

Non State Actors and Procurement Watch in Nigeria

Compiled and Edited

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A Publication of Public and Private Development Centre
Ltd By Gte



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ISBN ISBN

First Published in Nigeria in 2008

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Published by:

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List of Acronyms and Abbreviations

NACCIMA.....	Nigerian Association of Chambers of Commerce, Industry, Mines and Agriculture
PPA.....	Public Procurement Act
BMPIU.....	Budget Monitoring & Price Intelligence Unit
BPP.....	Bureau of Public Procurement
NPWP.....	National Procurement Watch Platform
CSOs.....	Civil Society Organizations
CS.....	Civil Society
ICB.....	International Competitive Bidding
PPDC.....	Public & Private Development Centre
UNCITRAL.....	United Nations Commission on International Trade Law
FEC.....	Federal Executive Council
MDAs.....	Ministry, Departments & Agencies
PPDC	Public and Private Development Centre Ltd By Guarantee

Preface

In July 2007, realizing the need for a strong non-government sector engagement in the procurement framework, as in the then newly enacted Public Procurement Act 2007, Public and Private Development Centre (PPDC) developed a Public Procurement Watch Program. The program's objectives, amongst other things, included: improving awareness and the capacity of non-government actors to play their assigned role in the new Public procurement Framework; articulating an Agenda for Non-stakeholder participation in the implementation of the Public procurement Act 2007; and activating the emergence of a strong national non-government stakeholder platform for procurement watch programming and activities, etc.

These objectives were in line with our organizational goal of improving public participation in governance and development. Gladly our personnel had the privilege of working with committees of the National Assembly and were particularly instrumental to introducing the elements of public participation and observation in the new procurement Act. It was for us, therefore, a natural progression to work to see that the act and its provisions are implemented.

This program gained support from the PACT Advance Program, funded by USAID Nigeria, and partnership with several non-state actors and public bodies. In March 2008, we realized that a sister organization, the Civil Society Legislative Advocacy Centre (CISLAC) had a similar program, which was yet to secure support and we invited it to partner with us considering its strong role in civil society advocacy for the passage of the Act.

The Bureau for Public Procurement, agreed to collapse our proposed advocacy visit to the body, with their already planned CSO sensitization meeting. In that very successful meeting, which held on the 29th day of April 2008 at the conference room of the Bureau for Public Procurement office in Abuja, we presented a proposed agenda on non state actors participation in public procurement watch in Nigeria. We laid out the goals, objectives, strategy, activities, and programs for the formation and sustenance of a Nigeria wide non-government actors' procurement watch platform, which supports the work of the Bureau, the oversight functions of the National legislature and gives the Nigerian people a strong voice in public expenditure management. The gathering accepted and adopted this program, and all non-government actors attending the meeting retired into another session where they decided, as urged, to form the National Procurement Watch Platform (NPWP). These and other decisions from that meeting were contained in the joint communiqué issued by the Bureau and Civil society organizations after that meeting.

To support the full development of this Platform, PPDC organized and hosted the first expanded general meeting of the National Procurement Watch Platform in Bolton White Hotel on the 3rd of June 2008, during its capacity building program for procurement observers supported by PACT Advance program and funded by USAID Nigeria. It was in this meeting that the proposals put forward and accepted in the earlier meeting were refined and developed into the National Procurement Watch Platform Framework Document, which is part of this

publication. A national steering committee and other important organs of the Platform were also set up by members. Since then the NPWP has articulated a Code of Conduct for Procurement Observers and a Checklist for Procurement Observation to make reporting and analysis of observation reports easier and helpful to the Bureau and the legislative committees in the exercise of their powers of supervision over public procurement and oversight respectively. This will also help the platform monitor progress and consistently advocate for improvements in the system.

As many non-state actors become aware that the public procurement act gives an important role to CSOs and professional bodies, we have become beseeched with requests for information and also copies of not only the Act and the observers' code of conduct, but also the observation checklists of the Platform. Many CSOs have been getting involved with procurement watch related activities with limited guide, and this is because there is no standard guide or manual available for these organizations to rely on. This publication is intended to provide a limited guide for the many individuals and organizations that are now embracing the challenge (as observers) to ensure that we have a transparent, competitive procurement framework, delivering value for money in Nigeria. It will support their understanding of this legislation and the non-state actor's role in its implementation. The procurement watch checklist part of this publication gives a detailed idea of information that the observer should seek to confirm.

CSOs and professional bodies are encouraged to use the documents contained in chapter V of this publication and to always send a copy of their observation reports back to the platform, where they will be analyzed, the issues therein distilled and reported for broader engagement. Non-state actors that have not joined the platform are encouraged to join by reproducing, filling and submitting the application form in this publication to the Platform. It is our hope that you will find the materials here presented useful.

Chibuzo C Ekwewuo
Co-Ordinator
Public and Private Development Centre Ltd By Guarantee

Introduction

This publication presents three articles commissioned by PPDC for the first procurement observers training held to activate non-government actors' participation in procurement watch activities. Chapter 1 introduces the provisions of the Public Procurement Act 2007. It gives a brief synopsis of the recommendations of the World Bank supported Country Procurement Assessment Report of 2000, the broad objectives of procurement reforms in Nigeria, the institutions and implementation structures established by the Act: their mandates, principles, methods, detailed processes, and offences; it is indeed a summary of the Act.

Chapter 2 discusses the access to information provisions in the Act, and identifies the broad principles that should guide public procurement. It critically examines the provisions on transparency in the Act, and points out the progress made and the limitations of the provisions of the Act.

Chapter 3 describes the civil society, and discusses the CSO membership of the National Procurement Council established by the Act and the linkages that ought to arise as a result of this membership, between the Council's core functions and the activities of CSOs. The chapter also depicts the reasons for and the substance of non-state actors' observation of public procurement processes, describing what observers should be looking out for, and how.

Chapter 4 is a report of the PPDC assessment of the implementation of the Public Procurement Act 2007 up until September 2008. This exercise was conducted by designing and administering a questionnaire instrument on procurement officers in some MDAs, and some non-state actors, and is intended to generate advocacy issues for non-state actors.

Since the formation of the National Procurement Watch Platform, it has produced a Code of Conduct for procurement observers, which has been approved and published by the Bureau for Public Procurement. The Platform has vetted and submitted an initial list of NGOs to observe public procurement processes at the federal level, which the Bureau has published and circulated to MDAs. The National Procurement Watch Platform has also produced a detailed standard checklist for reporting by procurement observers. These and the Platform's Framework Document, and its membership application forms make up the contents of this chapter. The list of NGOs is not included here, since it is being reviewed and updated.

The presentations in this volume examine the provisions of the Act in a way that not only informs the reader of what exactly they mean, but also of their value to the system and their limitations. The Public Procurement Act like other laws is not perfect, but now is the time to implement it, document experiences and draw lessons for some day in the future when an amendment may be needed. This is not the time to amend a law that is yet to be fully implemented; to do so may give opportunity to those who do not want change in the status quo to further water down its provisions.

Nkem Onyekwerre
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Chapter 1

INTRODUCING THE PROVISIONS OF THE PUBLIC PROCUREMENT ACT 2007

Chibuzo C. Ekwekwu
Legal Practitioner and Development Legal Specialist

This article introduces the provisions of the Public Procurement Act 2007. It presents the key recommendations of the country procurement assessment report and discusses the institutional arrangements for exercising supervisory authority over public procurement in the federal service in Nigeria, the internal structures and processes provided for by the Act for implementing public procurement. It discusses the fundamental principles for public procurement and the uniform conditions to be met by all bidders seeking procurement contracts under the Act. It reviews the provisions of the Act relating to the submission, opening, examination and the evaluation of bids, criteria for the selection of winning proposals and bids, and the standard provisions of procurement contracts including interests on delayed payments. It examines, to a limited degree, the provisions on access to records, special and restricted methods of procurement, procurement of consulting services, administrative review of procurement, and the complaint and redress system provided by the Act. The provisions of the Act on the disposal of public assets, the code of conduct of participants in the procurement process, offences and the scope of application of the Act are also discussed. It is indeed a summary presentation of the provisions of the Public Procurement Act 2007.

In broad terms, procurement reforms in Nigeria are intended to achieve some major objectives: **a.** the harmonization of existing government policies and practices on public procurement; **b.** the establishment of pricing standards and benchmarks; **c.** ensuring the application of fair, competitive, transparent, value-for-money standards and practices for the procurement and disposal of public assets and services; and **d.** the attainment of transparency, competitiveness, cost effectiveness and professionalism in public sector procurement. These are captured in the Act as objectives of the Bureau¹.

To achieve these broad objectives, the Nigerian Country Procurement Assessment Report 2000 recommended a number of definite steps including: the enactment of a law based on the United Nations Commission on International Trade Law (UNCITRAL) model, the establishment of a regulatory body for policy making and quality control of the procurement function, the discontinuance of registration as an eligibility criterion for open competitive bids, defining tender evaluation criterion in tender documents, improving evaluation procedures, assuring transparency, and the use of appropriate tender and performance

¹ S 4 of the Public Procurement Act 2007

securities. Also, the publication of contract awards, the abolishing of departmental and federal tenders boards with political influence and the establishment, in their place, of ministerial tender boards consisting of civil service professionals, removing the involvement of the FEC in the procurement process, carrying out procurement needs assessment and increasing training resources, as well as creating a procurement cadre and providing incentives for assuring integrity and efficiency². An important recommendation was the removal of public procurement from direct political influence.

Institutional Framework

This has provided for a robust institutional framework. Some aspects of this framework differ from the UNCITRAL model. It was felt that given the history of corruption in procurement in Nigeria, there was need for a policy approval authority at the top, different from the industry regulator. The Public Procurement Act, therefore, establishes an apex policy making body different from the regulator called the National Council on Public Procurement. This council has the responsibility to consider and approve monetary and prior review thresholds, policies, rules on public procurement, changes in procurement procedure; to make staff regulation providing for conditions of service, and among other things recommend for the appointment of the President, a competent person – as Director General – who will be selected through a competitive process. The council is to be chaired by the Minister of Finance, but in addition to the membership of top level public officers like the Hon. Attorney General and Minister for Justice, the Secretary to Government, the Head of Service, and the Economic Adviser to the President. Its membership includes representatives of other non-government actors like the Nigerian Institute of Purchasing and Supply Management, the Nigerian Bar Association, the Nigerian Association of Chambers of Commerce, Industry Mines and Agriculture, the Nigerian Society of Engineers, the Media and a civil society representative.

The institutional framework provided by the Act includes a Bureau which by its functions is the hands-on regulatory body for the sector. The Bureau's functions includes formulating all policies and guidelines relating to public procurement; issuing standard documentations; maintaining a database of standard prices, contractors; dissemination of the law and guidelines; and generally the supervision of the implementation of the act and procurement polices, while acting as secretariat to the Council. It is also to publish details of all procurement contracts, and establish and maintain a single internet portal which shall be a primary and definitive source of procurement information, among other things. Its powers includes the enforcement of established monetary thresholds, the stipulation of conditions and documentation for obtaining "No Objection", the review of all procurement transactions to ensure compliance with the Act; and to debar contractors that contravene the Act, to call for and receive information from Ministries, Departments and Agencies (MDAs) relating to all procurement, to hear and determine complaints against the decisions of accounting officers, to recommend the discipline of staff and MDAs not complying with the Act and

² Reform Progress in the Area of Public Procurement contained in the Expenditure Management and Financial Accountability Review (PEMFAR) Volume 1 2007

implementing rules, and among other things, it has the power to nullify any procurement proceeding not in compliance with the Act.

Procurement Planning Committees

As regards the MDAs, the Act makes it mandatory for every procuring entity to establish a procurement planning committee and undertake procurement planning³. It provides for the specific planning activities to include: NEEDS assessment and evaluation; the identification of specific goods, works and service needed; appropriate marketing and statistical surveys; and analysis of cost implications for the procurement. It is the procurement planning committee, as different from the tenders board, that will specify the standard of goods, works or services needed and prepare the bidding documents specifying standards for performance in accordance with standard documents issued by the Bureau⁴. This, if fully implemented, can ensure not only prioritization, the quality of goods, works and service procured, but also fitness for purpose and the economy. It is also this committee that determines, in addition to standard conditions, the detailed conditions that bidders will be required to meet.

Ministerial Tenders Board

The Act provides for a clear process for application for pre-qualification and or bids, empowering the ministerial tenders board as different from the procurement planning committee to advertise, call for application for pre-qualification/bids, issue bidding documents, receive bids and proposals, examine and evaluate as required, pre-qualify, select and notify winners based on the common standards, criterion, weights and measures contained in the bidding documents and made available to all bidders simultaneously⁵. This is such that the same committee determining specification of goods and conditions and criteria for supplies and contractors, will not be the one actually calling for bids, evaluating it and selecting a winner.

Under the new law, the tenders boards themselves are approving authorities⁶ and, within the limits of a threshold established by the Bureau, can approve and award contracts without approval of the political leadership. Where the sum involved is above its threshold, the tenders board should conclude the process, notify the winner of the bid that he has won, and seek no objection from the Bureau to award the contract. It is the duty of the tender's board to debrief bid losers; in the case of pre-qualification, it is the tenders board that will, on request, communicate to the losing bidders the grounds for which they were not pre-qualified. The board will obtain and confirm the validity of the performance bond, announce and publicize the award of contract as required by this law. When awarded, the decision is then communicated to the accounting officer for implementation. There is no provision in the law

³ S 16(1b) and S 18 of the PP Act 2007

⁴ S 18 of the PP Act 2007

⁵ Sections 18, 19, 21, 22, and 32 of the PP Act 2007

⁶ S 17 of the PP Act 2007

requiring a minister or executive council approval of contracts prior to award, though this appears to be the practice till present.

Public /Stakeholder observation of the Process

The Act provides for the procuring entity to invite at least one civil society organization working in the area of anti-corruption and a representative of a professional body with expertise in the area of the goods, works or service being procured as observers⁷. The Act provides that these persons shall observe the procurement process as expansive as it is. Yet the Act appears to mandate their invitation only at a later stage in the process, since the process starts with the work of the procurement planning committee. A reading of section 19 of the Act appears to suggest that this invitation will be after the advertisement for tenders have been issued by the tender's board. Also section 38 provides for confidentiality over contents of what it refers to as "portions" of procurement records up until selection and notification of a winner. Indeed the Act provides that disclosure of these on described "portions" of procurement records at such a stage can only be obtained by an order of court. The Act fails to describe what portion of the information it refers to in S 38(2), nor even to define procurement process as a whole. It is my view that this section refers only to contents of a bid once received by the procuring entity, and this is to ensure that bids are not compromised.

It would appear that in practice the tender's boards may invite observers at the stage of bid opening or at least after advertisements are issued, and such observers may not be allowed to observe the process of bid evaluation as a result of the provisions of S 38 of the act.. It is therefore imperative that observers be organized and develop strong analytical tools that can enable them even at such a time, and after evaluation and selection of a winner, to determine whether statutory and regulatory processes have been followed. This is because their responsibility is to observe the procurement process which broadly speaking includes the process of acquiring goods, works and services, from the identification of need to contract administration and through to the end of a services' contract or the useful life of an asset⁸. Observation therefore does not end with a procurement contract. It includes watching over implementation of the contract, its monitoring, evaluation and payments etc. At bid opening or such other time as an observer is invited, he should try in addition to other issues to confirm that proper procurement planning activities were carried out. The procuring entity on its part has a statutory obligation to provide information sought by observers, there is nothing in the act preventing the procuring entity from providing information for example relating to the advertisement, the procurement plan, bidding documents, market surveys and statistical analysis etc at this stage, however information relating to contents of a contractors bid, other

⁷ S 19 of the PP Act 2007

⁸*Procurement Manual, Bureau of Management, Office of Legal and Procurement Support, Jan 2005*

than prize quoted and name of bidder to be called over at the bid opening, can only be provided after a bid winner is announced.

Uniform Statutory Principles for Procurement

The Act provides that excluding exceptions in the Act, all procurements shall be by open competitive bidding, they shall be based on procurement plans supported by prior budgetary appropriation, and shall not be formalized until the procuring entity ensures the availability of funds to meet maturing obligations. It provides that all procurements should be in a manner which is transparent, timely, equitable and ensuring accountability, promoting competition, economy and efficiency in accordance with the Act.⁹ The Act also stipulates that every procurement shall be with the aim of achieving value for money and fitness for purpose in accordance with the Act and rules made from time to time.

Application of Uniform conditions to all Bidders

The Act provides a uniform process for pre-qualification, it stipulates basic qualification criteria for bidders and allows the procuring entities the discretion, prior to the launch of each procurement process, to determine unique minimum qualification of supplies, contractors and service providers, in addition to general conditions. And also to provide all intending bidders or applicants simultaneously the precise criteria upon which it intends to give consideration to their applications¹⁰, and reach a decision as to which contractor, supplier or service provider qualifies¹¹. The Act binds the procuring entity to apply only the criterion set out in the solicitation documents and no more in the evaluation and pre-qualification of bidders¹². In other words, the criteria set out in the beginning must not change and must be the only basis for the selection of a winner. This is one major issue to be observed and monitored.

The Act makes it mandatory that uniform conditions shall apply to every bidder in each particular bidding process. It provides for the procuring entity to notify every bidder who has submitted an application for pre-qualification whether or not it has been pre-qualified and on request and in writing inform a failed bidder the reasons, why it was not pre-qualified¹³. Such is also the case in bid exclusion¹⁴. This ensures that a dissatisfied bidder knows the decision arrived at and grounds for arriving at the decision, in a way that enables him, if he chooses, to correctly challenge the decision.

⁹ S 16 of the Public Procurement Act 2007

¹⁰ S 24 of the Public Procurement Act 2007

¹¹ S 23 of the Public Procurement Act 2007

¹² S 23(1) of the Public Procurement Act 2007

¹³ S 23(7) and 23 (9) of the Public Procurement Act 2007

¹⁴ S 16(9) of the PP Act 2007

The Act mandates the procuring entity to make available to any member of the general public on request a list of pre-qualified persons.¹⁵ The extent of access to pre-qualification information appears as a good deterrent to any person who otherwise would falsify qualifications or rely on fake or fraudulent documents or claim, if provisions are fully implemented. However it does appear that the provision of S 16(14) relating to unclassified procurement records will constitute a limitation on public access to public procurement information.

Submission and Opening of bids

All bids in response to invitation shall be submitted in writing, signed by an officer authorized to bind the organization, and placed in a sealed envelop, and once received deposited in a secured tamper proof bid box¹⁶. The procuring entity shall issue a receipt showing the date and time the bid was received. Bids received after the dateline and time specified shall be returned unopened. At the bid opening, the procuring entity shall allow attendees to examine the envelopes in which bids are placed to ensure they have not been tampered with, ensure bid opening takes place immediately following the dateline for the submission of bids or any extensions, take a register of names and addresses of all present and organizations they represent, and call over to the hearing of all present the names and addresses of each bidder, the total amount of each bid, and ensure the recording of all details in the minutes by the tender board secretary or his nominee¹⁷. The act and the implementing rules requires the tenders board to keep the register and minutes of the bid opening which are part of the many important process documents and information which it must keep and maintain for at least ten years after each procurement exercise. These documents remain very informative for an observer.

Evaluation and Comparison of Bids Adjudged Valid for Evaluation

The Act provides that no other method or criteria shall be used to evaluate bids except the criteria stipulated in the solicitation documents, and the objective of evaluation in the case of goods and works shall be to establish and select the lowest evaluated responsive bid amongst bidders adjudged responsive to the bid solicitation. In making this selection, the tenders board or a technical committee set up by it is mandated by the Act to carry out specific activities including: post qualification of bidders or verification of qualification, checking of omissions with quantification of same, application of discounts as applicable, clarification with bidders of questionable minor deviations, quantification in monetary terms of such deviations, conversion to a common currency in international competitive bids, calculation of bid amount with domestic preference where applicable, determination of lowest calculated prize in order of rank, writing up bid evaluation reports, etc. The law provides that all relevant factors in

¹⁵ S 23 (7) of the PP Act 2007

¹⁶ S 27 of the PP Act 2007

¹⁷ S 30 of the PP Act 2007

addition to the price that will be considered in bid evaluation and the manner in which such factors will apply will be as stated in the solicitation documents¹⁸.

Specific and Basic Uniform Conditions for all Bidders

The law lays down basic conditions every bidder must fulfill to participate in public procurement, in addition the Act empowers procuring entities to specify other conditions unique to the particular procurement in the solicitation documents, and non-compliance to these conditions therefore become grounds for exclusion of a bidder. These include:¹⁹ professional and technical competence to carry out the job; financial capability; equipment, machinery and other relevant infrastructure; adequate personnel; and legal capacity to enter into the contract. The Act also provides that such a business must not be in receivership or be insolvent or such a person be undergoing bankruptcy.

The person, legal or natural, must have fulfilled all obligations to pay taxes, pensions and social security contributions, if any. If a company, it must have no director or a part owner who has been convicted of an offence involving financial impropriety, fraud, falsification of facts in connection with procurement or financial gain. The person should accompany its bid with an affidavit confirming the veracity of facts presented and confirming the interest of any present or former officer of the procuring entity, Bureau in the organization or its business. It must not have given or promised a gift of money or any tangible thing or offered employment or any other item or service quantifiable in monetary terms to a current or former employee of a procuring entity or the Bureau in an attempt to influence any action or decision. It must not have previously failed to perform or been found to have performed without due care any public procurement within three years immediately preceding the particular bid. All bidders should submit a statement regarding persons involved in the same proceedings who are in a subordinate or to whom it is in a subordinate relationship. It must not be a person involved in preparing the procurement or any part thereof. And should provide a bid security of not more than 2% of the bid value. The law provides that every bidder excluded shall be informed in writing by the procuring entity of reasons for its exclusion.

Basis for the selection of a winning bid

In the case of goods and works, the Act provides that the winning bid shall be the lowest cost evaluated bid from amongst the bids responsive to the bid solicitation with regards to work specification and standard²⁰. However in respect of consulting services, the Act allows procuring entities to choose from three different criteria, provided that this choice is made prior to the launching of the actual procurement, and the criteria is contained in the solicitation documents. The alternatives provided are between: (a) where the procuring entity elects to select the winning proposal based on technical and prize factors – the responsive

¹⁸ S 32 of the PP Act 2007

¹⁹ S 16(6) of the Public Procurement Act 2007

²⁰ S 33 of the PP Act 2007

proposal with the best combined evaluation in terms of criteria set out in the request for proposals, or (b) the responsive proposal with the lowest evaluated price, or (c) the highest marked/ranked technical (responsive) proposal within the budget²¹.

If an agency chooses the option of the best combined evaluation, it must establish a weight with respect to quality and technical price factors, and set out the criteria and various weights attached to each factor in the solicitation documents, and rate every proposal according to the weight and marks set out in the solicitation/bid documents.

Statutory Provisions for Procurement Contracts

The Act provides that all procurement contracts must contain warranties for the durability of goods and exercise of requisite skills in service provision, and the use of genuine materials and inputs in execution²². They must contain provision for arbitral proceedings as the primary source of dispute resolution²³. The Act provides that a mobilization fee of not more than 15% may be paid to a supplier or contractor, supported in the case of International competitive bid by an unconditional bank guarantee issued by a banking institution acceptable to the procuring entity²⁴, and in the case of a National competitive bid an alternative of an insurance bond issued by an institution acceptable to the procuring entity is allowed. Also, the provision of a performance guarantee will be a pre-condition for the award of a contract in respect of which mobilization will be paid; the performance guarantee must not be for a value less than 10% of the contract value or the amount of mobilization to be paid, whichever is higher.

Interest on delayed payments

The Act provides that payments for goods, works and services have to be settled promptly and diligently, and any payment due for more than 60 days should, in accordance with the Act, attract interest; it requires every procurement contract to specify the rate of interest that late payment after 60 days will attract²⁵. This is possible since the Act provides that no procurement be launched except the procuring entity ensures prior budgetary provisions and the availability of funds. If the funds are available before the award, there is no reason the contractor should not be paid on time if he or she has performed.

Access to Records

The procuring entity has a duty to keep record of comprehensive procurement proceedings, which can be made available to any person supplier, contractor, consultant or bidder after a tender proposal offer or bid has been accepted or proceeding has been terminated without

²¹ S 50 and 51 of the PP Act 2007

²² S 16(28) of the PP act 2007

²³ S 16(26) of the PP Act 2007

²⁴ S 35 of the PP Act 2007

²⁵ S 37 of the PP Act 2007

resulting in procurement. Prior to the award, procurement information can only be disclosed by the leave of court. S 16(14) of the Act provides that all unclassified records of procurement shall be open to inspection by the public at the cost of copying and certifying of the documents. However, the real meaning or criteria for the classification of information is not provided for. The law compels procuring entities to submit records and information on procurement to the Bureau in a format determined by the Bureau. The Bureau has an obligation under the Act to publish details of all procurement contracts. The Bureau is to establish a single internet portal which shall be a primary definitive source of procurement information, and shall publish procurement journals.

Special and Restricted Methods of Procurement

As the name suggests, these are special methods, exceptions to the general rule of open competitive bids²⁶, and strict and justifiable conditions and criteria are given for choosing any of these methods. Procuring entities are not at liberty to employ them except when the strict conditions laid down are present. Also each tries to ensure competitiveness and incorporates many aspects of the open competitive bidding method. In the case of selective tender, the law provides that provisions of this Act on open competitive bidding shall apply, and be only limited to the extent those provisions are limited by S. 40 of the Act. Each of these special methods can only be applied with the approval of the Bureau. The methods include Two Stage Tendering, Restricted Tendering, Selective Tendering, Direct Procurement, Emergency Procurement, etc

Procurement of Consulting Services

The Act provides that a procuring entity wishing to procure services for its needs which are precise and ascertainable shall solicit for expressions of interest or applications to pre-qualify to provide services by publishing a notice in at least 2 National dailies. It provides that in cases where the value of services needed is below one million Naira or with the approval of the Bureau is of such other low value that only national consultants would be interested, the entity may without placing an advert in the newspaper request three and not more than 10 consultants or service providers to bid for the services²⁷. It allows for direct requests to few consultants where the services are available from no more than three consultants, or where the time and expense required to examine and evaluate a large number of bids will be disproportionate to the value of services to be provided, or where it is in the interest of national security or similar reasons of confidentiality to use such special method²⁸. This is however an exception, and largely the procedure for procuring consultants is by an open competitive bidding, and mirrors the basic elements of procurement of goods and works, except that the procuring entity has a choice of criteria for selection of the winning bid, and

²⁶ Sections 39 -43 of the PP Act 2007

²⁷ S 44 of the PP Act 2007

²⁸ S 45 of the PP Act 2007

expression of interest takes the place of pre-qualification; the difference is actually in the details.

Administrative Review of Procurement Proceedings

The Act empowers the Bureau to review and recommend for investigation any relevant authority and any matter related to the conduct of procurement proceedings by procuring entities or the conclusion or operation of a procurement contract, if it considers that a criminal investigation is necessary to detect or prevent an infraction of the law²⁹. The Bureau may as a result of its review exercise, advice of a procuring entity or results of a relevant body's investigation, issue a variation order requiring a contractor at his own expense to repair, replace or do any thing left undone in its contract, if found to have been carried out with inferior materials or less skill and expertise as required by the contract. The power of the Bureau to take remedial action if satisfied that there has been a contravention of the Act includes: nullification of the procurement proceeding, debarring contractors, cancellation of the procurement contract, ratification of anything done in relation to the procurement or a declaration consistent with the provisions of the Act³⁰.

Complaint and redress System

The Act also provides a complaint and redress system requiring the accounting officer of every procuring entity to receive and decide in writing complaints from bidders within 15 working days of the complaint being made. It gives the bidder the right to appeal to the Bureau against the decision of the accounting officer or in case he fails to decide the complaint within the time stipulated, and a right of appeal to the high court against the decision of the Bureau or in such situations that the Bureau fails to decide a complaint within the time stipulated or where the complainant is dissatisfied by the decision³¹. The decision of the accounting officer and Bureau must be in writing and be delivered to the complaining bidder. Failure to do so within the stipulated time activates the complainant's right of appeal.

Disposal of Public Property

The Act provides that open competitive bidding shall be the primary source of receiving offers for the purchase of any public property offered for sale, and gives the Bureau power to issue guidelines detailing principles and organizational modalities for the disposal of public property; it is to issue standardized documents, reporting standards and enforce compliance. It also defines public property to include tangible and non-tangible assets, but excludes the

²⁹ S 53 of the PP Act 2007

³⁰ S 53(4) of the PP Act 2007

³¹ S 54 of the PP Act 2007

Public Enterprises (privatization and commercialization) Act 1999³². It mandates disposal entities to conduct prior valuation of public properties to be disposed³³.

Code of Conduct

The Act empowers the Bureau to stipulate a code of conduct for all public officers³⁴, suppliers, contractors and service providers with regards to their standards of conduct in matters of procurement and disposal of assets. It requires all staff of the Bureau, members of tenders boards and other persons involved in public procurement to subscribe to an oath as approved by the council. It provides that principles of honesty, accountability, transparency, fairness and equity shall continue to apply at all times. The Act not only requires public officers involved in procurement to divest themselves of conflicts of interest, but goes ahead to define situations amounting to conflict of interest and to criminalize a host of them.

Offenses

The Act declares it an offense for a natural person, not being a public officer, to contravene any of the provisions of this Act, and makes such an offence punishable by imprisonment for a period not less than five calendar years and not exceeding 10 years³⁵. In similar breathe, the Act makes the contravention of the provisions of this Act by any person, an officer of the Bureau or a Procuring entity an offense punishable by imprisonment without the option of a fine for a period not less than five calendar years, and dismissal from service, but unlike the punishment for non-public officers, it imposes no upper limit to the term of imprisonment³⁶. In addition, the Act creates several other offenses that are punishable, such as entering or attempting to enter into collusive agreement, conducting or attempting to conduct procurement fraud, directly or indirectly attempting to influence the procurement process to gain unlawful advantage, the splitting of tender, the alteration of any procurement document with the intent to influence the outcome of a tender, the use of fake documents or encouragement of their use, the willful refusal to allow the Bureau or its officers access to any procurement records³⁷, and goes on to provide for several other individual offences.

Scope of Application of the Act

The Act provides that it shall apply to the procurement of goods works and services by the Federal government, its line ministries and corporations or any entity created or existing by virtue of a Federal legislative enactment or any procurement by entities outside the above description which derive at least 35% of the amount for funding the procurement from the

³² S 54 of the PP Act 2007

³³ S 56 of the PP Act 2007

³⁴ S 57 of the PP Act 2007

³⁵ S 57(9) –S 57(12) of the PP Act 2007

³⁶ S 58 (5) of the PP act 2007

³⁷ S 58 of the PP Act 2007

federal share of the consolidated revenue fund. However it exempts the procurement of special goods, works and services involving national defense and security, providing that this law can only apply to such special goods, works and services with prior approval of the President.

Conclusion

No doubt the last few years have witnessed some improvement in the legal framework for attaining a people-oriented budget process, a transparent and competitive public procurement process at the federal level of government, and also the increase and improvement of the tools for corruption prevention, detection and prosecution. Though these new legislations provide some effective tools for civil society advocacy, they are however only the very beginning of the consistent efforts required to improve the living standards of the greater population of Nigeria. They leave our hopes alive that development is possible in the country.

Chapter 2

ACCESS TO INFORMATION UNDER THE PUBLIC PROCUREMENT ACT 2007

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Introduction

One of the most important attributes of any public procurement system is transparency. It is the most effective safeguard against corruption in public procurements and it is critical for ensuring stakeholder and public confidence in the system.

A transparent regime implies not only that the implementing agency should grant requests for information from stakeholders and interested members of the public, but that it should also proactively publish and widely disseminate relevant information to the public.

What type of information should be proactively published will vary, depending on specific circumstances. However, the agency should as much as possible routinely publish a wide variety of information relevant to its operations, procedures and specific procurement activities.

For a public procurement system to be characterized as transparent, there must be adequate publicity given to opportunities for tenders such that all eligible contractors or suppliers can have all the necessary information to enable them participate effectively in the process.

In this regard, all procurement notices should contain all the exact details about the procurement method required, the specifications of the goods or services for which procurement is required, the deadlines for the submission of bids, information about fees, if any, that are required to be paid by those submitting bids, etc.

Objectives of the Public Procurement Regime

The stated objectives which the Federal Government is seeking to achieve in public procurements through the regime introduced by the Public Procurement Act 2007 and the fundamental principles guiding all public procurements include:

- Ensuring **probity** in the procurement process;
- Ensuring **accountability** in the procurement process;

- Attainment of **transparency** in the procurement process;
- Attainment of **competitiveness** in the public sector procurement system;
- Ensuring **fairness** of the procurement system;
- Application of **value-for-money** standards and practices for the procurement and disposal of public assets and services;
- Attainment of **cost-effectiveness** in the procurement system;
- Attainment of **professionalism** in the procurement system.

Transparency Provisions under the Public Procurement Act

In its efforts to achieve these objectives, particularly regarding transparency and accountability, a number of broad measures are prescribed by the Act. These are:

1. Rigorous and systematic documentation of procurement proceedings and maintenance of procurement records, as well as collation and maintenance of a variety of other records and information related to the procurement process.
2. The requirement for proactive release of certain types of information, including by advertising and use of websites.
3. The requirement that bid opening sessions are open to the public as well as stakeholders and interested parties.
4. A regime of access to information based on request by stakeholders and interested members of the public.

The Act places a lot of emphasis on record keeping and management and contains extensive provisions relating to information and record gathering, collation, storage, management and dissemination.

There are a number of databases and information systems which the Bureau of Public Procurement is mandated to develop, establish, or maintain. These include:

- To maintain a national database of the particulars and classification and categorization of federal contractors and service providers. The Bureau is empowered, to the exclusion of all procuring entities, to prescribe classifications and categorizations for the companies on the register (See sections 5(h) and 6(1)(f));
- To collate and maintain in an archival system all federal procurement plans and information (See section 5(i);
- To establish a single internet portal to serve as a primary and definitive source of all information on government procurement containing and displaying all public sector procurement information at all times (See section 5(r);

- To maintain a list of firms and persons that have been debarred from participating in public procurement activity. This is to be published in the procurement journal (See section 6(1)(g)); and
- To receive copies of all procurement records showing information identifying the procuring entity and the contractors; the date of the contract award; the value of the contract; and the detailed records of the procurement proceedings. These are to be transmitted to the Bureau by all procurement entities not later than three months after the end of the financial year. (See section 16(13)(a) to (d)).

Every procurement entity is required to maintain both physical and electronic records of all procurement proceedings made within each financial year. Apparently, in addition to transmitting these records to the Bureau within three months after the end of each financial year, the procurement entities are also required to maintain the procurement records for a period of 10 years from the date of the award (See section 12).

Every procurement entity is obliged to maintain a record of the comprehensive procurement proceedings (See section 38(1)).

There are also a number proactive disclosure requirements provided for by the Act. First, under Section 5(b) of the Act, the Bureau of Public Procurement is required as part of its core functions to publicize and explain the provisions of the Act. Specifically, it is also obliged under the same section to:

- Publish the details of major contracts in the procurement journal;
- Publish paper and electronic editions of the procurement journal and maintain an archival system for the procurement journal.

It is also mandatory for procurement entities to advertise and solicit for bids in the implementation of their procurement plans (See section 19(a)).

Procuring entities are also required by the Act to carry out the procurement of goods and works through “open competitive bidding”, which is defined as “offering to every interested bidder, equal, simultaneous information and opportunity to offer the goods and works needed” (See section 24(1) and (2)).

The Act goes on to specify how this requirement can be achieved. In the case of international competitive bidding, it stipulates that the invitation for bids “shall be advertised in at least two national newspapers and one relevant internationally recognized publication, any official websites of the procuring entity and the Bureau as well as the procurement journal not less than six weeks before the deadline for submission of the bids for the goods and works” (See section 25(2)(i)).

In the case of procurement under national competitive bidding, it provides that the invitation for bids “shall be advertised on the notice board of the procuring entity, any official websites of the procuring entity, at least two national newspapers, and in the procurement journal not less than six weeks before the deadline for submissions of the bids for the goods and works” (See section 25(2)(ii).

The requirement in Section 5(r) that the Bureau establishes a single internet portal to serve as a primary and definitive source of all information on government procurement containing and displaying all public sector procurement information at all times is a very positive development.

An internet portal is a site that serves as a point of access to information within the entire system and, if properly done, should present information from various units, departments, procuring entities and other sources in a unified way. The advantages of such a portal are many. But most significantly, the portal will point users from a single point to all the information available on public procurements which they might otherwise not have been aware of or able to track.

It will make it possible for bidders, contractors, interested members of the public and civil society organizations monitoring the various processes to get vital information which they need.

The critical questions would be on how comprehensive or up-to-date such a portal would be. This is one issue that should be closely monitored by civil society organizations and other interested parties as it has the capacity to significantly open up the system.

Another significant access to information provision in the Act is contained in Section 16(14) of the Act. The sub-section provides that:

“All unclassified procurement records shall be open to inspection by the public at the cost of copying and certifying the documents plus an administrative charge as may be prescribed from time to time by the Bureau.”

Progressive as the provision appears on the face of it, it is problematic in many respects, including for its lack of clarity about what the real intentions are. But it is safe to argue that although the provision talks about procurement records being open to inspection by the public, it actually intends that interested members of the public should receive certified true copies of such records.

However, the first concern raised by the provision relates to the reference to “unclassified procurement records” in the sub-section, suggesting that procurement records may be classified, but without specifying or clarifying the circumstances under which such classification may take place or stipulating any system of classification.

This provision is particularly worrying given that under section 15(2), the provisions of the Act do not apply to “the procurement of special goods, works and services involving national defence or national security unless the President’s express approval has been first sought and obtained.”

Since the Act does not ordinarily apply to procurements involving national defence or national security, there is a legitimate question as to why procurement records may be classified.

Even if there are legitimate grounds for classifying procurement records, those grounds and circumstances ought to have been clearly specified to prevent abuse or arbitrariness.

As the Law stands, there is an unfettered discretion given to the Bureau and possibly procuring entities to determine which procurement records may be classified and are therefore not open to inspection by the public.

The second issue with the provision relates to the cost of obtaining the procurement records. The sub-section requires interested members of the public to pay the cost of copying and certifying the records. This is consistent with established principles on the cost of access to public records and information that individuals should not be deterred from making requests for access to information and records by excessive charges.

However, this provision of the Act goes further to give the Bureau an unfettered discretion to impose an administrative charge in addition to the cost of copying and certifying. The rationale for this is unclear, except to say that this is seen as an opportunity for the Bureau to make a profit from members of the public interested in accessing procurement records or to generate additional revenue for itself or the government. Such an approach completely negates the spirit of transparency and the principles underpinning the public’s right to know.

For one thing, the power of the Bureau to determine administrative charges is not circumscribed in any way. There are no guidelines or principles for the Bureau to follow in setting administrative charges. There is therefore a real danger that this could result in prohibitive administrative charges being imposed on those requesting access to procurement records and this might also discourage members of the public.

It is essential that fees or charges payable for access to records and information are not so high as to frustrate the right of access. It is well established that the long term benefits of a regime of openness in government business far exceeds the costs which the government body might recover from implementing an access to information regime. Although implementing such a regime might result in some additional costs to the government or to a government body like the Bureau, such a regime brings immense benefits to the society by instituting greater transparency, accountability and efficiency and, as such, the recovery of such costs ought not to be an overriding consideration.

The additional cost to the government body, if any, must be seen in the light of the capacity of an access to information regime to advance democracy and enhance public participation. It is therefore important that access to information legislation reflects this public policy objective through guidelines or parameters which send a clear message to public institutions that the objective here is not to make money.

Besides, while the cost to a public institution might initially be high because the system is only just evolving and new structures and measures need to be put in place to implement the new regime, as government departments and agencies become more efficient in their record-keeping and in handling requests for access, the associated costs will reduce progressively.

This provision needs to be revisited with a view to correcting these anomalies and clarifying the areas of confusion.

Other “disclosure on request” provisions of the Act which are potentially problematic are contained in Section 38. Sub-sections (1) and (2) of the section provide as follows:

“(1) Every procuring entity shall maintain a record of the comprehensive procurement proceedings.

(2) The portion of the record referred to in this Section shall, on request, be made available to:

(a) any person after a tender, proposal, offer or quotation has been accepted or after procurement proceedings have been terminated without resulting in a procurement contract; and

(b) suppliers, contractors or consultants that submitted tenders, proposals, offers or quotations, or applied for prequalification, after a tender, proposal, offer or quotation has been accepted or procurement proceedings have been terminated without resulting in a procurement contract.”

Sub-section (1) requires procuring entities to comprehensively record all procurement proceedings while sub-section (2) suggests that only portions of the record specified in the section shall be released on request to any person or to contractors, suppliers or consultants. But nowhere in the section is the portion of the record to be released specified.

Sub-section (3) of the Section also provides that:

“(3) A disclosure of procurement proceeding records, prior to award of contract may be ordered by a court, provided that when ordered to do so by a

court, the procurement entity shall not disclose such information, if its disclosure would:

- (a) be contrary to law;
- (b) impede law enforcement; or
- (c) prejudice legitimate commercial interests of the parties.”

It is difficult to understand what this sub-section seeks to achieve. It appears to be giving procuring entities the discretion to decide whether to comply with any court order directing them to disclose records of procurement proceedings prior to an award of a contract. It seems to suggest that even if a court has ordered the procuring entity to disclose the records of procurement proceedings, if in the opinion of the procuring entity such disclosure would be contrary to law, impede law enforcement or prejudice the legitimate commercial interests of the parties, the procuring entity should not disclose the record as ordered by the court.

It is my view that this provision is unconstitutional, contrary to the principles of the rule of law, and an invitation to anarchy. Section 287(3) of the 1999 Constitution provides as follows:

“(3) The decisions of the Federal High Court, a High Court and of all other courts established by this Constitution shall be enforced in any part of the Federation by all authorities and persons, and by other courts of law with subordinate jurisdiction to that of the Federal High Court, a High Court and those other courts, respectively.”

This provision should be amended at the earliest possible opportunity to bring it into conformity with the provisions of the Constitution and subjugate the procuring entities to the authority of the courts.

Open Public Meetings for the Opening of Bids

Section 30 of the Act provides for open public meetings for the opening of bids and contains the following specific requirements to ensure transparency of the proceedings:

- That the procuring entity should permit all attendees to examine the envelopes in which the bids have been submitted to ascertain that the bids have not been tampered with;
- Cause all the bids to be opened in public, in the presence of the bidders or their representatives and any interested member of the public;
- Ensure that the bid opening takes place immediately following the deadline stipulated for the submission of bids or any extension;

- Ensure that a register is taken of the names and addresses of all those present at the bid opening and the organizations they represent which is recorded by the Secretary of the Tenders Board; and
- Call over to the hearing of all present; the names and addresses of each bidder, the total amount of each bid, the bid currency and that the procuring entity shall ensure that these details are recorded by the Secretary of the Tenders Board or his delegate in the minutes of the bid opening.

However, despite the positive approach of indicating open meetings, the Act fails to make provisions to ensure that bid opening sessions are indeed public. For instance, there is no requirement for the issuance of notices to the public on bid opening sessions, and the matter appears to have been left entirely at the discretion of the procuring entity, which may simply invite only bidders and those who may be identified as stakeholders to such bid opening sessions.

An essential principle of open meetings to conduct public business is that notices of meetings are crucial to ensure awareness among members of the public, and such notices should be issued to give the public real opportunities to participate in the meetings. In addition, the law should require that adequate notices of meetings are given sufficiently in advance to allow for attendance. The Public Procurement Act contains no such requirement for the issuance of notices.

In the long term, the Act will need to be amended to make provisions for this. However, in order to correct this lapse in the short term, the Bureau may issue guidelines which require procuring entities to routinely issue notices of meetings for bid opening sessions so as to encourage members of the public to participate in the process.

Conclusion

The achievement of the purpose, objectives, and principles of the Public Procurement Act 2007 will depend on its effective implementation. It is, therefore, of critical importance that civil society organizations and other stakeholders ensure its effective implementation through public enlightenment and monitoring activities.

The Act contains numerous provisions whose implementation require monitoring. The first area that will require monitoring in the implementation of the Act is compliance by the Bureau of Public Procurement and procuring entities with the obligations imposed on them to establish, develop, or maintain, as the case may be, various databases and records. These provisions are intended to facilitate the effective implementation of the Act, and crucially they provide a clue to the public and interested stakeholders on the different types of information available and where they can be obtained.

In addition, it is important that the requirement that the Bureau and the procuring entities proactively publish certain types of information about themselves and their activities are strictly enforced and compliance monitored by civil society organizations and interested stakeholders. Unless these are done and the public as well as primary stakeholders have access to the information, the transparency objectives of the Act cannot be achieved.

Civil society organizations, therefore, constantly need to test these provisions by making requests for information and determining whether the requirements of the Act are being complied with.

Chapter 3

CIVIL SOCIETY AND THE PUBLIC PROCUREMENT ACT 2007

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1. Abstract

This section starts with a brief discussion of the concept of civil society and how it relates to the Public Procurement Act 2007 (PPA). It details the role played by civil society organizations up to the enactment of the Act. The operational issues of the PPA, including the qualifications and functions of the civil society representative, the failure of the President to constitute the National Council on Public Procurement, and the illegal ritual of the Federal Executive Council's award of contracts in its Wednesday meetings are discussed. The chapter also reviews the scope of application of the PPA.

In civil society (CS) procurement observation and monitoring, the following issues were discussed: the basis of observation, procurement planning, the fundamental principles of procurement, access to information, the submission of bids and bid security, bid opening, and the examination and evaluation of bids. Other issues discussed include the acceptance of bids, the margins of preference, mobilization fees, administrative review, the code of conduct and offences. A section was dedicated to miscellaneous issues, and this includes contract watch after the award of contracts, contributing to the development of state level procurement legislation, and contributing to the national level policy formulation and development of guidelines.

In conclusion, it was asserted that CS should intervene as monitors and observers of the procurement process. And that role is already secured by legislation. However, CS needs to prepare and equip itself with knowledge and skills to function in its assigned role. Expanding participation in procurement monitoring beyond the scope of traditional non-governmental organizations is imperative for effective coverage of all major spending agencies. Procurement lies at the heart of public expenditure management, good governance and democratic development; guide the procurement function towards value for money and accountability, then the showers of democratic development are bound to follow and the security and welfare of the people would be manifested as the primary purpose of government.

2. Introduction

In this discourse and in accordance with the provisions of the PPA on the observation of procurement proceedings, CS will include non-state actors that are active on social, economic and political issues. This includes non-governmental organizations and private sector professional organizations. However, CS has been defined as follows:

..the arena of uncoerced collective action around shared interests, purposes and values. In theory, its institutional forms are distinct from those of the state, family and market, though in practice, the boundaries between state, civil society, family and market are often complex, blurred and negotiated. Civil society commonly embraces a diversity of spaces, actors and institutional forms, varying in their degree of formality, autonomy and power. Civil societies are often populated by organizations such as registered charities, development non governmental organizations, community groups, women's organizations, faith based organizations, professional associations, trade unions, self help groups, social movements, business associations, coalitions and advocacy groups¹.

From the foregoing, it can be stated that the six part-time members of the National Council on Public Procurement, with the exception of the representative of the organized private sector from Nigerian Association of Chambers of Commerce, Industry, Mines and Agriculture (NACCIMA), are CS representatives². But the PPA specifically mentioned a civil society representative as if the others do not belong to CS. The hallmark of CS work is that it is not a mandate created by legislation but essentially a voluntary undertaking by individuals and groups to protect some interests, purposes and values. Within this context, it involves some form of "meddling". To remain relevant, CS meddles and intervenes for the common good³, whether legal provisions grounding such interventions exist or not. The work of CS is done from the point-of-view of what ought to be, in contradistinction from extant positions. But where legal provisions exist, giving CS a platform to intervene, it makes the work of CS easier. The PPA, although not a perfect law, appears to be more in the realm of what ought to be for the Nigerian procurement process and system.

CS organizations played key roles in the process leading to the passage of the PPA. At the outset, when a call for memoranda was sent out by the Budget Monitoring and Price Intelligence Unit (BMPIU), a detailed memorandum was developed and sent by a public expenditure management network of non-governmental organizations³ to the BMPIU. The network and other CS organizations participated in the BMPIU sponsored workshops leading to the drafting of the Public Procurement Bill. Thereafter, CS made tremendous contributions at legislative public hearings, through a multi media advocacy approach, the legislative lobby for the passage of the law, etc. CS groups are therefore happy that the law has seen the light of the day.

3. Operational Issues

a. The Civil Society Representative: apparently the PPA limits the representation of CS to one. There are many questions beyond the fact of his appointment by the President. How should the representative emerge? What should be his credentials and track record? When he emerges, what are our expectations from him? And how do we use his position to influence procurement policy and process? The CS representative should be one with a solid track record of interventions in procurement reforms and is willing and able to carry other CS organizations along in the task of representing them. The functions of the Council are quite critical to the achievement of procurement reforms⁴:

- Consider, approve and amend the monetary and prior review thresholds for the application of the provisions of this Act by procuring entities
- Consider and approve policies on public procurement
- Receive and consider for approval the audited accounts of the Bureau of Public Procurement
- Approve changes in the procurement process to adapt to improvements in modern technology
- Give such other directives and perform such other functions as may be necessary to achieve the objectives of this Act.

The last subsection is omnibus enough to cover issues not expressly stated but necessary for the procurement function and process.

The CS representative should have a mechanism for collating views and opinion on procurement policy in CS for onward presentation at Council meetings. In this regard, the idea of a Procurement Platform which is in the works will facilitate the proposed exchange between CS and its representative on the Council.

b. Failure to Constitute the Council and Federal Executive Council Awarding Contracts: there is no Council in place one year after the enactment of the PPA. The President has failed, refused and neglected to set up the Council, rather there are official statements on proposed amendments to the law. The Federal Executive Council still continues the illegal ritual of weekly award of contracts at its meetings, and there are proposals for the amendment of a law that has virtually not been operated. The PPA has provided no role for the Federal Executive Council in the procurement process. What should be the reaction of civil society? The options include persuasion, lobby, litigation, street/mass action demanding the constitution of the Council, and getting the National Assembly to pass a resolution for the full implementation of the law, etc. It is recommended that a combination

of all the strategies be employed to ensure that the Council is constituted and the provisions of the law respected by the Federal Executive Council.

c. Scope of Application of the Act - S.15 of the PPA: beyond the application of the Act to the Federal Government and all procuring entities, it also applies to all entities outside the foregoing description which derive at least 35% of their funds appropriated or proposed to be appropriated for any type of procurement described in this Act from the Federation share of the Consolidated Revenue Fund. CS should find out if the law is applicable to Joint Venture Partnerships (JVPs) in the oil industry where the federal government is contributing at least 35% of the funding. Available information indicates that the PPA has not been extended to these JVPs.

4. Procurement Observation and Monitoring

a. Basis for Observation: The PPA provides in S.19 as follows:

Subject to regulations as may from time to time be made by the Bureau under direction of Council, a procuring entity shall, in implementing its procurement plans

Invite two credible persons as observers in every procurement process, one person each representing a recognized

Private sector professional organization whose expertise is relevant to the particular goods or services being procured, and

Non governmental organization working in transparency, accountability and anti-corruption areas, and the observers shall not intervene in the procurement process but shall have right to submit their observation report to any relevant agency or body including their own organizations or associations.

Beyond the above provisions of the law, it is pertinent to explore the reasons informing the observation and monitoring of procurement proceedings by CS. They have been stated to include ensuring openness, accountability and transparency; fighting corruption; preventing the subversion of the legal system; enhancing democracy and development; ensuring value for money and fitness of purpose; maintaining the constitutional aphorism that the security and welfare of the people is the primary purpose of government, etc⁵.

What do we do with the report of observation - publish it, use it for advocacy and sensitization? Any relevant body in S.19 of the PPA should include the Bureau, anti-corruption agencies, the Auditor General's office, the media, or any body deemed relevant by the Observer.

What is the observer going to observe? Apparently, the observer will observe the implementation of a procurement plan of a procuring entity and whether the provisions of the PPA have been honoured in breach or in compliance. Although the observation is not *stricto sensu* an assessment of the procurement system and process, it will also be imperative for observers to understand the five pillars of a functional procurement system and management covering the procurement of goods, services and construction:

- The existence of a comprehensive and transparent legal, regulatory and institutional framework guided by an independent procurement oversight body for policy and quality control;
- Modernised procurement procedures, bidding documents, including transparent bid evaluation and award procedures and contract management;
- Proficient and qualified staff applying the rules efficiently and transparently;
- Existence of an independent control mechanism with audit and recourse mechanisms separate from the procurement implementation function with effective implementation of sanctions;
- Anti corruption measures incorporated into the laws and rules and accompanied by the application of effective sanctions.

Knowing the above will facilitate the observer's reporting and recommendations on how to improve the system if flaws are detected.

b. Procurement Planning: S.18 of the PPA provides for a procurement plan. What is the content of a procurement plan? The CS observer should confirm if the Procurement Plan has been appropriately prepared. It should include a needs assessment and evaluation; identify the goods, works or services required; contain the market and statistical surveys leading to analysis of cost implications of the procurement; involve aggregating requirements where possible; also, the procurement contained in the annual budget; and, the prescribed method for effecting procurement subject to approval. It should equally include an observation on whether the procurement planning envisaged above is carried out by the Procurement Planning Committee. Essentially, the Procurement Planning Committee members are detailed in S.21 of the PPA⁶.

c. Fundamental Principles for Procurement: The observer generally needs to find out in accordance with S. 16 (1) of the PPA if the procurement is by open competitive bidding; in a manner which is transparent, timely, equitable for ensuring accountability and conformity with the PPA and regulations deriving therefrom; with the aim of achieving value for money and fitness of purpose; in a manner which promotes competition, economy and efficiency; in accordance with the procedure and timeline laid down in the PPA and as may be specified by

the Bureau of Public Procurement (the Bureau) from time to time. The observer should seek answers to the following posers:

- Is the right and appropriate procurement methodology being followed? Is the procuring entity using a special and restricted method of procurement where open and competitive tenders should be used? For instance, in a situation where a direct or emergency method of procurement is used and facts leading to the emergency show that it arose out of the dilatory conduct of the procuring entity, then such a situation needs to be expressly reported. Or the conditions stipulated in S. 42 and 43 were not present and the procuring entity purported to engage in direct or emergency procurement.
- Did the bidders have a level playing ground - equal, simultaneous information and opportunity to offer the goods, works and services? Were the appropriate publications made and in a timely manner? The answer to these posers can come from bidders and from observation of publications and documentations on the procurement.
- Is there evidence that tenders have been split to avoid thresholds set by the Bureau? The PPA did not define tender splitting but this can be remedied by regulations of the Bureau.
- The company that submits a bid: is it actually registered at the Corporate Affairs Commission to clothe it with legal personality and the capacity to enter into procurement contracts? A search at the Corporate Affairs Commission can reveal this.
- Is the company in receivership, the subject of any form of insolvency or bankruptcy proceedings or the subject of winding up petition?
- Has the company or individual fulfilled its obligation to pay taxes, pensions and social security contributions? A search at the Inland Revenue, Pensions Commission, etc will reveal the true position of things.
- Does the company have any director or senior manager who has been convicted in any country for any criminal offence relating to fraud or financial impropriety or criminal misrepresentation or falsification of facts relating to any matter?
- Does the company have the financial capability, equipment and other relevant infrastructure, personnel as claimed to perform the contract? In these days of equipment leasing, this can be very tricky; it is important to find out if the company claims to own the equipment or is merely hiring and taking them on lease.
- Had the company in the last three years failed to perform or provide due care in performance of any public procurement?

- Is there any evidence that the bidder has compromised or attempted to compromise officers and former officers of the procuring entity or the Bureau in an attempt to influence the decisions related to the bid? Generally, issues of conflict of interest, ethics and inappropriate behaviour should be examined.

A bidder is to accompany his bid with an affidavit disclosing whether or not any officer of the relevant committees of the procuring entity or Bureau is a former or present director, shareholder or has any pecuniary interest in the bidder, and confirm that all information presented in its bid are true and correct in all particulars. Thus, this is an oath and lying on oath is the offence of perjury.

If all the above requirements have been satisfied, it is important to confirm that the procuring entity has obtained a certificate of “No Objection” to the award of contract from the Bureau.

d. Access to Information: it is pertinent to mention that the PPA in S. 16 (14) grants access to procurement documentation to the public in the following words:

All unclassified procurement records shall be open to inspection by the public at the cost of copying and certifying the documents plus an administrative charge as may be prescribed from time to time by the Bureau.

By this section, CS work is thereby facilitated. However, S. 38, in mandating procuring entities to maintain records of procurement proceedings, provides for the examination and or copying of procurement records only after the end of procurement proceedings whether resulting in the award of contract or termination without resulting in procurement contract. A close and harmonious reading of the two sections and the observation mandate of CS in the PPA discloses that observation will not be possible without access to information. Thus, access to information is implied in the observation mandate.

e. Submission of Bids and Bid Security: the resolution of the following posers will facilitate the observers reporting:

- If bid security is required, did all bidders comply?
- Were the submitted bids placed in a secured tamper proof bid box?
- Did the procuring entity issue receipts showing the date and time of submission of bid?
- Were bids accepted after the closing date for bid submission?

f. Bid Opening: did the bid opening formalities comply with S.30 of the Act?

- Permit attendees to examine the envelopes in which the bids have been submitted to ascertain that the bids have not been tampered with;
- Cause all the bids to be opened in public, in the presence of the bidders and their representatives and any interested member of the public;
- Ensure that the bid opening takes place immediately following the deadline stipulated for the submission of bids or any extension thereof;
- Ensure that a register is taken of the names and addresses of all those present at the bid opening and the organizations they represent;
- Call over to the hearing of all present, the name and address of each bidder, the total amount of each bid, the bid currency and ensure that these are recorded in the minutes of the bid opening.

g. Examination and Evaluation of Bids: in examining bids, how were the major and minor deviations treated? Did any invalid bid move from the examination to the evaluation stage? In the evaluation of bids, did the procuring entity use any other criteria apart from the ones stipulated in the bid solicitation documents? And the observer should watch out for conflicts of interest, bid rigging, etc, in the bid evaluation process. The central challenge for the observer (which is the challenge of justice) is to confirm that like cases were treated alike and unlike cases were given differentiated treatment under the terms agreed at the time of the commencement of the bid solicitation. S.31 and 32 of the PPA will guide the process. The major issues include checking out omissions and quantification of same, application of discounts, clarification with bidders, conversion to common currency, calculation and tabulation of bid amount with domestic preference where applicable, determination of lowest calculated prices in order of rank, post qualification of bidders where applicable.

h. Acceptance of Bid: the successful bid in respect of goods and works shall be that submitted by the lowest cost bidders from the bidders responsive to the bid solicitation, the only exception being as provided for in S 33(2), situations in which the procuring entity can show good grounds from the Act for selecting a bidder other than the lowest cost bidder, it however appears to me that in either case the criteria for selection must be such as was specified in the bid documents.

For proposals (services), the responsive bid or the proposal with the best combined evaluation in terms of general criteria set with respect to technical and price factors in the case of quality and cost based selection. The second is the responsive bid or proposal with the lowest price in the case of least cost selection while the third is the responsive bid with the highest technical ranking within the budget. Did the procuring entity comply with these positions?

i. Margins of Preference: if margins of preference have being applied, is the procurement under international competitive bidding or are they comparing tenders from domestic suppliers offering goods manufactured abroad with those manufactured locally? Essentially, were the conditions for the application of a margin of preference in place at the time the margin was applied?

j. Mobilization Fees: if 15% mobilization fees have been paid, did the contractor provide an unconditional bank guarantee in accordance with the law?

k. Administrative Review: did the accounting officer and Bureau respond timorously to complaints by bidders? The PPA prescribes decisions to come within 15 working days from the date of the receipt of the complaint for the accounting officer and within 21 working days for the Bureau.

l. Code of Conduct: this is applicable to all public officers, suppliers, contractors and service providers involved in procurement proceedings in accordance with S.57 of the PPA. For public officers, the PPA prohibits their engagement or participation in any commercial transaction involving the federal government, its ministries, and extra ministerial departments, corporations where their capacity as public officers is likely to confer any unfair advantage - pecuniary or otherwise on them or any person directly related to them. And public officers are required to divest themselves of any interest or relationships which are actually or potentially inimical or detrimental to the best interests of government and the underlining principles of the PPA. Any person who has such a relationship that might compromise his position and impartiality is duty bound to report to the authorities any actual or potential interest. S.57 (12) of the PPA explicitly defines the situations that the observer should look out for:

(12) A conflict of interest exists where a person:

- (a) possesses an interest outside his official duties that materially encroaches on the time or attention which should otherwise be devoted to affairs of government;
- (b) possesses a direct or indirect interest in or relationship with a bidder, supplier, contractor, or service provider that is inherently unethical or that may be implied or constructed to be, or make possible personal gain due to the person's ability to influence dealings;
- (c) entertains relationships which are unethical, rendering his attitude partial toward the outsider for personal reasons or otherwise inhibits the impartiality of the person's business judgments;
- (d) places by acts or omissions the procuring entity he represents or the Government in an equivocal, embarrassing or ethically questionable position;

- (e) entertains relationships compromising the reputation or integrity of the procuring entity he represents or the Government;
 - (f) receives benefits by taking personal advantage of an opportunity that properly belongs to the procuring entity he represents or the Government;
 - (g) creates a source of personal revenue or advantage by using public property which comes into his hands either in course of his work or otherwise; and
 - (h) discloses confidential information being either the property of his procuring entity, the Government or to a supplier, contractor or service provider to unauthorized persons.
- (13) A person involve in the disposal of assets, shall not either by a third party or by himself be interested in any manner in buying directly or indirectly these assets and shall not have or obtain any type of advantage or revenue from the disposal for a period of three years after the disposal.

The observer has a duty to monitor and report on conflicts of interest as stipulated above after closely reading and understanding S.57 of the PPA.

m. Offences: the major offences created by the PPA include collusion and collusive agreements, conducting or attempting to conduct procurement fraud, directly or indirectly attempting to influence procurement proceedings to obtain unfair advantage, splitting of tenders, bid rigging, altering documentation, using fake documents and willful refusal to allow the Bureau or its officers access to records. Any fact or set of facts indicating the foregoing should attract the attention and reporting of the Observer.

5. Miscellaneous Issues

In contract watch after award of procurement, is the procurement proceeding according to specifications? NGOs, communities, professionals, faith based groups, etc need to be involved.

How do we ensure that states pass sub-national public procurement laws and implement them? The process is ongoing and collaboration between the Federal Ministry of Finance, States and Donor Partners seeks to enact these laws at the state level. CS needs to be mobilized to engage the process. It is better to engage at the time the law is being drafted rather than wait and complain after the law has been passed. This proposition is based on the poverty of remedial justice.

How would CS contribute to policy formulation by the Council and the development of Guidelines by the Bureau considering the powers, duties and functions of the Council and the

Bureau? The establishment of the proposed Platform and a special research and documentation unit to engage the policy formulation and guideline development process is imperative.

The development of the observation manual and handbook including the code of conduct for observers should proceed immediately. CS should lead the way.

Essentially, CS should do capacity building, advocacy, monitoring and observations, whistle blowing, and report writing, etc on the PPA. The PPA is new and contains a lot of technicalities. As such, capacity building in civil society is imperative. Full understanding of the law will also facilitate the monitoring and observation work of CS.

There are plans to amend the law to get politicians back on the handle of contract awards. What strategies should CS adopt to engage the executive and the National Assembly? Public sensitization, lobby and great advocacy will need to be undertaken to ensure that the law for now is not amended to reverse the reforms.

6. Conclusions

CS should intervene as monitors and observers of the procurement process. And that role is already secured by legislation. However, CS needs to prepare and equip itself with knowledge and skills to function in its assigned capacity. Expanding participation in procurement monitoring beyond the traditional non-governmental organizations is imperative for effective coverage of all major spending agencies. Procurement lies at the heart of public expenditure management, good governance and development, the Act has recognized the role of CS through monitoring to guide the public procurement function towards competitiveness, value for money and accountability; in this way we can all help make the security and welfare of the people the primary purpose of governance as provided by our constitution.

Chapter IV

THE PUBLIC PROCUREMENT ACT 2007 IMPLEMENTATION ASSESSMENT REPORT

1. Background

The Government of Chief Olusegun Obasanjo approved the conduct of the Country Procurement Assessment Report (CPAR) between 1999 and 2000. The report made several recommendations, resulting in the setting up of the Budget Monitoring and Price Intelligence Unit (Due Process) – the administrative implementation of a due process mechanism in the procurement of goods, works and services, and the enactment of the Public Procurement Act 2007. This Act was passed by the National Assembly in May 2007 and signed into law by President Umaru Musa Yar’adua on 4th June 2007. This Assessment is part of the Public and Private Development Centre’s Procurement Watch Program, the very first of such civil society programs launched after the passage of the Public Procurement Act in 2007. The program included capacity building for Civil Society Organizations and professional body observers of the procurement process and led to the formation of the National Procurement Watch Platform, a coalition of CSOs and Professional bodies working to achieve a competitive, transparent, public procurement system in Nigeria, delivering value-for-money and promoting good governance for National development.

2. Objectives of the Assessment

The objectives of the Assessment include to:

- a. determine the extent of the implementation of the Public Procurement Act 2007, more than one year after it became law;
- b. identify specific implementation issues for advocacy by civil society organizations.

3. Methodology/Challenges

The assessment exercise involved the design of a survey instrument (a questionnaire), the conduct of a survey through the administration of the questionnaire on procurement officers in the Federal Service, some private sector persons and few representatives of CSOs. There was then the collation and analyses of the questionnaires responses collected from the respondents for the purpose of the assessment exercise.

3.1. Challenges

There is great reluctance by public officials to respond to questionnaires relating to government processes. It took repeated visits and pleas to get public procurement officers in the public service to receive the questionnaires. Many of the public servants initially approached would not accept the questionnaires and the officers that answered them did so on conditions of anonymity. Indeed, all public service respondents to the questionnaire refused to indicate their names on their responses, and it was not until it was resolved that they need not indicate their names on the questionnaire that accepted and responded to the survey. This, however, was after some of them had attended the Bureau of Public Procurement's (BPP's) organized procurement training for public servants.

Awareness of the provisions of the Public Procurement Act 2007 is still low, and this breeds caution and fear, and may account for why out of the 100 questionnaires initially intended to be administered on public procurement officers, only 54 public servants accepted questionnaires. Out of the 54 who accepted the questionnaires, only 30 officials actually responded. On the contrary, 10 people from the private sector and 6 from CSOs received and responded unreservedly to the questionnaire. In addition, it was noted that many MDAs may not be fully implementing their budget due to poor understanding of the Act and the regulations issued by the Bureau.

This research had a very limited budget which did not permit wider consultations with the questionnaire instrument, the wider sampling of the several departments of the Federal bureaucracy, nor did it enable the deployment of enough personnel to personally administer questionnaires on the respondents. As a result, respondents were many times left to complete the questionnaires on their own, and one is not certain how well the questions were understood in the light of the knowledge gaps already pointed out.

Another important challenge was the fact that the Act had only been implemented for a limited period before this exercise, leading to the impression that amongst non-government respondents, there may have been limited contact with the system since the implementation of the Act commenced. And amongst public service respondents, that they may be responding without a clear demarcation in their minds between the administrative implementation of the due process mechanism and the current implementation of the provisions of the Act which mirrors the former but introduces several changes.

3.2. The Data Collection Instrument

In order to obtain the required data, a questionnaire was designed and administered. The questionnaire contained 58 indicators categorized into parts as shown in the questionnaire attached. The questionnaire was simply designed to get the desired data with ease, with each indicator (as shown in the tables below) targeting a particular opinion. The attributes (questions) in the questionnaire were structured in a manner that a respondent was required to

just tick his/her desired answer. The indicators were compiled to assess progress on major implementation obligations imposed by the Public Procurement Act 2007.

3.3. The Field Operation

The field operation was undertaken for two months between July and September 2008, and the questionnaires were duly administered, retrieved and analyzed by a procurement consulting firm based in Abuja.

3.4. Data Analysis

Accordingly, the result of the assessment is presented in tables below, showing the observed responses and the percentages of responses against the various issues in each indicator. These, also, have formed the basis of the conclusions and recommendations of the Assessment exercise.

4. Findings

4.1. Executive Summary of the Exercise and Its Findings

The Public Procurement Act 2007 was promulgated to address the inadequacies of the procurement practice in Nigeria. Though signed into law by President Yar'adua in June 2007, its implementation was in doubt until lately. This exercise was embarked upon to determine the extent of its implementation so far and identify advocacy issues for civil society organizations. Data was gathered through a questionnaire instrument, which was applied, collated and analyzed. The results indicated as follows;

The survey found that there are poor levels of information sharing within the service on happenings in the public procurement arena. Though the apex policy making body, the National Procurement Council is yet to be inaugurated and yet to approve the procurement guidelines formulated by the Bureau, many public service users of the guideline are unaware that the rules now in use are yet to be so approved. On the other hand, the Bureau, though established, is yet to have a substantive Director General in accordance with the Act.

The survey established that the Bureau has no archival system or procurement intelligence system in place, and that a tender journal is being published, though not by the Bureau. Also, it was discovered that the Bureau is yet to begin publishing details of all procurement contracts as required by law, in addition it is yet to set up the one-stop procurement internet portal provided for by the law as a primary source of procurement information.

It was revealed in the course of the survey that the Bureau provides capacity building programs for public procurement officers, explains and disseminates provisions of the Act,

and is actively promoting the professionalization of procurement in the service, as required by law.

The survey ascertained that the Bureau has no accessible database of standard prizes, of the categorization of contractors, or of debarred contractors, as required by law. The information gathered indicates that the Bureau does not carry out on-the-spot review of procurement in the MDA, and although it has conducted procurement audit in some MDAs it has not done so in some others.

The survey established that MDA procurements are now largely based on prior budgetary appropriation, and indications exist that some MDA procurements may not yet be based on prior procurement plans. Open competitive bidding appears to be the dominant method of procurement currently in many MDAs, and most MDAs do seek no objection for procurements above their threshold. The survey results suggests that not all MDAs have established procurement planning committees and ministerial tender boards, however it was observed that MDAs are advertising their solicitations to pre-qualify/bids. Still, many MDAs are not inviting CSOs and professional bodies to observe their procurement process as provided for by law.

It found that whilst bid submission registers are kept in many MDAs, it appears that this may not be the case in all the MDAs. And, the information gathered indicate that MDAs are prequalifying contractors, opening bids in public, and that bid security is often attached to bids currently. It was clear from the results garnered that most bids from companies employing more than 5 persons are not accompanied by any evidence of the payment of pension contributions. The findings also indicate that domestic preference is not being applied and contractors with delayed payments are paid no interests presently.

The survey noted that the call for expression of interests for consultants' proposals are advertised, and that such advertisements contain details of qualifications and information required, whilst requests for proposals set out precisely agency needs and the criteria for the evaluation of proposals. It was established that the rules for the disposal of public property have not been issued by the BPP, and only a few MDAs may be valuing assets before disposal.

The information gathered shows that either no code of conduct for public procurement officers has been issued or if it has, the public procurement officers, for whom it is intended, are not aware of this. Furthermore, the results indicate that although a code of conduct for non-government observers may have been issued, not all persons who should know about it are conscious of its existence, meaning that there is need for increased awareness and dissemination of the code.

The survey confirmed that ministerial tenders boards are approval authorities within MDAs, but also that the Federal Executive Council is still acting as an approval authority for procurement awards contrary to the provisions of the Public Procurement Act 2007.

5. Assessment of the Implementation of the Public Procurement Act 2007

The Survey was carried out through the administration of questionnaires containing 58 indicators categorized into nine parts thus:

- Establishment of the National Council of Public Procurement and its functionality;
- Establishment and functioning of the Bureau of Public Procurement;
- Adherence to Fundamental Principles of Public Procurement;
- Establishment of MDA Procurement Structures and Adherence to statutory procedure for procurement;
- Procurement of Consultancy services;
- Existence of Rules for disposal of Public Property;
- Existence of codes of conduct;
- Approving Authority for Public Procurement.

Based on these categories, survey related data were obtained from the MDAs, procurement officers, a few procurement consultants and a few representatives of CSOs. Their responses were analyzed and reported thus.

Table 5.1: Distribution of Respondents

Category	No of Respondents	Percentage %
MDA Procurement Officers	30	65
Private Sector Participants	10	22
Representatives of CSO's	6	13
Total	46	100

5.1. Respondents

A total of 100 questionnaires were printed, 70 questionnaires were accepted by proposed respondents. However, only 46 of them were retrieved thus: 30 or 65% from the MDAs Procurement Officers; 10 or 22% from Private Sector Participants and 6 or 13% from representatives of CSOs.

Table 5.2: The Establishment of National Council of Public Procurement

ISSUES	YES A	No B	Don't Know C	% A	%B	%C
Has the National Council on Public Procurement been inaugurated?	40	6	0	87	13	0
Has the Council been discharging its statutory functions?	38	6	2	83	13	4
Has Council appointed the Bureau principal Officers?	40	6	0	87	13	0
Has the Council approved the BPP Officers' remuneration, allowances and benefits?	30	6	10	65	13	22
Has the Council made regulations on BPP's assets and funds?	20	6	20	43.5	13	43.5

5.2: As shown in table 5.2, 40 or 87% of the respondents said that the National Council of Public Procurement has been inaugurated, while 13% claimed it has not been inaugurated. When asked whether the Council has been discharging its functions, 38 out of 46 respondents said its has, two people said they did not know, whilst 6 respondents maintained that the Council has not been discharging its functions. On the issue of the appointment of principal officers of the Bureau by the Council, 40 or 87 % of the respondents answered in the affirmative, 6 or 13% of the participants in the survey, again, said that these officials have not been appointed. And, on whether the Council has approved the remuneration of Bureau officers, 30 respondents claimed that this was the situation, 6 participants to the survey disagreed with this view, and 10 people said they did not know. When asked if the Council

has made regulations on BPP's assets and funds, 20 respondents claimed that they have, 6 or 13 % said that they have not, and 20 people said that they did not know.

The results of this dimension of assessment are significant to the extent only that they indicate a total lack of knowledge of happenings by respondents. In actual fact although members of the Council have been appointed for almost a year now, and their inauguration fixed severally, that inauguration is yet to take place and they are yet to convene for business. Also a substantive Director General is yet to be appointed for the Bureau.

It appears that many respondents just assumed that since BPP has issued implementation rules to them, and a council has once been appointed, those rules must have been approved by the council and the council must be at work. This therefore highlights the need for information sharing and dissemination in addition to capacity improvement. The absence of a functioning council creates a large vacuum in the system established by the Public Procurement Act 2007. CSOs may wish to engage government on these implementation issues.

Table 5.3: Establishment and Functioning of the Bureau of Public Procurement (BPP)

ISSUES	YES A	NO B	Don't Know C	%A	%B	%C
Has the BPP been established according to the Act?	44	2	0	96	4	0
Has the Director General of the BPP been appointed in accordance with the Act?	2	44	0	4	96	0
Has the BPP been formulating the procurement guidelines, policies and implementation rules to regulate the sector?	44	0	2	96	0	4
Has the Bureau been publishing and explaining the Act?	40	2	4	87	4	9
Has the Bureau been making the Act otherwise available to the public?	40	0	6	87	0	13
Has the Bureau established procurement intelligence and database?	5	38	3	11	83	6
Has the Bureau or any other agency been publishing procurement tender journals?	40	2	4	87	4	9
Has the Bureau been circulating the procurement tender journals?	35	4	7	76	9	15
Do MDAs use other media other than the	40	5	1	87	11	2

journal to publish procurement advertisement?						
Does the Bureau have archival system (Old Issues) of the journal?	11	5	30	24	11	65
Has the Bureau published details of all contracts awarded in the journal?	6	11	29	13	24	63
Does the Bureau maintain information on all federal procurement plans?	11	30	5	24	65	11
Does the Bureau conduct periodic procurement research or survey?	2	40	4	4	87	9
Does the Bureau conduct capacity building workshops, seminars, training, and development programs for procurement officers?	42	0	4	91	0	9
Has the Bureau prepared Standard Bidding Documents (STD)?	44	0	2	96	0	4
Has the Bureau established a single internet portal to display procurement information?	5	36	5	11	78	11
Does the Bureau conduct on the spot procurement review?	10	36	0	22	78	0
Has the Bureau developed a database for debarred contractors and service providers?	0	40	6	0	87	13
Has the Bureau a database of prizes to guide MDAs?	0	42	4	0	91	9
Has the Bureau administered oath of office on its principal officers?	0	0	46	0	0	100
Has the Bureau been conducting Procurement Audit?	25	10	11	54	22	24

5.3. Establishment and Functioning of the Bureau of Public Procurement

As indicated in table 5.3, 44 or 96% of the respondents said that the BPP has been established, but that the Director General has not been appointed in accordance with the Act. 44 or 96% people observed that the BPP has formulated and provided procurement guidelines and rules, 40 or 87% of the respondents claimed that BPP has been publishing and explaining the Act. 40 or 87% of the people surveyed said BPP has otherwise been making the Act available to members of the Public. 38 or 83% of the respondents noted that the BPP has no procurement intelligence system. 40 or 87% claimed that BPP has been publishing a procurement tender journal, though the journal referred to might be the tender journal published by the Federal Ministry of Finance; 35 or 76% said that BPP has been circulating a procurement journal; 40 or 87 % pointed out that MDAs also use media other than the journal

to advertise tenders; only 11 people, less than 25% of the total respondents, agreed that the Bureau had an archival system for the tender journals.

Only 6 persons agreed that the Bureau publishes details of contracts awarded in the journal, 29 or over 60% did not know whether they did so or not, 11 respondents said they do not. 11 respondents said the Bureau maintains information of all Federal level procurement plans, whilst 30 persons or 65% said they do not maintain such information. When asked whether the Bureau conducts periodic procurement research or survey, 2 or 4% of the respondents said that the Bureau does so. 40 or 87% observed that the Bureau does not. 42 or above 90% respondents said the Bureau conducts capacity-building activities and 44 or 96% of participants in the survey agree that the Bureau has produced standard bidding/tender documents.

5 or 11% of the respondents said that the Bureau has an internet portal to display procurement information, 36 or over 76% of respondents disagreed with this assertion. 10 or 22 % claimed that the BPP conducts on-the-spot procurement reviews, whilst 36 people differed to this claim. 40 or 87% of respondents said the Bureau has no database of debarred contractors. 42 persons or over 90% respondents agreed that the Bureau had no database of standard prices to guide the MDAs. All respondents did not know whether the Bureau had administered oath of office on its principal officers. 25 or above 52% of respondents affirmed that the Bureau has been conducting procurement audits, 10 or 22 % said they have not been doing so, whilst 11% said they had no idea.

As can be ascertained from the survey, the Bureau has been established, but it is yet to have a substantive Director General appointed in accordance with the Act. The survey established the fact that the Bureau has formulated and disseminated guidelines/rules, and has been explaining and disseminating provisions of the Act. It also confirmed that the Bureau has produced standard tender documents, and that a tenders journal is being published, but not necessarily by the Bureau. The survey depicted that MDAs, in addition to the tender journal, use other media for publicizing tenders. It yet revealed that the Bureau has no archival system for these tender journals; still, respondents observed that the BPP has no procurement intelligence system in place.

The Bureau, it appears, is yet to begin to publish details of all procurement contracts as required by law. It seems, from the survey, that the Bureau does not still maintain information of all federal procurement plans, perhaps the MDAs are yet to submit such plans to the Bureau since the law gives them up till three months after the end of each year to submit all procurement information to the Bureau, except for proceedings subject to no objection proceedings.

The survey confirmed that the Bureau does not yet conduct periodic procurement research or survey, and this appears understandable since the implementation of the law started only in the last few months. Equally, the information gathered revealed that the Bureau conducts

capacity building programs for public procurement officials and has produced and circulated standard bidding/tender documents. The survey shows that the Bureau has no internet portal serving as a primary source of procurement information, as required by the law. And, the survey also pointed to the fact that the Bureau may not be carrying out on-the-spot review of procurement in the MDAs, and has no database and categorization of all contractors and of debarred contractors to guide MDAs.

The survey established that the Bureau has no database of standard prizes. If it did, then this is not available to procurement officers, who it should guide. The survey result indicates that the Bureau may have conducted procurement audits in some MDAs, but not in all. One can, more so, deduce the absence of some key tools of transparency, from the information gathered. CSOs may wish to engage the Bureau on the establishment of systems for collating all procurement information from MDAs and the publication of details of procurement contracts. Equally, on the setting up of an internet portal as a primary source of public procurement information, the creation of a database of standard prizes, and the database on list of contractors generally and, in particular, of debarred contractors. And also on the issue of the improved audit of procurement process, and the exercise of supervisory authority generally, including the arrangement for procurement research, the archiving of tenders journals, and the improvement of on-the-spot reviews of process of procurement within MDAs. These will help create the levels of transparency and deterrence that the system currently requires.

Table 5.4: Adherence to the Fundamental Principles of Public Procurement

ISSUES	YES A	NO B	DON'T KNOW C	% A	% B	%C
Are MDA procurement exercises based on prior budgetary appropriations?	35	4	7	76	9	15
Are MDA procurement based on prior procurement plans?	20	16	10	43.	35	22
Is open competitive bidding the dominant method of procurement amongst MDAs?	35	6	5	76	13	11
Are MDAs seeking No Objection for all procurement above their threshold	40	2	4	87	4	9

In table 5.4, while 35 or 76% of the respondents state that MDA procurements are now based on prior budgetary provisions, only 4 respondents disagree with this fact, whilst 7 people do not know. 20 persons or just above 43% of respondents are sure that MDA procurements are now based on prior procurement plans. 16 respondents or about 34% of the respondents do not agree with this claim, whereas 10 or 22% of respondents do not know. Since 30 of the 46 respondents are public procurement officers, this means that at least 10 or more of them said

their MDA procurements are not based on prior procurement plans or at least did not know whether their procurements are based on prior procurement plans. 35 or 76% of the respondents said that open competitive bid is the dominant method of procurement in their MDAs, 6 or 13% said that it is not and 5 or 11% said they did not know. When asked whether MDAs are seeking No Objection for all the procurement above their thresholds, 40 or 87 % of respondents confirmed this, 2 or 4% stated otherwise, while 4 or 9% did not know.

The above results establish that MDA procurements are now largely based on prior budgetary appropriation. However, it would appear that many MDA procurements may not yet be based on prior procurement plans, and this is therefore an issue for CSO advocacy. Open competitive bidding appears to be the dominant method of procurement currently in many MDAs and the result confirms that most MDAs do seek no objection for procurement above their threshold.

Table 5.5: Establishment of MDA Procurement Structures and Adherence to Statutory Procedure for Procurement

ISSUE	YES A	No B	Don't Know C	A%	B%	C%
Have all MDAs established Procurement Planning Committees?	26	12	8	57	25	18
Have all MDAs established Ministerial Tender Boards?	26	12	8	57	25	18
Have all MDAs been advertising solicitation for bids or invitation to prequalify?	40	2	4	88	4	8
Have the MDAs been inviting CSOs and professional bodies to observe their procurement processes?	12	16	18	24	36	40
Are bid submission registers kept by MDAs?	26	12	8	57	24	16
Have the MDAs been pre-qualifying Contractors?	35	0	11	76	0	24
Are Bids being opened in public in the presence of representatives of bidders and members of the public?	40	4	2	88	8	4
Are bids currently accompanied by bid security?	30	5	11	64	11	24
Are bids currently accompanied by verifying affidavits?	5	35	6	11	76	13
Are bids currently accompanied by the evidence of payment of pension contributions for	2	40	4	4	88	8

companies employing more than five persons?						
Are minutes of bid opening kept?	40	0	6	88	0	12
Are domestic preferences being given to local contractors in ICB?	12	6	28	24	12	56
Are Contractors/Service providers paid mobilization above 15%?	4	40	2	8	88	4
Is contract performance guarantee being demanded from Contractors/Service providers?	30	0	16	64	0	32
Are Contractors/service providers paid interests on delayed payments?	0	40	6	0	88	12

5.5. Establishment of MDA Procurement Structures and Adherence to Statutory Procedure for Procurement

According to table 5.5 below, 26 or about 57% of the respondents said that procurement planning committees have been established in MDAs, 12 or above 25% said these committees have not been formed and 8 or above 16% said they did not know if they had been created or not. When asked whether all MDAs have established Ministerial tenders committees, these same results were recorded. Considering that at least 30 respondents were themselves public procurement officers in service, we can safely arrive at the conclusion that Procurement Planning Committees and Ministerial Tenders Boards have been established in some, but not in all, MDAs as required by law. This is, therefore, an issue for CSO advocacy.

40 or about 88% of the respondents observed that MDAs now advertise bid solicitations or invitations for prequalification. 12 or about 24% of those who participated in the survey said that MDAs invite CSOs and professional bodies to observe procurement process, 16 or about 36% of respondents said the MDAs do not invite observers, whilst 18 or about 40% said they did not know. This result is significant and clearly indicates that most MDAs may not have invited any CSO or professional body to observe their procurement processes, however this does not confirm that all MDAs have actually been carrying out procurement, and part of the problem may be low budget implementation resulting from late releases and poor understanding of the procurement law; but certainly some MDAs are not inviting CSOs and professional bodies to observe their procurement processes.

26 or above 57% of the respondents claimed that bid submission registers are kept, 12 or above 24 % disagreed with this, and 16 or above 32 % claimed they did not know whether or not these registers are kept. When asked whether MDAs have been pre-qualifying contractors, 35 or about 76% of the participants to the survey responded in the affirmative.

However, 11 or about 24% of the respondents claimed ignorance of this fact. 40 or above 88% of the respondents confirmed that MDAs are opening bids in the public, whilst 4 or above 8% and 2 or 4% disagreed and claimed ignorance of this practice, respectively. 30 or above 60% stated that Bid security is currently attached to submitted bids, 5 or above 11% of respondents offered contrary views to that fact, whilst 11 or above 24% of respondents did not know whether this is so.

Only 2 or above 4% of the respondents agreed that bids are accompanied by the evidence of pension contributions, 40 or above 88 % disagreed and 4 or above 8% did not know. 40 or above 88 % claimed that minutes of bid opening are kept, and 6 respondents were not so sure. 12 or above 24% of the respondents said that domestic preference is being applied on ICB, 6 or above 12% said this was not so, whilst 28, more than 56%, did not know. This is significant and indicates that domestic preferences is not being applied in most cases, however this survey did not try to confirm whether the MDAs have carried out any ICB in the period under examination.

4 or above 8% of the respondents to the survey pointed out that contractors are paid mobilization fees above 15%, 40 people or above 88% did not support this view, and two persons did not know if such practice obtained. Thus, we can safely conclude that the payment of mobilization of more than 15% of the value of a project may not be happening. 30 or above 60% of the respondents confirmed that performance guarantees are demanded for the award of contracts, 16 or 32% of respondents did not know. Not a single respondent agreed that contractors and service providers are being paid interests on delayed payments: 40 or above 88% of respondents said that they are not paid, and 6 or above 12% claimed that they did not know.

The above results establish that not all MDAs have established procurement planning committees and ministerial tender boards; this is therefore an advocacy point since the Act says that all MDAs should establish these boards. The results indicate that MDAs are advertising their solicitations to pre-qualify/bids, but that many MDAs are not inviting CSOs and professional bodies to observe their procurement processes as provided for by law, thereby limiting the levels of transparency in these processes.

Whilst bid submission registers are kept in some MDAs, it appears that this may not be the case in all MDAs, and it is an issue to look out for, particularly since observers are not invited to some of these bid openings. The results indicate that MDAs are pre-qualifying contractors, opening bids in public, and that bid security is attached to bids currently. It is clear from the information gathered above that most bids from companies employing more than 5 persons are not accompanied by any evidence of payment of pension contributions, and this is a serious issue for advocacy. Results also indicate that domestic preference is not being applied; this, however, may be because very few ICBs have taken place since implementation of this Act began.

The responses show that contractors with delayed payments are paid no interests, and this may be because none has arisen in the limited time since the commencement of implementation of this Act, since it is in the procurement contracts that rate of interests are agreed upon.

5.6: Procurement of Consultancy Services

ISSUES	YES A	No B	Don't Know	% A	%B	%C
Are expressions of interests for consulting services published?	40	1	5	87	2	11
Do the advertisements contain detailed qualifications required?	35	6	5	76	13	11
Do they contain address, time, pay day, dateline and place for submission?	44	2	0	96	4	0
Do requests for proposals set out Agency needs precisely?	35	11	0	76	24	0
Are requests for proposals simultaneously given to all pre-qualified firms?	30	12	4	67	26	9
Do requests for proposals contain detailed criteria for evaluation and selection of winner?	28	18	0	61	39	0

40 or 87% of the respondents noted that the expressions of interest for consultants' proposals are advertised. However, only 35 or 76% agreed that the advertisements contain details of qualifications required. 44 or 96% of the respondents noted that the adverts contain dateline, time, and places for submission. Only 35 or 76 % of those who participated in the survey observed that advertisements set out agency needs precisely, 11 or about 24 % did not agree with this. 30 or about 67% of the respondents claimed that requests for proposals are simultaneously given to all at the same time; 12 or about 26% expressed views that were contrary to this. Only 28 or above 57% stated that requests for proposals contain detailed criteria for evaluation, whilst 18 or 36 % opposed this position.

Table 5.7: Disposal of Public Property

ISSUES	YES A	NO B	Don't Know C	A%	B%	C%
Has detailed rules and guidelines for disposal of public property under the act been issued by BPP?	6	20	20	12	44	44
Do MDAs value public property before	10	25	11	22	54	24

disposal?						
Is disposal of public property being conducted by open competitive offers?	15	20	11	32	44	24
Are MDAs disposing public assets since commencement of implementation of this Act?	6	20	20	12	44	44

Only 6 or about 12% of the respondents observed that detailed rules for the disposal of assets have been issued, 20 or about 44 % disagree with this observation, and another 20 or 44 % of the respondents did not know. This is significant and indicates that these rules have not been issued, and if they have been issued, then very few people know about their existence.

While 10 or above 22% of the respondents to the survey noted that MDAs value public assets before disposal, 25 or above 54% said they did not, and 11 or about 24% did not know whether public property were valued before disposal. Again this indicates that many MDAs may not be valuing public assets before disposal. In response to the question of whether the disposal of public property is being conducted through open competitive offers, only 15 or about 32% of the respondents replied in the affirmative, 20 or about 44% disagreed, while the same number claimed they did not know. When asked if public assets are being disposed under the Act, only 6 or about 13% positive responses were received, 20 or about 44% disagreed and another 20 did not know.

The above responses indicate that the rules for the disposal of public property have not been issued by the BPP, and if they have been issued, then many of the MDAs do not know they have been so issued. This results shows that few MDAs may be valuing assets before disposal. It would appear that very limited public assets disposal has occurred since the commencement of the Act, and this may account for some of the results above.

5.8a: Existence of a Code of Conduct for Public Procurement

ISSUES	YES A	No B	Don't Know C	A%	B%	C%
Has BPP issued a code of conduct for public officers involved in public procurement?	10	25	11	22	54	24
Has BPP issued a code of Conduct for non-government procurement observers?	25	6	15	54	12	32

10 or about 22% of the respondents to the survey claimed that BPP has issued a code of conduct for public procurement officers, but 25 or 54% of people disagreed with this, and 11

or 24 % did not know about it. 25 or 54% of the participants in the survey stated that the BPP has issued a code of conduct for non-government observers of procurement processes, six or about 13% of the respondents offered a contrary view to this, and another 15 or above 30% of the people were not aware that this code has been issued.

The above responses inform that either no code of conduct for public procurement officers has been issued or if it has, the officers for whom it is intended do not know about it. Further more, the results indicate that although a code of conduct for non-government observers has been issued, not all persons who should know about it do so, meaning that there is need for increased awareness and dissemination of the code.

5.9. Approval Authority

ISSUES	Yes A	No B	Don't Know C	A%	B%	C%
Are Ministerial tenders boards approval authorities for procurement within MDAs?	44	2	0	96	4	0
Are contract awards approved by the Executive Council?	44	1	1	96	2	2

The above responses show that ministerial tenders boards are approval authorities within MDAs, but also that the Federal Executive Council is still an approval authority for procurement awards, contrary to the provisions of the Public Procurement Act 2007. This is a major issue for advocacy.

6. Conclusion/Recommendation

Consequent upon the foregoing outcomes of the survey, we make the following conclusions and recommendations:

- The apex policy approving body, the Council, is not in place and this is hampering the efficient and effective implementation of the Act and the operations of the Bureau. The government may be risking the invalidity of several public procurement activities if there is no Council to approve current guidelines, rules and policies, or if a substantive Director General and principal officers are not appointed for the Bureau. These are steps that critically need to be taken immediately.
- The Act is operational; the structures for implementing the Act are in place in some MDAs but not in all. The Bureau needs to ensure that every MDA establishes and operates in accordance with the structures provided for by the Act.

- The BPP has performed creditably in this short period since the FEC approved implementation, although with a large room for improvement.
- The MDAs' procurements are becoming transparent, however there is still much space for improvement.
- The Bureau needs to immediately deploy the various data-based tools provided by the Act including that of standard prizes and improve the overall supervision of the framework.
- The Bureau should sustain and improve partnership with non-government monitors and observers, since it does not have sufficient human and material resources to directly monitor all the MDAs.
- There is need for continued, coordinated and strengthened CSO and professional bodies' oversight and advocacy on public procurement. It is under such a unified umbrella as the National Procurement Watch Platform that effective advocacy on issues identified here may be successfully carried out. This is an urgent need.
- There is need to improve knowledge, procurement practice and monitoring skills amongst all stakeholders including the private sector. Improved knowledge and capacity remains a critical need.
- There is need for a strong independent procurement monitoring and reporting mechanism, providing procurement intelligence, supporting the supervisory role of BPP as well as legislative oversight over MDAs and mobilizing increased popular participation in monitoring public expenditure.
- The legislature needs to exercise its oversight powers in ensuring full implementation, monitoring and periodic evaluation of implementation of procurement reforms in Nigeria.

OTHER DOCUMENTS

Framework Document For the National Procurement Watch Platform

Introduction

This framework document was finalized and adopted at the National Procurement Watch Platform meeting held at the Bolton White Hotel, Abuja on Tuesday, June 3, 2008 and attended by 32 participants representing various professional bodies and associations, non-governmental organizations and other civil society organizations.

The Network is conceived of and established as a mass movement of civil society organizations, professional bodies and associations, as well as the organized private sector working to ensure the emergence of an open, timely and transparent public procurement system, delivering value for money.

Conceptual Framework

Vision of the Network

The Vision of the Network is the emergence of:

A competitive, transparent, public procurement system in Nigeria, delivering value-for-money and promoting good governance for national development

Mission

The Mission of the Network shall be:

To promote a competitive, efficient and effective public procurement process in Nigeria in

compliance with relevant laws, through increased popular participation at all levels of government.

Objectives

The broad objectives of the Network shall be:

- To promote accountability, transparency, popular participation and value-for-money in the Nigerian Public procurement System.
- To ensure the emergence of a strong platform of stakeholders mobilizing the critical mass of Nigerians in support of transparent public procurement in Nigeria.
- To improve the capacity of stakeholders to engage at all levels of public procurement within two years.
- To ensure the availability and free flow of procurement information which will enhance popular participation in the procurement process.
- To promote the conduct of Periodic Country Assessments.

Programme of Work and Strategies

In seeking to achieve these objectives, the Network shall adopt the following strategies:

- Capacity-building activities
- Monitoring and Evaluation
- Advocacy
- Public sensitization
- Research and Documentation
- Media Programming

Capacity Building

- In the area of capacity-building, the Network will organize workshops and training programmes for its members and other civil society actors to improve their understanding of the new public procurement regime, help them identify opportunities for engaging the process to advance their interests and build their capacity to engage it.
- The Network will also produce an “Observation Manual” to guide members, other civil society actors and citizens to observe procurement proceedings in accordance with the provisions of the Public Procurement Act 2007 on the observation of proceedings.
- The Network will also develop and adopt a Code of Ethics for its members. The Code will prescribe an agreed standard of conduct for members of the Network to address

possible cases of conflict of interest or other unsavory conduct and enhance the integrity of the Network.

Research and Documentation

- In recognition of the fact that only a limited number of organizations and individuals can be reached through workshops and other training programmes, the Network will develop and produce a standard training manual through which standardized training programmes can be delivered to hundreds of individuals and organizations around the country.
- The Network will document “Annual Procurement Reports”.
- The Network will document and share best practices in all aspects of the public procurement process. Such best practices will be documented based on experiences and observations from the monitoring of procurement processes and activities in different ministries, departments and agencies of the Federal Government or at other levels of government such as the States of Local Government Councils or based on experiences from other countries.
- The Network will conduct consultative policy dialogues on various aspects of the Public Procurement Act 2007 and other relevant public procurement legislation among its members and with other stakeholders in a process of developing civil society policy directions with which to engage the relevant authorities in policy formulation and reform processes in the area of public procurement.

Monitoring and Evaluation

The Network and its members will monitor various aspects of the Public Procurement Act 2007 to assess compliance by the relevant authorities and agencies with the provisions of the law; evaluate the effectiveness of the entire legal framework for public procurement as well as specific individual provisions, and identify loopholes and gaps in the procurement regime. It will also track and collate complaints and observations submitted by contractors, bidders, consultants, other stakeholders and members of the public in accordance with the provisions of the Act. Based on these activities, the Network will issue:

- Annual Reports on the State of Procurement;
- Periodic Country Procurement Assessments; and
- Bidders’ Complaint Evaluation.

Advocacy and Sensitization

In order to ensure greater awareness about the Public Procurement Act 2007 among members of the public as well as government officials, the Network will carry out various advocacy and sensitization activities. Specifically, the Network will carry out and implement the following activities in this regard:

Public Enlightenment and Sensitization

- Production of Information, Education and Communication materials.
- Mass production of the original text of the Public Procurement Act 2007 and wide dissemination of the law to create greater access to it by various stakeholders and members of the public.
- Simplification of the text of the law to make the language more accessible to non-lawyers and the averagely educated members of the society as well as to reduce it into a more manageable volume.
- Mass production of the simplified and abridged version of the law.
- Translation of the simplified and abridged version of the law into as many local languages as possible to familiarize citizens who may not be literate in English with the provisions and requirements of the new public procurement regime.
- Conducting public education activities on the law.
- Analyzing and disseminating widely reports of procurement observation and monitoring in a people friendly manner/format and to relevant stakeholders.

Lobbying

Where necessary, the Network will engage with and lobby relevant authorities and agencies to implement specific provisions of the Act or put in place measures to ensure effective implementation. In this regard, the Network observes that one year after the signing into Law of the Act, the President is yet to constitute and inaugurate the National Council on Public Procurement in accordance with Section 1 of the Act. The Network has therefore decided to engage with the President immediately on this issue.

Strategic Impact/Public Interest Litigation

Where other forms of engagement are unsuccessful or likely to be successful, the Network may carry out strategic impact or public interest litigation to enforce provisions of the Act as may from time to time be necessary.

Grassroots Mobilization

The Network will also conduct grassroots mobilization to create a truly national movement around public procurement, which will transform people at the grassroots levels from their typical roles of spectators to active participants, engaging the process. The grassroots mobilization component of the Network's activities will seek to encourage and develop leaders within grassroots communities who will carry out effective organizing at these levels. This will enable people at the grassroots identify for themselves tangible benefits for themselves and their communities of a transparent, efficient and effective public procurement system and to speak for themselves on procurement issues as they affect them and their

communities. It will seek to link understanding of the corruption challenge by the poor to lack of basic amenities and public services that the people deserve.

Comprehensive Communication Strategy

The Network will develop a comprehensive communication strategy to which will put the issue of public procurement squarely at the centre of public discourse and create awareness about the new regime of public procurement in Nigeria and how members of the public can engage the process. The communication strategy will include:

- The development and maintenance of an interactive civil society website on public procurement through which the public can receive information about various issues relevant to the public procurement regime and processes, as well as contribute to the public discourse.
- The use of e-mail listserves and e-groups for dissemination of information and to facilitate discussions and debates.
- The use of radio discussion programmes.
- The use of television discussion programmes.
- Facilitation of news, features and opinion articles in the print media.
- Monthly or quarterly Procurement Watch Magazine.
- Integrating Procurement Watch observation and Procurement Implementation Reports into the oversight process of the legislature. That is having the secretariat synthesize and submit to relevant legislative committees and the Bureau observation and implementation monitoring reports from CSOs and professional bodies to inform their oversight functions.

Governance and Structural Issues

Membership

Membership of the Network shall be organizational or institutional. There shall be no individual members. Membership is open to non-state actors, excluding individual companies. The members will therefore consist of non-governmental organizations working in various sectors, other civil society organizations, professional bodies and associations cutting across all sectors and the organized private sector.

Governance Structure

There shall be a National Steering Committee, which will be the policy-making organ of the Network, represent the Network in engagements with other stakeholders and interest groups in the public procurement sector, and provide general oversight for other organs and structures of the Network. Members of the National Steering Committee shall be elected or

appointed by consensus from among representatives of member organizations of the Network. The National Steering Committee shall have 19 members. However, where in the opinion of the National Steering Committee additional competencies or expertise are required on the Committee, it shall have the power to invite other representatives of member organizations with such competencies or expertise to join the Committee. National Steering Committee members shall have a tenure of two years, which may be renewed for a maximum further term of two years.

It was agreed that slots on the National Steering Committee would be allocated to the different groups and sectors represented in the Network membership as follows:

- Non-governmental organizations - 8 slots
- Professional Groups and Associations - 6 slots
- Labour - 1 slot
- Organized Private Sector - 2 slots
- Media - 1 slot
- Academia - 1 slot
- Secretariat

Quorum

One number above half of the membership of the steering committee at any point in time.

Secretariat of the Network

The Network shall have a Secretariat with a full complement of permanent staff to implement the activities of the Network under the supervision of the National Steering Committee and in cooperation with members of the Network. The Secretariat of the Network shall, for the time being, be hosted by the Civil Society Legislative Advocacy Centre (CISLAC), which shall coordinate the activities of the Network in collaboration with the Public and Private Development Centre (PPDC).

Working Groups and Committees

The Network will establish such Working Groups and Committees as it may require for the effective execution of its projects and activities. The Network identifies the following Working Groups and Committees as necessary for its work, although the Steering Committee may from time to time establish other Working Groups and Committees as may be necessary:

- Contact and Mobilization Committee
- Research and Documentation Committee
- Media and Communications Committee
- Monitoring and Evaluation Committee

The Contact and Mobilization Committee was immediately constituted with the following members to start work immediately by embarking on a membership drive:

- Mazi Emma Onyema, Chairman
- Edetaen Ojo, representing Media Rights Agenda (MRA), Lagos
- Chibuzo Ekwewuo, representing the Public and Private Development Centre (PPDC)
- Dr Ayokunle Fagbemi, representing the Centre for Peace Building and Socio-Economic Resources Development (CePSERD), Abuja
- Uche Dureke, representing Centre for Development, Constitutionalism, and Peace Advocacy (CDCOPA)
- Dr Kenneth Okoro, representing the Nigerian Medical Association (NMA)
- Abdul Mamman, representing the Chartered Institute of Purchasing and Supply Management
- James Landi, representing TAMACS
- Mrs Hannatu Ibrahim, representing GCDA
- Musa Auwal Rafsanjani, representing the Civil Society Legislative Advocacy Centre (CISLAC)
- Clement Wasah, representing Community Action for Popular Participation (CAPP).

Code of Conduct for Public Procurement Monitors

Observers are expected to perform their duties in strict compliance with the following code of conduct:

1. They shall wear their identity cards/badges while executing their functions.
2. They shall be allowed to enter into venues for procurement proceedings to observe the entire process starting from procurement planning to the acceptance of bids and award of contract.
3. They shall observe the entire procurement proceeding without participating or interfering with the proceeding.
4. They shall not direct, control, instruct or countermand decisions of the Accounting Officer or any other relevant authority.
5. All Observers shall comply with lawful directives issued by the Accounting Officer, chairperson of a Tender's Board or any relevant authority or its representatives.

6. Observers however have the right to ask questions from staff of the procuring entity, bidders and contractors outside the venue of procurement proceedings.
7. Observers shall have access to all necessary information to enable them come to an informed opinion as to the compliance of the procurement proceedings with the Public Procurement Act 2007, other relevant laws and policies of the National Council on Public Procurement and the guidelines of the Bureau of Public Procurement
8. Observers shall not grant press interviews or comments at the venue of procurement proceedings.
9. Observers can comment on the procurement process and other related matters in their report to their organizations, the Bureau and relevant agencies.
10. No Observer shall wear any apparel which:
 - (a) reflects affiliation with a bidder or service provider partaking in the procurement proceedings;
 - (b) in any way canvasses for a bidder or service provider to win the procurement proceedings.

11. No Observer shall participate in any function or activity that could lead to perception of a leaning or being favourably disposed towards a bidder or service provider.
12. An Observer shall not accept any gift, favour or any other benefit, item or service that can be quantified in monetary terms from any bidder, service provider, public officer or any person involved in the procurement proceedings.
13. Observers shall display strict impartiality in the course of observing procurement proceedings and shall at no time indicate or express any statement capable of public incitement at the venue of the procurement proceedings.
14. Observers shall desist from doing anything that compromises the integrity of the procurement proceeding.
15. Observers shall decline serving in that capacity, if any of the bidders, service providers or public officials engaged in the procurement proceedings is related to him by blood, marriage or business association, grant relationship or where the success of a particular bidder or service provider in the proceedings will confer a pecuniary or other advantage on him.
16. Observers shall not serve in a ministry, department or agency where he has been in the last two years, is being or likely to be involved in procurement proceedings as a bidder or service provider.
17. Observers shall not create a source of personal or organizational revenue or advantage by inordinately using public knowledge which comes to him in the course of his observation.
18. All Observers shall take reasonable steps to be factual and substantiate information to be used in their procurement report. In a situation where they cannot substantiate their report, the Observer shall, without fear, state his inability to verify the truth of the information.
19. Observers shall report all breaches of the Code of Conduct and offences observed during procurement proceedings.
20. Failure to comply with lawful directives may amount to a violation of the Public Procurement Act.

Qualifications of Public Procurement Observers

The qualification of Observers from organizations wishing to monitor procurement proceedings shall be as follows:

1. The organization's mandate, if an NGO, must include issues of transparency, accountability and anti-corruption; if a professional body, its expertise must be relevant to the goods, works or services being procured.
2. The organization, if an NGO, must have a track record of work in issues of transparency, accountability and anti-corruption.
3. The NGO must have been registered with the Corporate Affairs Commission, a relevant state or local government authority; and if a professional body, it must be chartered by statute or widely recognized as such.
4. That an Observer organization must not be one that has been blacklisted by the Platform for infractions to this code of ethics.
5. That every observing organization shall administer an oath of allegiance on its personnel involved in observation duties to comply with the Public Procurement Act, rules and regulations made there under.

Oath of Allegiance for Public Procurement Monitors

I.....
 do solemnly swear/affirm that I will discharge the duties of observation and reporting on the procurement proceedings of Ministries, Department and Agencies of the Federal Government in an honest and dispassionate manner; that I will use the best of my abilities and endeavours to discharge my responsibilities in a way and manner that promotes the objectives of the Public Procurement Act 2007, and policies and regulations made thereunder, the Constitution of the Federal Republic of Nigeria 1999 and other laws in that regard; that I shall not take advantage of any information that comes to me for any personal gain or extort money or blackmail a party to the procurement proceedings

So help me God.

**NATIONAL PROCUREMENT WATCH PLATFORM PUBLIC PROCUREMENT
OBSERVATION CHECKLIST**

1. Introduction

- a) Observer's Name:
- b) Observer's Organization:
- c) Observer's Address (include Telephone, Email and Fax):
- d) Ministry, Department or Agency Observed:
- e) Description of Procurement:
- f) Value of Procurement:
- g) Sources of Procurement Funding and their respective Percentages:
- h) Name of Accounting Officer:

2. Procurement Plan

- a) Was the procurement plan made available to you? Yes [] No []
- b) Did the Procurement Plan:
 - i) Contain a needs assessment and evaluation? Yes [] No []
 - ii) Identify the goods, works or services required? Yes [] No []
 - iii) Contain cost implications arising from the result of market and statistical surveys? Yes [] No []
 - iv) Aggregate requirements where possible both within the procuring entity and between procuring entities? Yes [] No []
- b) Was the procurement contained in the annual budget? Yes [] No []
- c) Who prepared the Procurement Plan? List the persons and their designations?

3. Procurement Methodology

- a) What procurement methodology was chosen?
- b) Reasons for choosing the methodology:

c) Did the methodology comply with the prior review thresholds set by the Bureau? Yes [] No []

d) Is there evidence that tenders have been split to avoid thresholds set by the Bureau? Yes [] No []

If the answer is in the affirmative, provide details:

4. Advertisement

a) Did the procuring entity advertise for bids or proposals? Yes [] No []

If the answer is in the affirmative, where was the advertisement placed?

- i) Notice Boards
- ii) National Newspapers - specify
- iii) Procurement Journal
- iv) Official Websites
- v) Relevant internationally recognized publications
- vi) Others - specify

b) How many weeks before the deadline for the submission of bids was the bid advertised?

c) Did the advert contain all the necessary information for the collection and submission of bids? Yes [] No []

d) Was there any complaint from bidders of non-provision of equal and simultaneous opportunity? Yes [] No []

If the answer is in the affirmative, please give details:

5. Pre-qualification

a) In pre-qualification proceedings, what documentation did the procuring entity issue to bidders?

b) Was this document made available to you? Yes [] No []

c) Were there requests for clarifications/complaints? Yes [] No []

d) Did the procuring entity respond to the requests? Yes [] No []

- e) Did the procuring entity communicate other bidders of its response to the request for clarification? Yes [] No []

6. Bidding

- a) Nature of bidder - natural person or a company?

- b) If a company is bidding, does it have:

- i) Corporate Affairs Commission's registration? Yes [] No []

- ii) Financial capacity to execute the procurement? Yes [] No []

- iii) Equipment and infrastructure to execute the procurement? Yes [] No []

- iv). Does the bidder have personnel required to execute the contract? Yes [] No []

- c) Is the company in receivership, the subject of any form of insolvency or bankruptcy proceedings or the subject of winding up petition? Yes [] No []

If the answer is in the affirmative, please give details:

- d) Has the company or individual fulfilled its obligation to pay taxes, pensions and social security contributions? Yes [] No []

If the answer is in the affirmative, please give details:

- e) Has the company any director or senior manager who has been convicted in any country for any criminal offence relating to fraud or financial impropriety or criminal misrepresentation or falsification of facts relating to any matter? Yes [] No []

If the answer is in the affirmative, please give details

- f) If a private company, is it controlled by persons who are subject to any bankruptcy proceedings, who have been declared bankrupt or made compromises with their creditors within the last two calendar years prior to the initiation of procurement proceedings? Yes [] No []

If the answer is in the affirmative, please give details:

- g) Has the bidder been sentenced for a crime committed in connection with a procurement proceeding or any other crime committed to gain financial profit? Yes [] No []

If the answer is in the affirmative, please give details:

- h) Did the bidder fail to submit a statement regarding dominating or subsidiary relationships with other parties to the procurement proceedings or persons acting for the procuring entity? Yes [] No []

If the answer is in the affirmative, please give details:

- i) What was the language of the procurement proceedings?

- j) Was every bid accompanied with an affidavit disclosing the lack of pecuniary interest and confirming the contents of the bid as true and correct? Yes [] No []

- k) Were any bids excluded and what were the reasons for the exclusion? Yes [] No []

- l) Did you observe any conflict of interest, bribery, treating, or inappropriate conduct in the bidding? Yes [] No []

If the answer is in the affirmative, provide details

7. Requests for Quotations

- a) How many suppliers were asked to present quotations?
- b) Were there negotiations between the procuring entity and the contractor before the award of the contract?

8. Submission of Bids and Bid Security

- a) If bid security was required, did all bidders provide one? Yes [] No []
- b) Were the submitted bids placed in a secured tamper proof bid box? Yes [] No []

- c) Did the procuring entity issue receipts showing the date and time of submission of bid? Yes [] No []
- d) Were bids accepted after the closing date for bid submission? Yes [] No []

9. Bid Opening

Did the Bid Opening Formalities:

- a) Permit attendees to examine the envelopes in which the bids have been submitted to ascertain that the bids have not been tampered with? Yes [] No []
- b) Cause all the bids to be opened in public, in the presence of the bidders and their representatives and any interested member of the public? Yes [] No []
- c) Ensure that the bid opening takes place immediately following the deadline stipulated for the submission of bids or any extension thereof? Yes [] No []
- d) Ensure that a register is taken of the names and addresses of all those present at the bid opening and the organizations they represent? Yes [] No []
- e) Call over to the hearing of all present the name and address of each bidder, the total amount of each bid, the bid currency, and ensure that these are recorded in the minutes of the bid opening? Yes [] No []

10. Examination of Bids

- a) Did all bids meet the minimum eligibility requirements stipulated in the bidding documents? Yes [] No []

Give details if the answer is No:

- b) Were bids:
 - i) duly signed? Yes [] No []

- ii) generally in order? Yes [] No []
 (If no, how many were not)
- iii) substantially responsive to the Bidding Documents? Yes [] No []
- c) How were the following treated during bid examination?
- i) change in prices
- ii) changes of substance in a bid
- iii) changes to make an unresponsive bid responsive
- iv) bids received after the date and time for the submission of bids stipulated in the solicitation documents
- v) bids submitted at the wrong location
- d) Did any invalid bid move from the examination to the evaluation stage? Yes [] No []
 (Provide details where necessary)

11. Evaluation of Bids

- a) In the evaluation of bids, did the procuring entity use any other criteria apart from the ones stipulated in the bid solicitation documents? Yes [] No []
- b) Did the evaluation:
- i) check out omissions and quantify same? Yes [] No [] Not Applicable []
- ii) apply discounts, as applicable? Yes [] No [] Not Applicable []
- iii) clarify questionable minor deviations with bidders? Yes [] No [] Not Applicable []
- iv) quantify in monetary terms such questionable deviations? Yes [] No [] Not Applicable []
- v) convert to common currency? Yes [] No [] Not Applicable []

- vi) calculate and tabulate bid amount with domestic preference where applicable? Yes [] No [] Not Applicable []
- vii) determine the lowest calculated prices in order of rank? Yes [] No [] Not Applicable []
- viii) post-qualification of bidders where applicable? Yes [] No [] Not Applicable []

12. Acceptance of Bids

- a) For goods and works, was the successful bid the lowest cost bid from the bids responsive as to the bid solicitation? Yes [] No []
- b) Were there grounds supported by the PPA to award the contract to another bidder who is not the lowest cost responsive bidder? Yes [] No []

Provide explanations:

- c) For proposals, what were the criteria for the acceptance of the bid?
 - i) The responsive bid or the proposal with the best combined evaluation in terms of general criteria set with respect to technical and price factors in the case of quality and cost based selection? Yes [] No []
 - ii) The responsive bid or proposal with the lowest price in the case of least cost selection? Yes [] No []
 - iii) The responsive bid with the highest technical ranking within the budget? Yes [] No []

Provide explanations if any

13. Tenders Board

List the names and designations of the members of the Tenders Board or technical evaluation committee of the tenders board that worked on the procurement.

14. Certificate of “No Objection” to Contract Award

Did the procuring entity obtain a certificate of “no objection” to the award of contract before awarding the contract? Yes [] No []

15. Margins of Preference

- a) Was a margin of preference applied? Yes [] No []
 - i) Is the procurement under international competitive bidding? Yes [] No []
- b) Did the solicitation documents indicate that domestic preferences will be applied and the information required to establish eligibility? Yes [] No []

16. Mobilization Fees

If mobilization fees have been paid:

- a) At what percentage of contract value?
- b) Did the contractor provide an unconditional bank guarantee?

17. Administrative Review

Timely response by the Accounting Officer and Bureau to complaints by bidders?

- a) How many working days did it take the Accounting Officer to make a decision?
- b) How many working days did it take the Bureau to make a decision? (Where applicable)

18. Conflict of Interest

In your opinion (give reasons for your opinion), did the public officers involved:

- (a) possess an interest outside his official duties that materially influenced the outcome of the tender? Yes [] No []
- (b) possess a direct or indirect interest in or

- relationship with a bidder, supplier, contractor, or service provider that is inherently unethical or that may be implied or constructed to be, or make possible personal gain due to the person's ability to influence dealings? Yes [] No []
- (c) entertain relationships which are unethical, rendering his attitude partial towards the outsider for personal reasons or otherwise inhibits the impartiality of the person's judgments? Yes [] No []
- (d) place by acts or omissions the procuring entity he represents or the Government in an equivocal, embarrassing or ethically questionable position? Yes [] No []
- (e) entertain relationships compromising the reputation or integrity of the procuring entity he represents or the Government? Yes [] No []
- (f) receive benefits by taking personal advantage of an opportunity that properly belongs to the procuring entity he represents or the Government? Yes [] No []
- (g) create a source of personal revenue or advantage by using public property which comes into his hands either in the course of his work or otherwise? Yes [] No []
- (h) disclose confidential information being either the property of his procuring entity, the Government or to a supplier, contractor or service provider to unauthorized persons in a bid to influence bidding outcome Yes [] No []

19. Concluding Comments

- a) In your opinion was the public procurement
- i) transparent?
 - ii) timely?
- b) Did the public procurement promote
- i) competition?
 - ii) value for money?
 - iii) fitness of purpose?

iv) generally in accordance with the provisions of the PPA?

20. Further Information

Use extra sheets of paper for further comments and issues not covered by this Checklist but which you consider relevant to the achievements of the objectives of the PPA

Signature

Date



National Procurement Watch Platform

c/o CISLAC, 5 Mahatma Ghandi Street, By Bullet Garden, off Shehu Shagari Way Area

11 Abuja. Email: nationalprocurementwatchplatform@gmail.com.

MEMBERSHIP APPLICATION FORM

ORGANISATION'S INFORMATION:

Name: _____

Address: _____

Phone Number: _____

Fax umber: _____

E-mail address: _____

Contact Person: _____

Organization's Objectives: _____

We hereby request to join the National Procurement Watch Platform, and agree to abide by the Code of Ethics for stakeholder participation in the public procurement process. We agree to submit a report to the National Procurement Watch Platform in the format contained in its checklist on every procurement activity we observe.

Name: _____

Designation: _____

Signature: _____ Date: _____