guilty of an offence and shall be liable upon conviction to a fine not exceeding five thousand penalty units or to imprisonment for a term not exceeding two years or to both”*. This offence forms the ‘back-bone’ of the inspectorate department of the Board which is an important unit in the monitoring of the committees formed under the Act, Government Departments or any parastatal body.

It is suprising to note that although this Act has been in existence now for about seventeen years no one has so far gone on record for having been charged with any of the above offences. There are only two possible reasons - either the system is working perfectly well or the enforcement mechanisms are weak. It appears, however, that the latter is the correct position.

1.3 REGULATIONS EMANATING FROM THE ACT-STATUTORY INSTRUMENTS

Statutory instruments are a form of delegated legislation. These are “laws made under a

higher authority. Usually the power to make such legislation is delegated to a minister of the government...”²⁰ Section 27(1) of the Act gives the Minister²¹ powers to make regulations for the better carrying out of the purposes of the Act. Such regulations are to be issued through statutory instruments. This is a very important feature of the Zambia National Tender Board Act because in practice it is this authority that enables the actual prescription of detailed rules or regulations concerning any matter which the Board is authorized to formulate, regulate or prescribe. The rules or regulations made through statutory instruments carry the force of law and to emphasize this fact the Act under Section 27(3) states that *“rules or regulations made under the Act may provide in respect of any contravention thereof that the offender shall be liable to a fine not exceeding twenty five thousand penalty units or to a term of imprisonment not exceeding ten years, or to both”*.

Two statutory instruments have so far been issued by the Minister. The first being statutory instrument 151 of 1995, and the second being statutory instrument 116 of 1997.

Statutory Instrument 151 of 1995

This instrument is entitled ‘The Tender Regulations’. It was created pursuant to section 27(1) of the Zambia National Tender Board Act which states that the Minister may, by statutory instrument make regulations for the better carrying out of the purposes of the Act; meaning the Zambia National Tender Board Act.

The statutory instrument is divided into nine parts. Part one comprises the citation of the regulations and the interpretation of certain terms used in the Statutory instrument generally. Part two establishes the Central Tender Committee: "There is hereby established the Central Tender Committee, in Lusaka which shall perform such functions of the Board as are set out in these regulations".²² The compositions of this Central Tender Committee is outlined in Section 4(1) and includes some members who are also members of the Board such as the permanent secretaries responsible for finance, development planning and works and supply. While the Board includes the secretary to the Cabinet and the Governor of the Bank of Zambia, the Central Tender Committee has instead included the Deputy Secretary to the Cabinet and the General Manager of Bank of Zambia respectively. Of particular interest here is that the Company Secretary of the Zambia Consolidated Copper mines Limited was a member of the Central Tender Committee. The Mines have since been sold into private hands and therefore there appears to be need to repeal this aspect of the law.

The functions of the Central Tender Committee are outlined in Section 5(1) and (2) and includes examining and authorizing all procurement of goods, works and services for both government and parastatal bodies whose value is above the limits authorized for tender committees.²³ The functions also include inviting and awarding running contracts on common user goods or services; examining and authorizing the variation of tender procedures for the established tender committees; and undertaking and regulating the

registration of suppliers of goods and services. The Central Tender Committee seems to have authority over the other established committees in that it can authorize the variation of tender procedures for the tender committees.²⁴

The Central Tender Committee determines its own procedure and may establish sub-committees for any specific matter.²⁵ It meets at such times and such places being not less than once a months as the chairman may determine.²⁶ Further by section 6(3) it is obliged to cause minutes to be kept of the proceedings of every meeting and such minutes should be transmitted to the Board after confirmation.

Provincial, parastatal and ministry tender committees are created under parts three, four and five of the regulations respectively. Regulation 7 establishes in each province a provincial Tender Committee. Regulations 11 and 16 establishes parastatal tender committees and Ministry tender committees respectively. The regulations relating to the functions and direction of proceedings are generally similar. The functions generally cover inviting and accepting tenders relating to the procurement of goods, works and services for the government within the limits provided for in accordance with the regulations.²⁷ With Regard to Parastatal bodies there is a provision under section 14(1) to the effect that operating expenditure on goods and services which are not of a capital nature shall not be subjected to the limits specified in part eight.

In terms of proceedings, these committees are allowed to determine their own procedure²⁸ and meet at such times and places being not less than once a month as the Chairman may determine.²⁹

The Financial Limits for government purchases are elaborated under part six of the statutory instrument and those for parastatal bodies under part seven. These limits are expressed in kwacha terms. This makes the practical implementation difficult because of inflation. For instance, at the time these regulations were being passed 25 million kwacha was the financial limit for government purchases. Anything beyond this would have to be referred to the central tender board.³⁰ Therefore, to keep pace with inflation and to ensure that only reasonably big amounts should go to the central tender board for approval, the minister has to issue new regulations by way of statutory instruments quite often. This is cumbersome. It is proposed here that such limits be expressed in units as is the case in the parent Act where penalties attracting payment of money are expressed in penalty units. In this way the financial limits will be self regulatory each time the value of the unit is determined by the Ministry of Finance. At the moment a unit is equivalent to K180,000.00.

Part eight of the statutory instrument contain general provisions. When formal tenders³¹ are to be invited by a tender committee, there is a requirement of ensuring that certain information, is obtained by the committee for administrative purposes. The kind of

information required is outlined under section 31 and most of these are usually included in the tender documents as a matter of professional practice. However, it should be noted that among other things an estimate of costs and completion time for construction works is obtained. This is important because it is upon this figure that the tender committee will know whether the project is within their allowed threshold for approval or that they may have to send it to the Tender Board. It is also a requirement that a written assurance be obtained to the effect that funds are available for that particular project. There is no need to waste time on projects that may not take place due to lack of funds.

Section 34 fixes the periods of floatation of tenders required. A local tender must be floated for four weeks and an international tender for at least eight weeks. Any variations of these periods can only be authorized by the tender committees if its within their threshold or by the Tender Board if its above the allowed threshold of the respective tender committees.

The procedures for handling late tenders, withdrawal of tenders, manner of opening tenders are all included in the regulations.³² Section 40 outlines the information required to be put in the tender documents. By virtue of such information being in the tender documents, they become contractual in nature because a tender document ultimately become part of the contract documents. It is also important that the evaluation procedure

be outlined in the tender documents so that the tenderers are aware of how the evaluation process will be conducted. This would give transparency in the evaluation process and would make it difficult to tailor the evaluation process in order to target a particular tenderer. The evaluation process should be done in three phases: preliminary responsiveness, technical responsiveness and commercial responsiveness. It is submitted that these phases must be categorically included in the tender regulations and must be followed in that order.

Section 48 specifically requires that the financing of works tenders be indicated in the tender documents, for instance whether it will be funded by the government or by donors. This is vital because particular tenderers may prefer certain financiers. There is a general lack of interest in projects purely funded by the government because of the prevailing funding bottlenecks.

Section 61 empowers the Board to prescribe general conditions of contract for government and parastatal bodies. For construction works, such conditions already exist under the umbrella of the Ministry of Works and Supply. It is a standard form of contract. However, it needs revision because it was issued in 1974 and hence has lost touch with reality on a number of issues.

Part nine only has two provisions. One creating an offence³³ and the other conferring power on the Board to determine, in its discretion, which class of tenders should be approved only by the Board.³⁴ The offence created states that "*any person who:*

- (a) *opens any envelope or other container in which a tender is contained, other than in the due and proper execution of his duties under these regulations;*

- (b) *burns, tears or otherwise destroys or partially burns, tears or destroys any tender;*
- (c) *or erases or does any other act which falsifies, or renders incomplete or misleading any tender;*

shall be guilty of an offence and shall be liable, upon conviction to a fine exceeding thirty thousand penalty units or to imprisonment for a term not exceeding three years, or to both”.

STATUTORY INSTRUMENT 116 OF 1997

This instrument is cited as ‘The Tender (Amendment) Regulations, 1997’. In other words this instrument was issued basically to amend some of the regulations found in the principal regulations - statutory instrument 151 of 1995 discussed above. The notable features in this statutory instrument are basically that the composition of the central tender committee is slightly modified.³⁵ A district tender committee has also been introduced for the first time.³⁶

The major component of the statutory instrument is composed of revisions to the amounts allowed for the various tender committees to approve. It has already been suggested above that because of inflation these revisions will have to be done quite often. This means a lot of statutory instruments will have to be issued by the Minister. As already discussed the best way is to express the amounts in terms of units.

The statutory instrument also creates other offences. Section 62(2) states that “*any controlling officer or chief executive or member of a tender committee who fails to comply with the provisions of section 18 of the Act shall be guilty of an offence and shall be liable upon conviction to a fine not exceeding five thousand penalty units or for a term of imprisonment not exceeding three months or to both*”.

Section 18 of the parent Act places the obligations of ensuring that procurement is done in accordance with the laid down procedures on controlling officers and to such other persons they may delegate to.

This statutory instrument also repeals regulations 21 by revoking it completely and replacing it with one which directs the controlling officers to consult tender board for its approval on the procurement provisions under any international, bilateral or multilateral agreement. Section 21 was originally conferring exemptions from applying tender procedures on controlled goods and services. This piece of regulation was no longer necessary as such occasions never arose. The concept of controlled goods and services is not in line with the government's policy of liberalization.

Otherwise, the rest of the amendments were not substantive and involved the rephrasing of some regulations to make them more clearer and not to change their substance.

1.4 ASSOCIATED LEGISLATION

There are other laws which impact on public procurement apart from the Zambia National Tender Board Act and its subsidiary legislation.

Under criminal law, the Corrupt Practices Act does impact on public procurement. If procurement officers are involved in corruption practices this piece of legislation can be invoked and applied accordingly. Further, criminal law may combat abuse of power. Section 99(1) of the Penal Code states that,

"Any person who, being employed in the public service, does, or directs to be done, in abuse of the authority of his office, any arbitrary act prejudicial to the rights or interests of the government or any other person, is guilty of a misdemeanor. If the act is done or directed to be done for purposes of gain, he is guilty of a felony and is liable to imprisonment for three years".

It can be seen here that this provision can certainly be applied to the procurement process. The other area of law that impact on public procurement is the law of contract. Procurement of construction projects involves getting into contracts. Therefore, standard general conditions of contract and case law built on such standard general conditions apply. The statute of limitations also apply in procurement of construction projects.

Further, Administrative law impacts on public procurement in many ways. It defines who has the authority to contract on behalf of the government, the status and responsibilities of civil servants, and the finance regulations applicable, to mention but a few.

Other special laws such as customs and taxes, banking and securities, exchange regulations and international treaties ratified under national law may also impact on public procurement. For instance the legislation on customs and taxes may hold an element of protection for local bidders and raise thorny problems for foreign contractors uncertain as to whether the award of a construction contract carries with it the obligations to pay tax on profit associated with the contract.

1.5 SUMMARY

This chapter has shown that in Zambia the basic national procurement objectives have been expressed in a law enacted by parliament - The Zambia National Tender Board Act. This law defines its scope of application, the procurement methods preferred, the essential elements of tender procedures, the mandate of the Board as a control body and its authority to issue directions for the application of the law. It has further been seen that the detailed regulations applicable to public procurement are expressed in the statutory instruments and two have so far been issued by the Minister of Finance.

Apart from that it has become clear that there are other areas of the law that impact on public procurement such as criminal law, administrative law, law of contract and other special laws like customs and taxes.

The next chapter, which is the last one, advances a number of recommendations. It also summarizes the conclusions drawn from the research.

REFERENCES AND ENDNOTES

- 1 This is stated in the preamble itself.
- 2 Hansard (1982); debates on the Zambia National Tender Board Act, Second reading, National Assembly at page 4595.
- 3 The Party in power then was the United National Independence Party.
- 4 Hansard (1982); Op.cit; speech by the Honorable Minister of Finance, Kebby Musokotwane, when presenting the bill for second reading.
- 5 It should be noted that amongst parastatal organisations some are created by statute and others through the Company's Act. An example here would be ZESCO Limited and Former Zambia Consolidated Copper Mines.
- 6 Section 7(1)
- 7 Codes of Practice.
- 8 Section 11(1).
- 10 Section 11(5).
- 11 Section 14(1)
- 12 Section 15(1)
- 13 Section 15(2)
- 14 Section 16(1)
- 15 Section 17
- 16 Section 8(1)
- 17 Unwin Hyman Dictionary of Law, Harper Collins Publishers, at Page 186.
- 18 Two statutory instruments have been issued so far. Statutory instrument No. 151 of 1995 and statutory instruments No.116 of 1997 cited as Tender (Amendment) Regulations, 1997.
- 19 Section 19(1) and (2).
- 20 Unwin Hyman Dictionary of Law; Op.cit at page 122.
- 21 This refers to the Minister of Finance.
- 22 Section 3.
- 23 Regulation 7, 11 and 16 establishes provincial Tender Committees, Parastatal Tender Committees and Ministry Tender Committees respectively.
- 24 Regulation 5(2)(b).
- 25 Regulation 6(1) and (4) respectively.
- 26 Regulation 6(2).
- 27 Regulation 9(1), 14(1) and 18(1). The limits alluded to are contained under Part six and eight of the statutory instruments.
- 28 Section 10(1), 15(1) and 19(10).
- 29 Sections 10(2)(a), 15(2) and 19(1).
- 30 Section 24(1)(c)
- 31 A formal tender is defined under the statutory instrument as one which is advertised in the Government Gazettee.
- 32 Sections 37, 38, and 39 respectively.
- 33 Section 62(1).
- 34 Section 63.
- 35 Section 3.
- 36 Section 9(3).

CHAPTER FIVE

RECOMMENDATIONS AND CONCLUSIONS

1.1 RECOMMENDATIONS

It is recommended generally that the Zambia National Tender Body Act and its subsidiary regulations arising through statutory instruments should be revised in certain areas in order to facilitate an efficient procurement process. For instance, the position of the Director General of Zambia National Tender Board should not be solely appointed by the president; almost invariably from party cadres, thereby politicising the institution. The institution should work as a professional body without political interference. This can only be achieved if the Director General enjoys a tenure of office protected from the whims and caprices of the political machinery. Therefore, even though appointment is left with the president, there must be ratification from Parliament. In addition the person to be appointed must be one with qualifications biased towards procurement.

The other recommendation relates to the objective of promoting domestic industry and employment. The government and its agencies constitute a large market for construction works. By awarding contracts to local contractors the government can stimulate growth

and development of the local industry thereby achieving a stable, and self-sustaining full employment economy in which poverty will be alleviated through high incomes throughout the population. This can be made possible by adding a section in the Act dealing with the preference of local contractors. At least a 15 percent domestic preference should be applied where foreign and domestic contractors are competing. This will be in line with the government's goal of giving preferential treatment to micro and small enterprises in government and parastatal procurement as indicated in their 1996 manifesto.

It is also recommended that to improve efficiency, the Zambia National Tender Board should also be given a time frame in which to approve applications for authority from the various established tender committees. Without a time frame unnecessary delays are bound to happen thereby making the whole process inefficient. A maximum of fourteen days would be reasonable.

The other recommendation relates to the conduct of officers sitting on the Board or committees when an issue in which they have personal interest arises. It is submitted that

this should be extended to cover even officers who have interest in their official capacity. For instance, if the request for the construction of a road is made by the Ministry of Works and Supply, the Permanent Secretary from this Ministry should not be present during the deliberations because he is likely not to be objective. He would certainly wish to support his application.

While the Act allows the Zambia National Tender Board to conduct a registration of government supplies of goods it does not extend this provision to building contractors. It is recommended that the Board also conduct or at least supervises the registration of contractors for government contracts.

The procurement limits given to established procurement committees should also be revisited . The amounts should not be expressed in monetary terms but should be expressed in units so that the amounts become self adjusting as and when the Ministry of Finance adjusts the value of a unit. The Act has achieved this aspect in the area of penalties where the penalty fees are expressed in penalty units. This will curb the need to issue statutory instruments each time revisions are made to the amounts, to keep pace with the highly inflationary economy like ours.

Furthermore, another recommendation hinges on the total number of board members required to form a quorum. Going by the fact that one half of the total number of board members can form a quorum and that decisions are by simple majority of the members present, it means that about 31 percent of the total number of board members can make decisions at any given time. This percentage is certainly on the lower side to make the decision of such a number of board members representative of the views of the entire board. It is suggested that the number be at least raised to three quarters of the membership for a quorum to be form.

Another recommendation is that section 8(3) which gives the established committees power to regulate their own procedures must be repealed. To allow the committees to regulate their own procedures would be inviting lack of uniformity in procedures by the various tender committees. The Board, should instead prescribe the actual procedures to be followed by all the tender committees.

The last recommendation relates to the evaluation criteria. The regulations require that an evaluation criteria be indicated in the tender documents but does not give a general

guideline of the nature of such a criteria. It is submitted that the evaluation process should be done in three phases: preliminary responsiveness, technical responsiveness and commercial responsiveness.

The preliminary responsiveness will examine each tender in terms of compliance to the general provisions of the tender documents; for instance, has the tender provided a tender security? The technical responsiveness will scrutinize the capacity of the tenderer to undertake the envisaged construction project. In here issues of experience, equipment and manpower will be analysed. The last in the process, the commercial responsiveness, will analyze each tenderer from an economic point of view. The tender sum and all other terms required by the contractor will be analyzed.

It is therefore, recommended that a general guideline of the evaluation criteria broken down into the three phases discussed above should be included in the tender regulations.

The above recommendations if implemented will help in the smooth running of the public procurement process for construction projects in Zambia.

1.2 CONCLUSIONS

In conclusion the question that arises is whether the legal framework surrounding the procurement of construction projects by the public sector in Zambia is a positive factor in achieving the project's objectives in particular as well as the policy objectives behind public procurement in general.

Chapter one has shown that the construction industry in Zambia comprises various participants with varying requirements and attitudes, a factor that presents a 'fertile ground' for conflicts but which may in reality set a good stage for 'unity in diversity'. As such it has become obvious that without proper co-ordination amongst all the participants the objectives of any construction project may not be fully developed. The importance of the construction industry in the national economy has been elaborated and it has become apparent that its role is critical in terms of investment, output and employment. With the dismal performance of the Zambian economy in the recent past it has been seen that the construction industry too has had a pathetic performance.

Chapter two has defined what public procurement is all about; various bodies subjected to public procurement have been highlighted. It is clear that public procurement is primarily the province of the government and its various agencies. In this chapter various policy objectives associated with public procurement have also been analyzed. The obvious inference is that the objectives are varied and are in a way different from those associated with private procurement.

The third chapter focussed on the procurement process and has shown that this process has various stages. These stages are pre-contract; contract; and post-contract and each stage is in turn made up of a series of activities which together culminate in the production of the envisaged project. It has been seen that this procurement process is centred around an established structure with the Ministry of Works and Supply, Ministry of Finance and Economic Development and the Zambia National Tender Board taking a centre stage. The structure is unique to government and is nowhere near what obtains in the private sector. Evidently, the process is much longer and in practice inefficient. The division of responsibilities that has resulted due to the prevailing institutional and administrative structure influences the flow of the steps and activities which result in the user department getting the project that it envisaged.

The fourth chapter has laid bare the fact that the public procurement process of construction projects together with the institutional and administrative structure upon which it rests cannot exist in a vacuum. It is supported by a legal framework; all the existing laws which impact on public procurement of construction projects have been examined and analyzed. The chapter has shown that in Zambia the basic national procurement objectives have been expressed in a law enacted by parliament. This law defines its extent of application, the procurement methods preferred, the essential elements of tender procedures, the mandate of the Zambia National Tender Board as a control body and its authority to issue directions for the application of the law. Such directions and detailed regulations are expressed in statutory instruments and two have been issued by the Minister of Finance so far. While these statutory instruments sets out the regulations and essential procedures leading up to public contracts, It does not define the contractual relationships between the contracting Ministry or parastatal body and the contractor. This aspect has been developed through standard contracts for building and Roads construction. Apart from this, it has also become clear that there are other areas of the law that impact on public procurement such as criminal law, administrative law, law of contract and other special laws like customs and taxes.

Although this legal framework surrounding the procurement of construction projects in Zambia is indeed a positive factor in achieving the objectives of public procurement of construction projects it has become obvious that the law should be revisited in certain areas with a view of consolidating and perfecting it. It is, therefore, expected that if the above recommendations are implemented, the ‘wheels’ of public procurement will start rotating smoothly and in the process objectives of public procurement of construction projects in Zambia will be realised accordingly.

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