

A BILL

entitled

GOOD GOVERNANCE ACT 2011

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WHEREAS it is expedient to amend the Public Treasury (Administration and Payments) Act 1969 to establish the Office of Project Management and Procurement and to create offences relating to failure to comply with Financial Instructions and the Code of Practice for Project Management and Procurement; to amend the Audit Act 1990 and the Internal Audit Act 2010 to increase their effectiveness; and to amend the Employment Act 2000 to protect “whistle-blowers” from unfair dismissal and disciplinary action;

Be it enacted by The Queen’s Most Excellent Majesty, by and with the advice and consent of the Senate and the House of Assembly of Bermuda, and by the authority of the same, as follows:

Citation

1 This Act may be cited as the Good Governance Act 2011.

Inserts sections 32B to 32E of the Public Treasury (Administration and Payments) Act 1969

2 After section 32A of the Public Treasury (Administration and Payments) Act 1969, insert—

“Establishment of the Office of Project Management and Procurement

32B (1) The Office of Project Management and Procurement is established within the Ministry of Finance for the following principal purposes—

- (a) to provide professional, qualified procurement expertise and advice to Government;
- (b) to ensure that there is no bias in the awarding of Government contracts;
- (c) to identify and apply performance measures to ensure that Government obtains value for money;
- (d) to ensure that best practices are adhered to in the oversight of capital projects;
- (e) to advise on, guide and support the development of, and adherence to, procurement regulations, policy and best practice.

(2) The Office shall consist of a public officer known as the Director of Project Management and Procurement, and such other staff as are required.

(3) The Director shall have the following functions—

- (a) oversight of all Government procurement, including contracts and all pre-contract negotiations, such as requests for proposal, invitations to tender and the obtaining of quotations and estimates;
- (b) oversight of all capital projects for Government;
- (c) handling of complaints relating to the awarding of Government contracts;
- (d) such other functions as may be conferred under any other enactment or by the Minister.

(4) The Director shall issue a Code of Practice for Project Management and Procurement to be followed by all public officers concerned with obtaining goods or services for Government.

(5) The Director shall take steps as he considers necessary to ensure that the Code of Practice for Project Management and Procurement is followed by all public officers.

(6) In this section and sections 32C to 32E—

“capital project” includes any project, not funded out of capital, which the Director considers should be managed in accordance with the Code of Practice for Project Management and Procurement;

“Director” means the Director of Project Management and Procurement;

“Government” includes a public authority;

“procurement” means the provision of any goods or services to Government otherwise than by a public officer;

“public officer” includes a person employed by, or acting as an agent for, a public authority.

Access to documents and information

32C (1) For the purpose of carrying out his functions, the Director may require any public officer to produce for inspection any documents or information relating to procurement and capital projects, including any computer data in any form, and may make copies or extracts of such documents or information.

(2) The Director is entitled to be given any information and explanations that he may request from a public officer in the performance of his functions under this Act.

(3) Notwithstanding any other Act or any privilege under the law of evidence, the Director may obtain any documents or information relating to procurement and capital projects from a public officer, and no such documents or information may be withheld from the Director on any grounds.

(4) In this section, “Director” includes a person authorised in writing by the Director.

Confidentiality

32D All information furnished by a public officer to the Director shall at all times be treated by the Director and all staff of the Office of Project Management and Procurement as confidential, shall be used solely for the purpose of carrying out functions under this Act, and shall not be disclosed except for the purposes of this Act.

Annual report of Director

32E (1) The Director shall, within three months after the end of each calendar year, prepare a report about the operation of the Office of Project Management and Procurement during the preceding year, and deliver it to the Minister.

(2) The Minister shall cause a copy of the annual report to be laid before both Houses of the Legislature.”

Inserts sections 33 and 33A of the Public Treasury (Administration and Payments) Act 1969

3 Delete section 33 of the Public Treasury (Administration and Payments) Act 1969 and substitute—

“Regulations

33 (1) The Minister may make such regulations as appear to him to be necessary or expedient for the proper carrying out of the intent and provisions of this Act.

(2) Without prejudice to the generality of subsection (1), the Minister shall make regulations—

- (a) containing any Financial Instructions or directions issued by the Minister under section 3; and
- (b) containing the Code of Practice for Project Management and Procurement issued by the Director under section 32B.

(3) The negative resolution procedure shall apply to regulations made under this section.

Criminal offences

33A (1) A person who, without reasonable excuse—

- (a) fails to comply with any regulations made under section 33(2);
- (b) fails to produce documents or information or otherwise obstructs the Financial Secretary or the Accountant-General or any member of their staff in carrying out his functions under section 3 of this Act; or
- (c) fails to produce documents or information or otherwise obstructs the Director of Project Management and Procurement or any member of the Director's staff in carrying out his functions under section 32B of this Act,

commits an offence and is liable on summary conviction to a fine not exceeding \$5,000, or to imprisonment for a term not exceeding 12 months, or to both such fine and imprisonment.

(2) Any person who alters, erases, destroys or conceals any document or information with the intention of avoiding producing the document or information in accordance with section 3 or section 32B of this Act, commits an offence and is liable on summary conviction to a fine not exceeding \$10,000, or to imprisonment for a term not exceeding 12 months, or to both such fine and imprisonment.

(3) Any person involved in the awarding of a contract to which the Code of Practice for Project Management and Procurement applies, who fails to disclose to the Director of Project Management and Procurement that he has any interest (whether legal, beneficial, fiduciary, family or otherwise) in any of the persons bidding for the contract commits an offence, and is liable on summary conviction to a fine not exceeding \$10,000, or to imprisonment for a term not exceeding 12 months, or to both such fine and imprisonment.

(4) A person who contravenes section 32D commits an offence and is liable on summary conviction to a fine not exceeding \$5,000, or to imprisonment for a term not exceeding 12 months, or to both such fine and imprisonment.”

Amends section 20 of the Audit Act 1990

4 Section 20 of the Audit Act 1990 (criminal offences) is amended as follows—

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- (a) renumber the existing provision as subsection (1);
- (b) in subsection (1), delete "\$3000" and substitute "\$5000";
- (c) at the end insert—

"(2) Any person who alters, erases, destroys or conceals any document or information with the intention of avoiding producing the document or information to the Auditor in accordance with section 14(a) or (b), commits an offence and is liable on summary conviction to a fine not exceeding \$10,000, or to imprisonment for a term not exceeding 12 months, or to both such fine and imprisonment."

Amends section 12 of the Internal Audit Act 2010

5 In section 12 of the Internal Audit Act 2010 (access to documents and information)—

- (a) in subsection (2), delete ", or a person authorised by the Director, ";
- (b) after subsection (2) insert—

"(3) Notwithstanding any other Act or any privilege under the law of evidence, the Director may obtain any documents or information of an auditee under this section, and no such documents or information may be withheld from the Director on any grounds.

(4) In this section, "Director" includes a person authorised in writing by the Director."

Amends section 22 of the Internal Audit Act 2010

6 In section 22 of the Internal Audit Act 2010 (offences and penalties), after subsection (1) insert—

"(1A) Any person who alters, erases, destroys or conceals any document or information with the intention of avoiding producing the document or information in accordance with section 12, commits an offence and is liable on summary conviction to a fine not exceeding \$10,000, or to imprisonment for a term not exceeding 12 months, or to both such fine and imprisonment."

Amends section 28 and inserts section 29A of the Employment Act 2000

7 (1) In section 28(1) of the Employment Act 2000 (unfair dismissal), after paragraph (i) insert—

"(j) the making of a protected disclosure under section 29A."

(2) After section 29 of the Employment Act 2000 insert—

“Whistle-blowers

29A (1) A person makes a protected disclosure if, in good faith, he notifies a listed person that he has reasonable grounds to believe—

- (a) that his employer or any other employee has committed, is committing, or is about to commit, a criminal offence or breach of any statutory obligation related to the employer’s business;
- (b) that he himself has been directed, either by his employer or by one of his supervisors, to commit such a criminal offence or breach of statutory obligation; or
- (c) that information tending to show any matter falling within paragraph (a) or (b) has been, is being, or is likely to be, altered, erased, destroyed or concealed by any person.

(2) For the purposes of this section, the “listed persons” are—

- (a) a police officer;
- (b) the Auditor General (appointed under section 88 of the Constitution);
- (c) the Ombudsman (appointed under section 93A of the Constitution);
- (d) the Accountant-General (appointed under section 4 of the Public Treasury (Administration and Payments) Act 1969);
- (e) the Director of the Financial Intelligence Agency (appointed under section 7 of the Financial Intelligence Agency Act 2007);
- (f) the Director of Internal Audit (appointed under section 3 of the Internal Audit Act 2010);
- (g) the Director of Project Management and Procurement (appointed under section 32B of the Public Treasury (Administration and Payments) Act 1969).

(3) A person making a protected disclosure may notify whichever of the persons listed in subsection (2) appears to him to be the most appropriate person to notify in the circumstances.

(4) Any provision of a contract of employment, or other agreement relating to the terms of employment of a person, shall be void insofar as it purports to preclude a person from making a protected disclosure.

(5) The Minister may, by order subject to the affirmative resolution procedure, amend subsection (2) so as to add or remove persons from the list.”

Commencement

8 This Act comes into operation on such day as the Premier may appoint by notice in the Gazette, and different days may be appointed for different provisions.

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EXPLANATORY MEMORANDUM

This Bill seeks to amend the Public Treasury (Administration and Payments) Act 1969 so as to establish the Office of Project Management and Procurement and to create offences of failure to comply with financial instructions and the Code of Practice for Project Management and Procurement, concealing or destroying information, and failing to declare a conflict of interest; to amend the Audit Act 1990 and the Internal Audit Act 2010 to increase their effectiveness; and to amend the Employment Act 2000 to protect “whistle-blowers” from unfair dismissal and disciplinary action.

Clause 1 is self-explanatory.

Clause 2 inserts new sections 32B to 32E into the Public Treasury (Administration and Payments) Act 1969 as follows:

- Section 32B establishes the Office of Project Management and Procurement within the Ministry of Finance to be headed by the Director of Project Management and Procurement, sets out the purposes of the Office and functions of the Director, and requires the Director to issue a Code of Practice for Project Management and Procurement.

- Section 32C provides that the Director can require information or documents from a public officer for the purpose of carrying out his functions. Subsection (3) provides that the Director’s power to obtain documents or information from an auditee “trumps” other statutory provisions or rules of privilege which would otherwise prevent disclosure of the documents or information. This provision is modelled on section 56(2) of the Public Access to Information Act 2010.

- Section 32D requires the Director and his staff to maintain confidentiality, backed by an offence in new section 33A(4) inserted by clause 4.

- Section 32E provides for an annual report by the Director of Project Management and Procurement to be submitted to the Minister of Finance and laid before the Legislature.

Clause 3 replaces section 33 and inserts new section 33A into the Public Treasury (Administration and Payments) Act 1969 as follows:

- Section 33 continues the Minister’s power to make regulations, and requires the Minister to make regulations containing the Financial Instructions issued under section 3 and the Code of Practice for Project Management and Procurement issued under new section 32B. Regulations are subject to the negative resolution procedure.

- Section 33A subsection (1) creates offences of failure to comply with regulations containing the Financial Instructions or the Code of Practice for Project Management and Procurement, and obstructing the Financial Secretary, Accountant-General or Director of Project Management and Procurement in carrying out their duties under sections 3 and 32B of the Act, with a penalty on summary conviction not exceeding a fine of \$5000 or 12 months imprisonment (or both). Subsection (2) creates an offence of destroying etc documents so as to avoid producing them for inspection under this Act with a penalty on

summary conviction not exceeding a fine of \$10,000 or 12 months imprisonment (or both). This is modelled on section 64 of the Public Access to Information Act 2010. Subsection (3) makes it an offence for any person involved in the awarding of a contract for any goods or services not to disclose that he has any interest in any of the persons bidding for the contract, with a penalty on summary conviction not exceeding a fine of \$10,000 or 12 months imprisonment (or both). Subsection (4) makes it an offence for the Director and staff of the Office of Project Management and Procurement to breach confidentiality, with a penalty on summary conviction not exceeding a fine of \$5000 or 12 months imprisonment (or both). This is modelled on sections 19 and 20 of the Audit Act 1990 (as modified by clause 4).

Clause 4 increases from \$3000 to \$5000 the maximum penalty for an offence under section 20 of the Audit Act 1990, and inserts a new offence of destroying etc documents so as to avoid producing them for inspection by the Auditor General under section 14(a) or (b), with a penalty on summary conviction not exceeding a fine of \$10,000 or 12 months imprisonment (or both). This is modelled on section 64 of the Public Access to Information Act 2010.

Clause 5 amends section 12 of the Internal Audit Act 2010 by inserting a new subsection (3), which provides that the Director of Internal Audit's power to obtain documents or information from an auditee "trumps" other statutory provisions or rules of privilege which would otherwise prevent disclosure of the documents or information. This provision is modelled on section 56(2) of the Public Access to Information Act 2010. New subsection (4) provides that "Director" in subsection (1), (2) and (3) of section 12 includes a person authorised in writing by the Director.

Clause 6 amends section 22 of the Internal Audit Act 2010 to insert a new subsection (1A) which creates an offence of destroying etc documents so as to avoid producing them for inspection by the Director of Internal Audit under section 12, with a penalty on summary conviction not exceeding a fine of \$10,000 or 12 months imprisonment (or both). This is modelled on section 64 of the Public Access to Information Act 2010.

Clause 7 amends section 28(1) of the Employment Act 2000 to provide a new ground of unfair dismissal if a person is dismissed for making a protected disclosure under new section 29A (whistle-blowers). New section 29A(1) provides that a person makes a protected disclosure if he notifies a listed person in writing that he has reasonable grounds to believe that his employer or another employee has committed, is committing, or is about to commit, a criminal offence or breach of statutory obligation related to the employer's business, or that he himself has been asked to commit such a criminal offence or breach of statutory obligation, or that evidence of either has been, is being or is likely to be, destroyed etc. Subsections (2) and (3) list the persons to whom a protected disclosure may be made. Subsection (4) provides that a provision of a contract (or similar) which purports to prohibit a protected disclosure is void. Subsection (5) provides that the Minister responsible for labour and training may amend the list of persons, by order subject to the affirmative resolution procedure.

Clause 8 provides for commencement by notice in the Gazette.