



THE TENDER BOARD NEED FOR ROOT AND BRANCH REFORM

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Key aspects of this paper

The public procurement system, with the Tender Board as its axis, has become beset by challenges over the last decade or so. A large portion of the problems can be blamed on a legislative framework which has long since passed its sell-by date. In some respects the existing legal framework can even be said to be relatively primitive and woefully inadequate in the face of the increasingly sophisticated nature of public procurement needs, pressures and requirements, as well as the increasing move towards greater democratisation of economic processes in the context of an interconnected global economy.

From an anti-corruption perspective, the situation calls for drastic and urgent overhaul, which is precisely the opposite of the way the modernisation of public procurement systems and processes have been handled by the state up to this point, for legislative reform has dragged on for about a decade without a clear indication of when a new and improved procurement dispensation will be promulgated and implemented.

That this state of affairs is worrisome goes without saying, especially when viewed against the backdrop of the state initiating spending – all of which will be exempted from the established procurement processes – of billions of Namibia dollars in an attempt to address the unemployment and consequent poverty crisis in the country.

When considering this, from an anti-corruption standpoint, the need for the finalisation of legislative and regulating processes and the upgrade, strengthening and improvement of the procurement environment, has reached a stage of critical urgency.

Towards this end, the following recommendations are made:

- 1) With regard to the drafting and promulgation of a new Tender Board Act, that:
 - The Ministry of Finance and the Tender Board Secretariat should speed up the drafting and consultation process of the proposed Tender Board Bill;
 - The drafting process be opened up to wider consultation, including incorporating the inputs of the private sector and civil society, as well as all other relevant stakeholders and concerned parties;
- 2) With regard to the composition of the Tender Board, that:
 - The authorities reassess the provisions of the existing and proposed legislation concerning the size of the Tender Board, and give serious consideration to reducing the size of the board in the pursuit of efficiency;
 - At the same time, authorities investigate the issue of including for Tender Board membership individuals, not in the employ of the state, beyond those independents and their alternatives already provided for, who are considerably experienced in financial matters and commensurately qualified and/or technically skilled, and who are representative of a cross-section of socio-economic sectors.
- 3) With regard to the conduct of Tender Board members, Secretariat staff and tenderers, that:
 - The disclosure of interest provisions be supplemented and strengthened by the introduction of a comprehensive code of ethical conduct for Tender Board members and Secretariat staff;
 - Registers of Tender Board members' and Secretariat staff's assets and interests, which would be regularly audited and periodically updated, be introduced amongst the proposed regulations of the new legislation;

- Copies of the registers mentioned above be kept by the Anti-Corruption Commission (ACC);
 - The creation of an oversight body, or the empowering of the ACC and/or Receiver of Revenue, to monitor the assets, incomes and spending habits of Tender Board members and Secretariat staff be initiated;
 - Similarly, that a comprehensive integrity system, to which all tenderers and contractors have to subscribe, be introduced amongst the regulations of the legislative framework;
- 4) With regard to ‘Namibianisation’ or indigenisation, that:
- The matter be reassessed in the interest of unburdening the legislative framework of provisions concerned with non-core issues, in an effort to focus proposed amendments on maximising institutional strength;
 - Namibia consider the development, design and implementation of specific legislation, parallel and complementary to the proposed Tender Board law, aimed at ‘Namibianisation’ or indigenisation through statutorily introducing preferential procurement practices geared towards uplifting and empowering women, youth, the disabled and all other previously disadvantaged and marginalised individuals and groups;
 - Similarly, government finalise black economic empowerment (BEE) legislation and policies which have been more than a decade in the coming, and incorporate preferential procurement provisions into such legislation;
 - The drafting and promulgation of such legislation, as with the Tender Board Bill, be prioritised as a matter of urgency.
- 5) With regard to exempting of tenders, that:
- The use of the tender exemption be urgently and critically reassessed as a viable tender and public procurement practice;
 - And the practice be investigated, through initiating extensive quantitative and qualitative research programmes, so as to evaluate the impact of exemptions on the image of the Tender Board and the Secretariat as well as general government contracting and economic activity, in the context of anti-corruption;
 - The introduction of alternative procurement practices be explored with an eye towards minimising the use of exemptions within the public sector procurement dispensation.
- 6) With regard to penalties and punitive measures, that:
- The existing blacklist, as a public sector document of great value, be made more descriptive and comprehensive in its composition and such a list be made publicly available, as a means of discouraging non-performance and potential corrupt activity;
 - A copy of such a blacklist be kept by the Anti-Corruption Commission (ACC);
- Penalties, fines and imprisonment provisions be firmed up, strengthened and increased in order to convey a strong message and discourage fraudulent and corrupt activities within public procurement processes.
- 7) With regard to dispute resolution, that:
- The creation of a review panel, to deal with the mediation of tender disputes, be given explicit mention in the provisions of the proposed law.
- 8) With regard to transparency and accountability, that:
- Relevant authorities subscribe to the notion of openness by giving full force to the principles of transparency and accountability, by amongst others giving consideration to making every step of the tender and procurement process as open to scrutiny as possible, by regularly publishing updates of the performance and delivery process, including the decision-making of the Tender Board itself;
 - In keeping with these principles, greater effort be made to make Tender Board deliberations more accessible, in that more should be done to disseminate particulars of bids and awards, through a web portal and in hardcopy, which would be readily available for public scrutiny;
 - Accountability be engendered through a culture of periodical and critical review of systems and process in an effort to continuously look to improving and strengthening these systems and processes and closing procedural and other loopholes as they might arise;
 - In ensuring the maintenance of the principles of transparency and accountability, access to information provisions be included amongst the proposed legislative provisions, while access to information legislation should be prioritised and passed as a matter of urgency.
- 9) With regard to the delegation of powers, that:
- Given the structural weaknesses at regional and local levels, these weaknesses along with other challenges be adequately investigated and addressed before steps are taken, in accordance with the provisions of the proposed law, to delegate the powers of the Tender Board;
 - Failure to ensure the adequate capacitating of regional and local levels to handle, manage and administer complex procurement processes, could result in considerable loss of confidence in the procurement systems and process, as well as the responsible bodies, and could result in astronomical financial losses to the state, and by extension the ordinary taxpayer;
 - Thus it is recommended that the delegation of powers of the Tender Board be approached and dealt with, with great caution.

Creaking under the weight of suspicion

Public sector procurement in Namibia has become something of a worrisome area over the years as procurement practices have become shrouded in suspicions about irregularities, sometimes bordering on corruption.

The problems plaguing the public sector procurement dispensation are in a large sense due to the shortcomings of the legislative framework and institutional weaknesses which have become entrenched, historical and structural as a consequence of government inertia.

As the axis of public sector procurement, the Tender Board of Namibia, as established through the Tender Board of Namibia Act (Act 16 of 1996), has become mired in a continuous reputational struggle as a result of questionable practices, most notably the increased exemption of procurement from established procedures, which has by most indications become the norm.

According to available information, and following the trend through to the present, tender exemptions have skyrocketed over the last half decade, effectively casting most of public sector procurement into the shadows, without the state or responsible agencies, such as the Tender Board, adequately or appropriately explaining why the situation has developed and what is being done to bring public procurement into the light, so to speak.

The concern becomes clear when considering the following. In the 2005-06 financial year the Tender Board approved tenders worth N\$619 million and tender exemptions worth N\$170.4 million. In the 2006-07 financial year, exemptions spiralled to N\$1.6 billion in value while awarded tenders amounted to N\$868.3 million. This trend continued through the 2007-08 financial year, when the value of government procurement soared to over N\$4 billion, and the value of tender awards amounted to N\$624.3 million, compared to N\$3.4 billion spent on tender exempted procurement. If this trend is followed through to the present and beyond, then a disturbing picture becomes starkly clear, in that tender exemptions appear to have become the rule and have long since ceased to be the exception.

Furthermore, with the country's adoption of the Targeted Intervention Programme for Employment and Economic Growth (TIPEEG) since early 2011, and with the programme set to run through the Medium Term Expenditure Framework cycle 2011-2014, procurement practices appear to be set to become of even more concern, as it appears that the bulk of public procurement under the ambitious employment creation project – which is set to see the spending of between N\$14 billion and N\$19 billion through various government departments and agencies on public works projects over the three-year period – will be exempted

from official procurement procedures, namely the provisions of the Tender Board of Namibia Act.

The dangers are self-evident. In the context of the country's anti-corruption drive, the procurement element of the TIPEEG enterprise would appear to be a great step backwards as the exemption of such a large chunk of state procurement, if such monies in the end do get spent, opens up a potentially considerable avenue for corruption. And it does not seem as if this was factored into the policy and planning of the endeavour.

According to the TIPEEG documentation², procurement for the initiative will be handled by the TIPEEG Implementation Committee (TIC), which will consist of the Permanent Secretary of the National Planning Commission, as chairperson, and four others – the Permanent Secretaries in the Office of the Prime Minister and Ministry of Labour, the Under Secretary of State Accounts in the Ministry of Finance, and a senior official from the Attorney-General's office.

The TIPEEG document states that the TIC's functions are "to recommend on the most effective procurement procedures to be followed to ensure fast implementation of projects, with due regard to good governance; to approve the procurement of all projects under TIPEEG; to monitor and evaluate the implementation of the projects and take corrective measures where necessary; and to prepare quarterly progress reports to the Director-General of the National Planning Commission".

More explicitly, in the context of this discussion, the TIPEEG document states that "it is also essential that to ensure a speedy implementation, all TIPEEG projects will be exempted from the existing Government procurement procedures".

This last statement immediately sets the alarm bells to ringing and given the already widespread exempting of tenders, casts the TIPEEG initiative in a dubious light, even as it struggled to get off the ground at the time of writing. It is conceivable that the unjustified use of alternative procurement mechanisms under TIPEEG could become a considerable source of controversy in time. As stated, the main issue of concern is that the tender exempting of TIPEEG procurement remains to be clarified, notwithstanding the vague pronouncements quoted above, and rather beggars the question why government does not just follow through on the modernisation and revamping of the tender legislation and procedures, a process which has been in the happening, albeit sluggishly, for about a decade now.

This modernisation of the procurement dispensation appeared to be what the state President Hifikepunye Pohamba was alluding to in his April 27, 2011, State of the Nation address, when he stated: "Deliberate steps are being taken to increase the participation of more Namibians in the local economy. One of the initiatives towards this end involves the review of the public

1 The figures are contained in Tender Board annual reports tabled in the National Assembly in February 2010. As far as could be ascertained no Tender Board annual reports have been tabled since the 2007-08 financial year.

2 The Targeted Intervention Programme for Employment and Economic Growth (TIPEEG 2011) document, compiled by the National Planning Commission (NPC), was released by government during the budget deliberations in March-April 2011.

procurement system through the amendment of the current legislation. The proposed amendments that will be tabled soon will address issues such as reservation of certain public tenders for targeted beneficiaries including youth, women and SMEs; and the provision for the Tender Board to delegate some of its powers to the Regional Councils. A review panel will also be established to consider complaints from aggrieved parties in the tendering process.”

Related to this and rather disturbingly, on the issue of TIPEEG implementation bypassing official procurement procedures, relevant authorities do not appear to have been consulted or informed of this, as both Finance Ministry Permanent Secretary, Ericah Shafudah³, and Tender Board Secretary, Welma Ensle⁴, did not appear to be aware of the relegation of the Tender Board to the TIPEEG sidelines.

TIPEEG aside, and as already intimated, it has long been recognised that the existing procurement legislative and procedural framework has become dated. That the system is deeply flawed, and even primitive to a degree, is evidenced by the range of challenges, including court bids, to Tender Board decisions over the last decade. However, this does not appear to have sped up the processes of installing a new or improved dispensation, as already stated efforts at modernisation have been a decade in coming, with no idea when these will come to fruition.

At the same, and parallel to the lethargy with which the revamping exercise has been approached and conducted, the Tender Board has conceivably suffered severe reputational damage. For it can be argued that the Tender Board, as evidenced by the numerous High Court challenges and public castigations of the institution from various quarters, including the Minister of Finance, Saara Kuugongelwa-Amadhila⁵, has become burdened by a loss of public and stakeholder confidence in the integrity of public procurement processes, which in turn has led to a negative corporate image for the Tender Board, and by extension diminished its credibility. This negative perception of the workings and practices of the Tender Board is compounded by the incidence of corruption within the Tender Board Secretariat⁶.

Against this backdrop, and in the context of minimising or closing the existing and potential avenues for corruption, it is necessary to revisit the existing law and discuss it in relation to the envisaged amendments, in order to assess whether and where improvements could be made or if the entire legal framework, as captured in the title of this paper, should not be uprooted and

replaced by a brand new dispensation, in keeping with and recognition of the continued evolution in sophistication of procurement processes and pressures in the 21st century.

Tender Board of Namibia Act (Act 16 of 1996)

The Tender Board Act, 1996 (“the Act”) was signed by the President on 26 July 1996 and came into force on 1 October 1996⁷. The objectives of the Act is to regulate the procurement of goods and services by the government and the letting of hiring of anything or the acquisition or granting of rights and the disposal of property on behalf of the government. The Act also establishes the Tender Board of Namibia (“the Board”) and defines its functions and powers.

The Minister of Finance (“the Minister”) is responsible for the administration of the Act. The Act applies to the procurement of goods and services by the government and the letting of hiring of anything or the acquisition or granting of rights and the disposal of property on behalf of the government, except the Namibian Defence Force and the National Intelligence Services Agency for security related goods, services and property. The Board may also, by regulation exempt certain categories of procurement, letting, hiring, rights or disposal from the provisions of this Act.

In terms of section 20 of the Act the Minister may make regulation, not inconsistent with the Act in relation to:

- the invitation of tenders;
- the conclusion or cancellation of agreements;
- the procurement of goods and services for the Government;
- the letting or hiring of anything on behalf of the Government;
- the acquisition or granting of rights for or on behalf of the Government;
- the disposal of Government property;
- the procedure and quorum at meetings of the Board and any committee thereof, including the manner of voting and the manner of votes required for a decision of the Board;
- decisions of the Board;
- the granting by the Board of price preferences when comparing tenders, including the basis on which such preferences may be granted;
- the imposition by the Board of a monetary penalty, calculated on such basis as may be prescribed therein, on any person with whom the Board has concluded an agreement on behalf of the Government on the strength of information furnished by that person which, after the conclusion of such agreement, is shown to have been incorrect informa-

3 Paulus Ashipala, *Namibian Sun*, 6 May 2011 ‘Tender Board Secretariat crippled – Finance PS’

4 Interview on Monday, June 20, 2011

5 Jana-Mari Smith, *The Namibian*, 29 April 2011 ‘Saara lashes Tender Board’

6 In a recently reported case, from early July 2011, a staff member of the Tender Board Secretariat was arrested, after going on the run, for alleged tampering with tender bids to influence the process in favour of a certain company for the supply of wheelchairs to the tune of N\$2 million. The investigation was handled by the Anti-Corruption Commission (ACC).

7 Government Notice 236 of 1996, Government Gazette No. 1403

tion, including the manner in which any such penalty may be recovered;

- the recovery of expenses, losses or damages incurred or suffered by the Government;
- a code of procedures;
- any matter which in terms of this Act is required or permitted to be prescribed; and
- generally, all matters in respect of which the Minister considers it necessary or expedient to make regulations in order to achieve the objects of this Act.

The Act is supported by several regulations that were passed under the Act. Government Notice 160 of 1992⁸ contains the **Tender Board of Namibia: Preferences**, which sets out price preference guidelines to the Board when considering tenders and also addresses issues such as ‘local content’ and what a ‘bona fide Namibian dealer or merchant’ is. This regulation also aims to redress social, economic and educational imbalances in a democratic society and to encourage job creation and industrial and commercial interests in Namibia. Government Notice 191 of 1997⁹ contains the **Tender Board of Namibia Code of Procedure**.

The Tender Board

The Tender Board of Namibia is responsible for the procurement of goods and services for the letting or hiring or acquisition or granting of rights for or on behalf of and the disposal of property of the Government.

The Board consist of the Permanent Secretary of Finance (the ‘Permanent Secretary’), as the chairperson and a staff member from each government ministry, agency and office appointed by the Minister concerned. The minister concerned may also appoint alternate members to the Board. The Minister of Finance must appoint two persons who are not members of the public service to also serve on the Board. The chairperson can designate any member as a deputy chairperson who shall act in his/her absence. If both chairperson and deputy chairperson is unavailable the members may elect a chairperson to act at a meeting. Meetings of the Board shall be held at such times and places as the chairperson may determine from time to time.

The Board may from time to time from among its members appoint a committee and designate a chairperson for that committee. Eight members of the Board shall form a quorum.

The term of office of Board members, who is employed in the public service is not fixed, but they shall ‘serve at the pleasure of the Minister concerned’, while other board members shall serve for a period of three years, subject to re-appointment. A Board member who is a public servant shall cease to be a board

member on termination of service. A member who has a direct or indirect personal interest in a tender or agreement shall declare such interest to the Board and shall not take part in any consideration or discussion of the tender or vote on it. Any member who contravenes or fails to make a declaration of interest shall be guilty of an offence and on conviction be liable to a fine of N\$500,000 or to imprisonment of 10 years to both such fine and such imprisonment.

The Board has the following powers and functions for and on behalf of the government:

- procurement of goods and services;
- letting or hiring of anything or the acquisition and disposal of property;
- conclude agreements with any person inside or outside Namibia regarding the procurement of goods or the letting or hiring of anything;
- determine the manner in which and the conditions under which tenders shall be submitted;
- inspect and test or cause to be inspected and tested goods and services which are offered in terms of an agreement or anything offered for hire;
- accept or reject any tender for the conclusion of an agreement;
- take steps or cause steps to be taken to enforce any agreement;
- withdraw from any agreement and, in appropriate cases, claim damages;
- exempt any person with whom an agreement has been concluded from compliance with such agreement or condone the failure of that person to comply with such agreement with prior Treasury approval;
- negotiate a settlement or amendment in respect of any agreement with tenderers with prior Treasury approval;
- exercise such other powers conferred upon it by the Act or any other law.

The administrative work of the Board is supported by staff designated by the Permanent Secretary from the Ministry of Finance. The Board may also request the assistance of staff members from any other Ministry to assist in the evaluation of any tender. An official involved in the drafting of a submission to the Board, who fails to declare his/her personal or direct interest shall be guilty of an offence and on conviction be liable to a fine of N\$500 000 or to imprisonment of 10 years to both such fine and such imprisonment.

Tender Procedures

Namibia has a free market system and an open tendering system. The Board is required to publish all tenders and prequalification tenders in the Government Gazette and at least once

8 Government Gazette No. 551

9 Government Gazette No. 1692

in each newspaper contracted by government and on the notice board of the Secretariat.

The Board shall determine the manner, form and time period in which an application for prequalification should be submitted and if applications for prequalification was invited the Board shall only consider those applications for the award of tenders. The call for tenders (title of tender) shall as far as practicable contain at least the following information:

- instructions for preparing tenders;
- technical and quality characteristics of the goods to be procured or services to be rendered or property to be disposed of or the nature of rights to be acquired or granted, including, where appropriate, technical specifications, plans and drawings;
- currency in which the tender price is to be formulated and expressed;
- the manner, place and closing date for submission of tenders;
- the period during which tenders shall be in effect; and
- the tender security to be furnished and conditions for its refund.

The Board generally requires that companies are registered with the Ministry of Trade and Industry and that it is in good standing with the Receiver of Revenue and the Social Security Commission.

If the Board is of the opinion that goods will be supplied from stocks readily available in Namibia or will be manufactured from materials or components grown, produced or manufactured in Namibia, the Board shall fix the closing date for the submission of tenders at a date not exceeding thirty days, but not less than twenty one days, from the date the tender is issued. If the Board is of the opinion that goods will not be supplied from stocks readily available in Namibia or will not be manufactured from materials or components grown, produced or manufactured in Namibia, the Board shall fix the closing date for the submission of tenders at a date not exceeding sixty days, but not less than thirty days from the date the tender was issued. The Board may however extend the above periods at its own discretion.

The Board shall not consider a tender unless it complies with all the characteristics, terms, conditions and other requirements set out in the title of tender. The Board may condone minor deviations from the title of tender. The Board may at any time request any tenderer to clarify, in such manner as may be determined by the Board, his or her tender in order to assist the Board in the examination, evaluation and comparison of tenders. If the Board does not accept the lowest tender, the reasons for not accepting the lowest tender must be recorded.

The Board shall, after having opened and listed all tenders, submit the tenders to the relevant office, ministry or agency for its recommendation. The Permanent Secretary of the relevant office, ministry or agency shall make its recommendation on the

tenders received and return the recommendation together with all the tenders to the Board. Where an office, ministry or agency does not recommend the lowest tender from among all the tenders submitted to it, the Permanent Secretary concerned shall certify that the recommendation is made in the best interest of the Government and it represents the best value to the Government and give reasons for not recommending the lowest tender. Where only one tender is received and recommended for acceptance, the Permanent Secretary concerned must state whether the tender price is fair and reasonable.

In 1997 the Board adopted a Code of Procedure that sets out the tender process and the evaluation of tenders in more detail. The following issues are dealt with in the Code:

- Reference to certain specifications
- Determination of closing date of tenders
- Tender prices and delivery periods
- General agreements
- Samples
- Determination of validity period of tenders
- Submission of tenders
- Closing date and hour of tenders
- Telegraphic and late tenders
- Tenders received open or without endorsement
- Opening of tenders
- Tenders for portion of items or specified quantities
- Consideration of tenders
- Comparison of tenders
- Definition of domestic value
- Recommendations of the offices, ministries and agencies
- Acceptance of equal tenders
- Acceptance of tenders for unspecified quantities
- Security
- Cession of agreements
- Communication with Board
- Availability of information

On completion of the evaluation process and once a tender has been awarded the Board must inform the tenderers concerned in writing of the acceptance of their tenders and also inform all the other tenderers. On written request of a tenderer the Board shall give the reasons for the rejection of his or her bid. Within thirty days, or such other period as the Board may determine, after the said notification and acceptance by the tenderer, the Board shall enter into a written agreement with the tenderer. If a written agreement is not required, the tender is valid from the date of acceptance by the tenderer.

If the tenderer fails to enter into an agreement within the required period or if it fails to provide the required security for the performance of the agreement, the Board may withdraw its acceptance of the tender and accept any other tender from among the tenders submitted to it or invite fresh tenders.

Exemption From Tender Procedures

The Board may grant an exemption from tender procedures if the estimated value of the goods or service does not exceed N\$10,000 or if the contracting party is a statutory body, local authority or regional council in Namibia or within another country, which the Minister has approved. The Board may also grant exemption when it in any particular case on good cause deems it impracticable or inappropriate to invite tenders. When exemption is granted the reasons for not inviting tenders shall be kept on record by the Board.

Price Preference Policy

In comparing tenders, the Board shall give effect to the price preference policy. The preference policy is set out in Tender Board of Namibia: Preferences regulation. The regulation gives certain preference points for:

- goods manufactured and assembled in Namibia by persons, companies or partnerships domiciled or registered in Namibia;
- services rendered by persons, companies or partnerships domiciled or registered in Namibia;
- goods kept by bona fide dealers or merchants in Namibia;
- goods conforming with national or international standard specifications.

The regulation gives the following definition of goods produced or manufactured in Namibia.

“Goods produced or manufactured in the Republic of Namibia” means when at least 25 % of the manufacturing cost of these goods, which shall constitute local content as determined in this Code, as represented by materials produced and direct labour performed and the last process in the manufacture of those goods has taken place in Namibia, provided that:

- (a) the last process of manufacture is substantial and sufficient to change the nature of the product and give it new, essential and distinct characteristics and it was performed in a firm equipped for that purpose;
- (b) the final product represents a completely new product process or at least an important state in the manufacturing;
- (c) each type of article or set shall qualify separately in its own right.

The regulation also defines ‘local content’ as the percentage of materials which are grown, produced or manufactured and the direct labour cost involved in the manufacturing process. It went further and lists the costs that should be excluded and included in terms of the definition.

The regulation also defines a ‘bona fide Namibian dealer or merchant’ as someone who is:

- (a) in possession of a general dealer’s licence at the time of tendering; or
- (b) in possession of a wholesaler’s licence and who holds reasonable stock at hand; or
- (c) is a registered Namibian company.

When viewing all this, what is striking about the provisions of the existing law is the lack of cognisance of the need to be proactive in guarding against corrupt practices seeping into the public procurement system. Aside from the few provisions dealing with penalties for such issues as non-disclosure of interest, there really is not much else regulating the conduct of both internal and external stakeholders in public procurement.

STILL SENDING THE WRONG MESSAGE?

Against this background and when viewing the existing law in relation to the envisaged legislation¹⁰, there are a number of significant issues to consider within the anti-corruption context.

These issues are:

- To what extent the disclosure regime is strengthened and expanded;
- To what extent the amended law would be aligned with existing anti-corruption legislation, such as the Anti-Corruption Act of 2003;
- To what extent the phenomenon of widespread tender exempting is being addressed with an eye towards minimising and even curbing the practice.

These three issues arguably and broadly exemplify the concerns surrounding public procurement and encapsulate the loopholes glaringly looming to be tackled.

That said, following is a brief discussion, focussing on the issues raised above, of the proposed provisions of a new Tender Board Bill.

The Tender Board Bill Of 2010

According to the Tender Board Bill of 2010, the Tender Board is established as “*an autonomous board*”, which is a first for and highly significant concept, in terms of terminological incorporation into the proposed law, for Namibia in the context of a state agency. The establishing provision goes on to state:

¹⁰ Tender Board Bill (June 2010-Final draft) was obtained from the Tender Board Secretariat on Monday, June 20, 2011.

“On the date of the commencement of this Act the **Tender Board of Namibia established in terms of the Tender Board Act of Namibia 1996 (Act 16 of 1996)**, shall cease to exist and as from that date a reference in any law or otherwise to such board shall be construed as a reference to the board established by subsection (1) of this Act.”

With regard to the concept of autonomy, while the word is used, it appears to be disconnected from and even contradictory to the rest of the provisions, in that it does not appear to be given force, of the proposed legislation, as following on from that initial establishing provision, the bill, in line with the existing law, goes on to grant the line minister various powers throughout. If the concept of autonomy is made a central aspect of the founding of a new tender board, it could go a long way in minimising or mitigating the spectre of political influence as a potential corruption-inducing factor in the awarding of public procurement contracts, not that such has been widespread in the Namibian context. However, such a provision would only be truly enlivened if the board is composed of independent-thinking, financially experienced and/or technically skilled individuals from a cross-section of socio-economic spheres. As it stands, the envisaged tender board would basically be a carbon copy of the existing one in that it would be composed of the various government representatives from each ministry and agency (in practice these have been Permanent Secretaries), their alternatives and the two independent members, plus their alternatives. Furthermore, with non-attendance and sporadic attendance of board members having been the bane and embarrassment of the tender board over the years, a missed opportunity appears to be in the offing in the sense that a new tender board could be made smaller, thus encouraging greater responsibility, on both a personal and collective level, as well as greater efficiency. The smaller tender board is something long in existence in such developed nations as Australia and the United Kingdom. In addition government representatives with specialised skills should be used on the tender board. The current situation in which permanent secretaries have made up the bulk of the board is not tenable – mainly because in Namibia permanent secretaries are *de facto* political appointments – hence the tender board could be seen as a ‘party political club’ that could be influenced by the political allegiances of those applying for contracts.

On the theme of responsibility, under the provision dealing with disclosure of interest (Section 6) it states:

Disclosure of interest

- (1) *A member who has a direct or indirect personal interest in a tender shall declare such interest to the Board.*
- (2) *A member shall not take part in any consideration or discussion of, or exercise any vote on a matter in which he or she has an interest as contemplated in subsection (1).*

- (3) *Any member who contravenes or fails to comply with a provision of subsection (2) shall be guilty of an offence and on conviction be liable to a fine **determined by the minister in the gazette or to imprisonment for a period not exceeding 2 years or to both** such fine and such imprisonment.*
- (4) *The provision of this section shall apply mutatis mutandis to any official who shall declare such interest to the Accounting Officer.*

Apart from the fact that as with the existing legislation the proposed law would remain passive on the issue of ethics – board members are relied upon to disclose instead of the proactive implementation and enforcement of a code of ethical conduct – there is another crucial element to the disclosure provisions of the bill, specifically the apparent reduction of the penalties in instances where disclosure has not taken place and a member has been found out to have acted contrary to the law.

When viewed against the penalty provisions of the existing law, it is hard to fathom the justification for a reduction – from a fine of N\$500,000 and/or imprisonment for 10 (ten) years to “*a fine **determined by the minister in the gazette or to imprisonment for a period not exceeding 2 years or to both***” – as it could be argued that a stiffer sentence would gravitate against tendencies to commit an offence under the law, in other words a stiff penalty would contribute to the fostering and maintenance of a ‘comply or else’ culture around public procurement.

Related to this discussion is another notable inclusion amongst the provisions of the proposed law, namely section (26), dealing with the liability of the Tender Board, which states:

Liability of the Board

The Board shall not be personally liable for any loss or damage arising out of or in connection with the performance of its duties, unless the loss or damage is due to its wilful misconduct, gross negligence or wilful failure to comply with any provision of, or direction or decision under this Act or any regulations or instructions issued under it.

This is interesting in the sense that while the penalties, as previously discussed, appear to have been softened considerably, Tender Board members could be held personally liable in the event of a dereliction and/or abdication of duty, which would constitute “*wilful misconduct, gross negligence or wilful failure to comply with any provisions*” of the proposed law.

In keeping with the discussion around the conduct of stakeholders and the functions of the tender board, the Powers and Functions of Board section (7) has an interesting and welcoming addition, in that, in an explicit attempt to bring the proposed law, along with the entire public procurement dispensation, within the regulatory ambit of the Anti-Corruption Commission (ACC), the following provision has been added:

(g) withdraw a tender from any tenderer who has been found guilty of corrupt practices as defined in Chapter 4 of the Anti-Corruption Act;

The specific chapter – Corrupt Practices and Penalties – in the Anti-Corruption Act¹¹ outlines the various and numerous offences which constitute acts of corruption, including “*Corruption in relation to tenders*” and “*Bribery for giving assistance in relation to contracts*”.

In the same vein, the issue of tender exemptions has also become a lot murkier, instead of moving the system, as founded in the law, towards greater clarity and openness, the opposite appears to be the case as with the provisions (section 17) for “*Exemption from tender procedures*”, which remain largely intact from the existing law, with the only and considerable change being the removal of the explicit N\$10,000 cap on individual exemptions, the existing law stating that exemptions can only be authorised if “the estimated value of the goods or service does not exceed N\$10,000 or if the contracting party is a statutory body, local authority or regional council in Namibia or within another country, which the Minister has approved”.

The equivalent section in the proposed law states that exemption is allowable in the following context, amongst others:

(1) If, in respect of the procurement of goods and services for, or the letting or hiring of anything or the acquisition or granting of any right for or on behalf of, or the disposal of property of the Government- the estimated value thereof as determined by the minister and published in the gazette;

Once again, the questionability of the wording in this section begs clarification, as it appears that Namibia will continue bucking the best practice trend, which shies away from tender exemptions and rather encourages greater flexibility of tender processes where and when urgency or emergency procurement is required. In other words, the international best practice trend is rather to find alternative and adaptable procurement mechanisms which would still require some sort of bid and evaluation process, albeit in fast-track mode, with exemption only the course of very last resort.

It is unclear why tender exemption has become the norm in Namibia, but one factor could be that because of the challenge of government departments and agencies being under resourced in both experience and technical know-how, this has created a debilitating environment of poor and bad planning, which forces departments into spur of the moment or last-minute procurement. The practice is self-evidently defeating in its circularity. That this state of affairs is conducive for corrupt practices cannot be stated enough. However, as illustrated already, rather than moving towards eliminating or reducing the pervasiveness of tender exemptions, it appears that by removing the N\$10,000 cap, and introducing decidedly vague language, exemptions

would become easier to push through at the discretion of the minister, which given the considerable amounts of taxpayers’ dollars at stake annually should never be an easy feat in the best of circumstances.

The situation demands a much greater investigation of the use and abuse of exemptions on the public procurement landscape, and the issue needs to be brought into the light, as given the current levels of exemptions, running into billions of dollars as sketched earlier, it is highly unlikely that these relate to an enormous multitude of contracts valued at less than N\$10,000 each, but are rather multimillion and even billion Namibia dollar contracts which are effectively bypassing good governance structures created with the purpose of ensuring the entire system is always above board and seen to be so.

And as stated earlier, with the TIPEEG enterprise set to be entirely tender exempt, as per the policy document, the initiative appears to be ripe for great controversy and even scandal, as multimillion dollar contracts are to be rolled out to achieve the ambitious objectives of the project in just under three years.

This contentious issue aside, another interesting and decidedly more well meaning incorporation into the proposed law is a section (18) titled “*Principles*”, which states:

The Tender Board shall, in exercising its powers under this Act, comply with the principles of

- (1) competition amongst tenderers by using the most efficient and competitive method of procurement and disposal to achieve the best value for money;
- (2) fair and equitable treatment of all tenderers in the interest of efficiency and the maintenance of a level playing field; accountability and transparency in the management of public procurement and the disposal of public assets in order to promote ownership of the system and minimize challenges thereof; integrity, fairness and public confidence in the procurement and disposal process; the fair sharing of risk; compliance with legislative provisions; the economic empowerment policy of the Government; support to SMEs, previously disadvantaged groups, women and the youth.

These provisions would appear to be in recognition of the perception, though unquantifiable, that the workings of the Tender Board are broadly viewed with suspicion (and the undertaking of a survey to establish to some degree to what extent the Tender Board is positively or negatively viewed is encouraged and recommended here).

Also, noteworthy amongst these provisions is (3), which would herald a fresh breeze with regard to the issues of transparency and accountability within state structures. Transparency and accountability, particularly as they relate to public procurement processes, are widely held to narrow and even severely

¹¹ Anti-Corruption Act 2003 (Act 8 of 2003) came into force in February 2006.

restrict the perpetration avenues, scope of and space for potential corrupt practices. Sadly, as stated in an interview earlier this year for this paper, Tender Board Secretary Welma Enssle quashed any inclination of interpreting transparency and accountability in this sense to refer to every step – from design to advertisement, through decision-making and award and on to implementation

monitoring – of tender processes being conducted in full public glare, as is the case in neighbouring South Africa and other more established democracies. While the principle (3) does seem to suggest this sort of dispensation, transparency and accountability in this context are meant to refer to the Tender Board being compelled to keep records, which should happen by default anyway,

Types of Tendering:¹

Open tendering

All interested contractors/suppliers are free to submit their tenders. Notice of tender invitations are published in the Government Gazette and, if necessary, in the local press, on the Internet and in selected overseas journals for the particular trade/product.

Selective tendering

Selective tendering is adopted when contractors/suppliers on the relevant approved lists of contractors/suppliers are invited to submit tenders. Selective tendering is usually adopted for works contracts. Notices of tender invitations are published in the Government Gazette, or are sent by letter to all contractors/suppliers on the relevant approved lists of qualified contractors/suppliers established for the purpose of selective tendering. Departments may establish lists of qualified contractors/suppliers for particular services or articles, where there is a frequent need to invite tenders for such services or articles but not all contractors/suppliers in the market are capable of providing the required services or articles.

Single and restricted tendering

For single or restricted tendering, tenders are invited from only one or a limited number of contractors/suppliers. Single or restricted tender procedures shall only be used in circumstances when open competitive tendering would not be an effective means of obtaining the requisite supplies or services, for example –

- (i) where there is extreme urgency brought about by unforeseeable events and where the delay that would arise as a result of open tendering would seriously harm the public or security interests;
- (ii) where for reasons connected with the protection of copyrights or technical reasons, the products or services can only be supplied by a particular supplier and where no reasonable alternative or substitute exists;
- (iii) where there is no response to an open or selective tender, or when the tenders submitted have been collusive, or not in conformity with the essential requirements in the tender, or from suppliers who do not comply with the conditions for participation, on condition that the requirements of the initial tender are not substantially modified in the contract as awarded;
- (iv) where the equipment or services to be purchased must meet requirements of compatibility or interchangeability with already existing equipment or services;
- (v) where it can be demonstrated that “patent” or “proprietary” items are the only items which can meet the specification;
- (vi) where services are to be provided by utility companies;
- (vii) where maintenance is to be executed on patent or specialised equipment and where the warranty of the equipment gives the supplier of the equipment the exclusive right to carry out the maintenance service;
- (viii) where lease terms require that work must be executed by a particular firm; and
- (ix) to save administrative costs, where it has been established that the existing contractor is a suitable and cost-effective source of supply.

Prequalified tendering

There may be circumstances which require the prequalification of a list of tenderers financially and technically capable of undertaking a particular project or supplying a particular product. These include projects which require pre-testing of equipment to determine its suitability; projects of an extremely complex nature, high value or subject to very rigid completion programmes; projects which call for a high level of co-ordination, technical expertise, or a non-standard form of contract, e.g. Build-Operate-Transfer (BOT) or Design-and-Build contracts; and products which are critical to the user departments.

¹ Taken from ‘Tender Procedures for Government Procurement’ of the Hong Kong Special Administrative Region of the People’s Republic of China.

of all decisions in the event these are challenged, and does not envisage these decisions or records being open to wider public scrutiny, but only those aggrieved by the outcome of a particular procurement drive. This is in keeping with the thinking circumscribed by the existing legislation.

However, the inclusion of the above provisions in the proposed law does seem to suggest movement in the right direction, particularly towards greater democratisation, if only on paper as yet, of these strategic state systems and processes.

With all this said, it needs to be borne in mind that the proposed law being discussed here is merely a draft that appears far from finalisation, despite with about a decade already having lapsed since the process was started, as there still are issues which demand and would require some sort of inclusion in any future law.

UNFINISHED BUSINESS

The following discussion will briefly touch on some issues deserving of consideration in efforts to make the practices and functions of the Tender Board, as the hub of state procurement, more efficient, responsive and moving towards a suspicion, and even alleged corruption, free image.

The issues discussed below tie in with some of the provisions already highlighted here or pronounced upon by senior government officials over time, but which have as yet not found explicit expression amongst the provisions of either the existing nor proposed laws governing the workings of the Tender Board.

The issues deserving of such frank discussion and possible inclusion and/or broader consultation, and probably also promulgation, are:

- Assets, incomes and spending habits of Tender Board members and other officials involved in procurement;
- Dispute resolution and challenges;
- Blacklisting of errant suppliers and service providers;
- And, access to information.

Assets, Incomes And Spending Habits

What the procurement dispensation, as established through the existing and proposed laws, lacks are, in general, proactive provisions geared towards keeping public sector officials involved in procurement processes honest, and as earlier stated not relying on them to step forward and proclaim their honesty and integrity, but rather forcing officials to adhere to appropriate and set standards of ethical conduct, which are enforced, given the sensitivity of their responsibilities.

In this regard, comprehensive codes of conduct would appear to be in order and long overdue. However, alongside this, space has to be made within the regulatory framework for a mechanism specifically tasked with monitoring the assets, incomes and spending habits of all officials involved in procurement processes, wherever they might be.

Given that the Tender Board already, and for the time being, resides within the organisational structure of the Ministry of Finance and that the ministry is by way of its tax and revenue collection mandate already in a way engaged in such a monitoring endeavour, insofar as it has access to the financial records of taxpayers, including public servants at all levels, it would seem the appropriate state department to be tasked with the staffing, resourcing and all round enabling of such a unit.

Importantly, such a unit would operate independently of the Tender Board and all other departments and agencies of state tasked with procurement, thus ensuring the integrity of the initiative.

Dispute Resolution And Challenges

Neither the existing nor proposed legislation make provision for a specially designed dispute and challenge resolution mechanism, despite both President Hifikepunye Pohamba, in his State of the Nation address of April 2011, and Tender Board Secretary Welma Enssle¹², having explicitly alluded to the creation of such a mechanism through the new legislation.

The existing Tender Board Act, as earlier indicated, in accordance with relevant constitutional principles concerning human rights, administrative and judicial processes, allows for the challenge of Tender Board decisions in the High Court of the country.

The Tender Board Bill of 2010, which it has to be remembered dates from June 2010, states the following with regard to disputes:

Right to review 24

Any tenderer that is aggrieved by a decision of a procurement body, may approach the Board for review.

What this means exactly is unclear, and probably because the particular provision has not been completely formulated. However, when considering the Pohamba quote from earlier – “A review panel will also be established to consider complaints from aggrieved parties in the tendering process.” – and statements made by Welma Enssle, these point to some sort of review panel or tribunal being created through the proposed legislation to adjudicate on tender disputes. Given that many challenges of Tender Board decisions, along with all manner of other cases, have become bogged down in the overstretched judicial system,

12 Interview on Monday, June 20, 2011

the creation of such a panel or tribunal ideally should see the swift handling of disputes and challenges. Enssle stated that the concept was borrowed from Mauritius, which appears to be leading the way in SADC with regard to the efficiency and effectiveness of such a measure, while South Africa also has a similar mechanism incorporated into its procurement dispensation. It should be pointed out that Mauritius operates with an Independent Review Panel rather than through the Tender Board itself.

In this regard, the regulations section (25) in the proposed law probably provides a possible answer. The section states:

1. The Minister may make regulations not inconsistent with the provisions of this Act in relation to-

(14) contract administration and dispute resolution;

It could be that the proposed review panel or dispute tribunal could come into existence through regulation rather than incorporation into the actual provisions of the proposed law itself. However, given that so much else, such as provisions dealing with the empowerment of women and youth, not directly pertaining to the core functions of the Tender Board get explicit mention in the proposed law, it would seem appropriate that something as significant as a review panel would receive the same statutory treatment.

Blacklisting of errant suppliers and service providers

Neither the existing nor proposed legislation explicitly provides for the blacklisting of errant and/or dubious service providers and suppliers, although such a measure is supposedly incorporated in the regulations of the existing Tender Board Act and should conceivably be carried over to the regulations of the proposed law.

The appropriate provision to consider in the proposed law is probably in the regulations section (25), which states:

1. The Minister may make regulations not inconsistent with the provisions of this Act in relation to-

(19) Penalties for violation of this Act and Regulations.

The big issue with the blacklist as it is, is that its existence is largely unknown and its listing is kept secret. Why this is so, both legislatively and practically, is unclear, as it would arguably be in the public interest to know when entities, who have benefitted from public procurement processes and taxpayers' dollars, have failed to deliver in accordance with the contractual obligations entered into with the state. In illustration, in 2010, there were three companies or suppliers on the blacklist, for failing to deliver adequately or in whole on tenders awarded. These 'offences' related to tenders issued in the previous financial year, and the three companies were blacklisted for a full financial year, in this case 2010-2011. The names of the companies cannot be disclosed and the list is never made public.

Furthermore, the blacklist is a barebones affair, giving scant information about the reasons for the listing of a particular entity.

Why the Namibian dispensation veers towards secrecy and brevity in such matters is questionable. By contrast, in neighbouring South Africa the blacklist is extensive and comprehensive and publicised, to the extent that a copy is freely available for download from the South African Treasury's web portal. And not only that, the blacklist does not only list the transgressor corporate entity, but also the principal officers behind it, so that these cannot try and slice into the public sector procurement pie through another company. Also, the length of the blacklisting is commensurate to the severity of the transgression, in other words a company or individual could be blacklisted for years.

Access to information

Access to information, along with the explicit formulation of policies and laws to give expression to the principle, is considered an integral component of anti-corruption efforts worldwide and is intrinsically tied to the symbiotic principles of transparency and accountability.

In the context of anti-corruption and the engendering and maintenance of the integrity of public procurement processes and systems, it is essential that Namibia adopt access to information legislation, parallel to strengthening and expanding the reach of various legislative elements of the anti-corruption landscape and the introduction of integrity systems.

There is room for a clause or provision on access to information in the proposed Tender Board legislation, given the proposed law's already incorporation of language to the effect that transparency and accountability will be central principles in the workings of the envisaged new Tender Board and encompassing legal framework.

Besides, if Tender Board deliberations and decision-making were made public in a timely fashion, as in published in a readily available and easily accessible format, whether online or in hardcopy, it might just contribute to less disputes and fewer court challenges, and thus greater confidence in the decisions of the board.

Something else to consider

'Namibianisation' or indigenisation'

With both unemployment and poverty having become structural in Namibia and continuing to be very high, government contracts are seen as a way of encouraging both entrepreneurship and employment growth, and by extension lowering poverty levels, the Tender Board is considered a critical conduit for distribution of wealth and economic opportunity, and thus the

upliftment of swathes of Namibia's economically disadvantaged population.

While government contracting has over the years since independence in 1990 contributed to previously disadvantaged individuals and groups entering into the economic mainstream, the fact probably is that very few have actually benefitted, and benefitted continually from state procurement processes. The situation, along with the fact that foreign, especially Chinese companies, have become major beneficiaries of public procurement processes, has led to considerable grumblings in recent times that the Tender Board was not acting in the interest of local companies and thus the local economy. In response the 'Namibianisation' or indigenisation of government contracting, in other words awarding the bulk of contracts or sourcing the majority of goods from Namibian-owned companies or entities with a sizeable stake belonging to Namibian citizens, has become a clarion call again.

Against this backdrop, a read through the Tender Board Bill of 2010 (see attached Appendix A), the Ministry of Finance has taken up the call and the proposed law has a considerable number of sections with elements of 'Namibianisation' incorporated.

However, there is an important question to ask here, namely: Is the Tender Board Bill, and its attendant regulations, the appropriate vehicle to address social issues? In other words, should the proposed Tender Board Bill be burdened with issues that should ideally form part of a special and specific policy or legislative framework geared towards economic empowerment through preferential procurement practices?

There is precedent here, for South Africa, as with Namibia under apartheid, had the majority of its population economically marginalised and to this end enacted a preferential procurement law¹³ in 2000 to supplement the provisions of its established procurement framework¹⁴. It might thus be more appropriate for Namibia to consider the same route of separate but complementary legislation, and thus leave the proposed Tender Board Bill to purely deal with the optimal institutional strengthening of the Tender Board, whatever legislative form it takes in future.

Delegation of powers to Regional Councils

In his speech on April 27, 2011, President Pohamba stated the following: "The proposed amendments [to the Tender Board Act] that will be tabled soon will address issues such as the provision for the Tender Board to delegate some of its powers to the Regional Councils." With regard to delegation of powers, the relevant section (22) in the proposed law states:

Delegation of power to Procurement Bodies 22

1. The Board may, subject to such condition as it may determine, delegate any power entrusted to it under this Act to a procurement body.

(a) A delegation under subsection 1 shall not divest the Board of any power delegated and it may at any time vary or set aside any decision made there under.

Once again this provision suffers from a lack of clarity, as Regional Councils are not specifically mentioned, and the move towards empowering Regional Councils to take up the duties of the Tender Board remains largely unjustified. Viewing the situation from an anti-corruption perspective, the move to delegate Tender Board powers to Regional Councils, in the absence of appropriate checks and balances, which appears to be the case at this level, when considering the deeply questionable state of procurement and contracting at regional level, as best exemplified by the alleged corruption surrounding the pit latrine saga¹⁵ recently in the north of the country, would on the face of it appear to be a bad idea at this point in time, given the lack of technical skills and know-how which mark most settlements outside the major urban and economic centres of the country.

On the other hand, the decentralisation of Tender Board activities, along with various other central government functions, should this actually ever come to fruition, could be a boon for economic activity and development at both regional and local levels. However, this is an issue that should be approached with great caution.

These provisions should be read in conjunction with various others in the proposed legislation dealing with procurement by public entities. On the whole, as with much else, explicit phrasing is required to clarify the meaning of these provisions.

Conclusions

That the existing Tender Board Act of 1996 has become dated, if not shown to be decidedly primitive when compared to other regional and international frameworks, and a liability in some sense, is probably not an argument worth having, and thus on the flipside attempts to update or upgrade the legislative environment as well as institutional framework governing public sector procurement is commendable on a number of fronts. However, the pace at which this is being done is of grave concern, for it appears that the process has been caught out and overtaken by events, most notably the need to respond to the country's shock-

13 Preferential Procurement Policy Framework Act, 2000 (Act No.5 of 2000)

14 State Tender Board Act, 1968 (Act No. 86 of 1968)

15 A rural sanitation scheme, the building of pit latrines for poor households across five northern regions of the country by the Ministry of Regional and Local Government, became mired in irregularity and alleged corruption when it was reported in April 2010 that the impoverished Omusati Region had spent its allotted N\$ 20 million on building just 60 toilets at settlements in the region. The ACC investigation had yet to be finalised at the time of writing.

ingly high unemployment rate of over 50 percent¹⁶, which has prompted government to push through the Targeted Intervention Programme for Employment and Economic Growth (TIPEEG), which makes provision for its procurement requirements – envisaged to run into multibillions of Namibia dollars – to effectively bypass the Tender Board, by merely applying for tender exemptions on all projects under the employment stimulating scheme. It is evident that this does not bode well for the public procurement dispensation as well as the monitoring of how taxpayers' monies get spent.

On the other hand what this state of affairs now clearly underlines is a range of longstanding concerns and it spotlights the fact that the legislative and institutional frameworks are in dire need of some too long in the coming overhaul and that this process needs to come to fruition soon. In this regard, the national President, Hifikepunye Pohamba, the Minister of Finance, Saara Kuugongelwa-Amadhila, and the Secretary of the Tender Board, Welma Enssle, have on various platforms stated that the re-legislating and re-regulating exercise will still be completed in 2011 and the new Tender Board Bill brought before Parliament sometime during the closing months of the year. This seemed highly unlikely at the time of writing, as some of the provisions mentioned, such as the creation of a review panel for tender disputes, as being integral to the workings of the envisaged Tender Board, hadn't even been incorporated into the Tender Board Bill being discussed.

This discussion aside, being as we are engaged in the discussion of ways to minimise corruption and various other nefarious activities around the public procurement dispensation, the heartening feature of the proposed law is the move towards greater openness as evidenced by the explicit inclusion of the principles of accountability and transparency amongst its provisions. If these principles are explored to the fullest meaning of the words themselves, along with that of autonomy, it could be that when the new dispensation is finally introduced, Namibia just might be a continental leader in 'clean' public procurement at some stage down the road. The importance of the incorporation of these principles in all the state's dealings can never be overstated.

On the other hand, as already sketched with regard to the issue of 'Namibianisation', the proposed legislation should not be overloaded with incorporation and inclusion of transformational provisions with an eye to socio-economic conditions – which the Tender Board should be cognisant of in its dealings in any case but not burdened with rectifying – which should primarily be addressed on and at other legislative and institutional platforms and levels, all of which should be grounded in mainstreamed and streamlined state policy and practice.

In light of all this, and in the context of anti-corruption, there are some recommendations worth making.

It is recommended

With regard to the drafting and promulgation of a new Tender Board Act, that:

- The Ministry of Finance and the Tender Board Secretariat should speed up the drafting and consultation process concerning the proposed Tender Board Bill;
- The drafting process be opened up to wider consultation, including incorporating the inputs of the private sector and civil society, as well as all other relevant stakeholders and concerned parties;

With regard to the composition of the Tender Board, that:

- The authorities reassess the provisions of the existing and proposed legislation concerning the size of the Tender Board, and give serious consideration to reducing the size of the board in the pursuit of efficiency;
- At the same time, authorities investigate the issue of including for Tender Board membership individuals, not in the employ of the state, beyond those independents and their alternatives already provided for, who are considerably experienced in financial matters and commensurately qualified and/or technically skilled, and who are representative of a cross-section of socio-economic sectors.

With regard to the conduct of Tender Board members, Secretariat staff and tenderers, that:

- The disclosure of interest provisions be supplemented and strengthened by the introduction of a comprehensive code of ethical conduct for Tender Board members and Secretariat staff;
- Registers of Tender Board members' and Secretariat staff's assets and interests, which would be regularly audited and periodically updated, be introduced amongst the proposed regulations of the new legislation;
- Copies of the registers mentioned above be kept by the Anti-Corruption Commission (ACC);
- The creation of an oversight body, or the empowering of the ACC and/or Receiver of Revenue, to monitor the assets, incomes and spending habits of Tender Board members and Secretariat staff be initiated;
- Similarly, that a comprehensive integrity system, to which all tenderers and contractors have to subscribe, be introduced amongst the regulations of the legislative framework;

¹⁶ According to the latest available figures, the Namibia Labour Force Survey (NLFS) 2008, of the National Planning Commission (NPC), unemployment stands at 51.2 % of the working age population.

With regard to 'Namibianisation' or indigenisation, that:

- The matter be reassessed in the interest of unburdening the legislative framework of provisions concerned with non-core issues, in an effort to focus proposed amendments on maximising institutional strength;
- Namibia consider the development, design and implementation of specific legislation, parallel and complementary to the proposed Tender Board law, aimed at 'Namibianisation' or indigenisation through statutorily introducing preferential procurement practices geared towards uplifting and empowering women, youth, the disabled and all other previously disadvantaged and marginalised individuals and groups;
- Similarly, government finalise black economic empowerment (BEE) legislation and policies which have been more than a decade in the coming, and incorporate preferential procurement provisions into such legislation;
- The drafting and promulgation of such legislation, as with the Tender Board Bill, be prioritised as a matter of urgency.

With regard to exempting of tenders, that:

- The use of the tender exemption be urgently and critically reassessed as a viable tender and public procurement practice;
- And the practice be investigated, through initiating extensive quantitative and qualitative research programmes, so as to evaluate the impact of exemptions on the image of the Tender Board and the Secretariat as well as general government contracting and economic activity, in the context of anti-corruption;
- The introduction of alternative procurement practices be explored with an eye towards minimising the use of exemptions within the public sector procurement dispensation.

With regard to penalties and punitive measures, that:

- The existing blacklist, as a public sector document of great value, be made more descriptive and comprehensive in its composition and such a list be made publicly available, as a means of discouraging non-performance and potential corrupt activity;
- A copy of such a blacklist be kept by the Anti-Corruption Commission (ACC);
- Penalties, fines and imprisonment provisions be firmed up, strengthened and increased in order to convey a strong message and discourage fraudulent and corrupt activities within public procurement processes.

With regard to dispute resolution, that:

- The creation of a review panel, to deal with the mediation of tender disputes, be given explicit mention in the provisions of the proposed law.

sions of the proposed law.

With regard to transparency and accountability, that:

- Relevant authorities subscribe to the notion of openness by giving full force to the principles of transparency and accountability, by amongst others giving consideration to making every step of the tender and procurement process as open to scrutiny as possible, by regularly publishing updates of the performance and delivery process, including the decision-making of the Tender Board itself;
- In keeping with these principles, greater effort be made to make Tender Board deliberations more accessible, in that more should be done to disseminate particulars of bids and awards, whether through a web portal or in hardcopy, which would be readily available for public scrutiny;
- Accountability be engendered through a culture of periodical and critical review of systems and process in an effort to continuously look to improving and strengthening these systems and processes and closing procedural and other loopholes as they might arise;
- In ensuring the maintenance of the principles of transparency and accountability, access to information provisions be included amongst the proposed legislative provisions, while access to information legislation should be prioritised and passed as a matter of urgency.

With regard to the delegation of powers, that:

- Given the structural weaknesses at regional and local levels, these weaknesses along with other challenges be adequately investigated and addressed before steps are taken, in accordance with the provisions of the proposed law, to delegate the powers of the Tender Board;
- Failure to ensure the adequate capacitating of regional and local levels to handle, manage and administer complex procurement processes, could result in considerable loss of confidence in the procurement systems and process, as well as the responsible bodies, and could result in astronomical financial losses to the state, and by extent the ordinary taxpayer;
- Thus it is recommended that the delegation of powers of the Tender Board be approached and dealt with, with great caution.

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Namibian Sun, 6 May 2011, Paulus Ashipala, 'Tender Board Secretariat crippled – Finance PS'

The Namibian, 29 April 2011, Jana-Mari Smith, 'Saara lashes Tender Board'

The Namibian, 19 August 2011, Namibian Press Agency, 'Kapofi blasts Tender Board members'

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Online Resources

The various Acts of Parliament discussed in this paper can be accessed at www.parliament.gov.na.

Additional Websites

Transparency International's documents can be viewed at www.transparency.org.

Organisation for Economic Co-operation and Development (OECD) documents can be viewed at www.oecd.org.

Appendix 1

Interview with Tender Board Secretary Welma Enssle

On 20 June, 2011, IPPR research associate Frederico Links interviewed Secretary of the Tender Board, Welma Enssle, in the company of Tender Board Secretariat senior staff member, Frank Isaacs, at the Tender Board offices in Windhoek. The interview was conducted in the absence of the interviewer having seen the draft Tender Board Bill, which up until then had not been made public. This is a transcript of that interview.

FL: My first question basically is around the amendments to the Tender Board Act. When we spoke last you told me there was going to be work done on the regulations, that is why the process has not been completed. So, when was this process started and when do you envision this to be completed?

WE: I was told some time ago it had been going for eleven years. I don't know, I'm not sure because I don't know when it started. I came to the Tender Board in 2008, I found a bill which was being worked on by different parties. This bill was a completely new thing, but during the discussions we had with the top management – with the minister, deputy minister and those involved, there was the suggestion that why don't we take the existing Act and look at the shortcomings in there and address those shortcomings, and that is where this one comes from. If you take the existing Act and compare it to this one you will see what has been changed and what has been added and what has been taken away. This is basically what is happening. When it will be tabled, when it will come into force, unfortunately, that is something I don't know.

FL: There is no timeline on this?

WE: We would like to see it this year still, and I think the minister would like to see it this year. What has happened in the meantime is that the Tender Board hosted a conference sponsored by the Commonwealth Public Procurement Network (CPPN). It's a technical conference that is sponsored by the Commonwealth, of which Namibia is a member, and it focused on public procurement and what came out of that was that there were certain things which we could include in our bill that are being done by other member countries of the Commonwealth and what we also found was that Namibia was also behind in terms of best practices in public procurement. But you have to keep in mind that this, the Tender Board Act, was promulgated in 1996.

FL: Why is it taking so long to get this through, what is the hold-up exactly?

WE: When I came to the Tender Board in 2008 one of my instructions was that I was to start working on the Tender Board Bill, which I did and it's not easy because we are not legal people. You make changes where you find it practical. And the changes that you make, if you change a sentence, that sentence cannot go to Parliament as it is, so we make changes from the practical side of things or we suggest changes from the practical side of things, but then it has to go through all the channels, you know, after it has been approved by top management in the ministry, then it has to go to Cabinet. And after Cabinet it has to go to the Cabinet Committee on Legislation. And if they are fine with the proposed changes, then only can it go to the legal drafters, but then the legal drafters may say, 'no what you are saying here does not make sense' or 'it's completely out of our area or it will just land you in trouble'. So they have to re-craft the language. And I think with not just the legal draft, but also with some of the things that have happened in between, the time that this thing was sent to Parliament or to the CCL, many things have happened. We had the CPPN last year where we found that many of the countries have what they call an independent review panel which is something Namibia doesn't have. There is no other recourse for an unhappy tenderer than the courts. Mauritius for instance and some of the other African countries have this independent review panel where you can lodge your complaint and it makes life a lot easier, for instance for SMEs here and small companies, because there is little cost involved, but definitely not the kind of cost they have to pay when they go to court. To have that, a number of things will have to change within the whole system and even within the act to accommodate that because, if we want to introduce a review panel, then the award has to be put on hold for a certain number of days in order to allow for everybody to know what has happened and then if they are not happy then they lodge their complaint, because once the award has been made then you have more than one unhappy party, because you have the unhappy party that was not part of the tender right from the beginning and then you have the other unhappy party who got the tender and now all of a sudden the tender is challenged. So certain procedures will have to be changed but those things will all be taken up.

FL: I'm asking this because there doesn't seem to be urgency to get this through and if we look at the background we're talking against here, the spending of a lot of money through TIPEEG over the next few financial years, almost N\$15 billion, that's a lot of government contracting, and I would have thought this should be the time to push this legislation through, to make tender awarding more transparent, if you will. Is the hold-up political?

WE: If I have to be honest, the Minister of Finance and the Deputy Minister and the top management of Finance, they have been pushing this. And if it was in the Minister's power, this thing would already have been true. Unfortunately, there are channels through which this has to go and it would not be good practice to rush something.

FL: What exactly was the motivation to change this legislation?

WE: The economic environment has changed completely since 1996. You know SMEs have emerged all over the place and they are not catered for in the existing Act. So many other things have emerged, for instance we do not have an approved BEE policy, but we have TESEF (Transformative Economic and Social Empowerment Framework) which has also not been finalised.

FL: Is this the 'Namibianisation' component which has become an issue over the last year or so?

WE: Yes, there are certain things to consider, for instance I saw in this morning's newspaper that they say we need to have a strategy with regard to the Chinese, the invasion of foreign companies or the taking over of foreign companies which leads to the Namibians being pushed to the background and going out of business, and our own people are sitting without jobs. If you look at the unemployment figure, it should not be like that. If only we had the mechanism to safeguard tenders for Namibians, but currently we do not.

FL: What proposals are you making in that regard?

WE: 51% Namibian ownership. I suppose, in broad terms, in all tenders, there will obviously be some tenders where you will have to open it up for outside competition, but like for instance construction, it should be Namibian construction.

FL: Is that what you make provision for in the amendments?

WE: Not specifically construction, but to qualify for government tenders you have to prove that you have at least 51% Namibian ownership.

FL: 51%?

WE: Yes. You have to be able to prove certain things. You have to be able to prove BEE compliance and all those sorts of things, but it's difficult to put these things in an Act because they are policies which keep changing and you cannot put that in an Act.

FL: Right, how does this work in terms of the competitive principle in economics? And it does influence how foreign investors look at us, is this just one of the things that will be included in terms of giving Namibians more access to for instance government contracts or is it the only thing?

WE: It's only one of the things. There are other, what we would call, empowerment measures, for instance for SMEs. We have this wide field of SMEs, but they don't go anywhere and if you look throughout the world, SMEs at some stage become the mainstay of an economy. So, due recognition has to be given to them, so there has to be some mechanism to uplift them and empower them so they become part of the mainstream Namibian economic environment.

FL: What are some of the other more salient features of the amendments?

WE: Well, they will also look at the whole scope of public bodies. If I talk about public bodies then its regional councils and SOEs. Everybody does what they think is best. And the idea is not to prescribe to them how to do procurement, but that they subscribe to the principles of the Tender Board Act, and some of the principles of the government and the Tender Board Act are for instance transparency and accountability.

FL: And those are issues that we have with government processes, because there is very little transparency and accountability, and with procurement as well. Are you following what's happening in South Africa at the moment with the tender regulations?

WE: Not completely, but to some extent.

FL: Well, SA Finance Minister Pravin Gordhan announced two weeks ago there was going to be a total overhaul of the whole tender system. What they're going to do is make the whole process a lot more transparent. All documents will be made public, every step of the process will be public. For instance, the line ministry that is going to contract will have to put every step of the process on its website, from the bid documents, the short-listings, all these things and the reasons why this was done. Everybody can see every step of the way why these companies were shortlisted and what the reasons were for this. So when we consider transparency in terms of

that, and it remains to be seen how successful it will be, is this the sort of transparency that we're talking about in the Namibian system? If it's not, what is it that we're talking about?

WE: I don't think that is what we're talking about because I must be very honest that was not exactly what we had in mind in terms of transparency, but to enhance what we currently have. Because we do open tenders in public, it's advertised in public, so everybody has access to it. You have the right to review, although you have to go to the courts. You have the right to ask the reasons why you weren't selected, although those reasons won't be made public, not at the moment. But the bidder, the unsuccessful bidder has the right, it's in the current Act, to ask. It's just that people do not do that. And I assume that it's because of lack of knowledge that they don't do that.

FL: The Tender Board has become something of a controversial body in Namibia and to remove that suspicion, don't you think it would be best to do everything openly?

WE: But do you know you also have to look at the other side of the coin. It's a competitive process so at some stage you cannot really reveal everything.

FL: But we're talking about taxpayers' money?

WE: That's right. For instance we have a period throughout the whole process where we cannot allow interference from outside, for instance you calling him, people saying 'did you look at this, did you look at that' after the bid has closed. Up to the time that the tender has been presented to the Tender Board, we should not have contact with bidders unless it's for the purpose of clarity with the bidders, because any contact, any interference, can be seen as an attempt to swing the decision.

FL: That's not exactly the thing I'm talking about. People are aware already you can't interfere with the process. It's when decisions are made, what are those decisions based on and why are certain contracts being given to certain contractors. And then you have people questioning the credibility of the Tender Board, and this is especially the case with the Chinese contractors, when you have Namibians demanding to know 'why was this decision made and based on what'. These decisions and processes are not publicly available and that is what I'm getting at. Why not do all this in public? So everyone knows why this contractor was chosen above others. It would remove a lot of suspicion from the whole process. Why is this thinking not part of public procurement process of the Tender Board?

WE: I agree that there is this part where it's not made public. Because it was the notion since the inauguration of the Tender Board way back. The competition was not actually as fierce then, so if you got a contact then there would probably be only two or three other bidders. Since it was an open process and it was opened in public, you would have known that 'I don't have a chance because my price is way to high', but in the meantime the world has changed and competition has become extremely fierce and when the Tender Board takes a decision, whether to take this one or the other one, it's first of all based on specifications. On the requirements of the Tender Board. Some of the requirements of the Tender Board are, for instance, that you have to be a registered company or you have to be at least a registered business, whatever it is. Without excluding individuals who are obviously not companies or close corporations or joint ventures. Then you have to be in good standing with the Receiver of Revenue and you have to be in good standing with Social Security, if it's applicable to you, but the Receiver of Revenue is definitely applicable to everybody, whether it's the public or companies. Those are the first things that the board looks at. Now the second part is basically the most important part. Do you comply with the specifications, do you have what the ministry asks from you, do you have the capacity, do you have the experience, do you have the track record, do you have the financial ability and all those things? Are you giving the TB what they have asked for. If you ask for the printing of business cards, do they get the quotation for the printing of business cards or do they get the location for the printing of complimentary slips. Those are the most important things being looked at. And once those have been looked at and the final short-listing has been done, then you look at the price, without excluding the ones who haven't met the requirements. And most of the time, if we come back to the Chinese, they meet all the requirements and they give the best price. Why? We don't know. We have our theories that most of these Chinese companies here are actually state-owned enterprises.

FL: The thing is, when you say they meet most of the requirements, local builders, the local construction industry has been saying that the Chinese do not meet Namibian labour requirements, labour law and equity requirements, and yet they get awarded tenders. So do they actually, that's where the question comes in, then meet the Tender Board specifications?

WE: The Tender Board, if you look at the mandate of the Tender Board, is to regulate procurement. Now if you have to regulate procurement then obviously the Labour Act is outside your mandate. And I know, we all know, that the Tender Board has been blamed for giving contracts to Chinese who do not adhere to the country's labour laws and do not adhere to other laws of the country. But the Tender Board is also not the policeman for these

other laws, that's why you have a Ministry of Labour and a Ministry of Home Affairs.

FL: This is taxpayers' money, shouldn't you be doing this thing properly? I mean, that would be an easy excuse, 'it's not part of our job', but this is our money?

WE: That's true, but then what do you leave for the Ministry of Labour to do? What do you leave for the Ministry of Home Affairs to do? It has been argued time and time again that the Tender Board is bogging itself down with the responsibilities of other ministries. Because it's not the Tender Board's responsibility to ensure people have valid work permits, that they are legally in the country. It's also not the legal responsibility of the Tender Board to check whether these people are being paid their prescribed wages. It's also not the responsibility of the ministry or the Tender Board to go and see whether they adhere to safety regulations.

FL: I mean I understand that, but if your specs say that there are certain certificates that need to accompany the tender bid, and those things are not there, it raises questions. There have been documents compiled by the construction industry showing that these [Chinese] companies did not have these certificates when they did get these contracts. Kerry McNamara and some others took the tender surrounding the new Ministry of Lands building to court. And in the court documents they did make these allegations.

WE: That's true, but if you remember correctly the court said it's not the mandate of the Tender Board to check whether correct wages are paid or to see whether people have work permits. That part is not the responsibility of the Tender Board and it has been argued at the Tender Board because you know one section of Tender Board members would say 'we need to do this', then the other section would say 'why should the Tender Board be responsible for this, why do we have a Ministry of Home Affairs, why do we have a Ministry of Trade and Industry, why do we have a Ministry of Labour, because these are their responsibility?' We make it a condition that you have to adhere to these things and you have to be able to prove that you do at the time of the award, but when the contract is running, it's outside the ambit of the Tender Board. You will see that in the amendment we tried to address some of these things, to give the board a little bit more power.

But it will be difficult, the Tender Board can't work on its own, it has to work in conjunction with these other ministries who are the experts in these areas. So it's a very controversial thing. The Tender Board can basically enforce the rules that it lays down with regard to procurement.

FL: Right, in this context, I just want to ask to you clarify the issue of accountability and transparency? I'd like you to explain to me, in short, how you would define accountability and transparency within Tender Board processes?

WE: Well, transparency for me is the fact that we have a competitive process that's open to everybody. If you meet the requirements, it's open. We have a public tender opening, when the results are out we make it public in the newspapers, on our website and on the notice board.

FL: But this only happens for a short period of time and then it's removed. Why?

WE: I suppose because of space. We don't have space enough to keep everything on, especially on the website for an indefinite period. But these are all things, all administrative things, we're working on. To improve the website for instance to make it more accessible, we are working on e-procurement, but because Namibia is way behind most of the southern African countries, and once we have moved that way, certain of the information will be more accessible. But what is also proposed after the conference in December and also after a group of Tender Board members have gone to Mauritius to look at best practice in the Mauritian procurement system, because Mauritius has been very robust with their reforms, is to look at something like a policy making office where policies with regard to public procurement would be made. And there would also be an element of oversight to make sure that everybody complies.

FL: This would be within the Tender Board?

WE: Yes, it basically looks at the total restructuring of the Tender Board, it's not part of the amendments yet, it's one of those things that may be included if we get the go-ahead, because it would then specifically give the Tender Board that authority to make policy and to enforce that policy, be it through the line ministry or be it through another body. That would also take care of, basically, transparency and accountability. This office would be responsible for standard and unified documentation. Everybody would have the same documentation. All the ministries, they will still have their own specifications, but everybody would have standard documentation, where if you say 51% Namibian ownership it has to be 51% across the board. Now some ministries say you have to show that you have a certain percentage Namibian ownership, you have to show you have black partners, but there is nothing legal that you can back that up with. It cannot be enforced, there is no policy yet so it cannot be enforced, it's an initiative from some of the ministries to try and address some of the inequalities that we have. But what will

also need to be changed is our price preference policy because that is basically the reason for the flak that the government procurement system gets.

FL: Going for the cheapest all the time?

WE: Not necessarily. But giving preference to the people who we feel should not get that preference. When in 1996 the preference policy was designed the procurement environment was very different. There were a few companies from outside, but they tendered as companies from South Africa or Zimbabwe. Now that has changed. In the meantime we have all these Chinese companies, all South African companies, and they have companies registered in Namibia because of our investment policy. And they attract the same preference as a Namibian company, as one of our preferences speaks directly to them. It says if you are registered or incorporated in Namibia then you may qualify. We have a Ministry of Trade, a ministry which has certain policies in place to attract investors and because of that we have an influx from certain countries and these are some of the things that will have to change.

FL: But that brings the issue of consultation into it. Who exactly is involved in the consultation around these things, around regulations around amendments and policy?

WE: For instance, Home Affairs, Labour, Trade and Industry and ...

FL: So if there are problems are there attempts to try to streamline processes and systems so that everybody falls in line, as a way to make things work more efficiently?

WE: That is the idea and in effect it is being done already. There are certain things for instance specifications specifically for construction and all these big tenders. They have a clause that says that no semi or unskilled labour should be from outside Namibia, and that is something that everybody has to adhere to. Now, I know that at the time when this announcement was made, when this decision was taken by the board, there was some criticism because how can the Tender Board just make an announcement like that, were there any other stakeholders involved? But then one would expect that the stakeholders take notice of what the Tender Board has decided. And then fall in with that. Because if you take the Ministry of Home Affairs, why give work permits to people with skills or without skills, because we have enough of that here? And they, the Tender Board, is being castigated for awarding tenders to Chinese companies, but have we looked at the private sector. Have we looked at the mines? What do they do? They import, and I challenge you to go look at them, they import lock, stock and barrel unskilled and semi skilled labour.

FL: But that's not part of the tendering process, what do they tender for?

WE: Mines are still busy with procurement. They bring in companies to ...

FL: That's private enterprise, this is government procurement we're talking about ...

WE: Now-now, would you say that there are a different set of rules for private...?

FL: I think there should be a very, very clear set of rules for government procurement, my personal opinion. Private enterprise, let them govern themselves with the rules governing them, but when it comes to taxpayers' money, that's a whole other game.

WE: But the very same people you bring in, the unskilled labour you bring in, once your project is over what will you do with them? You leave them in Namibia and they're the ones that are picked up by other foreign companies.

FL: When those companies come and tender for taxpayers' money then I'd come and say 'what is the Tender Board doing about this?'

WE: But we cannot have different standards for the Tender Board, for procurement by government and procurement by private companies.

FL: Why not?

WE: Because if we say that no skilled and semi skilled labourers should be on government projects why can't we say the same to private companies. We need to give work to our own people and we shouldn't import that kind of labour from outside. Because of that I believe there should be the same set of rules for everybody. Even when it comes to the awarding of tenders to companies, because we say that government gives tenders to the Chinese companies and the Chinese companies do not spend their money here and the money goes out, but the same with the other private companies.

FL: But that's what I'm talking about where consultation comes in. And I want to know, do these amendments make provision for a more efficient system, in terms of different line ministries actually meeting their responsibilities in the whole process of procurement and enforcing and seeing that the work gets done?

WE: No. Not particularly. Because once again you have to look at the functions of the board and the responsibility of the board in the right context. It's there to regulate procurement and it has to leave the other peoples' responsibilities to them, they may make their specifications such that these ministries have to take responsibility to see that these things are in force. For instance, that labour issues are adhered to. But it cannot be the responsibility of the Tender Board to really take care of these things because what is its role then at the end of the day? You have a mixture of everybody else's responsibilities.

FL: **There's another issue, that's happening in South Africa, they've produced a blacklist and it's available on the Ministry of Finance's website and it's not just companies it's individuals too. They are cognizant of the fact that individuals, if a company is blacklisted, can always just start another company and tender again. The people on the blacklist cannot tender for government contracts. Some of these are actually high ranking ANC officials, for instance there is one former high ranking official of the Western Cape, actually the leader of the ANC in the Western Cape, whose name is on there. Is there something like that in the amendments?**

WE: It's there in the existing Act. And it's done.

FL: **You have a blacklist?**

WE: Yes, we do have a blacklist.

FL: **Is it publicly available?**

WE: We do have a blacklist, but it is not publicly available.

FL: **Is there political interference in this process?**

WE: No, I don't say that ... What I say is the Tender Board, the line ministries, I wouldn't say they are lenient, but sometimes it's a matter of ignorance. If a company doesn't perform, this is basically when a company is blacklisted. When a company does not perform, there are no provisions for any other things, for instance tender fraud. Because again it's someone else's responsibility to uncover tender fraud. It's Anti-Corruption Commission's responsibility, it's the police's responsibility. It will also not be uncovered if somebody doesn't blow the whistle. And the Tender Board has limited powers when it comes to that because the Tender Board, when it hears about something then it has to investigate, it does not have that kind of power. It has to refer to the police or the government.

FL: **Do you make provision for that sort of thing? Actually strengthening that sort of thing where you actually do investigate and create a blacklist?**

WE: Yes, you get blacklisted. The board has the power to blacklist and it does blacklist.

FL: **Ok, but what you're saying is that this blacklist is ignored?**

WE: It's not ignored, it's purely based on performance but on the other things like corruption and those things, it's not covered in the Tender Board Act because once again it's the mandate of someone else.

FL: **But I'm not talking about corruption, I'm talking about if you're not performing. Can you never tender again?**

WE: No, we cannot punish someone forever. The Tender Board, after the company has been engaged, because you can't just blacklist, you must also engage that company, and ask 'what is the reason that you do not perform?', can we look at this again, because even the banks if you have problems with your hire-purchase, you go to the bank and you ask 'can we talk about this, can we look at refinancing' or whatever the case may be. We have to do the same, it's administrative justice. So you have to go through that process first and then only, if that process has been unsuccessful, then the ministry will come to the Tender Board and say 'this is what the company has done, this is what we have done, here's proof of everything, can we blacklist this company?' We withdraw the tender from this company and we blacklist this company. And any other companies that may be established with the same partners or shareholders. That is the latest thing, part of the old Act. The board used to blacklist just the company.

FL: **As long as things are not done in the open you will have question marks around processes, so we do want to know what is the thinking behind things like keeping the blacklist confidential?**

WE: Well one could not say that it's been kept confidential because the ministries are the ones that are dealing with the tenders, and have to evaluate them and they have this information. They know they can't consider this company because it has been blacklisted, but who else ... ok, the public out there ... but who else would need this information? This is between the Tender Board as well as the ministry because between the two is where the decision has to be taken that we cannot take this company as it has been blacklisted. It has not been made public not because we want to keep it a secret, but there was ... I would not really say there was no need for it, but ... well... there was no outcry.

FL: **There was no demand for it?**

WE: Yes, there was no demand for it up till now, but it can be done because what has transpired over the last couple of months is that there are a lot of processes that need to be reworked and given more prominence, more publicity, in order to enhance the transparency. Because the Tender Board or the procurement system has never been under so much pressure, never so in the limelight, as it has been over the past couple of years. You have to also look at what needs to be public information and you cannot just dump everything on the website of the ministry or notice boards, you also have to be careful how you manage the information that you have to put out to the public because it can have exactly the opposite effect.

FL: On a related issue, looking at the whole procurement environment since about 2005 we've now reached a situation where almost three-quarters of government procurement is tender exempt. What has given rise to this?

WE: No, it has been like that from the beginning.

FL: If we look from 2005 at Tender Board reports, they actually show that from 2005 there's been this massive increase in tender exemptions, that we've now reached a point where three-quarters are now tender exempt.

WE: You have to look at things like, for instance, the one ministry that may take up a lot of money on exemption is the Office of the Prime Minister, because they work with the disaster emergency management and for that you cannot really go out on tender, although they do go out for quotations, they have to publish and they have to do a sort of mini tender. Because for emergency services you can really not go through the tender process.

FL: But it's not just emergency services. Things like classrooms and other things like these being mentioned as being exempted from ...

WE: Uh, no ...

FL: This is actually in a tender report?

WE: That was at a time when there was this need. Well, we all know that there is this huge need for classrooms, we have it year after year after year. And it's not really, although the ministry have exemption for that, it's not an exemption in the real sense of the word because quotations are still called for. The companies go through a similar process as the tender process. They have to provide everything that they would have to provide when it's a formal tender, but it's just to shorten the whole process because then it only goes to the ministerial tender committee, but they still have to go through the whole process.

FL: This raises the question that why need to tender for it at all, if so much of government procurement is now done outside of Tender Board activities? Where are we headed with this? Let me ask you this, what would you think is the reason, is this poor planning by government departments that is reflected in the number of exemptions? Because, I mean, sometimes these things you know over a three-year period, that 'I'm going to need classrooms and buildings and infrastructure over this period' and you do plan for that over a number of years, you don't just wake up one morning and decide that you are going to build some classrooms.

WE: True.

FL: You don't just decide 'I'm going to build an office for this ministry'. You don't just decide that on the spur of the moment. These are things which come on for years. So why is this happening?

WE: You often have to be fair to government, you are now generalising. If I recall the issue of the classrooms it was one particular year that government said 'we have to do something about this'.

FL: But forget the classrooms, I'm looking at exemptions in general, how they've ballooned. Some of these things aren't incidental, like that you have to go out and buy a pen.

WE: Let me explain to you how exemptions work, or why we have exemptions. There are certain things that are definitely not practical to go out on tender for.

FL: Like?

WE: Like for instance office stationery. How much does a ministry like education spend on office stationery per year? We have the government stores that go out on annual tender for things like stationery and furniture and cleaning materials.

FL: But that's planning. You know you'll be needing this amount of stationery over a course of years. Over this year or next year you plan for increases in staff. Desks, computers, stuff like that... you know these things already the previous financial year. Even stationary you do plan for these things.

WE: That is why government stores have these annual tenders now the ministries get exemption not to go out on tender then they buy from the government stores. It's then supposed to stock these things. That is why they need the exemption. All government ministries buy from government stores, which resorts under the ministry of works and transport. They stock stationery, they stock furniture, cleaning materials and they go out on

tender for that. They put out a tender for these things and this is a major exercise, if you go downstairs to our basement you will see there is a room where we keep all the samples because the companies that tender have to give samples of what they are going to provide, for instance toilet paper and those things. So instead of going out on tender the ministries get exemptions and buy these things from government stores. It's sort of an inter-ministerial transaction. Or in the case of furniture for instance, the government stores do not stock the furniture because it also doesn't make sense to stock furniture, but they have approved tenderers. So if Ministry of Finance, or the Tender Board needs furniture, we can, without having to go out on tender, go to government stores and ask which companies they have on their annual tender for furniture and then they would give us a list and we would go to those companies that had been pre-approved by the Tender Board to supply when the need arises. So it's not exactly an exemption that exonerates ministries from going out on tender, there is one ministry which goes out on tender and it just makes the whole process a lot faster. And then the other ministries source from the approved tenderers of that one ministry. The same with vehicles. An annual tender for vehicles or else this would mean that every ministry would have to go out on tender for vehicles so government garage, which is also part of Ministry of Works, goes out on tender for vehicles. And the ministries, when the need arises, they would then go to government garage, get the list of companies which have been approved by the Tender Board and then approach those companies with an order.

FL: But do you see that when, for instance, we from outside look at the process, how much of procurement is tender exempt, it does sort of raise questions?

WE: There are certain things which are exempted for instance the police at the rehabilitation farms, they need things like fertilisers, seeds and they need exemption because these are things that depend on the number of inmates that they have, what the inmates can do. They also do some building. But it all depends on the inmates that they have, so they cannot go out on tender and ask for building materials for this amount or seed for this amount.

FL: So would you say that exemptions can create space for corruption?

WE: It does.

FL: If so much procurement is done outside of tender processes, it creates space for corruption. I mean, it could balloon much further into the future and at some point it could actually become a real problem?

WE: I think one needs to look at exemption against the background of the threshold that the ministry may stay within when they don't use tenders. It's N\$10,000. What do you buy with N\$10, 000? We do address it in the amendments, but it's going to be lifted, be increased.

FL: So what is the proposal?

WE: There is no proposal, it will all depend on the line function of the ministry. It may vary from ministry to ministry. For instance, Ministry of Agriculture needs to buy vaccination material and they need to buy it when they need it because you cannot purchase those things ahead of time. Because it has a very short shelf-life, so when the time arrives they would need vaccination material and that could run into millions, depending on what they needed. Ministry of Health may need polio vaccination, they may need malaria vaccination, and it would depend on the event. It would depend on what the situation is.

FL: Where is the Tender Board in all of this, do they have to consult with you?

WE: Yes. Every ministry has to get exemption every year because of the fact that N\$10,000 is not a lot of money. If you need two new desks, would you go out on tender for two new desks? Is it practical? Does it warrant the time and the money that you put into the administration of that tender? So it's not always practical to go out on tender.

FL: Now I go back to the issue of the time. If we see that these things are happening why are they taking so long to be addressed?

WE: Well, it's a lot of things that one needs to take into account. Otherwise you will have to go back to Parliament for these changes on a regular basis and that does not work. And you also have to make sure that what you want to change needs to be in the Act or should it rather go into the regulations where the minister has the mandate to make changes without having to go to Parliament. But you have to be very careful when you put something in the Act or when you take something out of the Act. How will it affect your future activities? Would it constrain you? Or would it give you too much leeway? So, it's a fine balance of what needs to go into the Act or what needs to be changed and what needs to be left as it is. We have some of the best procurement laws in southern Africa because it does not put too much restriction on procurement, but it also balances what needs to happen in terms of approval, in terms of what the board may do, what the tenderers may do... you need to be very careful when you put something in here... does it fit into the mandate of the board? And if you remove this, if you change this, what is going to be the effect of it on the whole process. And as we go along

we learn from, for instance, the court cases. We keep on learning from the court cases because you will only know where you go wrong when you are challenged and these are some of the things that we take from the rulings of the court and put in as amendments.

FL: The Tender Board attendance register shows when the alternate members attended, does this happen a lot?

WE: It does. You must recognise the fact that the permanent secretaries are the accounting officers of the ministries. They are running a ministry and sometimes they have equally important commitments and then they have to decide ‘do I go to the Tender Board meeting or do I go to this one’ and because they have an alternate member they can then choose to send the alternate member because the alternate member is supposed to be as updated as the full member. This is where the other commitment may require the accounting officer there because a decision needs to be taken that would be of national interest or would be of interest to the ministry and being the accounting officer, he or she is then required to be there in order for this decision to be taken. While at the Tender Board the alternate members have the same power when they attend on behalf of the absent member. So no meeting will be cancelled because we only have alternate members.

FL: Are there situations where there are just these alternate members?

WE: No, not really.

Appendix 2

Tender Board Bill (June 2010-Final draft)

1. **Definitions**
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27. **Procurement by public entities**
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33. **Short title and commencement**

To regulate the procurement of goods and services for; the letting and hiring of anything or the acquisition or granting of rights for or on behalf of, and the disposal of property of the Government: to establish the Tender Board of Namibia and to define its functions; and to provide for incidental matters.

(Signed by the President on.....)

By the Parliament of the Republic of Namibia as follows:-

In this Act, unless the context otherwise indicates-

1. Definitions

“**Accounting Officer**” means the accounting officer of any office, ministry or agency;

“**administrative head**” means the permanent secretary of any office, ministry or agency;

“**agency**” means an agency defined in section 1(1) of the Public Service Act;

“**agreement**” means an agreement concluded under section 7(1)(a);

“**BEE**” means the integrated and coherent socio-economic process directed at transforming the economy by giving previously disadvantaged groups economic opportunities previously not available to them;

“**BEE**” means those groups or persons disadvantaged by the policies of Apartheid;

“**Board**” means the Tender Board of Namibia established by section 2(1);

“**categories of goods and services**” means designated groups of tenders for goods and services as regulated by the minister

“**disposal**” means the divestiture of public assets, including intellectual property rights and goodwill and any other rights of the government, by any means, including sale, rental, lease, auction or any combination thereof

“**chairperson**” means the chairperson of the Board;

“**Construction**” means all work associated with the construction, reconstruction, repair or renovation of a building, structure or works;

“**Fund**” means a designated fund in terms of Article 125 (3) (a) of the Constitution;

“**goods**” includes raw materials, products, equipment and other physical objects in any state or form, and electricity;

“**interest**” means an interest that a person has, in a tenderer (or its agent) or a competitor of a tenderer as a result of potential pecuniary (financial) advantage;

“**Local Authorities**” means a local authority as defined in section 1 of the Local Authorities Act, 1992 (Act 23 of 1992);

“**local content**” means any Namibian materials/produce grown, produced and/or manufactured or any direct labour involved in the manufacturing of such goods and services;

“**member**” means a member of the Board or an alternate member acting as a member of the Board, as the case may, appointed by or in terms of section 3(1) or section 3(2), respectively;

“**Minister**” means the minister of Finance;

“**ministry**” means a ministry as defined in section 1(1) of the Public Service Act;

“**office**” means an office as defined in section 1(1) of the Public service Act;

“**Permanent Secretary**” means Permanent Secretary: Finance;

“**Procurement**” means, in relation to the furnishing of goods or services for the Government and for the arrangement of the letting or hiring of anything or the acquisition or granting of any right for or on behalf of the government and for the disposal of Government property, all processes from determination of need through specification, pre-qualification, tender award, contractual agreement, contract management, to termination, dispute resolution and final disposal;

“**Procurement Authority**” means the Board, or any office/ministry/agency/entity, subject to delegation, exercising any power of the Board under authority delegated by it;

“**Public entities**” means a State Owned Enterprise, Regional Council, Local Authority Council, Funds and such other bodies as may be prescribed;

“**Public Private Partnership**” means a partnership between government and the private sector for the purpose of more effectively providing services aimed at public benefit;

“**Public Service Act**” means Public Service Act, 1995 (Act 13 of 1995);

“**regional council**” means a regional council as defined in section 1 of the Regional Councils Act, 1992 (Act 22 of 1992);

“**security related**” in relation to goods, services and property, means goods services and property in respect of which secrecy is required in the national interest;

“services” includes any construction;

“set- aside” tenders means certain tenders awarded to designated groups as per regulation

“Small and medium enterprises” means as defined by the Ministry of Trade and Industry;

“State Owned Enterprise” means an entity named in Schedule 1 of the State Owned Enterprise Governance Act 2006;

“staff member” means a staff member as defined in section 1(1) of the Public Service Act;

“Tenderer” means a person who has made a written offer to carry out work, supply goods, etc. for a stated fixed price.

This Act: includes the regulations

2. Establishment of Board

(1) There is hereby established an autonomous board to be known as the Tender Board of Namibia.

(2) On the date of the commencement of this Act the Tender Board of Namibia established in terms of the Tender Board Act of Namibia 1996, (Act 16 of 1996), shall cease to exist and as from that date a reference in any law or otherwise to such board shall be construed as a reference to the board established by subsection (1) of this Act.

3. Composition of Board

(1) The Board shall consist of-

(a) The Permanent Secretary;

(b) A staff member from each office, ministry and agency nominated-

(i) in the case of the Office of the President, by the President;

(ii) in the case of the Office of the Prime Minister, by the Prime Minister;

(iii) in the case of the National Assembly and National Council, the Speaker;

(iv) in the case of ministries and agencies, by the Minister concerned;

and appointed by the Minister; and

(c) any two persons appointed by the Minister, who shall-

(i) be Namibian citizens; and

(ii) not be staff members.

(d) the minister shall appoint a chairperson from amongst the members appointed in terms of subsection (1) (a), (b) and (c).

(2) The Minister shall, with due regard to paragraphs (b) and (c) of subsection (1), appoint for each member of the Board appointed by him or her in terms of those paragraphs, an alternate member, nominated in so far as applicable in accordance with the provisions of these paragraphs, and any alternate member so appointed may during the absence of the member with respect to whom he or she is appointed or his or her inability to act as member, act as member in place of that member.

(3) The Board shall designate any other member as deputy chairperson, who shall act as chairperson of the Board when the chairperson is absent or unable to perform his or her duties, and when both the chairperson and the deputy chairperson are absent from a meeting of the Board, the members present may elect one of their number to preside at such meeting.

(4) In appointing members and alternate members in terms of Section 1(c), the members will have regard to the government policy on gender and youth empowerment.

4. Tenure and vacation of office

(1) Subject to the provisions of section (3), a member, who is in the employment of the Government, shall hold office during the period that such member or other member holds office at the nominating office/ministry/agency.

(2) Any member appointed in terms of section 3 (1) (c) shall hold office for a period of three years and may be eligible for reappointment after such period has expired.

(3) Membership ceases-

(a) in the case of a member appointed in terms of subsection (1) (a) when a member ceases to be in the employment of the nominating agency or,

(b) in the case of a member appointed in terms of section 3(1) (c) and who is not in the employment of the Government, that member resigns by written notice addressed to the minister;

(c) has, without sufficient reasons or the leave of the Board, been absent from three consecutive meetings of the Board; or

(d) is removed from office under subsection (4) by the Minister;

(e) has had a written resignation accepted by the Minister;

(f) is sentenced to imprisonment without the option of a fine.

(4) (1) The Minister may at any time remove a member from office for reasons which in the opinion of the Minister render him or her unsuitable to serve on the Board.

(2) If a member or alternate dies or vacates their position, the Minister shall appoint a replacement in accordance with 3 (1) and (2) above.

5. Remuneration of members

The remuneration and allowances of a member not being in the fulltime employment of the Government shall be determined from time to time by the Minister.

6. Disclosure of interest

(1) A member who has a direct or indirect personal interest in a tender shall declare such interest to the Board.

(2) A member shall not take part in any consideration or discussion of, or exercise any vote on a matter in which he or she has an interest as contemplated in subsection (1).

(3) Any member who contravenes or fails to comply with a provision of subsection (2) shall be guilty of an offence and on conviction be liable to a fine determined by the minister in the gazette or to imprisonment for a period not exceeding 2 years or to both such fine and such imprisonment.

(4) The provision of this section shall apply mutatis mutandis to any official who shall declare such interest to the Accounting Officer.

7. Powers and Functions of Board

(1) Unless otherwise provided in this Act or any other law, the Board shall be responsible for the procurement of goods and services for the Government and public entities, and, subject to the provisions of any other Act of Parliament, for the arrangement of the letting or hiring of anything or the acquisition for or on behalf of the Government and public entities, and for the disposal of property of Government and public entities, and may for that purpose-

(a) undertake any action and make any decision, subject to the provisions of this Act, with regard to or arising from procurement or disposal. Such actions and decisions may include, but shall not be limited to the:

- (i) Invitation of tenders or proposals
- (ii) Pre-qualification of a limited number of tenderers
- (iii) Awarding of tenders
- (iv) Facilitating conclusion of agreements/contracts
- (v) Overseeing the management of agreements/contracts

(b) with a view to award a tender contemplated in paragraph (a) ii, determine the manner in which and the conditions subject to which such tenders shall be submitted;

(c) inspect and test or cause to be inspected and tested goods and services which are offered or which are or have been furnished in terms of an agreement concluded under this section, and anything offered for hire;

(d) accept or reject any tender for the conclusion of an agreement contemplated in paragraph (a);

(e) take steps or cause steps to be taken to enforce any agreement;

(f) on behalf of the Government resile from any agreement and, in appropriate case, claim damages;

(g) withdraw a tender from any tenderer who has been found guilty of corrupt practices as defined in Chapter 4 of the Anti Corruption Act

(h) subject to the provisions of subsection (2), on such conditions as it may determine, exempt any person with whom an agreement has been concluded from compliance with such agreement or condone the failure of that person to comply with such agreement;

(i) subject to the provisions of subsection (2), negotiate a settlement with any person referred to in paragraph (g) or amend the agreement in question with the approval of that person;

(j) issue directives subject to the provisions of the Act and Regulations, with the concurrence of the Minister;

(k) require reports and information from procurement authorities in such form and at such dates as it may determine;

(l) require any procurement authority to provide it with such technical expertise in its possession from time to time, that might be of assistance in the execution of its functions;

(m) exercise such powers as may be conferred upon it by or under this Act or any other law;

(n) in the discharging of its function, inspect premises or documents for purposes of evaluating and monitoring.

(2) No exemption, condonation, settlement or amendment shall be granted, negotiated or made under paragraph (h) of subsection (1) without approval of the Treasury.

(3) The Board shall have administrative and professional oversight functions over the Tender Board Secretariat.

8. Committees of the Board

(1) The Board may from time to time from among its members appoint a committee to advise it on specific cases and designate a chairperson for that committee.

(2) The Board may at any time dissolve or reconstitute such committees and subcommittees and may at any time set aside or vary any decision made by such committees

9. Meetings of Board

(1) Meetings of the Board shall be held at such times and places as the chairperson may determine from time to time, and any meeting so convened may be adjourned or postponed by the chairperson.

(2) 50% plus 1 members shall constitute a quorum for any meeting of the Board.

(3) The Board must cause minutes to be kept of proceedings and decisions at each meeting of the Board.

10. Decisions of Board

No decision of the Board or act performed by authority of the Board shall be invalid by reason only-

(1) of a vacancy on the Board; or

(2) of the fact that a person who was not entitled to sit as a member of the Board sat as such a member at the time when the decision was taken or the act was authorized, if the decision was taken or the act was authorized by the requisite majority who were present at the time and entitled to sit as members.

11. Invitation of tenders and application for prequalification

An invitation-

(1) for tenders; or

(2) in the case where tenderers have to prequalify, for the application for prequalification, shall be published by the Board-

at least once in each of the newspapers contracted by the Government;

any other form the Board deems necessary

12. Contents of application for prequalification

An application for prequalification contemplated in section 11(b) shall-

(1) Be made to the Board in such manner and form and within such period as may be determined by the Board; and

(2) Be accompanied by such documents and information as the Board may require in the particular case to enable it to select potential tenderers.

13. Final invitation of tenders

Where applications for prequalification contemplated in section 11(b) have been invited, the Board shall restrict its final invitation to tender only to those potential tenderers selected in accordance with the provisions of section 12.

14. Contents of title of tender

A title of tender shall as far as practicable contain at least the following information:

(1) instructions for preparing tenders;

(2) technical and quality characteristics of the goods to be procured or services to be rendered or property to be disposed of or the nature of rights to be acquired or granted, including, where appropriate, technical specifications, plans and drawings;

(3) currency in which the tender price is to be formulated and expressed;

(4) the manner, place and closing date for submission of tenders;

(5) the period during which tenders shall be in effect; and

(6) tender security to be furnished and conditions for its refund.

15. Examination, evaluation, comparison and non-acceptance of tenders

- (1) The Board may at any time request any tenderer to clarify, in such manner as may be determined by the Board, his or her tender in order to assist the Board in the examination, evaluation and comparison of tenders.
- (2) The Board shall not consider a tender unless-
 - (a) the tender complies with all the characteristics, terms, conditions and other requirements set out in the title of tender; or
 - (b) if the tender does not so comply, the non-compliance consists in the opinion of the Board of a minor deviation that does not materially alter or depart from such characteristics, terms, conditions or other requirements.
- (3) The Board is under no obligation to accept the lowest or any tender.
- (4) The Board shall, with due regard to subsection (2), not accept a tender-
 - (a) if the tenderer who submitted the tender does not qualify as such in terms of the conditions of tender set out in the title of tender;
 - (b) if the tenderer fails to comply with a request contemplated in subsection (1).
- (5) In examining a tender, the Board shall give consideration to the capacity and financial status of the tenderer, provided that this provision will not be used to exclude upcoming empowerment groups;
- (6) In comparing tenders, the Board shall give effect to the objectives of national policies;
- (7) In comparing tenders, the Board would require that 51% total Namibian and 30% BEE ownership be a requirement for qualification;
- (8) In comparing tenders, the Board shall ensure local sourcing of products be given priority before considering regional and/or international markets;
- (9) In comparing tenders, the Board shall give effect to the price preference policy of the Government to redress social, economic and educational imbalances in a democratic society and to encourage job creation and industrial and commercial interests in Namibia;
- (10) In the event that the procurement cannot be sourced as stipulated in subsection 6, 7 and 8 above, such procurement may be set aside for regional/international bidding;
- (11) If the Board does not accept the lowest tender or tenders from among all the tenders submitted to it, the reasons for not accepting the lowest tender or tenders shall be kept on record by the Board.
- (11) All tenders shall be opened in public.

16. Acceptance of tenders, and entry into force of agreements

- (1) The Board shall in every particular case-
 - (a) notify the tenderers concerned in writing of the acceptance of their tenders, as the case may be, and the name of the tenderer whose tender has been accepted by the Board shall be made known to all the other tenderers;
 - (b) on written request of a tenderer, give reasons for the rejection of his or her tender.
- (2) Where in terms of a title of a tender-
 - (a) a written agreement is required to be concluded after the acceptance of a tender, the responsible procurement body and the tenderer concerned, shall within 30 days from the date on which that tenderer was notified accordingly in terms of subsection (1)(a) or within such extended period as the Board may determine, enter into such agreement;
 - (b) a written agreement is not required to be so concluded, an agreement shall come into force on the date that the procurement body has furnished such tenderer with an official order.
 - (c) no tender shall be executed without a written agreement if such tender involves the provision of services of a continuous nature.
- (3) If, in the circumstances contemplated in subsection (2) (a), the tenderer fails to enter into an agreement, through failure to meet requirements, within the period mentioned in that subsection or, if that period has been extended by the Board, within the extended period, or if the tenderer, when required to do so, fails to furnish the required security for the performance of the agreement, the Board may, subject to the provision for non-exclusion of empowerment groups, withdraw its acceptance of the tender in question and-
 - (a) accept any other tender from among the tenders submitted to it; or
 - (b) invite fresh tenders.

17. Exemption from tender procedures

- (1) If, in respect of the procurement of goods and services for, or the letting or hiring of anything or the acquisition or granting of any right for or on behalf of, or the disposal of property of the Government-
 - (a) the estimated value thereof as determined by the minister and published in the gazette;

- (b) the opposite party to an agreement to be entered into is-
 - (i) a statutory body, local authority or regional council in Namibia approved by the Minister.
 - (c) the Board in any particular case for good cause deems it impracticable or inappropriate to invite tenders, the Board need not comply with the provisions of sections 11 to 16; and
- (2) In the application of subsection (1) (c), the reasons for not inviting tenders shall be kept on record by the Board.

18. Principles

The Tender Board shall, in exercising its powers under this Act, comply with the principles of

- (1) competition amongst tenderers by using the most efficient and competitive method of procurement and disposal to achieve the best value for money;
- (2) fair and equitable treatment of all tenderers in the interest of efficiency and the maintenance of a level playing field;
 - (i) accountability and transparency in the management of public procurement and the disposal of public assets in order to promote ownership of the system and minimize challenges thereof;
 - (ii) integrity, fairness and public confidence in the procurement and disposal process ;
 - (iii) the fair sharing of risk;
 - (iv) compliance with legislative provisions;
 - (v) the economic empowerment policy of the Government;
 - (vi) support to SMEs, previously disadvantaged groups, women and the youth.

19. Procurement by the Board

- (1) Public procurement in terms of this Act shall be by competitive bidding, but provision is made for deviation when:
 - (i) procurement below a prescribed amount;
 - (ii) if in the view of the Board it is impractical or inappropriate to apply open competition;
 - (iii) if the Minister prescribes per regulation.

(2) An open competition shall follow the prescribed procedures;

(3) Where competitive bidding is not being applied the Minister shall issue regulations. The Board shall determine the method of procurement in respect of (i), (ii) and (iii).

(4) Set-aside tenders:

The Board shall set aside, pursuant to the economical and social objectives of the government, procurement and asset disposal tenders that shall apply to SMEs and persons and activities prescribed by the minister in the regulations.

(5) Namibian and BEE ownership:

The Board shall give preference to Namibian and BEE owned companies in the allocation of procurement activities.

20. Disposal of assets

(1) The Board shall dispose of public assets in a transparent, efficient and accountable manner subject to the provisions of this Act and as set out in the Regulations;

(2) Disposal of public assets in terms of this Act shall be by competitive bidding, but provision is made for deviation when:

- (i) if in the view of the Board it is impractical or inappropriate to apply open competition;
- (ii) if the Minister prescribes per regulation.

(3) Competitive bidding shall follow the prescribed procedures;

(4) Where competitive bidding is not being applied the Minister shall issue regulations. Board shall determine the method of disposal in respect of (i) and (ii).

(5) Set-aside (reserved) tenders:

The Board shall set aside, pursuant to the economical and social objectives of the government, procurement and asset disposal tenders that shall apply to SMEs and persons and activities prescribed by the minister in the regulations.

(6) Namibian and BEE ownership:

The Board shall give preference to Namibian and BEE owned companies in the allocation of procurement and disposal activities.

21. Empowerment by the Board

The Board shall, in the execution of its mandate have due consideration for

- (i) The stipulation of this Act as in Section 15(7);

- (ii) Specific empowerment measures for women, the youth and BEE's as determined by government;
- (iii) Localization of the procurement function;
- (iv) Set aside provisions-procurement and asset disposal tenders that shall apply to SME's and persons and activities prescribed by the Minister in the regulations

22. Delegation of power to Procurement Bodies

(1) The Board may, subject to such condition as it may determine, delegate any power entrusted to it under this Act to a procurement body.

- (a) A delegation under subsection 1 shall not divest the Board of any power delegated and it may at any time vary or set aside any decision made there under.

23. Breach of contract

(1) Unless otherwise provided in this Act or any other law, the Board may-

- (a) regardless of any contractual provision, terminate contracts, without penalty to the Board, on grounds of:
 - i. Substantive misrepresentation;
 - ii. breach of contractual obligations
 - iii. violation of this Act, Regulations or Code of Procedures.

24. Right to review

Any tenderer that is aggrieved by a decision of a procurement body, may approach the Board for review.

25. Regulations

1. The Minister may make regulations not inconsistent with the provisions of this Act in relation to-

- (1) the invitation of tenders;
- (2) the exemption from tender procedures;
- (3) the conclusion or cancellation of agreements;
- (4) the procurement of goods and services for the Government;
- (5) the letting or hiring of anything on behalf of the Government;
- (6) the acquisition or granting of rights for or on behalf of the Government;
- (7) the disposal of Government property;
- (8) the procedure and quorum at meetings of the Board and any committee thereof, including the manner of voting and the manner of votes required for a decision of the Board;
- (9) decisions of the Board;
- (10) the granting by the Board of price preferences when comparing tenders, including the basis on which such preferences may be granted;
- (11) the imposition by the Board of a monetary penalty, calculated on such basis as may be prescribed therein, on any person with whom the Board has concluded an agreement on behalf of the Government on the strength of information furnished by that person which, after the conclusion of such agreement, is shown to have been incorrect information, including the manner in which any such penalty may be recovered;
- (12) the recovery of expenses, losses or damages incurred or suffered by the Government;
- (13) set aside tenders for empowerment purposes;
- (14) contract administration and dispute resolution;
- (15) regulations for Public Private Partnerships;
- (16) a code of procedures;
- (17) any matter which in terms of this Act is required or permitted to be prescribed; and
- (18) generally, all matters in respect of which the Minister considers it necessary or expedient to make regulations in order to achieve the objects of this Act;
- (19) Penalties for violation of this Act and Regulations.

2. Such regulations shall apply to public entities.

26. Liability of the Board

The Board shall not be personally liable for any loss or damage arising out of or in connection with the performance of its duties, unless the loss or damage is due to its wilful misconduct, gross negligence or wilful failure to comply with any provision of, or direction or decision under this Act or any regulations or instructions issued under it.

27. Procurement by Public Entities

(1) Notwithstanding anything in any law to the contrary, any public entity shall be required to submit for approval a procurement structure consistent with the principles set out in Section 19 above;

- (a) Supervising ministers shall cause procurement structures to be submitted to the minister.
- (b) the Minister may, within three months, after consultation approve the procurement structure;
- (c) upon approval by the Minister, procurement by that public entity shall fully comply with the structure;
- (d) the Minister may direct amendments to the structure where deemed necessary.

(2) The Board shall have right of reasonable access to all premises and records related to tenders and may exercise that right at any time.

28. Public Private Partnership

(1) The Board shall be the authority for procurement under the Public Private Partnership model subject to government policy. In executing this function, the Board shall –

- (a) have due regard for the principles as outlined in Section 19
- (b) ensure optimal value and minimize risk for government;
- (b) secure clearance from Treasury for any Public Private Partnership that has any implications of debt;
- (c) ensure that all aspects of borrowing related to Public Private Partnerships have been dealt with before any decision will be taken;

29. Administration

(1) The Board shall have a Secretariat which shall provide administrative, secretarial and other support services to the Board and shall have a structure and organization as the minister may determine as necessary for the efficient performance of the duties and functions of the Board;

(2) The Board shall recommend to the Minister an appropriate structure and relevant competencies required by the Secretariat;

(3) Expenditure in connection with the exercise of powers and performance of the functions of the Board shall be defrayed from moneys appropriated by Parliament for that purpose;

(4) The Board shall submit to the minister

- (a) An Annual Performance Agreement which shall set out the objectives and resources required to deliver on specified outcomes for the minister's consideration and approval;
- (b) An Annual Report of the activities and operations of the Board not later than six months after the end of the financial year.

30. Application of Act

The provisions of this Act shall not apply in respect of the procurement of all goods and services, the letting or hiring of all things, the acquisition or granting of rights and the disposal of all property in respect of-

- (a) The procurement, letting, hiring or disposal by-
 - (i) the Namibian Defence Force; and
 - (ii) the Namibia Security Intelligence Agency,of security related goods, services and property; and
- (b) Such category of procurement, letting, hiring, rights or disposal as may on the recommendation of the Board, be prescribed by regulation, for the purpose of being exempted from the provisions of this Act.

31. Compliance with other laws

This Act shall not exclude the provisions of any other law insofar as it relates to the rendering of services to the government, or the sourcing, disposal or alienation of goods and services for and on behalf of government and/or affecting the services to the government or the sourcing, disposal or alienation of goods and services for and on behalf of government.

32. Repeal of laws, and savings

(1) Clauses..... of the Tender Board of Namibia Act 1996 as indicated are hereby repealed.

33. Short title and commencement

This Act shall be called the Tender Board of Namibia Act,, and shall come into operation on a date to be fixed by the Minister by notice in the Gazette.

Schedule

LAWS REPEALED

No. And year of law	Short title	Extent of repeal
Ordinance 1 of 1926	Finance and Audit Ordinance, 1926	Section 26A
Ordinance 20 of 1970	Finance and Audit Amendment Ordinance, 1970	The whole
Proclamation AG.56 of 1980	Finance and Audit Amendment Proclamation, 1980	The whole

About the Authors

Clement Daniels is a legal practitioner with human rights, media law and labour law experience. He holds B Iuris and LLB degrees from the University of Western Cape and was admitted as a legal practitioner of the High Court of Namibia in 1996. Daniels was employed with the Legal Assistance Centre (LAC), a public interest law centre in Windhoek for approximately fifteen years and served for five years as Director of the LAC.

After resigning from the LAC in 2004 he went into private legal practice for two years, where after he served as a temporary Magistrate in the district labour court. He was also employed by the Namibian Standards Institution as a legal advisor and company secretary between 2008 and 2010.

He is currently in private practice, focusing primarily on labour law, mediation and arbitration. He also serves as the Media Ombudsman of Namibia in a part-time capacity. He serves as a Board member of the Namibia Water Corporation and is a Trustee of the Legal Assistance Trust and the Lüderitz Community Development Trust.

Frederico Links has been a Research Associate with the Institute for Public Policy Research (IPPR) since 2009, working primarily on governance and democracy-related issues. In 2010 he researched and wrote the IPPR briefing paper Corruption Prevention: Strengthening Systems, Procedures and Practices. In 2010 Links was the IPPR's Research Coordinator for the Crinis Namibia Research Programme – a Transparency International (TI) backed project researching political party funding/financing in Namibia. The Namibian section of the study, authored by Links, was published in late 2010. In 2009 Links researched and wrote articles for the IPPR's Election Watch newsletter.

His previous published work includes *We Write What We Like: The Role of Independent Print Media and Independent Reporting in Namibia* (Namibia Institute for Democracy 2006) and *Parliamentary Reporters' Handbook* (Namibia Institute for Democracy 2006).

Since 2004 Links has worked as a journalist and sub-editor for a number media outlets including *Insight Namibia* magazine, Reuters news agency, *The Namibian* newspaper, *Informanté*, and Katutura Community Radio. From 2009 to 2010 Links researched and wrote *Insight Namibia's* monthly Corruption Tracker bulletin.

He has won Namibia Media Awards for his sports journalism (2005), tourism reporting (2006) and articles on education (2006). He holds a National Diploma in Journalism and Communication Technology (2007) from the Polytechnic of Namibia.

About the Anti-Corruption Research Programme

The IPPR's Anti-Corruption Research Programme will focus on strengthening anti-corruption regulations, procedures and practices. The Programme will provide a stocktaking of anti-corruption efforts so far, examine policy options for the future and recommend ways in which Namibia can ensure that the anti-corruption campaign retains public confidence and political support and is ultimately successful in reducing corrupt practices in Namibia.

The programme will pursue the following objectives.

1. Produce rigorous, detailed and accessible research on issues that contribute to the strengthening of anti-corruption systems, procedures and practices in Namibia
2. Raise awareness debate among Namibian policymakers, politicians, civil society activists, students, journalists, the business community and interested members of the public about effective anti-corruption strategies and policies that could be deployed in Namibia.
3. Seek to partner with agencies involved in tackling corruption in Namibia, in particular the ACC, other civil society groups active on the issue and policymakers who can play a role in ensuring anti-corruption mechanisms in Namibia are effective.

About the IPPR

The Anti-Corruption Research Programme is a project of the Institute for Public Policy Research (IPPR). The IPPR can be contacted at PO Box 6566, Windhoek, Namibia. Tel: +264 61 240514, Fax: +264 61 240516, info@ippr.org.na. The publication is also available as a PDF download from <http://www.ippr.org.na>. The IPPR's mission is to deliver independent, analytical, critical yet constructive research on social, political and economic issues that affect development in Namibia. The IPPR was established in the belief that development is best promoted through free and critical debate informed by quality research. The IPPR is a not-for-profit organization governed by a board of directors: Monica Koep (Chairperson), Daniel Motinga, Bill Lindeke, Pandu Hailonga-van Dijk, André du Pisani, Robin Sherbourne and Graham Hopwood (ex officio).