EVALUATING PUBLIC PROCUREMENT REGIMES IN THE SOUTH PACIFIC: PERSPECTIVES ON FIJI, SAMOA AND VANUATU[±]

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INTRODUCTION

The objective of the article is to analyse the problems of conventional public procurement regimes in the South Pacific with a view to identifying ways of overcoming them. A discussion on the prospects of electronic procurement in the region has similarly been covered elsewhere.[1]

Globalisation and internationalisation of capital, finance and technology are development imperatives which will ultimately exert pressure on island countries to re-examine their current procurement policies and practices.[2]

The capacity of a country, whether developed or developing, to efficiently procure its material requirements is fundamental to enhancing the level of its national development and improving the prosperity of its citizens.[3] Public procurement is one such means by which both goals can be achieved.[4] This is especially important for Fiji, Samoa and Vanuatu because of their reliance on aid to fund development projects.[5] Today, bilateral or multilateral aid donors are tying their grants to the issues of effective governance, transparency and efficiency in public procurement.[6] It is now becoming apparent to aid recipient countries that until and unless they take steps to improve the level of performance of their pubic sector institutions generally and in particular, increase efficiency in their procurement practices, they are likely to miss out on much needed aid and the inflow of foreign investment capital.[7]

More importantly, an inefficient and corrupt public procurement regime[8] only adds to the difficulty of liberalising their economies by hindering their participation and integration into the global economy.[9] This article analyses the issues surrounding public procurement with reference to the existing national procurement regimes and practices in Fiji, Samoa and Vanuatu. These countries still operate conventional or manual procurement processes. Thus, adopting a model procurement law is not a problem. Perhaps, the problems as will be demonstrated lie in the practical operation of the systems and the limitations imposed by their current procurement laws.[10]

It is against the foregoing scenario that the article begins by discussing the general contextual profile of Fiji, Samoa and Vanuatu. It also examines some theoretical propositions underpinning the conduct of public procurement. The main thrust of the article centres on the evaluation of the national procurement regimes in the three countries. The article concludes by proffering suggestions on how to raise the standard of public procurement in the region.

Definition

For the purpose of this article, public procurement contracts refer to agreements entered into between sovereign states and private commercial entities for the procurement, by the former from the latter, of goods, services or construction works.[11] The scope of this definition is limited to civilian procurements, thus excluding defence contracts.[12]

CONTEXTUAL PERSPECTIVE

The general context of the article is the South Pacific region but the specific context is confined to Fiji, Samoa and Vanuatu.[13] According to South Pacific Commission:

> Pacific Islands are made up of 22 sovereign and dependent states covering 30 million square kilometres of ocean. Island nations have for years based their unique development strategies in terms of their geographical isolation, comparatively small land area, cultural and ethic diversity and vulnerability to nature and foreign influences.[14]

Fiji

Fiji became a British colony as a result of the Deed of Cession signed on 10 October 1874. The colony was ruled by Britain until it gained political independence in 1970.[15] The country consists of about 300 islands with a total land area of 18,274 square kilometres, and an Exclusive Economic Zone of 1.26 million square kilometres of ocean.[16]

There is, in theory, the separation of powers between the executive, judiciary and the legislature.[17] It adopted the parliamentary system of representative government based on universal suffrage. Fiji has two houses of Parliament, the House of Representatives and the Senate. The Senate is made up of elected and appointed representatives.

Of all island countries in the South Pacific, Fiji has the most complex mix of races.[18] The two dominant ones are the indigenous Fijians and the Indo-Fijians.[19] There are also to be found people of mixed racial parentage, Rotumans,[20] Chinese, Europeans, Pacific Islanders[21] and others.[22] Cultural activities and traditional ways of life feature in most activities and people in the rural areas stay close to their culture. The vast majority of the population live in the rural areas, but there are significant urban settlements across the country.[23]

The legal system derived is derived from Britain. The court system is made of the Magistrates' Court, the High Court, Court of Appeal and the Supreme Court which is the highest appellate court in the country. There is also the native or *Tikina* Court operating informally at the village level, and a Disputes Tribunal that hears small civil matters. Fiji has a fairly sizeable industrial and economic base. It has light and some heavy industries and is a major exporter of sugar in the Pacific.[24] With revenues generated from its relatively wide industrial base, it is able to support a number of social services and national development projects.

Samoa

Formerly known as Western Samoa, the country was also colonised. It became a German protectorate[25] in February 1900 and later a League of Nations trust territory in December 1920[26] administered by New Zealand until it gained political independence from New Zealand in 1962.[27]

Samoa is an archipelagic group with a total land area of 2934 square kilometres and an EEZ of 12000 square kilometres, the smallest in the South Pacific. The national capital is Apia and the total population of the country is around 162000, with a natural rate of population growth of around 2.4 % per annum.[28]

The country is a parliamentary democracy based on the Westminster model. It has a unicameral legislature and the electoral processes are tilted in favour of matai title holders.[29] The constitution recognises the separation of power between the executive, legislature and the judiciary. As in Fiji the legal system is derived from Britain. The main court system is made up of District Courts, the Supreme Court, and the Court of Appeal. There is also a separate Land and Titles Court. Local customary authorities, or village *fono* have statutory recognition, and these *fono* can be considered "custom courts".

Samoa has very limited industries which are mainly confined to light manufacturing. The economy is predominantly agricultural, except for the service and financial sectors.[30] It is a Polynesian country.[31]

Vanuatu

Vanuatu presents a slightly different colonial context to Fiji and Samoa. It was a condominium jointly administered from 1906 by the French and British before gaining political independence in 1980. The estimated population (1993) was 161,000 spread over a land area of 12,189 square kilometres, but the archipelago covers 680000 sq km of sea. Vanuatu is classified by the United Nations as a Least Developed Country.[32]

At independence, the country adopted the parliamentary system of representative government based on universal suffrage. It has a unicameral legislature. The country has a written constitution which provides for the separation of powers between the executive, legislature and judiciary.

The legal system derived its origin not only from the English legal system, but also incorporates French laws formerly enforced by the French colonial power.[33] The court system is made up of the Magistrates Court, Supreme Court and the Court of Appeal, which is the highest appellate court in the country. There are also local quasi-customary courts known as Island Courts. A land tribunal has recently been established to resolve land disputes in line with local customs.[34]

Vanuatu has a very limited industrial base. There are only light industries and the country is heavily dependent on imports.[35] It has abundant fertile land which supports both commercial and subsistence agriculture. The main exports are beef and copra. The country heavily relies on tourism for its exports earnings and is also a fledging offshore centre and tax haven.[36] Vanuatu is a typical Melanesian country with the majority of its indigenous population being Ni-Vanuatu.

THEORETICAL UNDERPINNINGS

While there is as yet no substantive body of jurisprudence on the theory of public procurement in the South Pacific as such, discussing some general theoretical propositions[37] will provide the background against which the public procurement regimes in the three countries will be examined.[38] No doubt, there is an array of literature on international contracts in abundance.[39] However, none of these are works on public procurement in small island countries in the South Pacific. This article attempts to partly fill this gap.

To commence, public procurement contracts have been used, and are still being used by states[40] to procure goods, services and construction in order to fulfil the material requirements of public

administration.[41] According to Lloyd, the scope of government contracting is enormous and that this all goes to the heart of a nation's form of government and economy. He further asserted that in a capitalist economy of representative democracy, states must engage in contracts with private firms if they are to meet their requirements for supplies and services.[42] These cover a wide range of products from office pins to huge public infrastructural works such as dams and hydro electric projects. It is impossible for any government to effectively function without engaging in public procurement. As Turpin also pointed out, countries could contract for the development or production of highly specialised equipment[43] or construction, repair, maintenance or purchase of goods or the procurement of services involving large sums of public funds.[44]

The increasing reliance by states on public policy as a tool of public administration is having an impact on the conception, formulation and execution of public procurement contracts.[45] According to Stover, public policy choice is now a political issue. In a sense, this affects the way public procurement contracts are formulated or executed.[46] Public policy is to some extent whatever governments choose to do or not to do.[47] Because of this, public policy has theoretical and practical effects on the formation and execution of public procurement contracts.[48]

Public procurement is as old as the concept of state sovereignty.[49] Over the years however, changes in the nature of the nation-state,[50] principles of international law[51] and commercial practice have reshaped the doctrine of state sovereignty[52] and the principles of public procurement contracts.[53]

Changes in the doctrine of state sovereignty[54] have also impacted on the nature of public procurement.[55] This has created a dichotomy in the nature of state acts and in the way public procurement is to be analysed. Purely commercial functions of the state are no longer subject to the limitations imposed by the doctrine of sovereign immunity.[56] According to Lloyd, a state as a sovereign entity[57] would be expected to exercise unfettered powers in its contractual relations. Yet sovereignty in public procurement is now of secondary importance.[58] As similarly stated by Lewis, there may be situations when contracts entered into by a statutory corporation may be mixed with the elements of public law. The exercise of such powers by the corporation would therefore be limited to acts expressly or impliedly authorised by statute. In such instances, the state will be governed by the normal rules of contractual liability.[59]

However, in spite of the foregoing, national courts are generally barred by statutes from granting injunctions against actions of island states, whether in regards to public or private acts.[60] This legal trend is slightly moving towards the granting of certain injunctive relief against some states in the region. Declarations are allowed and in fact have on various occasions been made against state action.[61]

Because public procurements are combinations of the sovereign and commercial acts of states, [62] this often creates problems in the administration or execution of such contracts, especially where states are in default.[63] According to Endeshaw, the government has two roles in the market place. It is a contracting party as well as a sovereign.[64] Consequently, this duality of roles leads to the question of whether redress against states for breach of public procurement contracts is to lie in private or public law or both.[65]

With nation-states gaining independence, international law had imposed additional obligations on them through accession to treaties or conventions.[66] Some of these treaties or conventions have introduced new international standards in the way states conduct businesses or carry out commercial transactions.[67] Because of this development, signatory countries in the South Pacific cannot anymore be oblivious to the demands of the international community on how they run their affairs. For the countries in the region,

these demands are not and cannot always easily be met because of their inherent limitations in size, economy and industrial base.[68]

Globalisation[69] and the opening up to international capital,[70] donor aid scrutiny[71] and the quest for greater transparency, now mean that policy makers and others involved with public procurement need to understand the relationship between the theory and practice of these contracts.[72] According to Linarelli et.al, regulating public procurement will help to educate government officials and others involved on how to deal with all aspects of such contracts.[73] Commenting along similar lines, Craig stated that the cost of preparing and submitting tenders is so enormous that no participant can afford to be ignorant of the law and practice of public procurement.[74]

At another level, public procurement is to be seen as an objective and efficient way of contracting between the state and private entities.[75] Tender procedures enhance transparency in bidding processes.[76] According to Schooner, a transparent public procurement system uses procedures which instil confidence in offerors and contractors that business with government was done impartially and openly.[77] This helps to promote good governance.[78] It is also a means by which good working partnerships can be developed between the public and private sectors of the economy.[79]

The processes for awarding public procurement contracts guarantee and safeguard the rights and interests of the state on one hand and those of the contractor on the other.[80] This is one way of achieving efficient use of resources. As Bovis stated, in a market economy, free trade and international market competition are considered to be the most efficient instruments for promoting optimal resource allocation and economic growth.[81]

Public procurement contracts embody commercial as well as sovereign acts of states.[82] Such contracts are governed by appropriation rules formulated by parliaments.[83] When contracting, states are bound by the normal rules of contract.[84] These characteristics make public procurement contracts unique. Thus, such contracts are invested with the dual attributes of public and private laws.[85] According to Atiyah, when public bodies enter into ordinary contracts, they are to submit to the ordinary rules of contract and in fact are so governed, but the wider duties of such entities go beyond the obligations imposed by ordinary contracts.[86]

Public procurement contracts provide the mechanisms by which the national development goals of states can be attained.[87] According to Arrowsmith, public procurement contracts are means of achieving national development objectives.[88] However, there are no objective criteria by which these could be measured in small island countries.[89] Lack of up-to-date and accurate statistics on vital economic and social indicators is responsible. Even where these exist, such data or information is outdated or incomplete, and hence unreliable.

The complex nature of public procurement creates obstacles to their effectiveness and the wide-spread use by private suppliers wishing to contract with the state.[90] In commenting on the complexity of public procurement regime of the European Union, Tobler observed that the legislation is of bewildering complexity.[91] Because of this problem, there is no level playing field between huge multinational corporations and small island states with limited resources. [92] Accordingly, it has been argued that all public works contractors need a level playing field. 'Through anti-competitive means, irresponsible contractors undercut sound business practices and artificially restrict opportunities for small, locally based enterprises.'[93] International contractors or suppliers end up dictating terms and conditions which island states have to take or leave. The urgent demand for their services, which in many cases cannot be locally

procured, leaves these states with little or no choice but to accede to oppressive contracts.[94]

There is also the further difficulty of successfully navigating through the processes of negotiating these contracts.[95] While this may not be a problem for larger and advanced countries, it is a problem for small island economies such as Samoa, Vanuatu and to a lesser extent Fiji.

It is generally perceived that while the structure of public procurement contracts is in favour of huge multinational corporations,[96] it is nonetheless considered to be more in favour of the state when it comes to contracting with smaller domestic suppliers or contractors.[97]

Public procurement is often plagued with corruption, unfair practices and price collusion in view of the huge amounts of money involved.[98] In commenting on the issue of corruption in international business transactions, Pierros observed that in the last five years, corruption has been placed high on the international agenda. Corruption has taken an alarming dimension in recent years, at the same time spreading geographically and growing in intensity. Illicit payments now account for approximately ten to twenty per cent of international transactions.[99]

The implications of these theoretical issues would certainly be of some interest to the conduct of public procurement in the South Pacific. While they may be far removed from the epicentre of global markets, countries in the region are not immune from these developments.

Appropriation

Fiji, Samoa and Vanuatu have in place Acts of parliament and regulations on public procurement. Because of this, they offer comparative perspectives due to their varying levels of development.[100] In all these countries, the procurement power of the state is tied to the*Constitution*,[101]*Appropriation Act*[102] and relevant enabling procurement laws.[103] The executive authority to expend money is a constitutional, as well as a legislative act of the state.[104] According to Hogg, it is a constitutional requirement that all expenditures of public funds must be authorised by statute before the funds can be appropriated to any contract.[105] The constitution grants authority to states to engage in acts that are consistent with their sovereign status. As was also opined by Lewis, the state or its public bodies have the express or implied power to enter in contracts as ways of meeting their national development objectives.[106]

The legislature confirms this power by passing an appropriation law.[107] This arrangement is premised on the assumption that as a sovereign entity, a state cannot be denied the power to procure goods, construction or services needed for the efficient running of its public institutions, simply on account of the absence of an appropriation law.[108] As similarly observed by Hogg, in every jurisdiction there are statutory provisions and regulations governing government contracts. These instruments provide the legislative force to these contracts.[109] There are however views to the contrary.[110] But in the context of the South Pacific, the view that the state can source its needs through executive authority holds firm.[111] It is a common occurrence in most of these countries for appropriation laws to be passed three or four months into the current financial year. What is clear though is that an*Appropriation Act* needs to be passed even if, at a latter stage in order to validate the expenditure already incurred. By way of example, section 7 of the *Finance Act* [Cap 69] of Fiji Islands provides:

> If the Appropriation Act in respect of any financial year has not come into operation by the beginning of that financial year, the minister may issue a warrant authorising the withdrawal out of the consolidated fund of such moneys as he may consider necessary to carry on the services of the Government until the expiration of four months from the beginning of the

financial year or the coming into operation of the Appropriation Act, whichever is the earlier.[112]

Appropriation of public funds is a necessary attribute of state expenditure. In all three countries, its absence cannot necessarily negate expenditures incurred by states, provided that this is in pursuit of legitimate objectives. All that is required is for the expenditure to be ratified by an appropriation law.[113] Where an appropriation law is passed, the state is not limited to amounts in the relevant heads of expenditures when procuring goods, construction or services.[114]

NATIONAL PROCUREMENT PROFILES

Having briefly examined the link between the appropriation of public funds and procurement, the article will now discuss the procurement laws and practices in Vanuatu, Fiji and Samoa in that order.

Vanuatu

Vanuatu has a fairly detailed procurement law covering government contracts and tenders.[115] The purpose of the Act is to establish rules and procedures which are to be adopted in Government contracts and tenders.[116] There is a monetary threshold of VT5,000,000 or more before contracts for supply of goods or services or the execution of public works could come within the purview of the Act.[117] Every Government contract must be in writing.[118] The tender process has to be competitive and transparent and there must be a Council minute approving the contract.[119] Commenting on competitive bidding processes, Hogg asserted that there is always an implied contract between the state and all bidders that the former must fairly and equitably treat the latter.[120] A Government contract that breaches the provisions of the Act will therefore be void, of no effect and will not bind the Government.[121]

Additional features of the procurement law include: the setting up of a Tenders Board that is directly responsible to the Council.[122] The composition of the Board is evenly spread to cover all relevant and participating ministries. A Chairperson heads the Board.[123] The Tenders Board is invested with the powers to process all tenders and make appropriate recommendations to the council.[124] Unless the breach of a tender process is of minor consequence, there will be no binding contract on the Government.[125] There are criminal penalties for breaching the provisions of the *Government Contracts and Tenders Act*.[126]

In respect of all other procurement contracts below the monetary benchmark of VT5, 000, 000, the tender proceedings will be governed by the *Purchase of Goods and Services Regulation*.[127] An important aspect of this law is that tenders are to be called by competitive bidding.[128] Written contracts over 3 million vatu must have the prior approval of the Attorney General before execution.[129] Tenders over 3 million vatu shall be approved by the Council of Ministers before any such contracts are awarded to the successful contractor or supplier.[130]

In view of what obtains as the law in Vanuatu, it would appropriate to comment on the situation before examining the other two jurisdictions. Taking the provisions of the *Government Contracts and Tenders Act* and those of the *Purchase of Goods and Services Regulation* together, it is obvious that if properly implemented, the two laws would certainly ensure judicious use of public resources. In addition, this will result in the conduct of fair and transparent tender proceedings and in the award of government contracts.[131]

What may not be fully regulated by law[132] are customary influences, family alliances and political patronage.[133] Sometimes these influences exert either covert or overt pressure on tender processes.[134] The impact of customary alliance on the outcome of a bid can sometimes be significant. This is especially so when one takes into account the fact that South Pacific island societies are traditional in nature.[135] There are hidden assumptions as to the process established by the tender provisions, which are perhaps not understood or which are at odds with the customary expectations or ways of doing things. In a typical traditional context, some of these practices may not actually cause any offence. The vast majority of the adherents regard them as part of the social organisation of society. This situation is however further complicated by the introduction of very formal tender processes in a heavily influenced cultural environment.[136] There is bound to be conflict of expectations as to what is or is not acceptable practice in such societies. It is difficult to see how these contradictions are to be easily reconciled. This is where modernity is at crossroads with culture. Somehow it is now a dynamic of social organisation that both must co-exist in the interest of the societies concerned.[137] As Ghai pointed out, 'incorporating cultural values and practices in the constitution of island countries was a very challenging exercise.'[138] Commenting specifically in the case of Vanuatu, he further stated that 'the ideology of custom was more of unifying factor than religion or administration.'[139]

Specifically, the position in Vanuatu deserves further comment. The procurement law and regulations are silent on the issue of redress. There is no legislated means by which the tender proceedings could be measured against the background of fairness or equality of treatment. Also no mention is made of the remedies that the state could claim against negligent performance or non performance of the contract.[140] These are lacunae which the present law needs to address.

The procurement law and regulations are also silent on the issue of tender security.[141] This omission has grave implications on contracts involving large sums of public funds. It means that a contractor or supplier could refuse to perform a contract without suffering any legal penalty. The absence of tender security also means that the state is left without any immediate redress, especially if costs were incurred in the tender proceedings. The power of the Tenders Board to co-opt additional members is a good one. It allows the Board to utilise the competence and skills of experts in its procurements. This compliments the existing expertise within the public service. The Board would certainly benefit from the independent and frank opinions and suggestions of experts who have been co-opted from outside the Board.

Fiji

Unlike in the cases of both Vanuatu and Samoa, the procurement of goods, public works or services in Fiji Islands is wholly governed by subsidiary legislation[142] made pursuant to the *Finance Act*.[143]

The procurement of construction covering building or engineering projects is within the powers of the Public Works Tenders Board.[144] The Board is widely constituted to include representatives of relevant ministries and all participating departments of the government.[145] The Board controls all tender proceedings beginning from invitation,[146] opening,[147] evaluation,[148] to the determination of successful tenders.[149] The Board reserves the power to opt for selective tendering from persons selected by the Board.[150] The power to execute any procurement contract for construction of public works is vested in the Permanent Secretary or his nominee.[151]

In respect of major public works approved by the Public Tenders Board, the regulations are inadequate to deal with all problems that might arise from the tender proceedings for the following reasons. There seems to be no adequate checks and balances on the powers of the Board especially when invoking selective tendering.[152] Wide individual discretion is given to the Permanent Secretary to execute procurement

contracts on behalf of the state. These provisions are likely to allow room for party patronage, indiscretion in use of public funds and the abuse of the processes of tender proceedings.[153] This does no good to transparency in the affairs of the state.[154] These matters need to be addressed in any new procurement law or regulations for Fiji.

The power to procure goods and services is vested in the Supplies and Services Tenders Board.[155] There are three types of tender's board under these regulations dealing with major, minor and departmental[156] procurement of goods and services. Like the Public Works Tenders Board, membership of the Major[157] and Minor[158] Tenders Boards is drawn from various ministries and relevant departments.[159] Its staff members mainly sit on the Departmental Tenders Board. The power to call for tenders is vested in the Controller of Government Supplies who in turns submits the tenders for the consideration of the Board.[160] There is division of functions between the three boards.

Where goods or services are regularly used by more than one department of the state, the Controller of Government Supplies is required to call for tenders annually in order to meet the procurement needs of the State. The Controller has the discretion to call for tenders to meet more than a year's requirements provided that would be more cost effective.[161] There are provisions covering the issue and invitation of tenders, opening and the announcement of successful tenders.[162] The Controller is permitted by the*Regulations* to execute on behalf of the Government, any contract for the supply of goods and services.[163] Goods purchased must be from the most advantageous source and must also be at competitive prices.[164]

There are a number of issues to consider in respect of the Supplies and Services Tenders Board in Fiji. There is no objective way by which the powers of the Controller of Government Supplies could easily be monitored. The *Regulations* are silent on that. The contractor or supplier is likely to be at the behest of the Controller because of the wide powers vested in the Controller to procure goods or services for the State.[165] Contractors or suppliers need to be protected against indiscretion by the Tenders Board.

The foregoing assertions are supported by Regulation 21 where the Controller is empowered to purchase goods or services for use by a Department (up to a certain amount) through private treaty.[166] This is not a satisfactory approach in view of the large volume of purchases by various departments of government, for instance-ITS, Finance etc.

One possible way of regulating this power is through judicial review by relying on the *Wednesbury* principle.[167] In practice however, contractors or suppliers who applied for judicial review to question statutory exercise of the controller's powers will likely face a backlash. Such contractors may be excluded from future contracts or blacklisted from handling any government procurement.[168] To legally circumvent the law, the Controller may resort to private treaty or selective tendering as means of side tracking such contractors or suppliers.[169] A review of these provisions is therefore necessary if not now then definitely in the not distant future.

Samoa

In Samoa, just like in Vanuatu but in contrast to Fiji, the procurement of goods, construction and services is governed by both by the *Public Finance Management Act*[170] and the regulations made pursuant to it.[171] The Government Tenders Board regulates public procurement.[172] Cabinet appoints the members of the Board.[173] The Board has the power to co-opt additional members whenever it deems fit.[174] As and when requested by the Financial Secretary, the Board may render reports on the purchase of stores and services.[175] It also has the power to call tenders for government purchases.[176] It can accept tenders

provided that is in the best interest of the government.[177] In carrying out its functions, the Board is bound by the provisions of the*Constitution*, the *Public Finance Management Act* and the *Treasury Regulations*.[178] The Board acts as the central procurement authority for all Government Departments in Samoa.[179] Cabinet may at its discretion exclude any tenders or contracts from the powers of the Board.[180] The Board must comply with written instructions of the Minister.[181]

As is the case in both Fiji and Vanuatu, there are no provisions regulating the performance of contract or tender security in Samoa. In fact, there is no specific provision dealing with review of the tender proceedings or the award of tenders in Samoa. The Board has no power to co-opt additional members. The Board consists only of public servants. This state of affairs is not going to be conducive to transparency in the conduct of the procurement proceedings.

An apparent strength of the *Regulations* lies in the powers of the Tender's Board to co-opt external members. This is similar to the position in Vanuatu. However, it may be noted that the tendering processes specified in the *Regulations* are very minimal in nature. This could often lead to procedural problems in the administration of the tender. For instance, Regulation 48 permits the Board to settle its procedure. It seems that procedures could change with changes in the membership. There is likely to be no consistency in the application of its procedures. The wide powers of the Cabinet and the Minister are likely to lead to interference in the contract and tender proceedings of the Board. This is possible because the power to remove members of the Board is vested in the Cabinet.[182]

Furthermore, the absence of guidelines makes it rather difficult to understand how and when the rights of the contractor or supplier are breached. It would also be very difficult for the government to evaluate the efficiency of the procurements made on its behalf by the Tenders Board.[183]

Lastly, there are no provisions regulating the performance of contract or for tender securities. There are also no provisions for review of the tender proceedings or award of tender. These are important loopholes[184] which any future procurement law in Samoa should also address.

CONCLUSION

The article has highlighted some of the strengths and weaknesses of the national procurement regimes in Fiji, Samoa and Vanuatu. A lot of work needs to be done to raise the standard of public procurement in these countries.[185] As a way of improving upon existing practices, the implementation of the UNCITRAL Model Law on Procurement of Goods, Construction and Services may be considered.[186] However, a gradual and piece-meal implementation is to be favoured in view of the peculiar circumstances of small Pacific island countries. Any forceful or accelerated adoption of the sophisticated provisions of the Model Law in countries that could do with a minimal of such provisions is likely to compound the problems of implementation. This may end up creating obstacles in the development of the progressive law in the area of public procurement.

Perhaps, one way is to advance common grounds on which island countries in the region may stand on regardless of their level of development, size of economy and social or political orientation. A common approach at the regional level would be beneficial for a number of reasons. This is not to say that all South Pacific island countries are to all adopt the same type of procurement law. It does not also mean that the UNCITRAL Model Law on Procurement of Goods, Construction and Services is to be wholly and uncritically copied because countries are concerned that they may be branded and isolated as pariahs in international affairs if they fail to adopt it as a model.[187] The point being made here is that a country is

the first and best judge of what is beneficial to it. There is possibly no substitute to the wisdom of a country in this matter, because it is the country that needs to ultimately take responsibility for its actions.

A regional approach to the evolution of procurement laws is cost effective and will assist in nurturing local skills and expertise. It is also likely to create a wealth of jurisprudence on the implementation of the laws. Above all, it will provide a secure forum for exchange of information and experiences between procurement practitioners in the different countries. Of course this cannot be achieved without short-term costs. But the long-term benefits of taking the regional approach by far outweigh the costs.[188]

Proposals

In view of the foregoing, a number of measures aimed at strengthening the national procurement regimes may be proposed. They are not necessarily discussed in any order of preference.

Perhaps, one appropriate course of action may be for the South Pacific Forum[189] to consider establishing a regional advisory procurement unit or such similar organ within its present structure. This unit may be tasked with the responsibility of advising on, or producing appropriate procurement laws for small and developing island member countries after taking into account their special circumstances. At present no organisation or institution can better perform this advisory role than the South Pacific Forum.[190] It has a reservoir of information on all aspects of member countries that is not easily available outside the Forum. It therefore stands in the best position to advice the island countries than a completely external institution with little or no knowledge of the countries' local circumstances.

Each South Pacific island country could probably also compliment this approach by setting up a national procurement authority. In the alternative, to incorporate private companies solely dedicated to handling state procurement. Over a period of time, specialisation in procurement administration and practices would be achieved. In the long run, this will assist in the maximisation of scare resources, efficiency and economies of scale. Ultimately this helps to prevent duplication of procurement by competing departments.

As a training and educational institution, the University of the South Pacific may also have a role in complimenting the foregoing approaches. According to Prior 'training is directed towards behaviour change resulting in performance improvement which is readily measurable' He further asserted that learning opportunities are to be made available to individuals and groups within the public and private sectors of the economy so as to equip them to be more efficient.[191] As a regional educational institution serving the needs of the island nations, the University may consider establishing multi-disciplinary procurement courses at the certificate, diploma and degree levels. These courses are to incorporate financial, managerial, legal and technical aspects of procurement policies and practices that are suited to the needs of small island nations. At the moment, there is no specific curriculum or department in the University that caters for this sort of training.[192]

The other possibility is for the University to consider instituting refresher courses in procurement for principal officers handling state procurement. In a way, this will serve as short and long term solutions to achieving efficiency in procurement.[193] The trickle down effects (of efficiency in state procurement) to the national economy are not to be underestimated. These could bolster the country's gross national product in a number of significant ways.

South Pacific island countries that at present do not have specific procurement laws are to be encouraged to set up the necessary supportive framework which would usher in these laws. Other countries that already have laws in this regard need to improve or fine-tune them so as to achieve higher performance standards. On both sides of the divide, this requires tact, planning and above all- the political will to take

some bold steps. In the long run, these measures would enhance the operation of the government procurement machinery.[194]

Donor organisations wishing to see that island countries in the South Pacific hurriedly implement versions of their procurement laws must take things slowly. There are potential problems with any wholesome adoption of model laws. This is likely to create technical, financial and even legal implementation difficulties for small island countries. This is especially so in countries where established procurement practices are not in existence or do exist, but at very basic and modest levels of operation.[195] In this context, island countries need to therefore examine the suitability of some of the provisions of the model law in relation to their local circumstances. Importantly, these countries must align the provisions of any proposed model law to fit their national policy aspirations, socio-economic situation, environmental considerations and pace of legal development.[196]

Areas of some concern include those on legal redress in favour of the state against contractors and suppliers for breach of contract or negligence in executing the procurement contract; recognition of cultural protocols in handling tender procedures or executing procurement contracts that might impact on customary land and traditional practices. To deal with these problems, the proposed national procurement law is required to include some definitive provisions or amendments to the existing provisions of the model law.[197] This could be one way of striking a balance between the desire to have in place effective procurement laws and the needs of island countries in the region.

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[1] Mohammed L Ahmadu, 'E- Procurement as a Development Imperative for Small Island States in the South Pacific' (2003) 10 *James Cook University Law Review* 51.

[2] See Don Wallace, 'The Changing World of National Procurement Systems: Global Reformation' (1995). 2 *Public Procurement Law Review* 57; and cf Martin Discendofer, 'The UNCITRAL Model Law' (2003) 2 *Public Procurement Law Review* 100.

[3] Michael Supperstone (ed), *Judicial Review* (1997) chapter five, paragraph 5.29 on the contractual powers of public authorities; and D. G. Gavin, 'Government Requirements Contracts' (1972) 5 *Pub Contract L J* 234.

[4] T D Morgan, 'Achieving National Goals Through Federal Contracts: Giving Form to an Unconstrained Administrative Process' (1974) *Wis L Rev* 301; and cf Michael Asner, *Selling to Government* (1996) 1-130.

[5] See generally, R. Gordon Jackson, 'Aid and Development' in George Kozmetsky et.al (eds), *Pacific Cooperation and Development* (1988) 135; Jean-Philippe, 'Therein Debating Foreign Aid: Right Versus Left' (2002) 23 (3) *Third World Quarterly* 449-466; D Barber, 'NZ Aid not a Final Answer to Problems' (November, 1995) *Pacific Islands Monthly*; cf T K Jayaraman, 'FDI as an Alternative to Foreign Aid in Pacific Island Countries' (1998) 21 (3) *Journal of South Pacific Society* 29.

[6] See, John Lester, 'Corruption: How to Minimise Corruption in Public Works' (1999) 7(2) *J.F.C* 161; and Jane Weaver, 'Kleptocracy and Democracy' (1996) 90 *American Society of International Law Proceedings* 83.

[7] Cf T K Jayaraman, above n 5.

[8] Cf R A Miller, 'Economy, Efficiency and Effectiveness in Government Procurement' (1975) 42 *Brooklyn L Rev* 208; and R D Wallick et.al, 'Procurement Integrity: Pondering Some Imponderables' (1990) 19 *Pub Contract LJ* 349.

[9] Cf John Flood, 'The Globalising World' (1995) 23(11) *International Business Lawyer* 509.

[10] C V Stelzenmuller, 'Formation of Government Contracts Application of Common Law Principles' (1957) 40 Cornell L Q 238; and R S Parsley, 'Formation of Government Contracts Application of Common Law Principles: A Reply' 40 Cornell LQ 518.

[11] See, Assafa Endeshaw, 'Government Contracts and Procurement in Singapore' (1999) 5(2) *International Trade Law and Regulation* 33, who pointed out that an essential component of these procedures is the conclusion of a contract by the respective government department or agency with a private contractor or company that has the ability and experience to meet the department's requirements. Contracts involving such public bodies are hence known as government, administrative or public sector contracts. Usually such contracts are undertaken by procurement departments serving the Government as a whole or its separate departments or autonomous agencies; and A P Ingrao, 'Types of Government Contracts' (1976) 18 *AF L R* 3.

[12] For defence related procurement, see Hartley, 'Public Procurement and Competitiveness: A Community Market for Military Hardware and Technology' (1987) *J.C.M.C.* 238.

[13] The phrase 'South Pacific' is rather amorphous and used in different ways by different writers and agencies. However, by that I mean generally the 12 countries comprising the University of the South Pacific. See, Brij Lal (ed) *The Pacific Islands: An Encyclopaedia* (2000); Ron Crocombe, *The South Pacific* (2000) 16-19; I C Campbell, 'Constructing General Histories in Pacific Islands History' in Brij Lal (ed) *The Journal of Pacific History* (1994) 46.

[14] *Pacific Social and Human Development Issues*, SPC Noumea 2.

[15] See, R A Derrick, *A History of Fiji* (1946) Chapter 1.

[16] <http://www.undp.org.fj/fiji/fijiprog.htm> (Accessed 19 June 2002).

[17] See the 1970, 1990 and 1997 *Constitutions*.

[18] Morgan Tuimalealifano, *Samoans in Fiji* (1990) 92.

[19] Brij Lal (ed), *Crossing the Kala Pani: A Documentary History of Indian Indenture in Fiji* (1998) 7-8; Subha Singh, *Fiji: A Precarious Abolition* (2001) chapters IV & V.

[20] Elizabeth K Inia Kato'aga, *Rotuman Ceremonies* (2001) 7.

[21] Morgan Tuimaleali ifano, *Samoans in Fiji* (1990) 92.

[22] R A Derrick, above n 15, chapter 1.

[23] Michael Ntumy (ed), *South Pacific Legal Systems* (1999) chapter 2.

[24] Deryck Scarr, *Politics of Illusion* (1988) 23-24, on the question of landless tenants; and Roman Grynberg, 'Trade Liberalisation in the Post-Cold War Era: Implications for the Fiji Sugar Industry' (1993) 17 *The Journal of Pacific Studies* 132.

[25] Malama Meleisea, *The Making of Modern Samoa* (1987) 47.

[26] J W Davidson, *Samoa mo Samoa* (1967) 76, 90.

[27] Meleisea, above n 25, xi.

[28] <http:// www.undp.org.fj/kir/kirprog.htm> (Accessed 6 June 2002).

[29] Meleisea, above n 25, 8, on the two types of matai titles- *ali'i and tulafale.*

[30] AIDAB, *The Western Samoan Economy- Paving the Way for Sustainable Growth and Stability*, International Development Issues No. 35.

[31] Ron Crocombe, *The South Pacific* (2000) 65-68.

[32] <http://www.undp.org.fj/van/vanuatuprog.htm> (Accessed 19 June 2002).

[33] Don Paterson, 'Vanuatu' in Michael Ntumy (ed) *South Pacific Legal Systems* (1999) 385.

[34] Don Paterson, above n 33, chapter 14, on establishment of Island courts.

[35] <http://www.undp.org.fj/van/vanuatuprog.htm> (Accessed 19 June 2002).

[36] <http://www.undp.org.fj/van/vanuatuprog.htm> (Accessed 19 June 2002); cf Terry Dwyer, Harmful Tax Competition and the Future of Offshore Financial Centres' 15(1) *Pacific Economic Bulletin* 48; Terry Dwyer, 'Harmful" Tax Competition and the Future of Offshore Financial Centres' (2002) 5(4) *Journal of Money Laundering Control* 302; and Anthony van Grip, 'Money Laundering Global Financial Instability and Tax Havens in the Pacific Islands' (2003) 15(2) *The Contemporary Pacific* 237.

[37] A theory is defined as a generalisation or series of generalisations by which an attempt is made to explain some phenomena in a systematic way, see William Wiersma, *Research Methods in Education: An Introduction* (6th ed, 1995) 8.

[38] See, A W Mewett, 'Theory of Government Contracts' (1959) 5 *McGill L. J* 222.

[39] Dennis Campbell (ed) *International Public Procurement* (1998); Frank Wooldrdge, 'Public Procurement in European Countries' (1987) *Journal of Business Law* 505; S. Arrowsmith, 'Government Contracts and Public Law' (1990) 10(3) *Legal Studies* 231-244; John Linarelli et.al *Regulating Public Procurement: National and International Perspectives* (2000); S. Arrowsmith, *The Law of Public Utilities Procurement* (1996); Nicholas Seddon, *Government Contracts* (2nd ed, 1999); Albert H Kritzer (ed) *International Contract Manual* (1990); K K Puri, *Australian Government Contracts* (1978); Peter Nygh, *Autonomy in International Contracts* (1999); V K Agarwal, 'Procurement Service Contracts' in Penna

et.al (eds) *Current Developments in International Transfers of Goods and Services* (1994); A P Ingrao, 'Types of Government Contracts (1976) 18 *AF L R* 63); Willis Holding Jr, 'Problems of State Procurement' (1976) 8(1) *Public Contract L Jl* 17-21; David Medhurst, *EU- Public Procurement Law* (1997) M Trybus & S Arrowsmith, *Public Procurement: the Continuing Revolution* (2003); Ivan J Tether, *Government Procurement and Operations* (1977); J M F. Martin, *The EC Procurement Rules: A Critical Analysis* (1996); Friedl Weiss, *Public Procurement in European Community Law* (1993); Christopher Bovis, *EC Public Procurement Law* (1st ed, 1997); *USA Global Investment Staff Australia Government and Business Contracts Handbook* (2003); Michael Asner, *Selling to Government* (1996); and Ralph C. Nash Jr, *Formation of Government Contracts* (1986).

[40] See, David Held, 'Central Perspectives of the Modern State' in Gregory McLennan et.al (eds), *The Idea of the Modern State* (1990) chapter 2.

[41] A Hilliard and J H Grey, 'Contracts Entered into by Governments-Public Law-Agency' (1976) 54 *Can. B. Rev.* 401-16; cf H F Dick & R. A. Smith, 'Comments on the Problem of Value Assurance in Government Contracts' (1971) 13 *AF JAG* J 96; and H C Nail Jr, 'Contracting with Government Corporations' (1938) 6 *Geo Wash L Rev* 489-94.

[42] Robert E Lloyd, *Deconstructing Government Contracts* (1996) NCMA World Congress Proceedings <www.roblloyd.biz/robpaprs.htm> (Accessed 1 January 2004).

[43] Cf J S Gansler, 'Improving Weapons Acquisitions' (1986) 5 *Yale L & Pol'y Rev* 73.

[44] C C Turpin, 'Government Contracts: A Study of Methods of Contracting' (1968) 31(3) *The Modern Law Review* 241.

[45] See, Christopher Bovis, *EC Procurement Law* (1997) chapter 5.

[46] See, C F Stover, 'Government Contract System as a Problem in Public Policy' (1964) 32 *Geo Wash L. R.* 701.

[47] Thomas R Dyle, *Understanding Public Policy* (4th ed, 1981); and Gavin Murray, 'Political Control over Policy Development' (2003) 24 (2) *Statute Law Review* 157.

[48] Cf Stover, above n 46, 701.

[49] F T Vom Baur, 'Early Days of Government Contract Practice' (1989) 18 *Pub. Cont. L.J* 446; David G Ritchie, 'On the Conception of Sovereignty' in Edmund J James (ed), *Annals of the American Academy Political and Social Science* (1) 385; and Richard Tuck (ed) *Thomas Hobbes Leviathan* (1996).

[50] Ashis Nandy, 'State' in Wolfgang Sachs (ed), *The Development Dictionary* (1993) 264-5, on the fusion of nation and state.

[51] A F M Maniruzzaman, 'State Contracts in International Law: Monist versus Dualist Controversies' (2001) 12(2) *European Journal of International Law* 309.

[52] Elizabeth Wicks, 'State Sovereignty- Towards a Refined Legal Conceptualization' (2000) 29 (3) *Anglo-Am. L. R* 282; and Mark Beeson, 'Sovereignty under Siege: Globalisation and the State in Southeast Asia' (2003) 24(2) *Third World Quarterly* 357.

[53] See, G A Cuneo, 'Some Practical Applications of International Law to Government Contracts' (1975) 50 *Notre Dame Law* 843.

[54] See, *The Phillipine Admiral* [1977] AC 373; Michael Singer, 'Abandoning Restrictive Sovereign Immunity: An Analysis in Terms of Jurisdiction to Prescribe' (1985) 26(1) *Hav I. LJ*p1; J. Craig Barker, 'State Immunity; Diplomatic Immunity and Act of State: A Triple Protection Against Legal Action' (1998) 47 *ICLQ* 950; and F A Mann, 'A New Aspect of the Restrictive Theory of Sovereign Immunity' 31 *ICLQ* 573.

[55] See, Ernest Angeil, 'Sovereign Immunity- The Modern Trend' (1925) 35 *Yale LJ* 150.

[56] See, *Trendex Trading Coy v CBN* [1977] QB 529; cf Paul Walker, 'Public Interest Immunity: A New Approach' (1997) 2(1) *Judicial Review* 35.

[57] See, Georg Schwarzenberger (1957) 10 *Current Legal Problems* 264- 295, on the different forms of sovereignty.

[58] Lloyd, above n 42.

[59] See, Clive Lewis, *Judicial Remedies in Public Law* (2000) 473 and 483.

[60] See, e.g s. 15 *Crown (State) Proceedings Act* [Cap 24] (Fiji) s. 12 The *Government Proceedings Act 1974* (Samoa); and s. 17 *Proceedings by and against the Republic Ordinance* [Cap 76A] (Kiribati).

[61] See, M L Ahmadu & N Nand, *Judicial Review Applications in Fiji* (2001) chapter 7 in respect of judicial review applications. See e.g Order 53 Rule 3 (8) of the *Hugh Court Rules of Practice and Procedure* of Fiji.

[62] 'Procurement by Regulation or Contract? G.L Christian and Associates v. US' (320 F 2d NYU) (1965) 20 *Intra L Rev*102.

[63] P Hogg, *Liability of the Crown in Australia, NZ & UK* (2nd ed, 1989); and J M Evans, 'Government Factors in Contracts of Public Authorities' (1972) 35 *Modern Law Rev* 88.

[64] Endeshaw, above n 11, 33-41; cf G W Bronson, 'Sovereignty in the Market Place-A Panoramic view of Legal Peculiarities of Contracting with Federal Government' (1964) 4 *Washburn LJ* 45.

[65] S Arrowsmith, 'Government Contracts in Public Law' (1990) 10 *Legal Stud*. 231-44; and Haya Rashed A Khalifa, 'Negotiating and Arbitrating against Government Entities' (2003) 19 *Const. L. J.* (5) 258.

[66] I A Shearer, *Starke's International Law* (11th ed, 1994) 90-92.

[67] Cf Ingrid Detter, 'The Problem of Unequal Treaties' (1996) 15 *ICLQ* 1069; and David Kennedy, 'The Forgotten Politics of International Governance' 2001 (2) *E.H.R.L.R* 117.

[68] Campbell, above n 13, 12; Philip Alston, 'The Myopia of the Handmaidens: International Lawyers and Globalisation' (1997) 8(3) *E.J.I.L* 435; and Martin Khor, *Globalisation and the South: Some Critical Issues* (2000).

[69] Ali A Mazrui, 'Pretender to Universalism: Western Culture in a Globalizing Age' (2001) 21(1) *Journal of Muslim Minority Affairs* 11, for a comparative theoretical discussion; cf Marc Jones, 'The Contradictions of Globalisation' 48 *Journal of Australian Political Economy* 5.

[70] John B Tieder,'The Globalisation of Construction- Evolving International Standards of Construction Law' (1998) 15(4) *International Construction Law Review* 550.

[71] Tomohisa Hattori, 'Reconceptualizing Foreign Aid' (2001) 1 8(4) *Review of International Political Economy* 633.

[72] Janet McLean, 'Government to State: Globalisation, Regulation, and Governments as Legal Persons' (2003) 10(1) *Indiana Journal of Global Legal Studies* 173; and A. W. Mewett, 'Theory of Government Contracts' (1959) 5 *McGill L.J* 222.

[73] John Linarelli et.al, *Regulating Public Procurement: National and International Perspectives* (2000).

[74] R W Craig, *Procurement Law for Construction and Engineering* (1998).

[75] R A Miller, 'Economy Efficiency and Effectiveness in Government Procurement' (1975) 42 *Brooklyn L Rev* 208; and Steven L Schooner, 'Desiderata: Objectives for a System of Government Contract Law' 2002 (2) *Public Procurement Law Review* 103.

[76] Cf Friedl Weiss, 'Public Procurement in EEC- Public Supply Contracts' (1988) 13(5) *European Law Review* 318.

[77] Steven Schooner & Christopher R. Yukins, 'Model Behaviour? Anecdotal Evidence Between Evolving Commercial Public Procurement Practices and Trade Policy' (2003*)* 9(1) *International Trade Law and Regulation* 4.

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[79] Simon Randall, 'Public/Private Partnerships: Key Legal Issues' (1998) 2(5) *T.L.P* 51; Cf John R Baldwin, 'Regulatory Failure and Renewal: The Evolution of the Natural Monopoly Contract' (1989) *Economic Council of Canada* 1-122.

[80] See, R D Lumb 'Contractual Relations between Government and Citizens' (1932) 35 *Aust. L J* 45 32.

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[82] Cf Stephen Cirell & John Bennett, 'The Power to Contract' (1997) 8(Jul) *Local Government Chronicle Law and Administration* 8; and S Arrowsmith, 'Government Contracts and Public Law' (1990) 10 *Legal Studies* 231.

[83] J Cibinic Jr, 'Contract by Regulation' (1963) 32 *Geo Wash LR* 111; and e.g *Appropriation Act 1998/9* (Samoa); *Appropriation Act (No. 1) 2000* (Vanuatu).

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[88] S Arrowsmith, *The Law of Public Utilities* (1997) 810.

[89] T W Reilly, 'Role of Government Contracts in Furthering National Economic and Socioeconomic Policies' (1975) 21 *Catholic Law* 8; Cf. Case C-360/89 Commission v Italy on the question of using public procurement in a restrictive way to pursue social and economic policies of the state.

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[91] Christa Tobler, 'Contract Encore: Women's Clauses in Public Procurement under Community Law' (2000) 25(6) *European Law Review* 618.

[92] Rand L Allen, 'Integrity: Maintaining a Level Playing Field' 2002 (2) *Public Procurement Law Review* 111.

[93] Fiscal Policy Institute, 'Prequalification of Contractors: the Importance of Responsible Contracting on Public Works Projects' (May 5, 2003) NY USA; and cf David C Moore, *Government Contract Negotiations* (1996).

[94] M Allars, 'Administrative Law, Government Contracts and Level Playing Field' (1989) 12 *UNSW Law Journal* 114; and cf Ciucci & A B Hoppe, 'Legal Aspects of Contracting When the Currency Rate is Fluctuating' (1974) 16 *AF LR* 53.

[95] Rebecca L Shannon, 'Government Proposals: Cutting through the Chaos' (March, 2001) *Management Concepts Inc,* 1 et. seq.

[96] Edith Penrose, ' Ownership and Control: Multinational Firms in Less Developed Countries' in G.K Helleiner (ed), *A World Divided: The Less Developed Countries in International Economy* (1976) 147.

[97] Patrick C Osode, 'State Contracts, State Interests and International Commercial Arbitration: A Third World Perspective, *African Journal of International & Comparative Law* (1997) 9(1)107.

[98] Willis Holding Jnr, 'Problems of State Procurement' (1976) 8(1) *Public Contract Law Journal* 17.

[99] Phillipe Pierros, 'Bridges and Barriers: Corruption and International Business Transactions' (1998) 4(1) *International Trade Law and Regulation* 4.

[100] Cf D Campbell (ed) *International Public Procurement* (1998) 1 *et. seq*. for the perspectives of European Union, Australia, Switzerland etc.

[101] *See, e.g* Art. 95 *Constitution of Samoa*; s. 108 (3) *Constitution of the Solomon Islands*; s.109 (4) *Constitution of Kiribati*; and Art. 25 (1), (2), (3) of the *Constitution of the Republic of Vanuatu*.

[102] *Appropriation Act* (No. 19) 1998/99 of Samoa; *Supplementary Appropriation Act* (No. 10) of 1999; and *Appropriation Act* (No 1) 2000 of Vanuatu; s. 2 of the *Finance Act*, Cap 69 (Fiji) defines an Appropriation Act as the Act appropriating revenue in relation to any financial year for such expenditure as specified in that Act, and any other Act authorising the issue of money from the consolidated fund. For a general treatise on the Australian perspective, see N Seddon, *Government Contracts* (1995) 48.

[103] See, *e.g,* Cap 69, Fiji; Cap 120, Solomon Islands; Cap 79, Kiribati; No. 6 of 1998, Vanuatu.

[104] See generally, J W Booth, 'Legislation Affecting Government Contracts' (1971) 26 *Bus Law* 1305; Major Hughes, 'ADPE Procurements Without Proper Authority are Void' (1994, Apr) *Army Law* 42; and secs. 30-32 *Public Finance Management Act 2001*.

[105] Peter Hogg, *Liability of the Crown* (3rd ed) 220-221.

[106] Clive Lewis, *Judicial Remedies in Public Law* (2000) 474.

[107] See, e.g *The Appropriation Act* (No. 19) 1998/99 of Samoa; the Supplementary Appropriation Act (No. 10) of 1999; and *Appropriation Act* (No 1) 2000 of Vanuatu.

[108] See, e.g Art. 95 *Constitution of Samoa* and s. 32 *Public Finance Management Act* 2001.

[109] Hogg, above n 105, chapter 9, on the Australian perspective.

[110] See, D Rose, 'The Government and Contract' in P D Finn (ed), *Essays in Contract* (1987) 244.

[111] See, Gordon M Gray, 'Executive (Ab) use of the Procurement Power: Chamber of Commerce v. Reich' (1996) 84 *The Georgetown Law Journal* 2573.

[112] *Cf*. s. 32 of the *Public Finance & Economic Management Act 1998* as amended by the *Public Finance and Economic Management (Amendment) Act 1999* (Vanuatu). It provides: 'No expense or liability will be incurred by the State unless the expenditure in relation to such expense or liability...capable of being charged to a category specified in subsection (2) of this section'; and s. 32 *Public Finance Management Act 2001* (Samoa) *Cf.* the situation in the USA where procurements contracts that are not in writing as required by the relevant Appropriation Act would be invalid. See, L T Patten, 'Government Contracts-Are They Enforceable If Not in Writing?' (1975) 7(2) *Pub Contract L J* 232 .

[113] See generally, N Seddon, *Government Contracts* (1995) 47.

[114] See, *Public Finance Management Act 2001*.

[115] See, *Government Contracts and Tenders Act 1998*.

[116] *Id.* s. 1.

[117] *Id.* s. 2 (1).

[118] *Id*. s. 3 (1).

[119] *Id.* s. 3 (1)(f).

[120] Hogg, above n 105, 216-217.

[121] S. 7 *Government Contracts and Tenders Act 1998*; and see, Major Hughes, above n 104.

[122] See, s. 10 *Government Contracts and Tenders Act 1998*.

[123] *Id.* s. 11.

[124] *Id.* s. 12.

[124] *Id.* s. 13.

[125] *Id.* s. 13.

[126] *Id.* s. 14 .

[127] The principal Act was repealed. However, these Regulations have been saved by section 69 of the *Public Finance and Management Act 1998*.

[128] *Purchase of Goods and Services Regulation* 362 (1).

[129] *Id*. reg. 367 (2).

[130] *Id.* reg. 368 (2).

[131] Cf *Health Care Developers Incorporated v The Queen in Right of Newfoundland* (1996) 136 D.L.R (4^{th}) 609.

[132] (even though some practices have been made punishable).

[133] See, Anthony Thornton, 'Enemies of the State' (2003) 34 *Building* 42-43.

[134] See, Hans Joachim Priess, 'Distortions of Competition in Tender Proceedings: How to Deal with Conflicts of Interest and the Involvement of Project Consultants' (2002) 3 *Public Procurement Law Review* 153.

[135] Daniel J Gifford, 'Antitrust and Trade Issues: Similarities, Differences, and Relationships' (1995) 44 *DePaul Law Review* 1049-1091, on Japanese cultural trade practices.

[136] Cf L A Di Matteo, 'An International Contract Law Formula: The Informality of International Business Transactions Plus the Internationalization of Contract Law Equals Unexpected Contractual Liability' 23 Syracuse Journal of International law and Commerce 67.

[137] Cf Paolo Contini, 'Integration of Legal Systems in Somali Republic' (1967) 16 *ICLQ* 1088; and Guy

Powles, 'Law in Pacific Island States' (1982) 8(3) *Commonwealth Law Bulletin* 1189.

[138] Yash Ghai, 'The Making of Constitutions in the South Pacific Islands' 13(1) *Pacific Perspective* 23.

[139] Ghai, above n 138, 51.

[140] Cf John McCorquodale, 'Minimising Legal and Contractual Liability' (1993) 19(11) *Commonwealth Law Bulletin* 334, though more relevant to computer and software contracts.

[141] Cf Mark Lawson, 'Performance Bond- Irrevocable Obligations' (1987) *Journal of Business Law* 259-268.

[142] *Finance (Public Works) Regulations* and *Finance (Supplies and Services) (General) Regulations*.

[143] S. 70, Cap 69, Laws of Fiji (1985) ed; and Forum Secretariat, *National Integrity System: Country Report: Fiji* (2001) 5 <http:// www.forumsec.org.fj/docs/FEMM/200femn14%-%208%20principles.pdf> (Accessed 2 January 2004).

[144] *Regulations 2 & 3 of the Finance (Public Works) Regulations*.

[145] *Id*. reg. 4.

[146] *Id*. reg. 6.

[147] *Id.* reg. 7.

[148] *Id.* reg. 8.

[149] *Id*. reg. 9.

[150] *Id.* reg. 10.

[151] *Id.* reg. 11.

[152] Cf David A Whiteford, 'Negotiated Procurements: Squandering the Benefit of the Bargain' (2003) 32(3) *Pub Contract LJ* 509.

[153] Cf Julie B Nisbet, 'Transnational Bribery of Foreign Officials: A New Threat to the Future of Democracy' (1998) 31 *Vanderbilt Journal of Transnational Law* 1273.

[154] See, Fiscal Policy Institute, 'Prequalification of Contractors: the Importance of Responsible Contracting on Public Works Projects' (May 5, 2003) NY USA; and Judith Good, *Government Tender in the Tropics* (1998) 1.

[155] *Finance (Supplies and Services) (General) Regulations, Regulation 10*.

[156] Departmental and Divisional Tenders Boards are established by Regulation 14.

[157] *Finance (Supplies and Services) (General) Regulations*-12.

[158] *Id*. reg. 13.

[159] *Id.* reg. 13.

[160] *Id.* reg. 14.

[161] *Id.* reg. 15.

[162] See, regs. 16, 17; and 18 *Finance (Supplies and Services) (General) Regulations*-12.

[163] *Id.* reg. 19.

[164] Cf Edward R Murray, 'Beyond the Bowser: The Comptroller General's Account' (1999) 68 *George Washington Law Review* 161. See, Major Gregory E. Lang, 'Best Value Source Selection in the A-76 Process' (1997) 43 *Air Force Law Review* 239; and Hogg, above n 105, 210.

[165] Cf Major Gregory E Lang, 'Best Value Selection in the A-76 Process' 43 *Air Force Law Review* 239.

[166] Cf single source procurement- Howard L. Speight, 'Current Procedures for Performing Meaningful Discussions in Federal Negotiated Procurements are Uneconomical, Inefficient, and Ineffective- A Proposal for Improvement' (1990) *Saint Mary Law Journal* 985. See also, C J Peckinpaugh et.al, 'Best Value Source Selection- Contracting for Value, or Unfettered Agency Discretion' (1993) 22 *Pub Contract LJ* 275.

[167] Jeffrey Jowell, 'In the Shadow of Wednesbury' (1997) 2(2) *Judicial Review* 75-80, for the three constituents of the principle; and Paul Walker, 'Unreasonableness and Proportionality' in Michael Supperstone, *Judicial Review* (1997) chapter 6; and Michael Fordham, *Judicial Review Handbook* (3rd ed, 2001) 691.

[168] Charles Tiefer, 'The GATT Agreement on Government Procurement in Theory and Practice' (1997) 26 *University of Baltimore Law Review* 31-45, where direct challenge of state procurement practices through formal dispute settlement proceedings are rare even in the United States; cf Nathanael Causey, 'Contractor Challenges to the Government's Evaluation of Past Performance During the Selection Process: Thou Protesth Too Much?' (2002, Aug) *Army Law* 25.

[169] See generally, Michael Steinicke, 'Public Procurement and the Negotiated Procedure- A Lesson to Learn from US Law' (2001) 22(8) *European Competition Law Review* 331.

[170] No 10 2001. S. 131 repealed the *Public Moneys Act 1964*, but saved the regulations made pursuant to that Act.

[171] See, *Treasury Regulations 1965*.

[172] See s. 89 for the functions of the Government Tenders Board.

[173] See s. 88 of the *Public Finance Management Act 2001* for the composition; and the *Treasury Regulations 1965*- Regulation 38 (2).

[174] *Id.* reg. 38 (3); and see also s. 88(3) of the *Public Finance Management Act 2001*.

[175] *Id*. reg. 39 (a).

[176] *Id*. reg. 39 (b).

[177] *Id.* reg. 39 (c).

[178] *Id.* reg. 40.

[179] *Id.* reg. 40 (a).

[180] *Id.* reg. 41.

[181] *Id.* reg. 43.

[182] (Except Secretary of Finance). Cf Alejandro Posadas, 'Combating Corruption under International Law' (2000) 10 *Duke Journal of Comparative and International Law* 345.

[183] Cf Major Kosarin, 'Protecting the Integrity of the Procurement' (1991, Mar) *Army Law* 50.

[184] Also in the cases of Vanuatu and Fiji.

[185] See generally, Stephen M Daniels, 'Why Should We Be Concerned about the Movement toward Procurement Reform' (1997, Mar) *Army Law* 3.

[186] UNCITRAL, UNCITRAL Model Law on Procurement of Goods, Construction and Services was adopted at the twenty-seventh session of the United Nations Commission on International Trade Law in 1994, <http://www.uncitral.org/eng/texts/procurem/ml-procurem.htm> (Accessed 30 June 2001); Hereinafter referred to as the "model law," unless the context otherwise indicate. See generally, James J Meyers, 'UNCITRAL Model Law on Procurement' (1993) 21(4) *International Business Lawyer* 179; Don Wallace, UNCITRAL Model Law on Procurement of Goods and Construction' (1994) 1 *Public Procurement Law Review* CS2.

[187] See generally, Peter W. Edge, 'Use of Legislative Models in the Commonwealth: A Case Study of Criminal Legislation in the Isle of Man (1800-1993)' (April 1995) *Commonwealth Law Bulletin* 671.

[188] Cf Merit E Janow, 'Assessing APEC'S Role in Economic Integration in the Asia-Pacific Region' (1996-7) 17 *Northwestern Journal of International Law and Business* 974.

[189] Established in 1972. Its main aim is to foster regional cooperation among member states, http://forumsec.org.fj/about/spfs.htm> (Accessed 20 December 2001).

[190] The Asian Development Bank has very elaborate procurement procedures which are tied to its loan and lending portfolios. Adopting these at general level, may compliment existing national procurement frameworks in the region.

[191] John Prior (ed) *Gower Handbook of Training and Development* (2nd ed, 1991) 69.

[192] Cf George Washington University Procurement Program, which offers up to Master of Law degree in government procurement law. See, <http:// www.law.gwu.edu/govcon/default.asp> (Accessed 9 June 2004).

[193] John Prior, above n 191.

[194] See, David A Levy, 'BOT and Public Procurement: A Conceptual Framework' (1996) 7 *Indiana International and Comparative Law Review* 95.

[195] Cf Edith Brown Weiss, 'The Rise and Fall of International Law?' (2000) 69 *Fordham Law Review* 345, on the use market, peer and public pressure to motivate firms to undertake major changes in their procurement procedures.

[196] Cf Jane Weaver, 'Kleptocracy and Democracy' (1996) 90 *American Society of International Law Proceedings* 83, on how the procurement guidelines have had a significant role in shaping what are now widely accepted as standards of good international procurement practice.

[197] The one formulated by UNCITRAL.