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*Robert D. Anderson, Anna Caroline Müller, Kodjo Osei-Lah
and Philippe Pelletier*

Procurement law in Nigeria: Challenges in attaining its objectives

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Procurement law in Nigeria: Challenges in attaining its objectives

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✉ Corruption; Nigeria; Public procurement; Regulatory bodies

1. Introduction

Nigeria gained independence from the British Government in 1960. Between 1960–2007, the country has passed through both military and civilian governments. The military governments rule with decrees while the civilian governments govern by the constitution and the laws made by the legislature. Both military and civilian governments engage in business transactions of which the greater part is the award of contracts. Before 2007, there was no statutory provision that directly regulated the award of public contracts in Nigeria and the result was that the award of contracts was able to become an avenue by which the government functionaries could reward their friends and cronies and amass personal wealth.

In view of the depth of corruption in the procurement system and its effects on the economy, the Federal Government commissioned the World Bank in 1999 in collaboration with some private sector specialists to review the country's public sector procurement structure, including the existing legal framework, organisational responsibilities and capabilities, and present procedures and practices, including how these may differ from the formal rules and procedures. The World Bank report was damning, it notes that¹

“[a]bout 50% of projects in Nigeria are dead even before they commence. ... the projects are designed to fail because the objective is not to implement them, but to use them as vehicles for looting of the public treasury ... Instead of adding value, they become economic drain pipes.”

It was rightly observed that the government functionaries were involved in the award of public contracts and a new legal regime that will eschew this was advocated by the report:

“Members of the Federal Tender Board are Ministers who due to their political role shall not and cannot be expected to deal with details in procurement procedures. It is therefore considered that the Federal Tender Board does not add value to the procurement process. High level politician such as Governors, Ministers and Commissioners should use their valuable time for major policy and strategic issues rather than approving contract awards. Elected officials are responsible for allocation of resources but the mechanics of spending these resources should follow laid down procurement regulations and procedures.”²

Rather than enacting statutory legislation to regulate public contracts, the government took a step to check the abuse in the system by establishing the Budget Monitoring and Price Intelligence Unit (“BMPIU”) in

¹ A version of this article was first published in (2010) 11 *University of Botswana Law Journal* but has been substantially revised and rewritten. I am very grateful to the anonymous reviewer for comments.

² See Nigeria: *Country Procurement Assessment Report*, Vols 1 and 2, available at: <http://documents.worldbank.org/curated/en/2000/06/1121258/nigeria-country-procurement-assessment-report-cpar> [Accessed May 21, 2012].

³ *Country Procurement Assessment Report*, Vols 1 and 2, p.39.

the Presidency with the objective, amongst others, of ensuring that merit and due diligence are adhered to in the award and execution of contracts, procurement of products and services.³

However, on June 4, 2007, the then president of Nigeria, President Umaru Musa Yar'Adua, signed into law the Public Procurement Act ("PPA") which is the first procurement law in the history of Nigeria. The purpose of the Act is to ensure transparency, competitiveness, value for money and professionalism in the public sector procurement system.⁴ The Act provides for the establishment of the National Council on Public Procurement ("NCPP") and the Bureau of Public Procurement ("BPP") as regulatory authorities responsible for oversight, management and monitoring of public procurement practices and system. Although the new legal regime takes effect immediately, it can be argued that there is a lack of total commitment on the part of the Federal Government to fully comply with the regulations enshrined in the Act. The problem lies with the issue of government involvement. The argument of the government functionaries is that they must be involved in the procurement process in order to safeguard public resources, even though the report of the World Bank rejected this argument,⁵

"[p]oliticians in Nigeria would argue that it is their responsibility to safeguard public resources by ensuring that corruption is minimized in the procurement process. However, what is most critical is to build legitimacy in the procurement process through appropriate legislation and regulations and not direct involvement in the procurement process. This legitimacy is very important for both civil servants and the politician because they, in the end, need to be able to work in a system where the public has faith in what is going on and where they can account for their dispositions."

As of today, it can be argued that the greatest challenge for the enforcement of procurement law in Nigeria is the involvement of the government functionaries in the procurement process and this is possible because, four years after the Act took effect, the Government has not fully implemented the provisions of the Act. This is arguably predictable from the fact that it took the Government almost seven years to enact this law in the first place. It can be argued that both partial implementation and the delay in enacting the law in the first place have been actuated by the desire of the political class in the Government not to lose control over the award of contracts for political or other ends.

In this context, this article discusses the challenge for the attainment of the lofty objectives of the PPA. The implications of the current partial implementation of the Act are examined and recommendations offered.

The article is divided into eight parts. Part 1 is an introduction while Pt 2 examines the statutory objectives of the Act. In Pt 3, the scope of the application of the Act is considered, while Pt 4 deals with regulatory bodies monitoring the procurement process. The impacts and the amendment of the Act are briefly discussed in the subsequent Pts 5 and 6. The challenge for the enforcement of the Act is considered in Pt 7 and the conclusion is in Pt 8.

2. The objectives of the PPA

The importance of goals and objectives to a statutory enactment cannot be overlooked or over emphasised since they provide the means by which the implementation of the statutory provisions can be evaluated, analysed and appraised. They are part of major issues to be considered by judges when interpreting a

³ The BMPIU serves as a "vanguard of ensuring fiscal transparency, strict compliance with Federal Government guidelines on Due Process Certification as it concerns budgeting for and procurement of facilities/services/contracts at appropriate costs" (O. Ezekwesili, "Due Process Mechanism and Digital Opportunities", paper presented to the University Community at Princess Alexandria Auditorium, University of Nigeria, Nsukka (2005)).

⁴ Public Procurement Act 2007 s.4(1), can be downloaded at: http://right2info.org/resources/publications/Public_Procurement_Act_Document.pdf [Accessed April 27, 2012].

⁵ World Bank, *Country Procurement Assessment Report*, Vols 1 and 2, p.39.

statute because they provide not only the purpose which a particular statute intends to achieve, but the yardstick for its assessment and the mechanism for its interpretation.⁶

It is assumed that a statute ought not to be drafted without having a particular purpose in mind, just as a house should not be built without having a particular plan as pattern for engineers to follow.⁷ Therefore, there is a presumption that every enacted statute has a purpose and that purpose must be discovered either in the preamble to the statute or in the entire statute. Thus, this section will consider the objectives of the PPA.

Section 3(1) of the PPA establishes a regulatory body known as the Bureau of Public Procurement (“BPP”). The body becomes an agency with corporate personality.⁸ The objectives of the PPA as a statute are not directly stated in the Act but could be gathered from the statutory functions of the BPP. In a part of the Act,⁹ titled the “Objectives of the Bureau”, the Act mentions four objectives of the Bureau which can be argued to be the objectives of the Act. The first is to harmonise the existing government policies and practices on public procurement and to ensure probity, accountability and transparency in the procurement process. The second is to establish pricing standards and benchmarks while the third is to ensure the application of fair, competitive, transparent value-for money standards and practices for the procurement and disposal of public assets and services. The last is the attainment of transparency, competitiveness, cost effectiveness and professionalism in the public sector procurement system.

In addition, the official website of the BPP at its home page also enumerates the objectives of the BPP.¹⁰ The four core objectives highlighted are almost the same and can also be argued to be the objectives of the Act. They are economy efficiency, competition which is interpreted to be the provision of a level playing ground for all strata of bidders, value for money and transparency.

To avoid misconceptions over the purpose of the Act, the Federal Government of Nigeria publishes a Procurement Procedures Manual for public procurement in Nigeria.¹¹ The Manual reiterates the issue of the objectives of the PPA when it mentions and explains five¹² principal hallmarks of a proficient public procurement system. The Manual explains in clear terms the objectives and goals of the procurement law in Nigeria. Its first objective, according to the Manual is a function of economy which it explains as the best value for money. It further explains the meaning of value when it states¹³:

⁶ There are many rules of interpretation from the literal rule to golden rule and the mischief rule etc. The common thread however is that most of the rules consider the objects of the Act in interpreting a statute. Even where there has been uncertainty, ambiguity or absurdity in the words used in such way that it is difficult for the judge to fathom the meaning of the statute and its objects, the courts under the common law will still consider what is the purpose of the Act and not what ought to be the intention of the Parliament or the Judge. In *Duport Steels Ltd v SIRS* [1980] 1 W.L.R. 142; [1980] 1 All E.R. 529 HL, Lord Scarman said: “In the field of statute law the judge must be obedient to the will of Parliament ... Parliament makes ... the law: the judge’s duty is to interpret and to apply the law, not to change it to meet the judge’s idea of what justice requires ... Unpalatable statute law may not be disregarded or rejected, merely because it is unpalatable. If Parliament says one thing but means another, it is not, under the historic principles of the common law, for the courts to correct it ... We are to be governed not by Parliament’s intentions but by Parliament’s enactments”. But even if the court intends to use the purposive approach as advocated by Lord Denning the relevant point here is still the purpose of the parliament. In *Magor and St Mellons v Newport BC* [1952] A.C. 189, Lord Denning said: “We do not sit here to pull the language of Parliament to pieces and make nonsense of it. We sit here to find out the intention of Parliament and carry it out”. The Canadian courts captured the importance of objectives in interpreting a statute in the Driedger principle: “... the words of an Act are to be read in their entire context, in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.” See Ruth Sullivan, *Sullivan and Driedger on the Construction of Statutes*, 4th edn (Vancouver: Butterworths, 2002), p.1.

⁷ But see Steven L. Schooner, “Desiderata: Objectives for a System of Government Contract Law” (2002) 11 P.P.L.R. 103. He asked a question and answered it himself: “What does your government hope to achieve through its government procurement law? It is possible to draft and enact a new law without answering the question, and experience demonstrates that this is often the case”.

⁸ In Nigeria, a company must be registered with Corporate Affairs Commission (“CAC”) before it can be a corporate body but s.2 of the Act invests the agency with the power of a corporate entity without registration with CAC. Section 2 provides that the body shall be a body corporate with perpetual succession and a common seal and may sue and be sued in its corporate name and can also acquire, hold or dispose of any property whether movable or immovable for the purpose of carrying out any of its functions under this Act.

⁹ Public Procurement Act 2007 s.4.

¹⁰ See the official website of BPP at: <http://bpp.gov.ng/> [Accessed April 27, 2012].

¹¹ See the official website of BPP at: <http://bpp.gov.ng/> [Accessed April 27, 2012]. The Manual can be down loaded at the website.

¹² See the official website of BPP at: <http://bpp.gov.ng/> [Accessed April 27, 2012]. The Manual mentioned six objectives but only explained five; the sixth one reliability is not explained though it should mean consistency.

¹³ See the official website of BPP at: <http://bpp.gov.ng/> [Accessed April 27, 2012].

"For complex purchases, value may imply more than just price, for example, since quality issues also need to be addressed. Moreover, lowest initial price may not equate to lowest cost over the operating life of the item procured. But the basic point is the same: the ultimate purpose of sound procurement is to obtain maximum value for money."

The second is efficiency which the Manual insists must be measured in practical form by considering the administrative resources and professional capabilities of the purchasing entity and its procurement personnel. It is defined as simple and swift procurement system producing positive results without protracted delays.

The third is fairness, which it explains to be a state of being non partisan in the sense that all interested contractors, suppliers and consultants must be given a level playing field on which to compete and thereby, directly expands the purchaser's options and opportunities. The fourth is transparency which according to the Manual means that the procurement rules must be accessible and unambiguous. The last objective is that of accountability and ethical standards which it explains in the form of exhortation and obligation¹⁴:

"Good procurement holds its practitioners responsible for enforcing and obeying the rules. It makes them subject to challenge and to sanction, if appropriate, for neglecting or bending those rules. Accountability is at once a key inducement to individual and institutional probity, a key deterrent to collusion and corruption and a key prerequisite for procurement credibility.

A sound procurement system is one that combines all the above elements. The desired impact is to inspire the confidence and willingness-to-compete of well-qualified vendors. This directly and concretely benefits the purchasing entity and its constituents, responsive contractors and suppliers, and donor agencies providing project finance."

Generally, one reason behind domestic legislation of public procurements by the national governments is the use of public procurement as a tool to promote their social and industrial policies. This particular objective has become a universal trend throughout the globe and Arrowsmith rightly observed its significance¹⁵:

"Another important aspect of procurement procedure in many states is the use of the economic muscle provided by government procurement to support wider industrial, social or other policies which are not directly connected with the procurement itself. Thus, so far as industrial policy is concerned, in order to boost domestic industry and employment, general preferences have sometimes been given to national industry in awarding procurement contracts, either by reserving particular contracts for domestic products or suppliers only although more commonly by operating a preference of bids meeting specified domestic content requirements, in terms of use of domestic products or labor in the contract, or for firms which are deemed 'national' firms in term of their location or ownership."

To accomplish such a domestic objective,¹⁶ the PPA provides that in international bidding,¹⁷ a margin of preference may be given to domestic bidders or suppliers over the foreign bidders. This preference is exercisable during the process of evaluation of tenders when a procuring entity is comparing tenders from domestic bidders with the foreign bidders or even from the domestic suppliers if some of them are offering goods manufactured locally and others are offering goods manufacture abroad.¹⁸ The purpose is to develop the national economy, by using procurement legislation to promote locally manufactured goods. One of

¹⁴ See the official website of the BPP at: <http://bpp.gov.ng/> [Accessed April 27, 2012].

¹⁵ See Sue Arrowsmith, "National and International Perspectives on the Regulation of Public Procurement: Harmony or Conflict?" in Sue Arrowsmith and Arwel Davies (eds), *Public Procurement: Global Revolution* (London: Kluwer Law International, 1998). See also P.A. Geroski, "Procurement policy as a tool of Industrial policy" (1990) 4(2) *International Review of Applied Economics* 182.

¹⁶ There has been a minimal restriction on the use of domestic regulation to further industrial goal as a result of free trade phenomenon, that the world universal may be subject to criticism therefore this issue shall be further discussed in the next section.

¹⁷ International Competitive bidding is defined by the Act as a solicitation of bids from both domestic and foreign contractors and suppliers.

¹⁸ Public Procurement Act 2007 s.34(1) and (3).

the ways by which the citizens can benefit from dividends of democracy is for the government to encourage development of local contractors and manufacturers.¹⁹

Despite the tendency to prefer local contractors and manufacturers in certain circumstances as enumerated above, the overall goal of the Government is to give all qualified bidders an equal opportunity. Therefore, the Act provides that the procurement process should be done in a transparent manner and if there be any preference, it must be stated in the bidding documents.²⁰ It is suggested that that provisions for transparency and disclosure of preferences have two positive consequences for bidders; the foreign bidders will have notice of those preferences against them and can prepare on how to swim against the tide, and that local bidders too will have notice of eligibility for the preferences that will enable to prepare. At the end, the existence of preferences is not, of course, a guarantee that local bidders will win.

The PPA as an act seeks to accomplish all the above-mentioned objectives. It states that a sound procurement system must not take one objective and reject the other if confidence and willingness to compete must be integrated in to the procurement system.

Therefore the Manual²¹ provides the picture of what the Act intends to avoid by embracing all the objectives without exclusion of any when it states that²²

“[c]onversely, a procurement system that fails to take the above elements [objectives] stimulates hesitation to compete, submission of inflated tenders containing a risk premium, or submission of deflated tenders followed by delayed or defective performance. Other direct results include collusion in bribery by frustrated or unscrupulous vendors and purchasing entities, bad value for those entities and their constituents, and betrayal and abuse of the public trust for personal gain”.

3. Scope, coverage and application

Nigeria is a Federal Republic with a federal system of government. It consists of 36 states and a federal capital territory in Abuja. Power is divided between the states and the federal government. The legislative power of the Federal Republic of Nigeria is vested by the Constitution in the National Assembly of the federation which consists of the Senate and the House of Representatives.²³ The National Assembly has constitutional power to make law for the whole of the federation in any matter included in the exclusive legislative list.²⁴ The power to make law in any of the states of the federation is vested in the House of Assembly of each state.²⁵ The House of Assembly has power to make law on any matter not included in the Exclusive list.²⁶ Both the states and the national parliament can make laws on any matter that falls within the concurrent list with a proviso that if there is inconsistency between the law made by the federal legislature and the one made by the states, the law made by the national Assembly shall prevail and the state law shall be void to the extent of its inconsistency.²⁷

Government contracting falls within the concurrent list which means both the states and the federal governments can legislate on it and that is the constitutional limitation in the application of the PPA. It was enacted by the National Assembly and its coverage does not go beyond the federal government

¹⁹ See the official website of the BPP at <http://bpp.gov.ng/> [Accessed April 27, 2012]. The Manual reiterates that it is the policy of the government to encourage the development of local contractors and manufacturers.

²⁰ Public Procurement Act 2007 s.34(2) provides that where a procuring entity intends to allow domestic preferences, the bidding documents shall clearly indicate any preference to be granted to domestic suppliers and contractors and the information required to establish the eligibility of a bid for such preference.

²¹ See the official website of the BPP at <http://bpp.gov.ng/> [Accessed April 27, 2012].

²² See the official website of the BPP at <http://bpp.gov.ng/> [Accessed April 27, 2012].

²³ See 1999 Constitution s.4(1).

²⁴ The states could not legislate on any matter in the exclusive list. Some of the matters are: Aviation matters, Bankruptcy and Insolvency, Census, Copyright, Defense, Creation of states, Citizenship, etc.

²⁵ See 1999 Constitution s.4(6) and (7).

²⁶ 1999 Constitution s.4(7), this is called Residual power of the states to make laws in the area of chieftaincy matters, etc.

²⁷ 1999 Constitution s.4.

jurisdiction. It regulates public contracts at the federal level by the national government.²⁸ Another limitation on the applicability of the PPA is subs.(2) of s.15 which provides that the PPA shall not apply to the procurement of special goods; works and services involving national defense or national security. However, the limitation is not an absolute one, since it can be avoided if the express approval of the President has been first sought and obtained.

The PPA provides that it applies to all entities in Nigeria which derive at least 35 per cent of the funds appropriated or proposed to be appropriated for any type of procurement from the federation share of Consolidated Revenue Fund.²⁹ As a result of that provision, it might be suggested that the PPA enjoys a wide application in Nigeria that it applies to all governments be it state local or federal government and that states need not enact their own procurement law. However, s.162(3) of the Constitution,³⁰ makes provision, for distribution of money in the Federation Account, between the federal government, the states and the local government Councils in each state. Section 80 defines Consolidated Revenue Fund as³¹

“[a]ll revenues or other moneys raised or received by the Federation (not being revenues or other moneys payable under this Constitution or any Act of the National Assembly into any other public fund of the Federation established for a specific purpose) shall be paid into and form one Consolidated Revenue Fund of the Federation.”

In the author's view, since the constitution prescribes that the money in the Consolidated Revenue Fund should be shared between the three tiers of governments in Nigeria, the question for consideration is whether they can be regarded as entities and whether they are subject to s.15(1)(b) of the PPA. If they are, the PPA will apply to them as far as the usage of that fund is concerned; if they are not it will not apply. Be that as it may, the actual fact is that PPA applies to federal government and its ministries and agents wherever they might be located but does not apply to states and states must enact their own procurement law.

4. Regulatory bodies monitoring the procurement process and methods of procurement

A compliance strategy and mechanisms for accomplishment are important aspects of law making. If rules that are made are not complied with, the effect is the same as if they are not made at all in the first instance. Therefore, what should be the thinking of the law makers and those who are drafting the law on how to ensure compliance of the law? In most cases regulatory agencies are established by the enabling statutes to ensure compliance. That is the case with the PPA in Nigeria. Thus, the first thing the Act does³² is to establish a managerial and administrative architecture for public procurement in Nigeria mainly for the purpose of ensuring compliance with the procurement rules.

In s.1 of Pt 1,³³ the Act establishes the NCPP and in s.3 of Pt 2,³⁴ it establishes the BPP, both as regulatory authorities responsible for the monitoring and oversight of public procurement in Nigeria. While the BBP really performs regulatory and administrative functions, the NCPP exerts control over the administration of BPP to ensure that the objectives of the Act are not defeated. It gives directives for implementation to the BPP to ensure that it does not depart from the fundamental principles for procurement.

²⁸ This limitation is from the constitution as well as from the statute. Section 15(1) of the PPA provides that it shall apply to all procurement of goods, works and services carried out by the Federal Government of Nigeria and all procurement entities.

²⁹ See Public Procurement Act s.15(1)(b) of the; note that the Act is still new and all of its provisions have not been tested in courts. However, if there is conflict between any of its provision and that of the constitution, the provision of the constitution will prevail and that provision in the Act shall be void to the extent of its inconsistency see 1999 constitution s.1(3).

³⁰ 1999 Constitution.

³¹ 1999 Constitution.

³² The Public Procurement Act 2007.

³³ Public Procurement Act 2007 s.1(1).

³⁴ Public Procurement Act 2007 s.3(1).

It approves contract thresholds and policies on public procurement to ensure and maintain sound procurement process.³⁵ Although the president appoints the Director General of the BPP who is the Chief Executive and Accounting Officer,³⁶ the recommendation for the appointment must come from the NCPP who must also approve it before the appointment can be valid.³⁷

The BPP serves as the secretariat for the NCPP³⁸ and performs a plethora of administrative functions that are too numerous to list fully. In a nutshell, it oversees and regulates public procurement so as to achieve economic value for money, it develops the legal frame work for public procurement by undertaking research and survey, and it sets and monitors standards for public procurement. BPP is the organ that implements rules, policies and principles of Public procurement in Nigeria and has enforcement power to ensure compliance with its rules. The issue of a “Certificate of no Objection” by the BPP is a condition precedent before a contracting entity can award a contract,³⁹ and if a contract is awarded without this important document, the contract is null and void and no money can be disbursed to service such a contract.⁴⁰

The methods of procurement that are provided for are largely modeled on those found in the UN Commission on International Trade Law (UNCITRAL) Model Law on Procurement of Goods, Construction and Services of 1994 (since the law was enacted prior to UNCITRAL’s adoption of the Model Law on Public Procurement of 2011). The principal method of procurement is by open competitive bidding known as sealed bidding, a process by which a procuring entity, based on previously defined criteria, effects public procurements by offering to every interested bidder, equal simultaneous information and opportunity to offer the goods and works needed.⁴¹ Whether international,⁴² or national, it commences with invitation to bid which shall be advertised in at least two national newspapers. Additional advertisement in an internationally recognised publication is required for international competitive bidding.⁴³

All bids by the contractors under open competitive bidding must comply with special requirements that might be prescribed by the procuring entity. The bid should be in writing and sign by an official authorised to bind the bidder to a contract and placed in a sealed envelope.⁴⁴ All bids received before the deadline shall be deposited in a secured “tamper-proof bid box” while those received after the deadline are returned to the bidders.⁴⁵ The bids must be opened in public under the scrutiny of the bidders, their representatives and members of the public, after they must have been allowed to examine the bids and ascertain that their bids have not been tampered with.⁴⁶ After the bids have been opened, award must be made to the responsible bidder who submitted the lowest responsive bid with regard to work specification and standard.⁴⁷

The second type of procurement process consists of special and restricted methods of procurement, statutorily divided into different methods. The first is Two-Stage Tendering Process generally known as “two-step sealed bidding” which can be used by a contracting entity in specified circumstances.⁴⁸

³⁵ Public Procurement Act 2007 s.2.

³⁶ Public Procurement Act 2007 s.7(1)–(2).

³⁷ Public Procurement Act 2007 s.2(b).

³⁸ Public Procurement Act 2007 s.6(2).

³⁹ Public Procurement Act 2007 s.6(1)(b) gives the power to BPP to issue certificate of “No objection for contract Award” for all contract to be awarded by the Federal Government of Nigeria and any of its agencies and parastatals.

⁴⁰ Public Procurement Act 2007 s.16(2).

⁴¹ Public Procurement Act 2007 ss.16(1)(c) and 24(2).

⁴² Public Procurement Act 2007 s.25(1). It is international if the solicitation of bids is from domestic and foreign contractors but if all are domestic contractors it is national.

⁴³ If it is international, it can be advertised in any official websites of the procuring entity and that of the BPP, as well as the procurement journal. If it is national, it shall be advertised on the notice board of the procuring entity and any official websites of the procuring entity.

⁴⁴ Public Procurement Act 2007 s.27(1).

⁴⁵ Public Procurement Act 2007.

⁴⁶ Public Procurement Act 2007 ss.16, 17, 24 and 31.

⁴⁷ Public Procurement Act 2007 ss.29–30.

⁴⁸ Public Procurement Act 2007 s.39(2): “where it is not feasible for the procuring entity to formulate detailed specifications for the goods or works or, in the case of services, to identify their characteristics and where it seeks tenders, proposals or offers on various means of meeting its needs in order to obtain the most satisfactory solution to its procurement needs; where the character of the goods or works are subject to rapid technological advances; where the procuring entity seeks to enter into a contract for research, experiment, study or development, except where the contract includes the

The first step requires the contracting entity to request submission of tenders and if necessary solicit technical proposals. No tender price is involved at this stage because the purpose of this step is to find out whether the supplies or services received are adequate and acceptable. Those suppliers or contractors whose tenders have not been rejected must be called upon by the contracting entity to submit final tenders with prices on a single act of specification and the awards are made from the second stage tenders after the tenders have been compared and evaluated.⁴⁹

In exceptional situations, a procuring entity may resort to restricted tendering and invite only specified contractors to submit tenders, if it has obtained the approval of BPP. Restricted tendering can only be used if it could be proved that it is economical that a limited number of suppliers or contractors should supply the goods or works required and that the time and cost required examining and evaluating a large number of tenders is disproportionate to the value of the goods, works or services to be procured.⁵⁰

All contractors or suppliers who can provide the goods or services must be invited to tender without discrimination and if there is no time for evaluation and examination of tenders from all interested parties, then the contracting entity must select in a non-discriminatory manner the number of suppliers or contractors to ensure effective competition. A notice of the chosen tendering procedure must be published in the procurement journal.⁵¹

As for solicitation for negotiated contracts, PPA requires the contracting entity to request quotations from at least three separate contractors. The requests must be made in writing and contain information as to whether any factors other than the charges for the goods, works or services themselves, such as any applicable transportation and insurance charges, customs duties and taxes, are to be included in the price; and the contract shall be awarded to the qualified contractor or supplier that gives the lowest priced responsive quotation.⁵²

Furthermore, a procuring entity may procure goods or works or services directly without competition from a single individual as long as it satisfies the conditions for such direct procurement. However, it must justify its decision for single source procurement and those justifiable reasons for determination should be recorded in the record of procurement proceedings. The reasons must be compatible with the provisions of the PPA.⁵³ Grounds for using this method are that the goods, works or services are only available from one source, or that supervening events or catastrophic circumstances make the need for them so expedient that recourse to other methods of procurement is unrealistic. This method can also be adopted on the grounds of reasonableness of the price, unsuitability of alternatives to the goods or services in question or national security.

A procuring entity may also engage in direct contracting for goods, works and services during emergency situations when the country is either seriously threatened by or actually confronted with a disaster, catastrophe, war, insurrection or Act of God or when the condition or quality of goods, equipment, building or publicly owned capital goods may seriously deteriorate unless corrective or remedial action is urgently and necessarily taken, or when a public project may be seriously delayed for want of an item of a minor value that ought to be procured.⁵⁴ However, immediately after the cessation of the situation which led to the emergency procurement, the procuring entity must give a detailed report of procurement made to the BPP for verification and if necessary the BPP will issue a Certificate of No Objection.⁵⁵

production of goods in sufficient quantities to establish their commercial viability or to recover research and development costs, where the procuring entity applies this Act to procurement concerned with national security and determines that the selected method is the most appropriate method of procurement; or where the tender proceedings have been utilized but were not successful or the tenders were rejected by the procuring entity under an open competitive bid procedure and the procuring entity considers that engaging in new tendering proceedings will not result in a procurement contract."

⁴⁹ Public Procurement Act 2007 s.39(4)(a), (b) and (5). See also W. Noel Keyes, *Government Contracts*, 2nd edn (St Paul, MN: West, 2003), p.135.

⁵⁰ Public Procurement Act 2007 s.40.

⁵¹ Public Procurement Act 2007.

⁵² Public Procurement Act 2007 s.41.

⁵³ Public Procurement Act 2007 s.42.

⁵⁴ Public Procurement Act 2007 s.43.

⁵⁵ Public Procurement Act 2007.

5. The impact of the Act

The Federal Government of Nigeria initiated public procurement reform in 2001 and the law was passed in 2007. The Act has been in existence for four years, which is a short time to examine the effect of a new law in the life of a nation. Nevertheless, it is suggested that the effort of the government in enacting this law has not been in vain. This section examines briefly the impact of PPA in Nigeria since its inception.

The first impact is the establishment of procurement law for the first time in the history of Nigeria to govern public contracts. This should go a long way towards saving government money and to ensure transparency in procurement method. The rules and regulations enshrined should serve as deterrence to corrupt practices in the awards of contracts and government spending.

A commentator in Nigeria lamented how many people, particularly statesmen, have escaped punishment for offences of corruption in public procurement because of the absence of law in that area when he wrote⁵⁶:

“Last year ... [a politician] was forced to resign as Speaker of the House of Representatives,⁵⁷ in the light of evidence that she irregularly spent 628 million Naira on the refurbishment of her official residence and diverted much of this money into illicit payments ... [That politician] is a prime example of someone who could be prosecuted under the terms of the new Bureau of Public Procurement Act. And if she were convicted, the disgraced politician could find herself serving a prison sentence of up to 10 years.”⁵⁸

Another report from Nigeria illustrates the state of corruption in the award and performance of contracts from both private and public sector of the economy. A man was arrested in Lagos for being in possession of a bag containing 70 dead babies.⁵⁹ According to the report, the man was trying to dump the corpses when he was apprehended. The police report later confirmed that the man in question was neither a ritualist nor a child trafficker as was originally suspected.⁶⁰ On interrogation, the man confessed that he was a contractor to a prominent hospital in Lagos. He explained further that his services were engaged through a contract to dispose of corpses of dead babies by the Department of Morbid Anatomy of the hospital.⁶¹ He disclosed that part of the terms of the contract for disposing off the corpses was to give the dead bodies’ decent burial at a cemetery.⁶² The man confessed that he was forced into dumping the corpses of the dead babies because he could no longer afford to pay the cemetery charges even though they were included in the total cost of the contract because the funds had been exhausted after “greasing the palms” of key officials of the hospital who facilitated the award of the contract.⁶³ The writer observed correctly that the experience of that unfortunate contractor underlines the long chain of corruption in public procurement at all levels of government in Nigeria and that that issue is one of the numerous challenges which an agency like the Bureau of Public Procurement is expected to deal with on daily basis at the Federal level.⁶⁴

The enactment of PPA as statutory provisions regulating procurement law in Nigeria should ameliorate this problem if not totally curb it. It is noteworthy that the Act prescribes harsh sanctions for those who violate its rules. Most of the sanctions are imprisonment without an option of a fine. A natural person who is not a public officer can be imprisoned for not less than 5 years but not exceeding 10 years without the

⁵⁶ Vincent Nwanma, *Beware, That Business Proposal Could Procure a Jail Term for You*, Nigerian Budget Monitoring Project. See also Adoga Ugoga, “Alleged Contract Scam hits NASS” (2007) 1 *Legislative Digest*, available at: <http://www.docstoc.com/docs/.../Alleged-Contract-Scam-hits-NASS> [Accessed May 17, 2012].

⁵⁷ Nigeria has two houses of parliament at the federal level. The upper house is called House of Senate while the second one is called House of Representatives. The upper house is headed by the president of Senate while the second house is headed by a Speaker.

⁵⁸ The commentator was of the opinion that the government could not prosecute the former Speaker of the House of Representatives because there was no procurement law in existence at the time.

⁵⁹ See John Emaboren, “Nigeria; Procurement Reform — A case for BPP in the states”, *Vanguard*, August 9, 2010, available at: <http://www.vanguardngr.com/2010/08/procurement-reforms-a-case-for-bpp-in-the-states/> [Accessed April 27, 2012].

⁶⁰ John Emaboren *Nigeria; Procurement Reform — A case for BPP in the states* (2010).

⁶¹ John Emaboren *Nigeria; Procurement Reform — A case for BPP in the states* (2010).

⁶² John Emaboren *Nigeria; Procurement Reform — A case for BPP in the states* (2010).

⁶³ John Emaboren *Nigeria; Procurement Reform — A case for BPP in the states* (2010).

⁶⁴ John Emaboren *Nigeria; Procurement Reform — A case for BPP in the states* (2010).

option of a fine,⁶⁵ while a public officer who contravenes any provision of the Act is subject to the same years of imprisonment in addition to summary dismissal from government service.⁶⁶ Even a corporate entity cannot escape sanction if it contravenes the provisions of the Act as it may be liable for debarment from all public procurement for a period not less than 5 years and a fine equivalent to 25 per cent of the value of the procurement in issue.⁶⁷ It is not likely that those measures specifically aimed at ensuring the integrity of procuring entities will fail, if effective sanctions in the Act are enforced.

Another impact is that of sensitisation of the citizenry to the objects, values and components of the Act so that these become acceptable to all. This aspect has generated significant results in Nigeria. Conferences and workshops were organised by civil society and the BPP to create awareness among the people about the benefits of transparency in public procurement. The result is that of public approval of the Act; people have accepted the Act and are clamoring for enactment of the same law at the state and local levels of governments. As a result, most states have enacted their own procurement laws to satisfy these aspirations,⁶⁸ and other states are taking steps to follow suit. The benefit of this impact is that people are now playing a watchdog role on procurement issue.

The final impact is that of prudent management of government resources and money. The Director-General of the BPP is of the opinion that more than \$590 million (N88.5 billion) has been saved the nation through the activities of the BPP in the short time of its existence.⁶⁹ According to him, the Public Procurement Act of 2007 has served as

“a clarion call to probity, accountability, adherence to methods in the disbursement of a commonwealth and the production of evidence in the application of the wealth.”

As a result, “cost of contracts are no longer unreasonably expensive; they are projected in context and vetted with due rigour”.⁷⁰

6. Amendment to the Act

An amendment was made to some provisions of the PPA by the Senate in 2009. The first concerned the percentage of mobilisation to be paid to contractors handling Federal Government projects in the country. In the Public Procurement Act (Amendment) Bill passed by the Senate, the Senate specifically amended Section 35 of the Procurement Act which provided for payment of a mobilisation fee of not more than 15 per cent of the contract sum.⁷¹ The amended Bill allows for the negotiation of mobilisation fees to be prescribed in the bid document for approval by the tenders board, whereas the original Act exclusively vested such power in the BPP.⁷²

The Senate also used the amendment to break the monopoly currently enjoyed by the executive to give approval for procurements by other arms of government. Under the regime of approval that the new amendment seeks to introduce, other arms of government such as the legislature and judiciary have been given powers to undertake and supervise their procurement process in line with the provisions of their respective budgets. By virtue of the amended s.16, the power of approval has been devolved to the Body of Principal Officers of the National Assembly in the case of procurements in the Federal legislature and the Judiciary Tenders Board in the case of procurements in the judiciary.

⁶⁵ Public Procurement Act 2007 s.58(1).

⁶⁶ Public Procurement Act 2007 s.58(5).

⁶⁷ Public Procurement Act 2007 s.58.

⁶⁸ Twelve states have enacted their own procurement law in Nigeria.

⁶⁹ Oscarline Onwuemenyi, “Due process saved Nigeria N88.5 Billion in two years”, *Vanguard*, August 12, 2010.

⁷⁰ Oscarline Onwuemenyi, “Due process saved Nigeria N88.5 billion in two years”, 2010.

⁷¹ Senate amends Public Procurement Act. This day, October 7, 2009.

⁷² Senate amends Public Procurement Act.

According to the Chairman of the Senate Committee on Finance, who presented the report of the committee on the amendment Bill, the purpose of the amendment to s.16 was to ensure the independence of the other arms of government.⁷³

Section 22 was also amended to provide that the decision of the Tenders Board shall be communicated to both the Minister and the Accounting Officers of the entities making the procurements in the legislature and the judiciary. In the original Act, the decision was communicated to only the minister.⁷⁴

The Senate, which subjected the Bill to clause-by-clause consideration, also deleted the section which vested the Chairmanship of the NCPP in the Minister of Finance and provided that the Chairman shall be appointed by the President. Another amendment to the Bill was the inclusion of the Nigerian Union of Journalists (“NUJ”) under composition of membership of the NCPP.⁷⁵

7. Challenges for the new legal regime

In the author’s view, the enactment of PPA is a great opportunity for Nigeria to develop as a nation because national resources are more likely to be allocated on a just and transparent manner to satisfy the needs of the people and the facilitation of accountable government. However, the greatest challenge to the Act is that of implementation. Enacting a new law, however, is just a beginning of a bipartite project; the project is completed, when it is fully implemented. The issue of implementation is a challenge in Nigeria, particularly with respect to procurement law. As of today, it can be argued that the greatest challenge for the implementation of procurement law in Nigeria is the involvement of the government functionaries in the procurement process and this is possible because, four years after the Act took effect, the Government has not fully implemented the provisions of the Act.

Since 2007,⁷⁶ the Government is yet to do the first thing that the Act prescribes to be done to lay a strong foundation for its implementation. Section 1(1)⁷⁷ establishes the NCPP, an agency which is a great instrument for full implementation of the Act. It has a mandate to approve and amend the monetary and prior review thresholds for the application of the provisions of the Act by procuring entities.⁷⁸ It is the highest authority in the hierarchical structure of the procurement institutions in Nigeria, and without its establishment its statutory role to control and monitor procurement procedure obviously will be lost. Apart from the status and function of the NCPP, which are exemplary, the feature of the Council which is most likely to be important for its success is the composition of its members.⁷⁹ While it can be argued that there may be tendency on the part of the government to influence some of the members of the NCPP, there is a likelihood that it may be difficult to influence a majority of them. Therefore, the involvement of the government in procurement process may be minimal and of no detrimental effect. Presently, it is the Federal Executive Council (“FEC”) that approves public contracts in Nigeria, a duty that is statutorily assigned to the NCPP as the approving authority. The continued approval of contracts by the Federal Executive Council violates the Public Procurement Act as FEC is not the approving authority recognised by the Act, and this can only be corrected if the NCPP is inaugurated by the government.

In the author’s view, the non-establishment of NCCP, which should be the foundation for full implementation of new procurement regime in Nigeria, raises a question mark over some of the steps that

⁷³ Senate amends Public Procurement Act.

⁷⁴ Senate amends Public Procurement Act.

⁷⁵ Senate amends Public Procurement Act.

⁷⁶ The Act was passed in 2007.

⁷⁷ Public Procurement Act 2007.

⁷⁸ Public Procurement Act 2007 s.2A.

⁷⁹ Some of the members are Minister of Finance, Attorney General and Minister of Justice, the Secretary to the Government of the federation, Economic Adviser to the president who by their political position might likely be influenced by the president but the list of members include representatives of the civil society and other professional bodies, like the Nigeria Bar Association, Nigeria Society of Engineers, Nigeria Institute of Purchasing and Supply Management, Nigeria Association of Chambers of Commerce, Industry, Mines and Agriculture etc. who are likely to be independent. In fact some of the professional bodies, like the Nigerian Bar Association, have been in the forefront of democracy campaign.

have been taken so far by the governments with respect to the administration of the procurement law. This is the case, in particular, with the appointment of the Director General of the BPP by the president without input from the NCCP in accordance with the Act.⁸⁰

If the NCPP is not constituted in order to fulfil its duties, there may be serious negative consequences. Abuse of procurement is likely to be the order of the day and this could in fact be one of the contributing factors to recent abuse in the award of high profile contracts in Nigeria. The award of a N8.2 billion contract for the upgrading of NTA broadcast equipment generated a lot of controversy until it was probed by the Senate to affirm its consistency with the processes of the procurement law. Certain revelations from the probe suggest the fact that a lot of discrepancies occurred during the award. An independent reporter explained the inconsistencies of the award with the procurement law when he wrote⁸¹:

“During the Public Hearing conducted by the Senate Committee ... [a Minister] had stated categorically that the contract was not awarded by her; rather she only received three names of contractors forwarded to her by the NTA [Director General] which she also forwarded to the President/Federal Executive Council (FEC) for approval. Further she claimed at that time (2009) that the planning of the contract started about two years ago (that is 2007) before her appointment as Minister, though concluded under her administration, and that she is ignorant of the technicalities involved in the procurement processes and therefore failed to participate in the award of the contract ... the first capital error of ... [the Minister] is that in procurement implementation under Section 19 and 22(5) of the Public Procurement Act, *no one contract is awarded to three contractors at the same time* by the Tenders Board with the approval of the Chief Accounting Officer. It is on record that while responding to the above charges before the Senate Committee, the Director General of the BPP, admitted on the floor of the Senate, before the nation’s media crew of print and electronic that the President sent the details of the three contractors to him for audit/review. Therefore in this chain of contract award process, the bus stop was now at Director General’s door step. According to him, on analyzing the contract documents he found out there were errors, which included that *the project (contract) was not appropriated* for, neither was it advertised for prospective bidders as required by law in Section 24 of the PPA.” (emphasis added)

The independent reporter condemns the role of the Director General in the whole saga when he further wrote⁸²:

“The Bureau under the Director General did not only become *an independent statutory player (referee) but also a major party in bid Technical and Financial Evaluation (TFE) in the contract award, a responsibility strictly reserved for procuring entities*. In essence, he is now acting as a procuring entity instead of an independent umpire that should adjudicate on the matter when and if there is a dispute ... By selecting one of the contractors forwarded to him, which he described as ‘Damage Control’, knowing that the award failed due process makes him a major party in the [bad] *procurement dispute*” (emphasis added).

Another indictment for BPP came in respect with Abuja Airport Second Runway Contract for the construction of a 4 km second runway at the Nnamdi Azikiwe International Airport, Abuja. The House of Representatives Committee on Aviation after conducting a public hearing on the contract gave a damning

⁸⁰ The Act provides in s.7(1) that the Director General shall be appointed by the President, on the recommendation of the NCCP after competitive selections.

⁸¹ See Mohammed Bougei Attah, *Independent Report: The unresolved N8.14 billion NTA Contract Award Saga*, available at: <http://www.nigerianinquirer.com/2010/07/30/independent-report-the-unresolved-?8-4-billion-nta-cont> [Accessed May 17, 2012].

⁸² Mohammed Bougei Attah, *Independent Report: The unresolved N8.14 Billion NTA Contract Award Saga*, available at: <http://www.nigerianinquirer.com/2010/07/30/independent-report-the-unresolved-?8-4-billion-nta-cont> [Accessed May 17, 2012].

verdict accusing BPP of manipulating the cost and bidding process of the award in violation of procurement procedures.⁸³ A newspaper editorial in Nigeria captures the discrepancies graphically when it comments⁸⁴:

“Many issues were uncovered during the public hearing. The ‘No Objection Certificate’ issued for the project was not only falsely issued by the Bureau of Public Procurement but deliberately and wrongly issue in conspiracy with the Managing Director of Federal Airport Authority of Nigeria [FAAN] and other officers of FAAN to inflate contract and defraud the federal government of Nigeria. The proceedings, processes and decisions for the award of the contract were not made accessible to the public, which would have allowed for observation, monitoring, review, comment and possible whistle blowing to ensure transparency”.

The Minister of Transport was also criticised over the award of a contract for the modernisation of the Jebba-Kano railway line to Costain West Africa Construction Company at the sum of N12.2 billion. The staff of the Railway who made the allegation recounts how the contract was inflated through spurious procedures contrary to procurement rules. They assert⁸⁵:

“By right, the board supposes to deliberate and agree on any railway contract before it recommend to the Federal Executive Council (FEC) through the Minister for approval. But unfortunately, the meeting of the board was summoned on December 29, 2009 by 10am to deliberate on the contract for the rehabilitation of the Jebba to Kano railway line that was to be awarded to Costain West Africa that same day by 4pm. It has already been decided and invitations were already distributed invited people to witness the signing of the contract by 4pm that day before we were asked to come for a meeting by 10am the same day to agree on what has already been decided. There was no record anywhere indicating that Costain West Africa ever handled any railway project in the past. In any case, the board suppose to meet, deliberate and agree on who should be recommended for the contract and not for us to adopt the decisions of the minister.”

The minister retorted back in defence⁸⁶ that

“[w]e want to make sure Nigerians enjoy railway services. The challenges are enormous, people call us names. We are not of particular interest to a particular contractor, to a particular sector, to a particular group, but what is of particular interest to this administration is delivery. If you are able to deliver or you have the ability to deliver, we would work together”.

It can be argued that the involvement of the government in the award of contracts in Nigeria contrary to the procurement law has generated controversy that could be avoided if the NCCP were to be established to perform its statutory function. Governments are not procuring entities; they are not tender boards and should also not be the approving authority for public contracts. The present trend should be reversed.

Another fact that has emerged from the controversies surrounding the award of contracts in Nigeria is that of the integrity of the procurement officers. The procurement officers should be made to understand that the integrity of the procurement system rests on them and not on the government officers. There is

⁸³ House Aviation Committee Chairman issued a statement where he specifically mentioned the sections of the law breached. He said: “There were obvious breaches of various Sections of the Public Procurement Act, especially 16(17), (18), (19), (20); 24(3), 31(2), (3a, b and c), and 33, indicating the potential breach of due process in the award of the contract”, see: <http://news2.onlinenigeria.com/news/general/25770-Reps-Tackle-Presidency-Over-Runway-Contract.htm> [Accessed April 27, 2012]. See also “Abuja’s Airport Runway of Controversy”, *Daily Trust*, April 14, 2010, available at: <http://allafrica.com/stories/201004150472.html> [Accessed May 21, 2012].

⁸⁴ See “Editorial: Profligacy in Public procurement”, *News Star*, May 31–June 1, 2010, p.14.

⁸⁵ Shehu Abubakar, “Nigeria: How N2Billion Railway project was awarded at N24 Billion”, *Daily Trust*, January 26, 2010, available at: <http://allafrica.com/stories/201001270550.html> [Accessed April 27, 2012].

⁸⁶ Shehu Abubakar, “Nigeria: How N2Billion Railway project was awarded at N24 Billion”, *Daily Trust*, 2010, available at: <http://allafrica.com/stories/201001270550.html> [Accessed April 27, 2012].

adequate sanction⁸⁷ for the misconduct of procurement officers. In addition, s.57(1)⁸⁸ provides that the Bureau with the approval of the NCPC shall stipulate a code of conduct for all public officers. The problem is that NCPC is not yet in existence to do that. There is no doubt that the composition of NCPC is essential for to ensure implementation of the procurement law and for Nigeria to realise the full benefits of the Act.

8. Conclusion

The policies and the objectives of the Public Procurement Act 2007 are sound. The regulations which are made in accordance with the guidance and principles of UN Commission on International Trade Law (UNCITRAL) Model Law on Procurement of Goods, Construction and Services of 1994 are capable of promoting the desired objectives if fully implemented. This article has, however, highlighted that a key challenge for its full implementation is the involvement of the Government at a political level in the procurement process. There seems to be a lack of political will on the part of the Government to fully implement the procurement law. This article observes that there cannot be full implementation of the procurement law in Nigeria until the Government constitutes the NCCP that is provided for in the law to perform its statutory duties. Presently in Nigeria, the FEC is responsible for approval of contracts while ministers and other government functionaries play a significant role in procuring contracts. We have seen that Government involvement was criticised by the World Bank Report,⁸⁹ and that is a key mischief that the Act was intended to correct. The Federal Government of Nigeria needs now to take all necessary steps to inaugurate the NCCP according to the procurement law. On the issue of the integrity of the procurement officers, those who are found to be corrupt or whose names have been discredited should face the wrath of law and qualified professionals of impeccable character should be appointed. Another aspect for development is the scope of the application of the PPA; efforts should be made by all the state governments to enact similar laws in their states. As for the broad exception in the areas of defence and security,⁹⁰ this can constitute an avenue for compromise and corruption in Nigeria in view of the controversy surrounding the use of security vote by the executive governors in the states. Thus, there should also be an amendment to check the excesses of the executives in that area.

⁸⁷ Public Procurement Act 2007 s.57.

⁸⁸ Public Procurement Act 2007 s.57.

⁸⁹ *Country Procurement Assessment Report*, Vols 1 and 2, p.39.

⁹⁰ Such an exception is found in many countries.