PATHWAY FOR AN IMPROVED PROCUREMENT LAW IN NIGERIA

BY: Chibuzo Chiemela Ekwekwuo

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Dedication

To my dear wife Faith and our children, Ganiru, Chi Chi, Ngozi and Chinalurumuogu who continue to bear the greatest burden of my long working hours, I dedicate this work.

Contents

Abbreviations & Acronyms

BEME - Bill of Engineering Measurement and Evaluation
BMPIU - Budget Monitoring and Price Intelligence Unit
BPP - Bureau of Public Procurement Act
CPAR - Country Procurement Assessment Report
EFCC - Economic and Financial Crimes Commission
EXCoF - Executive Council of the Federation (same as the Federal Executive Council (FEC)
FCT - Federal Capital Territory
FEC - Federal Executive Council (same as Executive Council of the Federation, EXCoF)
DG - Director General
HOS - Head of Service
ICB - International Competitive Bidding
ICPC - Independent Corrupt Practices and Other Related Offences Commission
MD - Managing Director
MDA - Ministries, Departments, & Agencies
MTB - Ministerial Tenders Board
NASS - National Assembly
NCAA - Nigeria Civil Aviation Authority
NCB - National Competitive Bidding
NCPP - National Council on Public Procurement
NJC - National Judicial Commission
PPA - Public Procurement Act
PPDC - Public & Private Development Centre Ltd.
PTB - Parastatal Tenders' Board
SGF - Secretary to the government of the Federation
TB - Tenders Board
WB - World Bank
UNCITRAL - United Nations Commission on International Trade Law

ABSTRACT

Since the return to civil rule in Nigeria in 1999, successive governments have recognized the importance of transparent, fair, competitive, accountable procurement systems aimed at reduction of corruption and improving service delivery to the citizens.

As a result, the Government of Nigeria embarked upon procurement reforms. This process was supported by a Country Procurement Assessment Report (CPAR) conducted in the year 2000. This report had identified many gaps and challenges both at the Federal and other tiers of government and suggested remedies including the passage of a new procurement law. The law was promulgated in 2007 as the Public Procurement Act (PPA 2007). However, soon after the law was passed and assented to in 2007,the Federal Government of Nigeria, the proponent of the Act, submitted an executive bill to amend the Act. The National Assembly (Nigeria`s National legislature)[1], while considering the amendment proposals submitted by the executive branch, introduced amendment proposals of its own..

This publication primarily examines this and other proposals for amendment from the executive, legislature and stakeholders. It x-rays comparable international legal regimes and practices, and concludes that the PPA 2007, despite its

limitations provides a reasonable framework to ensure clarity, achieve transparent, fair, competitive and accountable procurement system that will deliver value for money, and improved service delivery for Nigeria. It illustrates that proposed amendments from executive and legislative arms of government betray tensions between public administrators, the political leadership, the legislature and the challenge of political interference in the procurement process in Nigeria, and fails to capture the yearnings of other stakeholders. It also concludes that the amendments proposed by both arms of government reflect the state of development of governance structures and the continuous contest for power associated with governance system whose institutions are weak.

Finally, the publication recommends a number of amendments to the PPA 2007.These include: provisions on offences, membership of the Council, appointment of Director General of the Bureau, Criteria for selection of winning bidders, complaint and redress mechanisms among others.

CHAPTER ONE

1.1 COUNTRY BACKGROUND/INTRODUCTION.

Nigeria has a population of about 158.3milion[1]. According to Government statistics, 54% of Nigerians live below the poverty line of less than a dollar a day[2]. This according to the 2006 Census stands at 78 million people. This is greater than the combined total population of seven West African countries (Ghana, Togo, Sierra Leone, Republic of Benin, Liberia, the Gambia and Cote d'Ivoire) whose total population is about 67.3 million. Nigeria, with a huge and industrious population, vast arable land and natural resources has the potential to become an economic giant in Africa. Nonetheless, this Africa's largest and world's eighth exporter of crude oil[3] also plays host to the largest single population of poor people in Africa. Governance is at the heart of the development problems in Nigeria. Authoritarian military regimes, poor governance evidenced in gross mismanagement of resources, poor procurement practices, failed political processes, and weak institutions led to years of poor economic performance and abysmal human development indices. Nevertheless, since the return to civil rule in 1999, successive governments in Nigeria have recognized that weak procurement systems contribute to corruption and poor governance. Thus, governments have made consistent efforts designed to improve procurement laws, and practices in Nigeria.

[1] **http://www.population.gov.ng/index.php and also http://www.tradingeconomics.com/nigeria/population assessed 24th October, 2011.**

[2] National Planning Commission 'Nigeria Millennium Development Report' (2007)

[3] Proposal for support of Public And Private Development Centre Nigerian Procurement Monitoring Program addressed to United Nations Democracy fund 2009

Procurement reforms in Nigeria have been part of the broader public sector reform effort, seeking to improve government effectiveness in service delivery. In 1999, there was a clear understanding by government that weaknesses in the existing procurement system were contributing to the nagging issue of corruption. Indeed it has been said that about 80% of corruption cases in Nigeria arise from the Procurement process[4]. An assessment of the state of procurement law and practice was carried out by the government with the help of the World Bank. The result of that assessment carried out in conjunction with a national task force was the Country Procurement Assessment Report (CPAR) 2000. The CPAR report was a detailed diagnosis of the Nigerian procurement system and included both findings and recommendations[5]. To begin implementation of recommendations of the CPAR, the government set up the Budget Monitoring and Price Intelligence Unit (BMPIU) in June 2003 as an operational department headed by the Senior Special Assistant to the President. Although thinly staffed, its personnel comprised of experts with bias for project management, construction and procurement. The BMPIU operated under clear goals, objectives, and strategies. Its goal was to put in place and ensure full compliance with laid down guidelines and procedures (produced by it) for the procurement of capital and minor capital projects as well as associated goods and services . Among its objectives were to :

[4]Ojeme Hastings " Public Procurement Act as an indispensable fiscal policy to move Nigeria forward" Public Procurement Journal February March 2009, page 17

[5]World Bank supported Nigerian Country Procurement Assessment Report (CPAR) Vol 1 Summary of Findings June 30 2000.

A) Harmonize existing government policies/practices and update same on public procurement;
B) Determine whether or not Due Process has been observed in the procurement of services and contracts;
c) Introduce more honesty, accountability and transparency into the procurement process;
d) Establish and update pricing standards and benchmarks for all supplies to government;
e) Monitor the implementation of projects during execution with a view to providing information on performance, output and compliance with specifications and targets;
f) Ensure that only projects which have been budgeted for are admitted for execution.

The strategies of the BMPIU revolved primarily around: regulatory, certification, monitoring, training and advisory functions[6]. It was the BMPIU that produced the draft public procurement bill, presented to the National Assembly by the Executive Council, which was considered, revised and enacted into law in 2007 as the Public Procurement Act, 2007. Soon after the passage of the PPA 2007, the Bureau for Public Procurement (BPP)[7] was established. The Bureau benefited from the staff and structures of the BMPIU, and made quick progress in beginning to enforce the provisions of the PPA 2007 within its prior review threshold and to secure compliance by procuring entities generally. It also made strong strides in improving capacity of procuring entities to

6 Compliance with the Public Procurement Act 2007, A survey report of procuring entities, civil society observers, bidders , legislators and Bureau for Public Procurement issued by the Public & Private Development Centre in 2010.
7 Herein referred to as the Bureau.

implement procurement in accordance with the new law. It is to be noted that while the Bureau's function under the new law, includes elimination of corruption in award and execution of public contracts[8], it does not include verification and payment certification as was the case with the BMPIU[9]. Despite the foregoing, the government failed to establish the National Council on Public Procurement, which ought to be the apex procurement policy approval body.

However, complaints about continued exercise of contract approval powers by the Federal Executive Council and non-constitution of the National Council on Public Procurement persisted and may have prompted an executive bill to amend the PPA 2007. Also there were some stakeholder concerns about some of the provisions of the Act. These concerns range from its perceived rigidity, over prescription, apparent conflicts and in a few respects lack of clarity. We will see later in this publication the extent to which amendments proposed by both the executive arm of government and the legislature sought to address these challenges or to legitimize executive actions already complained about by stakeholders, and also whether or not these proposals capture important citizen concerns and expressed need for amendment.

During the consideration of the proposed amendments of the Act by the Executive, both chambers of the National Assembly introduced several other proposals for amendment. These

8 Emeka Ezeh " The old order of corruption through contract award and execution is over "Public Procurement Journal Maiden Edition November 2008.page 3
9 Emeka Ezeh "Our new role in budget implementation" Public Procurement Journal Maiden Edition November 2008. Page 2.

include proposals to establish independent procurement supervisory and oversight body for both the legislature and Judiciary. Both houses of the National Assembly considered the amendment proposals in detail. The Senate passed a set of proposals first on the 15th January 2009. It later rescinded this decision and committed the proposals yet again to its Finance Committee for further consideration. On the 9th July, 2009, the Senate passed its last version of the proposed amendments. The House of Representatives had on 11th September 2008 passed its version[10].

As is normal with bi-cameral legislative practice, a conference committee of the Senate and House of Representatives was set up to harmonize differences in the two versions of the amendment bill passed. There is no doubt that the proposal submitted by the executive saw substantial changes during legislative consideration. The version of the bill that was recommended by the joint conference committee of both houses and passed, in the words of the joint conference committee *"...basically seeks to provide for the independence of the legislature and judiciary in procurement matters and to allow for flexibility in determining the level of advance payment in order to facilitate budget implementation"*[11]. The initial bill proposed by the Federal Executive Council was *"intended to amend the Public Procurement Act 2007 by introducing additional tier of approving body (the Federal Executive Council) in respect of thresholds that would be*

[10] Report of the Conference Committee of the National Assembly on Public Procurement Act (Amendment Bill) November 2009.

[11] Report of the Conference Committee on Public Procurement Act (Amendment Bill) November 2009.

handled by each procuring entity"[12]. This publication considers not only the executive amendment proposals, the proposals of both houses of the legislature and decisions of the legislature as in the harmonized version of the bill presented by the legislative conference committee and passed, but also some alternative amendment proposals by stakeholders and or proposals in other bills proposed in the legislature within the period 2008-2011 seeking to amend the Public procurement Act 2007.

The following is the author`s contribution to the continuing debate on proposals for amendment of the Public Procurement Act, 2007.

[12]Explanatory Memorandum, An Act to amend the Public Procurement Act 2007 and for other matters connected thereto.

CHAPTER 2

SUMMARY OF THE PROVISIONS OF THE PPA,2007

2.1 Structure for regulating procurement under the PPA

There is no doubt that the Act provides several mechanisms to address specific challenges identified by the CPAR. The Act established the Bureau of Public Procurement (BPP or the Bureau) to fill the identified gap of a central regulatory authority issuing rules, standards and continuously over sighting, evaluating and refining processes and procedures for procurement at the Federal level in Nigeria. It provides for a National Council on Public Procurement (the Council) as the apex policy approval body with one half of its proposed members from civil society.

It also provides for mandatory citizen observation of procurement processes to improve transparency and citizens oversight on public expenditure. It empowers the Bureau to formulate and the Council to approve implementing rules and guidelines.

It provides for formulation of detailed codes of conduct for stakeholders and for the professionalization of procurement in the public service at the federal level in Nigeria. It empowers the Bureau to certify that laid down procedures were followed in procurement above a given threshold, and to supervise

implementation and ensure the emergence of a transparent, fair, competitive procurement process, delivering value for money and ensuring fitness for purpose.

2.2 Structures for Carrying out Procurement under the PPA: The individual Ministries, Departments, Agencies, and Parastatals (MDAs) were recognized as independent procuring entities, and given full powers to plan and implement procurement. The Act set up internal mechanisms [called procurement planning committees (PCC)] for inclusive procurement planning and implementation within MDAs. It sets forth a membership for the PCC intended to achieve broad based departmental participation in defining and planning MDA procurement activity. The law restructured and empowered the Tenders Boards to become the approval authority to take the award decision for procurement contracts. It empowered the Accounting Officer of each procuring entity (Permanent Secretary in the case of ministries and Director General or Chief Executive in the case of agencies) as line supervisor of procurement activity in the MDAs, superintending over the procurement planning committee. It provided for dual responsibility principles to help ensure that someone is held accountable for every infraction or abuse of the procurement process. Also it provides for professionalization of procurement and introduction of a professional procurement

cadre in the Civil Service.

2.3 Key elements of the Procurement Process under the PPA: The PPA sought to address the key findings of the CPAR, as indicated above, it sets up an independent regulatory authority and system, different from the MDA structures that implement procurement daily. It vests the Council and the Bureau with sufficient power to achieve *"effective regulation of public procurement, harmonization of existing government policies and practices on procurement, setting common procurement standards, and developing the legal framework and professional capacity for public procurement in Nigeria"*[13]. The PPA provides a regime for documentation of not only decisions, but also rationale for decision making, providing that all procurement related communication must be in writing. It sets out a regime for standard documentation and practice, and adequate dissemination of information relating to opportunity for procurement contracts.

The law provides for procurement of goods, works and services as well as disposal of assets, and is made applicable to all works, goods and service contracts at the federal level except for *"special goods, works and services involving national defense or national security, unless the president`s express approval has been first sought and obtained"*[14]. A broad approval was granted then by the sitting president[15],

[13] Ibid Report of the Conference Committee on Public Procurement Act (Amendment Bill) November 2009.
[14] S. 15(2) of the PPA 2007
[15] Alhaji Musa Yar Dua former president of Nigeria.

which has remained in force till today. The Act provides essential steps in procurement including but not limited to; efficient procurement planning driven by needs assessment, appropriation, advertisements, transparent pre-qualification, bid submission, bid opening, bid evaluation (technical and financial), tenders board approval and contract award and execution[16]. The Act provides for citizens' participation in monitoring the implementation of its provisions, requiring that the MDAs invite at least one representative of an NGO and one representative of a professional body with expertise in the area of the goods or works being procured to independently monitor the procurement activity. The Act provides a timely complaint and redress mechanism, enabling dissatisfied bidders to complain, and where their complaint was not addressed or they are unsatisfied with the decision thereon, to furher appeal to a higher body. It also preserves the right of action in a court after exhausting the internal mechanisms[17].

2.4 Fundamental Principles of Procurement under the PPA: The PPA 2007 prescribes fundamental principles that all procurement regulated by the Act needs to comply with. This was the first of such a provision in any law in Nigeria. It requires that all procurement be based on *prior* procurement plans**,** prior budgetary appropriations**,** and that no procurement contracts should be formalized until the MDA is assured that funds are available to meet maturing

[16] "Report of Stakeholder Capacity Building Workshop conducted by BPP" Public Procurement Journal January March 2010 page 12
[17] S. 54 of the PPA 2007

obligations**.** The Act requires that a bidder, where appropriate, shall have professional, technical and financial qualifications, as well as have the required equipment and personnel needed to implement a particular procurement activity[18]. It leaves the details of the exact qualifications for each procurement activity for the procurement departments to determine through procurement planning. It provides for Open Competitive Bidding as the default or primary method of procurement, and defines it as a process by which a procuring entity "based on previously defined criteria effects public procurement, by offering to every interested bidder, equal simultaneous information and opportunity to offer the goods and works needed".

The Act requires that all procurement be carried out; *"in a manner which is transparent, timely and equitable for ensuring accountability...; with the aim of achieving value for money and fitness for purpose; in a manner which promotes competition, economy and efficiency; and in accordance with procedures and timelines laid down in this Act and as may be specified by the Bureau.[19]"* As part of the fundamental principles of procurement, Sections 16 of the Act further sets out conditions for disqualification of a contractor or its bid, certain documents that need to accompany a bid, the basis for selection of a winning bid, and requires that unclassified public procurement information be accessible to the public.

[18] S 16(6) of the PPA
[19] S 16(1) of the PPA

CHAPTER 3

GAPS, CONFLICTS AND IDENTIFIED CHALLENGES

3.0 Introduction

Within the first year of the implementation of the Act, some stakeholder groups raised concerns about some of the provisions of the Public Procurement Act 2007 (PPA), the concerns ranged from its perceived rigidity, over prescription, apparent conflicts and in a few respects lack of clarity, this chapter will examine these gaps, and capture concerns where they exists.

3.1. Limitations to the transparency provisions.

The PPA clearly provides for citizens access to procurement records. As one of its fundamental principles, the PPA requires that all procurement be in a manner that is transparent[20]. Section 16 (14) of the PPA 2007 grants public access to all unclassified procurement records at cost of copying and certifying and an administrative charge to be determined by the Bureau[21].

The PPA 2007 fails to define which record is classified, and which is not, or to place limits on value of administrative charges that the Bureau may impose. This section appears to be in conflict with or to limit the broader public access to procurement information granted in Section 38 of the Act, where the Act grants unlimited access to procurement records

[20] S 16(1) d of the PPA

[21] S 16(4) of the PPA" 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".

to *"any person after a tender, proposal, or quotation has been accepted or after procurement proceedings have been terminated without resulting in a procurement contract.*[22]*"* Also Section 38 provides that disclosure of procurement records prior to acceptance of a tender, proposal, and quotation or before termination of a proceeding may be ordered by a court. However, Section 38(3) of the PPA 2007, appears to give the procuring entity discretion contrary to Section 287(3) of the 1999 constitution of the Federal Republic of Nigeria[23] to refrain from obeying such a court order *"if the disclosure would a) be contrary to law; b) impede law enforcement ; or c) prejudice legitimate commercial interest of the parties"*. Juxtaposed against the provisions of the Freedom of Information Act 2011 (FOI Act), and the Constitution the access to information provisions appears to require fine-tuning and amendment. Section 2 of the FOI Act imposes an obligation on public institutions to create, organize, maintain, and keep public records, as well as a right of access by all persons to request and receive information publicly held. It also provides for proactive disclosure obligations of public agencies, and one of the classes of information they are required to proactively disclose is "information relating to the receipt or expenditure of public or other funds of the institution"[24]. In its current form, S. 16 (14) of the PPA 2007 is in conflict with the Freedom of Information Act 2011 which is the specific law that regulates public access to information publicly held.

[22] S 38 (2)(a) of the PPA.
[23] S 287(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 t hose other courts, respectively."
[24] S 2 (3) d of the Freedom of Information Act 2011

3.2 Subjection of the Bureau's Powers to perform its functions to prior approval of the Council.

The Act establishes the Bureau as the industry regulator, and gives it several functions ranging from formulation of policy and guidelines, preparation of standard documents, down to supervision of implementation of established procurement policies and rules. It also gives it several information collation and dissemination functions, including the setting up of data bases to aggregate data and information on the following areas: procurement plans; procurement journals, particulars, classification and categorization of contractors, standard prices etc.

Section 6 of the PPA 2007 grants the Bureau the powers with which to carry out these functions. Nonetheless, in providing for those powers Section 6(3) of the PPA subjects three broad and important powers of the Bureau to prior Council's approval, this section provides thus, " the Bureau shall subject to the approval of the Council , have power to; a) enter into contract or partnership with any company, firm or persons which in its opinion will facilitate the discharge of its functions; b) request for and obtain from any procurement entity information including reports, memoranda and audited accounts, and other information relevant to its functions under this Act and c) liaise with relevant bodies or institutions

national and international for effective performance of its functions under this Act.". In effect except with the approval of the Council, the Bureau has no powers to enter into contract or partnership with anybody or do any of the other things outlined in Section 6(3) (b) & (c), including requesting for and obtaining information and documents fundamental to performance of its regulatory functions from any procuring entity. This is despite the fact that the Council is an ad-hoc body, which will only sit from time to time, and might not be sitting when the Bureau may need to take such steps, that occur regularly such as requesting information and documentation from procuring entities. If implemented this can undermine the performance of the Bureau's function, this power is also susceptible to abuse.

3.3 Powers of the BPP under Section 6.

Section 6(1) of the PPA empowers the Bureau to recommend to the National Council on Public Procurement disciplinary actions which may include; suspension of officers in the service; replacement of the head or any members of the procuring entity or tenders board; discipline of accounting officers; temporary transfer of procuring and disposal function of a procuring entity[25]. However, the PPA 2007 does not give any disciplinary powers over public servants in the service to the Council. On the contrary, the discipline of civil servants in Nigeria is the responsibility of the Civil Service Commission by paragraph 11 of the third schedule to the

[25] See generally section 6 of the Act.

constitution, except delegated by it with approval from the President to any of its personnel or any officer in civil service of the federation in accordance with Section 170 of the Constitution. Indeed, it is doubtful whether the Civil Service Commission can delegate such disciplinary powers to the Council. Worthy of note is that neither the language of Section 170 of the Constitution nor the third schedule to it, anticipates delegation of the powers to such an authority as the National Council on Public Procurement. The effect may be that the Council has no legitimate or valid authority to discipline any public servant, and recommendations to it of any disciplinary action by the Bureau may be ultra-vires*, and simply of no effect.*

3.4 Provisions on mobilization payments, advance payments and performance guarantees.

The provision in Section 35 of the PPA 2007 places an upper limit of 15% on mobilization fee payable for all projects. Though, well intended, this poses enormous challenges for major projects and supplies involving manufacture and shipments of goods from abroad. Standard conditions of which often require irrevocable letters of credit for sums well above 15% of value of projects. Also the provisions for performance guarantee in Section 37 suggests that performance guarantees are only a pre-condition for contracts in which advance payment is to be made. Indeed, given the challenge of poor implementation of public contracts,

government needs to secure performance guarantees in a broader range of public contracts. The direct result of the requirement for advance payment guarantees appears to be the reduction of the number of cases where contractors abscond with the advance payment. It is reasoned that with the provision on advance payment guarantees still in force, the chances of government losing money to contractors through unreasonable advance payment would be minimal; however some stakeholders have argued that the maximum payment possible under the law may need to be raised for exceptional situations.

3.5 Dual role of procurement implementation and dispute settlement vested in procuring entities and the Bureau.

The Bureau has powers to act upon all complaints made to it pursuant to the PPA 2007. This seems reasonable when such complaints relate to procurement below the "No Objection Threshold" carried out wholly by procuring entities. It is to be ascertained, whether this is considered entirely appropriate, if the complaint is against the Bureau's decision to grant or refuse No Objection or steps taken by the Bureau in order to grant or refuse No Objection. This is similar to the other provision in the same Section 54 of the PPA 2007, which provides that complaints against omissions or breaches by procuring or disposing entities be first referred to the Accounting Officer of the procuring entity, who by Section 20 of the PPA is the person charged with line supervision and

overall responsibility for the entire procurement proceedings from planning to implementation and disposal of assets in the MDA. Thus, a joint reading of Sections 54 (1 & 2) and 20 of the PPA 2007 may present a situation where a wrongdoer (i.e. the accounting officer) presides over a complaint against himself and his agency. Similarly, a joint reading of Sections 54 (3-6) of the PPA may present a situation where a wrongdoer (i.e. the Bureau) presides over a complaint against itself. These provisions may permit scenarios where both the Accounting Officer and the Bureau are judges in their own cause. But one of the grounds for seeking judicial review remedy of certiorari against the actions or omissions of inferior courts or quasi judicial acts of administrative bodies in Nigeria is the infringement of one of the cardinal principles of fair hearing and natural justice rule of *"nemo judex in causa sua"*[26]. This rule is violated where a party to a cause acts as a judge in its own cause. But this principle of *"nemo judex in causa sua"* applies only in the exercise of judicial or quasi judicial function. It does not apply to the exercise of administrative powers, or lie against executive acts, or mere administrative acts as decided by Nigeria's Supreme Court[27]. It would therefore, appear by the wording of Section 54 of the PPA 2007 that the review envisaged by either the Bureau or an Accounting Officer is an administrative one and not a judicial review. Thus, the principle of nemo judex in causa sua may not apply. This notwithstanding, it is not unimaginable that

[26] No one should be a judge of his own cause.
[27] See the case of Nwaoboshi V. MILAD, Delta State (2003) 11 N.W.L.R (Pt. 831) 305 at 318 paras D E SC.

situations may exists when rights of parties are at stake and the actions or decisions of the Bureau and or the Accounting Officer may in some cases be considered quasi judicial. It is also entirely a different thing, the impact on the psyche of the complaining bidder, if his complaint is to be directed to the same person, against whom it is made and will be decided by the same persons or institution who perpetrated the wrong. Like it is often said "Justice is not only to be done, it must be seen to be done". It is therefore not surprising given the need for improved scrutiny of public finance related actions of public officers in Nigeria that stakeholders will need to see the legislature have a second look at this arrangement.

3.6 Duration for advertisement for pre-qualification and for bidders to submit bids.

Section 25 (2) (i & ii) of the PPA 2007 both provide that invitations to bid, both in the case of International Competitive Bids (ICB) and National Competitive Bids (NCB) shall be advertised for at least six weeks. In practice, it has been found that given the challenge of late passage of budgets, the rigour and time required for procurement planning, preparation of procurement documentation, time required for pre-qualification and to comply with several other requirements and obtain necessary approvals, it has become increasingly difficult for procuring entities to comply with the six weeks minimum period particularly in the case of

NCB. Indeed, this requirement is regularly breached, as can be seen from the advertisement of many agencies. Some stakeholders consider the minimum period unrealistic given the situations referred to above.

3.7 Apparent conflicts in provisions relating to criteria for selection of winning bids for goods and works and proposals for services: While Section 16 (17) of the PPA 2007, which is part of the fundamental principles of all procurement activities, provides that a procurement "contract (without distinguishing between contracts for goods and works on the one hand and that for services on the other) shall be awarded to the lowest evaluated responsive bid from bidders substantially responsive to the bid solicitation". In another section the PPA 2007 provides for[28], " Lowest evaluated price" or " the Best combined evaluation in terms of the general criteria set out in the request for proposals and the price quoted", as alternative basis for selection of winning proposals referring to services. Equally, Section 51(6) provides three criteria, (two of which are similar, but not entirely the same) for selection of winning proposals to supply services in Section 50, and a third, which is not found in Section 50 of the Act. In each case, these two provisions have used different, but similar wordings that are capable of different meanings and interpretation[29]. This does not provide the level of consistency and predictability that is required in a procurement regime and may subject decisions of procuring entities to increased conflict and disputation, which can erode

[28] S 50(1) of the PPA

[29] S 51(6) Provides " The successful proposal shall be ; a) the proposal with the best combined evaluation in terms of the criteria established under subsection (1) of this section from price in the case of quality and cost based selection; b) the proposals with the lowest price in the case of least cost selection ;or c) the highest ranked technical proposal within the budget"

public confidence in the entire process.

3.8 Major and Minor deviations.

A procurement framework needs to have a certain level of predictability of outcomes. Stakeholders need to be sure of acceptable minimum standards. This needs no ambiguity, the framework needs to positively and consistently reward performance. Failure to meet standards should not be an advantage. Competitiveness is supported when common criteria and standards apply all through the process, and are not subject to change midstream. This is difficult, if the procurement law designates such items as use of rod, difference in standard, difference in use of materials etc as minor deviation, subject to correction by bidders, just like an arithmetic error as provided for in Section 31(10) of the PPA 2007. This may mean that a bidder whose bid is non - responsive to a solicitation, can after the bid opening be asked to correct the bid to make it responsive, robbing the process of the benefits of open competition and equal opportunity.

This also means that a bidder can adjust, the standard of works or goods or services he has offered, after the bid opening. If applied, this provision will bring about a lot of confusion and unintended consequences and also completely erode the meaning of responsiveness of a bid. Similarly, if applied, it will defeat the requirement in the law that an objective pre-determined criteria, disseminated to all be applied exclusively

in determining a winning bid.

Indeed the standard of works or goods offered makes a world of difference. Oftentimes, it determines whether the procurement has achieved value for money and can fulfill the need for which the procurement is carried out, or will become a waste. In the case of construction, effect of lowered standards could be collapse of buildings, loss of all monies invested and above all lives. Furthermore, it is not an acceptable practice to identify specific items in goods or of construction like "use of rods" as major or minor deviation. It is not in every works, or goods contract that rods may be required, but rods are a common and important feature used for re-enforcement of buildings and other construction works. If profit motivated contractors are free to amend their proposals at will after bid opening to include or remove such an important construction component in a process where the least cost (responsive) bidder is winner, the system may be sending the wrong signals and unwittingly approving of poor construction. Nonetheless, implementing rules and standard documents issued by the Bureau appear to have remedied this error in practice, and the Bureau is known to enforce these rules in contracts subject to prior review. However the best solution will be to have these provisions amended.

3.9 Offences and punishment provided for under the PPA.
The Act creates offences in Section 58. It also provides

punishment for the offences under Section 58 (1) & (5-7)[30] of the PPA 2007. Punishment is provided for four classes of infringing parties in these sections as follows:

I. Punishment for public servants;
ii. Punishment for all other natural persons not public servants;
iii. Punishment for companies and
iv. Punishment for directors of an infringing company listed at the company's registry.

In each case, both public servants and ordinary citizens infringing the law will be liable to a minimum of five years imprisonment without option of a fine, except in the case of company directors who will be liable to a minimum of three years imprisonment. The stiffness of the punishment provided does indicate the level of seriousness the legislature intended to attach to infringement of this law. Be that as it may, realizing that procurement offences are committed in most cases for financial gain, it would have been reasonable and more effective to target and eliminate the financial returns arising from procurement offences. This does not appear to be the case, also in the case of directors of companies, punishing all directors listed at the Corporate Affairs Commission, whether or not they have been connected with the actions or omissions subject of the offence, may produce negative results. In any case, where it is established in a court that a party, director of a company, who is not part of management or may have had no

[30] "Any natural Person not being a public officer who contravenes any provision of this Act commits an offence and is liable on conviction to a term of not less than 5 calendar years, but not exceeding 10 calendar years without option of a fine" in the case of public servants Subsection 5 provides for a minimum of 5 years imprisonment without an upper limit and requires also dismissal from service.

connection at all with the actions or omissions that constitute the offence, a court may be in a dilemma to convict, knowing that in such a case the mere fact of being listed as a company director will be the substantive action being punished, if it convicts such a director. This may lead to reluctance to convict and ultimately affect standards of proof required for conviction, and indeed promote a sense of injustice against such accused persons.

3.10 Disposal of Assets.

The provisions for disposal of assets in the PPA requires that every asset must be valued prior to being slated for disposal. This, as it appears was intended to address the notorious practice of disposal of public assets at ridiculously low rates, but did not take into account, the fact that occasions may arise where the cost of preparation of a formal valuation report by an independent valuer, may far outstrip the value of the asset. It fails to require the strict maintenance of assets registers indicating date, and cost of purchase and in relevant cases other operational information regarding the asset which will have bearing on its disposal value. Furthermore, the definition of assets in Section 55(5) of the Act to include shares, stock or bonds may create a conflict situation with the Public Enterprises Privatization and Commercialization Act 1999, which sets up a Bureau for Public Enterprises and empowers it to embark on privatization which may be by way of sale of shares. This being the case, there is also a sense in which this

same provision requires clarity with provisions of the Infrastructure Regulatory Commission Act 2005, since leases, for example, are a known method of achieving public private partnerships, leading to an impression that there is an overlap of mandates amongst these institutions on these issues.

It would appear that government considered these proposals for amendment serious. Indeed the Bureau considered the amendment process a major challenge, the outcome of which is key to resolving some critical issues in the operations of the Bureau, like the appointment of the members and inauguration of the National Council on public Procurement. [31]

[31] Bureau For Public Procurement Annual Report 2009 page 50

CHAPTER FOUR

PREVIOUSLY PROPOSED AMENDMENTS BY THE EXECUTIVE AND LEGISLATURE: AN ANALYSIS OF OPTIONS.

4.0 Introduction

Soon after commencement of implementation of the PPA 2007, government proposed some amendments to the Act. Two prominent proposals in this amendment bill were the ones to delete the requirement for competitive appointment of the Director General, and the proposal to include a third layer of approval authority (the Federal Executive Council). These proposals sparked a lot of debate amongst stakeholders and led to many more proposals for amendment of the PPA 2007. It would appear that the legislature also used the opportunity of these proposals to attempt to exempt the National Assembly structures from full application of the regulatory provisions of the PPA 2007, seeking to establish for itself an alternative procurement supervisory body.

This chapter will consider the executive proposals, and others which the National legislature finally considered and passed, but which were not submitted for presidential assent, and thus elapsed at the end of the last legislative session for want of assent by the president. It will also consider by subject matter one or two other proposals for amendment that featured in the legislature.

4.1 Removal of Minister of Finance as Chairperson of the National Council on Public Procurement.

The argument appears to be that an independent chairperson of the Council who is not a minister may provide less executive influence on procurement policies approved by the Council. This seems to flow from the general argument to reduce executive interference in procurement activity, and there lies the paradox. The basis of this argument is that the political appointees in the executive should concentrate on determining policy and the system should give civil servants the authority and independence to implement procurement activities. This is based on the observation that allowing political appointees to superintend policy making, as well as directly approve and participate in procurement implementation as has been the case in Nigeria, opens the system up to more opportunities for policies to be skewed in a way that allows for increased personal aggrandisement in implementation.

Again, once directly involved in both procurement policy making and procurement implementation activities, political appointees loose the independence to dispassionately assess procurement performance and outcomes. The system has often ended up in a situation, over the years, where those who ought to hold the service accountable for procurement infractions were often, if not always, the ones who have approved the particular actions amounting to infractions. It was therefore not a contention to prevent political office holders from determining policy, but to limit them to policy

approval. Thus, this view does not and has not presented any arguments in support of removing the policy making role of political appointees, but rather seeks to eliminate their direct involvement in implementing procurement activity and may not be a viable argument to oppose the Minister's headship of a policy making organ of government, the National Council on Public Procurement. The combined provisions of Section 5(1) of the 1999 Constitution, Sections 3, 4, 5 and 6 of the Finance (Management and Control) Act No 33 of 1958, (an Act to provide for the Control and Management of the Public Finances of the Federation and for matters connected therewith) appears to support the view that that the Minister of Finance supervise the approval of public financial management policies; the kind the Council will be overseeing.

4.2 Proposal to replace the word "media" in Section 1(2)(iv) with "Nigerian Union of Journalists", and to remove representative of Nigeria Society of Engineers.

The approved proposals for amendment which did not become law, proposed the replacement of "representative of the media" with representative of the "Nigerian Union of Journalists" in the Council. Many stakeholders see no harm in this; rather the dominant view appears to be, that being the "generally accepted professional organization" in the media,

the Nigerian Union of Journalists will better ensure professional participation in the affairs of the Council, if by such an amendment they are given a sense of belonging as an interest group. Howbeit, this is not exactly the case with the Nigerian Society of Engineers and the Nigerian Institute of Quantify Surveyors and Valuers, which are two distinct, but relevant professions to the public procurement sphere. Most public commentators support the inclusion of representatives of the two professional bodies in the membership of the National Council on Public Procurement, given their relevant specializations, rather than replacement of the Nigerian Society of Engineers with the Nigerian Institute of Quantity Surveyors. This view is also supported by the memorandum of civil society organizations under the umbrella of the NPWP. [32]

4.3 Whether or not the Judiciary and Legislature should have separate procurement regulatory mechanisms from that applying to the executive.

The amendments proposed by the legislature and passed without assent, provided for establishment of new agencies performing some of the functions of a procurement regulator for the legislature and judiciary. In order words, the draft amendment proposed to give the body of principal officers of the legislature equivalent authority as the Bureau in some respects, and sought to invest similar authority in the Judiciary

[32]Comments on proposed amendments to the PPA 2007. A Memorandum sent to the Committee on Due Process and Public Procurement of the House of Representatives by the National Procurement Watch Platform a coalition of civil society organizations and professional bodies monitoring procurement in Nigeria.

Tenders Board. It may be important to note at this point that these provisions emerged during committee consideration of the bill. This will obviously amount to an unnecessary duplication of functions and powers within the same government, and be perceived as legislatures abuse of its powers and usurpation of executive functions, or worse still to be seen as a ploy to prevent external oversight of expenditure by the legislature.

4.4 Competitive selection of the Director General.

Section 8 of the PPA requires the appointment of principal officers including the Director General and Chief Executive of the Bureau through a competitive process. Be that as it may, the proposed amendments to the Act gave power to the President to appoint a Director General without competition. The amendment proposed by the Executive branch sought to amend Section 7 of the PPA 2007 by deleting the phrase *"after competitive selections" appearing in line 2*[33]. Two opposing arguments contend for space on this issue. On one side is the contention that the President should be allowed a free hand to appoint any person that meets a minimum qualification to be stated in the law, in whom he has confidence to implement the tasks of the office of the Director General. This argument is supported by the strong view that the President needs to have confidence and trust in the individual to occupy the office of the Director General of the BPP. The opposing argument is

[33] S 3 of A bill for an act to amend the Public Procurement Act 2007 and for other matters connected thereto SB 125, C 1909-1911 2008.

that this appointment be subjected to open advertisement and an interview process to be conducted by the Council, which will shortlist three persons from amongst whom the President can appoint one as Director General. This argument is supported by the view that an open competitive process is the best guarantee that merit, aptitude and credibility will be the basis for hiring the Director General. It may also be contended that it will enable higher levels of scrutiny in selection of candidates. The interview process will be an opportunity to test and confirm that the applicants have needed skills and knowledge to perform the functions, and will not only reduce political influence on the appointment process, but also provide the President a choice between three competent persons. It is further argued that ensuring competition in public procurement is one of the principal objects of the PPA 2007 and by Section 4 (c) and (d), ensuring competition is one of the objectives of the Bureau of Public Procurement. Consequently it makes sense, that the Director General of the Bureau, the chief priest of competition in government commerce should be selected through a competitive process[34].

4.5 Making the Federal Executive Council, an Approval Authority.

One of the proposals for amendment was to amend Section 17 of the Act by adding subsection (c) which reads "for *procurement in excess of the thresholds set out in subsection*

[34]Ibid

(b) of this section, the Federal Executive Council"[35]. This clause seeks to make the Federal Executive Council an approval authority for procurement above the prior review threshold. This was in the original proposals for amendment submitted by the Federal Executive Council to the legislature. This, it appears, was intended to legitimize the ongoing practice of taking procurement contracts above the pre-review threshold to the federal executive council for approval, after the Bureau's "No Objection" approvals have been obtained, a practice which has variously been criticized by the public. Proponents of this amendment contend that the elected politicians are responsible to the citizens for proper implementation of contracts. On the contrary, the CPAR had based on its findings recommended as follows "*Once a law on public procurement has been enacted and regulations, manuals and standard bidding documents issued, carrying out public procurement including contract awards will clearly be an administrative function, the mechanics of which should be disengaged from the executive. Currently, high level politicians such as Governors, Ministers and Commissioners are operationally involved in the procurement process. However, under the reformed procurement system, high level politicians should maintain their overall managerial oversight responsibilities, while leaving administrative and operational matters (including procurement) to the civil servants*."

The rationale for this finding appears to centre on three issues,

[35] S 4 of An Executive "Bill to amend the public procurement Act 2007 and for matters connected thereto" SB 125 gazette pages C 1909-1911

one being that if the elected political office holders determine policy which dictate contracts to be awarded, approve or award contracts themselves and also provide oversight to the process, it creates more room for decisions to be successfully skewed for personal interest. Secondly, political office holders are naturally more exposed to political influence; and thirdly, if and when anything goes wrong in the process the same political office holder who has taken the policy decision, awarded the contract, overseen implementation, will also be the one to administratively ensure accountability, in which case such involvement by the political office holder will diminish the in-house opportunity to provide administrative checks and balances.

This primarily was one reason post implementation assessments were ineffective and in some cases non-existent prior to reforms. It also accounted for why it was difficult to hold anyone accountable for the many procurement related infractions in the period prior to procurement reforms in Nigeria. Regrettably, this proposal appears to have been intended to ratify the continued practice by the Federal Executive Council to approve contracts above the pre-review threshold despite provisions of the PPA 2007 to the contrary.

4.6 Approving Authorities for procurement of other arms of government above prior review thresholds.

This proposal sought to constitute the body of principal officers of the National Assembly including the Senate President, Speaker of the House, Majority and Minority leaders, Chief Whip, Committee Chairmen and Vice Chairmen etc numbering well over a hundred, and the Judiciary Tenders Board, which on the contrary includes the Chief Registrar and heads of department in the judicial arm into a procurement supervisory authority of the type of the Bureau, for the sole purpose of issuing "No Objection" to contracts above a given threshold. In effect, these proposed bodies were intended to perform the functions of the Bureau as it relates to prior review thresholds and grant of No objections etc[36], for the legislature and judiciary. There is the view that this proposal was a theatrical response to the demand by the executive council for powers to approve contract awards above the prior review threshold. Also it can be equally viewed with an eye on the several procurement expenditure related scandals within the legislature involving principal officers of the legislature. Particularly, the two immediate past speakers of the House or representatives, one of which had to quit her office following procurement related scandals and the second, who was prosecuted for similar offences[37]. This view point may arrive at the conclusion that the legislature was perhaps trying to statutorily prevent external scrutiny of its procurement practices under the guise of securing its independence.

[36] This proposal sought to amend S 16(4) of the PPA 2007 by inserting immediately after the last word "Bureau" the following "body of Principal Officers in the case of the National Assembly or by the Federal Judiciary Tenders Board in the case of the judiciary." And is found in the Report of the Conference Committee on Public Procurement Act) Amendment Bill November 2009.
[37] Particia Ette : www.en.wikipedia.org/wiki/Patricia_Etteh .See also Nigerian Speaker Dimeji Bankole Aressted in www.guardian.co.uk/world /2011/jun/06/nigerian/politician/dimeli/bankole/arrested accessed 26th October,2011.

4.7 Transferring the responsibility for considering and approving threshold for procurement from the Council to the President.

Sections 2 and 17 of the PPA 2007 both grants the Council powers to consider, approve and monitor monetary and prior review thresholds for the application of the PPA 2007 by procuring entities. In the first executive bill proposing amendments to the PPA 2007, a proposal was made to amend Section 17 of the Act, to give the president powers to approve thresholds for implementation of procurement by procuring entities, without any attempt to amend the portion of Section 2 of the PPA 2007 which gave the power to approve thresholds to the Council. Also it was proposed in the same breath to make the executive council an approving authority. If this proposal had become law in the form it was proposed, both the Council by virtue of Section 2 of the PPA 2007, and the President by virtue of amended Section 17 of the PPA 2007 would have had the power to approve thresholds. Also when you consider the proposal by the legislature to confer authority on its body of principal officers and Judiciary Tenders Board to determine monetary thresholds for procurement carried out within their arms of government[38], the effect would be that each arm of government will independently determine the thresholds applicable to public contracts in their domain, and also carry out prior review of their own contracts. It is perhaps important

[38] Report of the Conference Committee of the National Assembly on Public Procurement (Amendment) Bill 2009. The proposed amended S 2(2) read" Notwithstanding the provisions of subsection 1, the Legislature, Executive and Judiciary shall determine their respective thresholds"

to point out that these proposed amendments will effectively turn what should be purely administrative and economic decision guided by empirical indices into a political one, which may be determined more by political than by any other considerations. Another view is that, even for the executive branch contracts, concentration of power in the very busy president has the negative impact of crowding the stable and distancing decision making in this respect from those who more regularly observe the process and its impact. These are persons who are in better positions to respond to available economic and administrative indices and stimuli. Another less attractive view point however, is that in practice such decisions of the President will be based on reports and recommendations of the Bureau and Council and provide the advantage of a dispassionate decision of the President based on facts, data and recommendations of the Bureau and the Council. There appears to be no other justification for the proposal seeking to grant the body of principal officers of the legislature and Judiciary Tenders Board equivalent powers to conduct prior review and approval of contracts emanating from their arms of government, except what the Report of the Conference Committee on Public Procurement Act Amendment Bill refers to as "providing for the independence of the legislature and judiciary". Many stakeholders, in the light of the many scandals relating to public expenditure management in the legislature, are concerned that the purpose

of these proposals may be neither the independence of the legislature, nor that of the judiciary which sought no such amendments.

4.8 Personal Responsibility of Accounting Officers for Procurement Malpractices Occurring in their Agency.

Section 20 of the PPA 2007 vests the Accounting Officer who is a permanent secretary of a Ministry or the Director General or officer of co-ordinate responsibility for extra ministerial departments or agencies with line responsibility for planning, organization, evaluation and execution of procurement activities in the procuring entity. It gives him the responsibility and power to ensure full compliance with the Act in his MDA and personal responsibility for infractions even when he has delegated his authority. The history of this clause is the institutional or broad group responsibility that appeared to exist in the service before the Act. Where even though, it is clear there has been an infraction, the lines of responsibility are blurred by bureaucracy, and clear personal responsibility for the infraction becomes difficult to pin point and ascertain. However, to what extent the permanent secretary should be held responsible for actions of his subordinates, particularly if it is shown that he is not complicit in any way, will be a challenging question for the courts, given the dominant

common law principles dictating two critical elements of an offence, *actus reus*[39] and *mens rea*[40], applicable in Nigerian jurisprudence. This will be further discussed as part of comparison with international best practices. However, it is to be noted that there is the view point that the present provisions meet a real need in the system.

4.9 Mandatory provisions specifying category of contracts for which only Nigerian companies can compete.

In 2010, a new proposal for amendment of the PPA 2007 was considered by the House of Representatives, it was a *"Bill for an Act to make it compulsory for government of Nigeria and its agencies to award construction contracts up to Five Billion Naira to Nigerian indigenous companies and for other connected purposes"* sponsored by Hon. John Halims Agoda, who argued that the bill is seeking to empower government institutions and agencies to patronize indigenous construction firms, by providing a five billion Naira works value ceiling, under which all construction contracts must go to local firms with asset value of at least NGN 250 Million, in addition to a 60% tax relief to indigenous contracting firms etc. The proponent of the bill in the legislature as can be gleaned from the House Committee Reports[41], in a speech in support of the bill at its public hearing, hinted that local firms are at a

[39] This is generally referred to as the physical act or omission which constitutes an offence.
[40] This is referred to as the guilty mind or intention or knowledge in committing the act or making the omission.
[41] Report of the House Committee on Public Procurement on the Bill for An Act to make it Compulsory for Government of Nigeria and its Agencies to award construction contracts up to 5 Billion Naira to Nigerian Indigenous construction companies and other Connected purposes 2009 (HB.163 2009).

disadvantage to compete with foreign firms in the stifling competitive environment of the construction industry in Nigeria. He argued that foreign firms maximize their operational leverage to gain competitive advantage over local firms, which to him meant that the growth, acquisition or transfer of construction technology to indigenous firms is being stifled. He pointed out that Nigeria needed growth driven by indigenous firms.

In opposition, the Bureau, Nigerian Society of Engineers and many other stakeholders pointed out, that it is against the spirit of the PPA 2007 to award contracts to a firm that is not qualified to execute it, only because that firm is indigenous. This, it was pointed out will encourage briefcase contractors, who will obtain contracts only to find foreign or other firms to implement the contract and will over time raise costs of projects to government, and take the nation back to an era of many failed contracts.

The committee in its final report rejected the proposed amendments, but put forward its own amendments. Essentially, its proposal contained in a one page draft bill attached to its report[42], was to amend Section 25 (2) of the PPA to make invitation to bids under national competitive bidding to be open to only Nigerian indigenous companies. A further proposed amendment to the definition Section 25(2) of the Act was to define indigenous companies for this purpose to

[42] Titled "A bill for An Act To Amend the Public Procurement Act 2007. Act No 14 in Order to Enhance the Participation of Nigerian Indigenous Construction Companies in the Nigerian Construction Sector and for Matters connected therewith.

include only Nigerian registered companies in which Nigerian citizens own at least 70% of the shareholding. This bill however was not passed by the House of Representatives.

CHAPTER FIVE

COMPARATIVE ANALYSIS OF IDENTIFIED CHALLENGES IN THE LIGHT OF INTERNATIONAL PRACTICES

5.0. Introduction.

This chapter comparatively looks at some of the identified proposals for amendment in the light of international practices. It seeks to present examples of how other jurisdictions have approached the issues raised and to see if there are lessons to be learnt from these examples.

Certain universal principles that govern the public procurement function across borders are discernible. These include those of economy, transparency, accountability, fairness, competition, equal treatment or non-discrimination, reliability, public supervision, appropriate conditions, efficiency, accountability and ethical standards, separation of functions, and value for money, fitness for purpose among others. These concepts largely do not support discriminatory practices in award of procurement, even if based on citizenship status. This however may not always be the case for value for money, which accommodates a country`s economic, and social objectives, which may in part be protectionist in nature.

This chapter considers such issues as statutory reservation of contracts for indigenous companies, dual responsibility for infractions, allocation of power to determine thresholds or to

award contracts, competitive appointment of leaders of procurement agencies, transparency and access to information provisions, who heads or is in charge of overseeing procurement policy approval, independence of the procurement regulator and extent of its powers to recommend disciplinary action and to whom, criteria for selection of winning bid, major and minor deviations, and dual roles of procurement implementation and handling of complaints. These issues have been dictated by the controversies surrounding proposals for amendment of the procurement Act in Nigeria as laid out above.

5.1 Proposals to Reserve Certain Construction Contracts for Indigenous Companies.

At the heart of international best practices on public procurement lie the twin concepts of "best value for money" and "competition". "Competition implies absence of hindrances to participation in procurement. It means effective advertisement of technical, professional, or financial conditions and criteria for selection proportionate to the subject of the contract. It also means selection of appropriate procurement procedure. Competition requires preparation of the technical specifications enabling wider participation of competent bidders.

Competition is at the core of public procurement"[43].

A competitive process provides the procuring entity the best

[43] Compliance with the Public Procurement Act 2007, A survey report of procuring entities, civil society observers, bidders and contractors, legislators and Bureau for Public Procurement issued by the Public & Private Development Centre issued in 2010

opportunity to procure the goods or services with value for money. There may however, be valid exceptions to the principle of competition in exceptional cases; this depends on the nature of the requirement. However, even in such exceptional cases, the principle of transparency requires clear and open definition of the circumstances where exception is appropriate[44].

The concept of "best value for money" involves "the optimum combination of whole life cost and quality (or fitness for purpose) to meet the customers' requirements." "Whole life cost" includes both quantifiable and non-quantifiable or intangible costs and benefits. The concept enables a public body to compile a procurement specification which includes social, economic, and environmental policy objectives within the procurement process. It also requires that opportunity be given for competition to induce bidders to give their best offers. The concept underlies relevance of a professional procurement department in the procurement process, as well as the role of key sector specific specialists where needed. It also underscores the relevance of procurement objectives in achieving the economic and public policy objectives of a country and a people". Government public procurement policies have five key common concerns or objectives. First, purchase of items should be economic and efficient. Second, use of public funds should purchase only items needed for national development. Third, purchases should secure best value by giving all qualified bidders equal opportunity to

[44] Compliance with the Public Procurement Act 2007, A survey report of procuring entities, civil society observers, bidders and contractors, legislators and Bureau for Public Procurement issued by the Public & Private Development Centre issued in 2010

compete for contracts. Fourth, the procurement process should encourage the development of local contractors and manufacturers. Finally, public procurement should ensure the transparency of and accountability in the public procurement process[45].

Technology transfer and growth of local Nigerian construction industry is a legitimate objective that can be pursued by government. It is however doubtful if legislating contract quotas for indigenous companies can achieve this objective or is in fact a legitimate and enduring way of achieving this objective. It does breach the principles of open competition, and may lead to poor value for money results, and its potential in ultimately growing local capacity is in doubt. For countries parties to the WTO general procurement agreement, such a proposal may amount to a breach of its international obligations. In a sense, it may constitute a restraint of trade, even though there may be countries that have other programs of similar effect e.g. under the Serbian procurement law, a bid from a bidder from a country with which Yugoslav does not have equivalent access to its markets may be rejected if more than 50% of products offered originate from such a country[46], particularly in the water, energy, telecommunication and transport sectors. The evaluation criteria in bids within many countries are continuously used to ensure that bidders` offers and proposals accepted are ones that meet such economic and social

[45] Ibid.
[46] Article 119 of the Serbian Procurement Law.

objectives of countries, including promotion of minority and disadvantaged people's interests.

The General Procurement Agreement (GPA) of the WTO allows for special and differential treatment of developing countries in its Article 5, which, broadly speaking, allows to an extent for protection of local industries. By the nature of the GPA framework itself, countries can negotiate to exclude sectors and sections of their society where their social and economic objectives may appear protectionist. Also, below agreed thresholds for application of the GPA, some countries legitimately retain measures that are protectionist in nature. The UNCILTRAL model law allows for margins of preference[47]. Also evaluation criteria by the UNCILTRAL model law may include - (a) effects of the transaction on balance of payment of the country, (b) counter trade measures (c) extent of local content required (d) domestic investment (e) transfer of technology and the system always allows national domestic competitive bids below certain thresholds. Within the EU even contracts below the threshold of the directives must apply basic principle of the EC treaty as it relates to EU citizens or businesses, which includes the free movement of goods and service, rights of establishment, the freedom to provide services, non-discrimination and equal treatment, transparency, proportionality and mutual recognition, this however may not be the case if the third party country is neither an EC member or signatory to WTO/GPA agreements. Under the World Bank framework and in

[47] 1994 United Nations Commission on International Trade Law.(UNCILTRAL) Model Law on Goods, Construction and Services with Guide to Enactment, here referred to as UNCILTRAL Model Law; http://www.cnudmi.org/uncitral/en/uncitral_texts/procurement_infrastructure/1994Model.ht, assessed 29th October 2011

connection with contracts to be financed in whole or part by the Bank, the Bank does not permit a borrower to deny pre or post qualification for any reasons unrelated to the capability and resources of the firm to successfully perform the contract, except in situations where as a matter of law the borrower country prohibits commercial relations with the country of origin or manufacture of goods required, and provided that the Bank is satisfied that such exclusion does not preclude effective competition for the supply of goods or works[48]. It is rare to find examples of strict restriction or allocation of contracts to local companies in the text of a law, though such practices may in fact exist in practice. Thus, such a provision as proposed that intends to exclude all other businesses, except Nigerian registered businesses from participating in particular contracts may appear discriminatory, and has a doubtful potential to achieve locally driven growth as its proponents may have intended.

5.2 Dual Responsibility for Infractions.

The provisions in Section 20 of the PPA 20007 impose personal responsibility on the Accounting Officer for infractions in the procurement process in his or her MDA, even when such infractions may occur from the actions of officers to whom he or she has delegated authority. This means in effect that an Accounting Officer may be personally and criminally responsible for procurement infractions, even in a situation, where he or she does not directly carry out the act or

[48] Articles 1.6-1.7 of the Guidelines for Procurement under IBRD loans and IDA Credits Published May 2004 and revised October 1 2006 & May 1 2010.

omission subject matter of the offence. Generally, under common law, for a person to be held liable for an alleged crime, two elements must be present. First, it must be shown that the accused person personally committed the act or made the omission which constitutes an offence; this is technically called the *actus reus (i.e the physical act constituting the offence)*. Secondly, it must be shown that he had a guilty intention or knowledge in committing the act or making the omission; this is technically called the *mens rea*. Thus, a person can "only" be held liable for crimes he participated in.

Nigerian courts have given recognition to this principle, indeed in one notable instance a court held in recognition of the foregoing principle, *"I know of no law which authorizes the police to arrest a mother for an offence committed or purportedly committed by the son. Criminal responsibility is personal and cannot be transferred. While I am aware of cases of vicarious liability in criminal law, the instant case is not one"*[49]. This was a case instituted by the Respondent for the enforcement of her fundamental rights under the Nigeria Constitution for being wrongfully arrested by the police at the instance of the appellant for an offence allegedly committed by her son who was then at large. Because the statutes take precedence over common law in the hierarchy of laws in Nigeria, just as in England where this common law rule emanated, there are now statutory exceptions to the foregoing common law rule[50]. These statutory exceptions are strict liability and vicarious liability crimes.

[49] The Nigerian case of A.C.B V. Okonkwo (1997) 1 NWLR (Pt.480) 194 at 207-208 paras H-A :
[50] See the Nigerian case of Owners of MV "Arabella" V. N.A.I.C (2008) All FWLR (Pt. 443) 1208 where it was held that statute is supreme over common law.

5.3 Strict Liability.

Strict liability crimes are found in circumstances where a person is found guilty of acts or omissions done in the absence of *mens rea* or guilty intention. They are called crimes of "liability without fault". This is relevant to this work since S.20 of the Act makes the accounting officer of an MDA personally liable for breaches of the provision of the Act and regulations made thereunder, whether he is personally involved in the breach or not. The implication of this is that he is personally liable for any breaches of the Act or regulation in course of a procurement process of his MDA whether or not there was a *mens rea* in the breach. In other words, the fault element is immaterial here.

The strict liability nature of this section is also evident in the fact that the Accounting Officer may not possess any guilty intention for a breach by his delegate or subordinates, which he neither, personally participated in, procured nor counseled. But here, the law makes him liable for offences which he may not be aware off or may not have participated directly and therefore may not have guilty intention over.

5.4 Vicarious Liability.

A person is said to be vicariously liable when the acts/omissions or consequences of the acts/omissions of another are imputed to him by the law either because that other person is his servant, agent, subordinate or delegate. Here the law sees the acts of that other person as the acts of the accused. Vicarious liability crimes are the second exception to the

general rule considered above. Section 20 of the PPA 2007 creates a vicarious liability situation by making the accounting officer of an MDA personally liable for the breaches of the provisions of the Act caused by his subordinates and delegates. Here, the Act may be said to make the act or omission and guilty intention of the delegate or subordinate that of the accounting officer; it is immaterial that the breach was caused by the delegate or subordinate while acting outside the sphere of his authority or duty. These exceptions are mostly created by statute to serve important public purposes, especially where there is a notorious vice which the law seeks to curb. As in this instance, the law creates these exceptions to tackle a mischief and advance a remedy for the betterment of the society[51].

Section 20 of the PPA 2007 is a response to the wide spread corrupt practices in the procurement and disposal of public works, goods and services in Nigeria prior to the enactment of this Act, and the institutional arrangement that made it possible, in some circumstances for things to go wrong, without any one individual to be held personally accountable. It has its roots in the English common law. The intention appears to be to ensure that in all circumstances, where there is a procurement infraction, at least the Accounting Officer of the agency will be responsible, and he cannot be heard in defense to say that he delegated the function. It is to be reasoned that in accordance with established principle in case law, courts will

[51] See generally Smith and Hogan Criminal Law, 5th Ed. Pp. 87-98 particularly p. 90 and 147-154.

interpret this provision and the responsibility that it imposes very strictly. Courts may need to develop a set of rules, principles or standards for such collateral liability, which in one way or the other is likely to include a level of complicity, or opportunity the Accounting Officer had to prevent the infraction or to actively support it. Even in the case of strict liability, liability may be strict but not absolute, courts are known sometimes to be reluctant to convict solely on strict liability, but require some inference of guilt on the part of the accused person. In some instances courts have admitted the defence of mistake, or automatism in a road accident situation[52] to buttress this strict interpretation rule.

Under the Tanzanian Act, the Accounting Officer is responsible for infractions resulting from procurement activities, except he can satisfy the authority that he has delegated the duty to someone else in writing or that he is by a written law under the control of another person who has influenced the infraction, in which case that other person will be held responsible[53].

5.5 Transferring the responsibility for considering and approving threshold for procurement from the Council to the President.

Under the WTO General Procurement Agreements, the thresholds are determined by negotiation amongst parties at

[52] J.C Smith et.al .op cit at pp.37,100-103.
[53] S 44 of the Tanzanian Public Procurement Law 2004.

the time of ascension to the treaty. In the EU, thresholds are determined by the rules issued by the Commission, a body with both executive and semi-legislative functions. The Commissions' rules determine a threshold above which Commission rules apply and on all other procurement, national laws and rules will apply, but such laws must accord with established principles of the EC Treaty. Under the Tanzanian procurement law the Minister can by regulation determine threshold applicable for procurement. In the Ugandan law similar powers exists for the Minister to make such regulations, though the authority may also issue procurement guidelines that are laid before the legislature. In Kenya, the Minister of Finance pursuant to provisions of the procurement law issues rules which provide for the threshold[54]. There appears to be limited or no precedent in international procurement practice supporting determination of threshold by country presidents or by principal officers of the legislature or Judiciary. The nearest situation to it is the EU commission because it exercises executive powers, but the EU Commission is a unique body and not a single occupant of a public office like a president.

5.6 Competitive Appointment of Director General.

The Tanzanian procurement legislation provides for appointment of the Chief Executive Officer of the Authority, an agency of equivalent status with the Bureau in Nigeria, by the president on such terms and conditions as he determines

[54]S 140 of the Kenyan Public Procurement and Disposal Act 2005.

and on a contract term of four years, renewable for only one further term. It further requires that he be appointed from amongst the registered professionals, and should be a person "*who has at least ten years of experience in either engineering, architecture, law, materials management, quantity surveying, business administration, economic development planning or in any related fields and who have had substantial academic qualifications and experience in such fields including proven record of procurement experience*"[55].

In the case of Uganda, the Chief Executive and Accounting Officer of the agency is appointed by the Board, and the board can discipline or terminate his appointment[56].

In Kenya the law requires that the Director General of the Authority be appointed by the Board of the Authority and be approved by parliament[57]. In these two cases therefore, there is a presumption that Board appointment will be competitive. There are also examples where board members are appointed by the minister from amongst designated stakeholders.

Whilst the best practice may appear to be a competitive appointment as provided for in the Nigerian legislation, there are sufficient successful examples of direct appointments by presidents to warrant that option. The challenge is whether we should amend this provision without giving it a real try.

[55]S. 20 Tanzanian Public Procurement Act 2004.
[56]S. 17 of the Ugandan Public Procurement and Disposal of assets Act 2003.
[57]S. 10 of the Kenyan Public Procurement and Disposal of Assets Act N0 0f 2005.

5.7 Proposals to make the Federal Executive Council "Approval Authority" for Contracts and or to Constitute Body of Principal officers of the legislature or Judiciary as Approval Authority for Contracts above Prior Review Threshold or to approve Thresholds .

The Tanzanian legislation makes the Tenders Board the sole approving authority for procurement activities and invests it with powers to act independent of all other authorities and persons. It has exclusive powers to approve projects and project variations and to liaise directly with the authority which is the regulatory authority[58]. It further provides that no one shall advertise, award or sign any contract without the approval of the Tenders Board. It accords full independence to the Accounting Officer and Tenders Board to act independent of any other authorities[59]. This is similar to the position in the Ugandan law where the Contract Committee, an equivalent organ to the Tenders Board, has the approving authority for procurement and award of contracts[60]. However, under the EC system where there is no strict separation of powers, the Commission generates proposed directives, which are then approved by the European Parliament, and the Council, taking into account views of other organs of the EC and in this instance reflecting decisions of the courts on validity of previous directives based on the European Union Treaty[61]. Of course, the EC circumstance appears different, given its

[58]S. 30 of the Tanzanian Law
[59]S .31and 38 Tanzanian Public Procurement Act 2004
[60]S. 28 and 29 of the Ugandan Procurement Act 2004
[61]Directive 2004/18/EC of the European Parliament and the Council of 31st March 2004

unique governing architecture and the fact that it is a union of sovereign nations.

In the United States, while the courts are not directly involved in setting procurement policies and rules, they try all legal cases that involve the federal government, including contract disputes, and their decisions become a source of federal procurement regulations as is the case in the European Commission and indeed many other countries. The Congress primarily influences the federal procurement system through laws, budget appropriations, and its oversight powers. Indeed, it passes laws establishing procurement policies and procedures, and appropriates funds for procurement purposes, within the time and amount of funds specified. In addition, the Congress oversees federal procurements through its various standing committees, as shown in Table 2, and the U.S. General Accounting Office (GAO). It also authorizes GAO to recommend decisions to agency heads on contract award and non-award protests. These decisions also become a major source of federal regulations. [62]

It is instructive to note that in the United States with a similar federal and presidential system as Nigeria, and in other African countries examined and in the individual European countries with varying democratic and in some cases unitary systems in place, it does not appear, there is an example in which direct procurement award decisions are routinely taken

[62] David Drabkin,US General Services Administration and Khi .V. Thai, Florida Atlantic University; US Federal Procurement Structure, Process and Current Issues. A paper presented at the International Purchasing and Supply Education and Research Association's Comparative Public Procurement Cases Workshop,, Budapest, Hungary, April 10-12, 2003.

directly by the Executive Council or cabinet and or the principal officers of the legislature and/ or judiciary, or the President or equivalent office holders, as some of these executive and legislative proposals for amendment in Nigeria seeks to achieve. In most instances, executive action are limited to appointment of officers into the agencies, to issuance of policy and rules, which often is directly undertaken by regulatory or executive bodies or by a minister of cabinet status. Legislative action is largely limited to passage of laws, that may enthrone new policy or rules, passage of budgets and oversight of implementation by public departments and agencies. And the judicial role remains within the bounds of determination of cases coming before them.

5.8 Transparency Provisions.

The regime of detailed documentation of activities, publication of procurement records, open bidding processes-**open competitive bidding**, receipt, management and distribution of comprehensive records of all procurement proceedings; often including the duty to develop, establish and maintain databases or ICT based systems for collation, storage and distribution of information relating to procurement activities and actors in the procurement process in the subject countries, provides the environment for access to information, relating to public expenditure by citizens. Nonetheless, these provisions are not absolute, the laws do not all

have direct provisions allowing for access to information by the public and where they do, it often shares a number of limitations. In addition to the confidentiality clauses relating to some category of procurement information in the Kenyan and Tanzanian laws[63] for example, a common statutory limitation to procurement related access to information provisions in many countries is the imposition of administrative fees or levies on a person seeking access to public procurement documents[64]. In the case of Nigeria the PPA 2007 provides for payment of cost of copying and an unstated administrative fee, leaving the actual fee to the regulator to stipulate[65]. The Bureau of Public Procurement in Nigeria is yet to stipulate any fees, as is the case in Uganda where the same decision is left in the hands of the Contracts Committee[66]. The Schedule to the Kenyan law proactively provides the administrative fee payable to be Kshs 2000[67], for review and the maximum of five thousand shillings payable by bidders for copies of tender or pre-qualification documents[68]. Section 47 PPDPA (Uganda) 2003 provides that, *"A procuring and disposing entity shall not, except when required to do so, by an order of court, disclose any information where the disclosure would amount to a breach of the law; impede law enforcement; prejudice legitimate commercial interests of the parties; inhibit fair competition; or in any way not be in the public interest, until the successful*

[63] S 42 of the Tanzanian Public Procurement Act 2004.
[64] Similar confidentiality clauses do not however exist in the Ugandan and Nigerian laws.
[65] S 16(14) of the Public Procurement Act 2007.
[66] Section 16(14) PPA 2007 (Nigeria). **Section 41(2) Ugandan Public Procurement Act 2003** provides that the records of the procurement and disposal process shall be open to inspection by the Authority during working hours, Also, Fourth Schedule to the Act Section 79(1)(2)&(5).
[67] Part II, Fourth Schedule to the Public Procurement Regulations (Kenya) 2006.
[68] Section 39 of the Public Procurement and Disposal Act 2005.

bidder is notified of the award"[69]. The challenge here is that the criteria for the decision to grant access or not to are so subjective, that they may amount to substantial limitations. On the other hand, these provisions appear to be saying, that these limitations to access to information will not apply once the winning bidder is announced and notified. In effect, at this later stage all information should become available.

The Tanzania law, has a similar provision, this time vesting in the Permanent Secretary (on his own or under direction of the Minister) the power to prohibit the Authority, its employee or member of staff from communicating to any person, for any purpose any document or information so specified, when such would involve the disclosure of the deliberations of the Government, relating to matters of a secret or confidential nature and is likely to be injurious to the public interest, or prejudicial to interests of the country[70]. The most retrogressive is Section 44 of the Kenyan law which has not only similar provisions to the Tanzanian law referred to above, but criminalizes disclosure of exempted information refereed to. This provision gives too wide a discretion to those whose conduct needs to be opened up for public scrutiny, to regulate what the public sees or will not see. It would appear that in none of these examples does the procurement law provide a complete regime for access to information. Thus where no access to information laws exist, improved access to information provisions in the procurement law will be a good beginning. Be that as it may, a comprehensive framework for access to information as we have seen in Liberia and more recently in Nigeria, combined with necessary implementing

[69] Emphasis mine.
[70] Section 12(1)(a) of the Tanzanian Public Procurement Act 2004.

measures by both the citizens and public sector, is often the best option for effective access to information. However this work does not consider the impact of the new Kenyan constitution on access to publicly held information including procurement information.

In the case of Nigeria the provisions requiring procuring entities to invite and allow representatives of citizen groups and professional bodies to monitor procurement processes further extends the scope of access possible, and presents great opportunity for increased citizens' participation in governance. In general, it would appear that the apparent constraints introduced by the provisions of Section 16 (14) of the Nigerian PPA 2007 limiting access to only unclassified information, without defining what is classified, is substantially resolved by Section 38 of the same law granting access to documents in the procurement proceedings to any person, after a proposal is accepted or procurement proceedings is terminated, and the fundamental principles of procurement as in Section 16 (1), which sets forward transparency as a fundamental objective and principle of the Act. It is not likely that courts will interpret any provisions in the Act to defeat its stated fundamental principles, and even more gladdening is the fact that by the new Freedom of Information Act 2011 in Nigeria, public bodies in Nigeria now have an obligation to create, keep, manage and organize public records. Also it affirms the right of every person, citizens and residents of Nigeria, to access publicly held

information, beyond the scope provided for by the PPA 2007. It requires that certain information be proactively disseminated, including information relating to public expenditure.

5.9 Minister of Finance as Head of Council.

In Uganda, the Minister issues regulations and the Authority issues guidelines, standard documents etc. In Tanzania and under their law, it is the Minister of Finance that issues procurement regulations including yearly reviews of limits of authority or thresholds[71]. The Minister also appoints the members of the Board of the regulatory agency except for the non-executive chairman[72], and the Chief Executive who are appointed by the president. The Authority is also located within the Ministry of Finance. In Uganda the Chairman of the Agency`s Board is a non-executive chairperson appointed form outside the service[73]. In both instances the laws require the authority to submit to the Minister annual performance evaluation reports, with details including its recommended disciplinary and remedial actions, and the response of competent relevant authorities. In the United States there are three acquisitions regulatory councils: the Defense Acquisition Regulatory Council, the Civilian Acquisition Regulatory Council and the Federal Acquisition Regulatory Council. In South Africa the National Treasury exercises overall responsibility for public procurement policy at the three levels of government[74]. In all these examples, though the

[71] S 80 of the Tanzanian Public Procurement Act 2004.
[72] 1st Schedule to the Tanzanian Public Procurement Act 2004 paragragh's 1 & 2 .
[73] S 10 of the Ugandan Public Procurement and Disposal of assets Act 2003. .
[74] See www.treasury.gov.za

minister may not be heading the regulatory agency directly as is the case in Nigeria, examples exist where he plays supervisory role over the agency and issues rules and guidelines that determine applicable procedure.

5.10 Subjection of Bureau powers to Council Approval (independence of the regulator).

In Tanzania the equivalent body to the Bureau in Nigeria is given unfettered powers to require information, enter into contracts, partnerships, and further more to summon witnesses, commission or undertake investigation etc[75]. This is equally the case in Uganda[76]. Also under the Kenyan legislation, the Authority is given all the powers necessary or expedient for performance of its functions[77]. This writer has not found another example in any other of the country's laws studied, of the extent of subjection of powers of the regulatory agency to approval of a board or other agency as found in Section 6 of the Nigerian PPA 2007.

5.1. 5.11 Powers of the Bureau to recommend disciplinary action and of the Council to act on it.

Both under the Tanzanian[78] and Ugandan procurement laws[79], the regulatory agency of equivalent status with the Bureau in Nigeria has authority to refer cases of breach of duty or misconduct or criminal offences against an officer, staff or

[75] S 16 of the Tanzanian public Procurement Act 2004.
[76] S 8 of the Ugandan Public Procurement and Disposal of assets Act 2003.
[77] S 8(2) of the Kenyan Public Procurement and Disposal Act 2005.
[78] S 14 of the Tanzanian Public Procurement Act 2004.
[79] S 9 of the Ugandan Public Procurement Act 2003.

member of a public body to a competent authority. In the case of Tanzania, the law requires that the matter be referred to the person or body competent to take such disciplinary or other proceedings as may be appropriate, with recommendations for action and submit a special report to the Minister in that respect[80] . In each of these cases the competent authority will inform the procurement regulatory body in writing of the measures taken and its outcome, and such information will form part of the agency's performance reporting requirements annually.

Thus, it is not out of place for the PPA 2007 to provide for the Bureau to recommend disciplinary action against any category of officers involved with procurement activity. The difficulty is with the fact that the recommendation is to the Council which appears to have no statutory authority to deal with such complaints. On the contrary, as already indicated, the Civil Service Commission has constitutional authority to discipline civil servants in Nigeria and would in our circumstance be the appropriate authority.

5.12 Offences and Punishment.

Both the Tanzanian and Kenyan laws provide an option of a fine for procurement offences and none has a minimum; but rather both have maximum sentences of three and ten years[81]. In the Ugandan law also there is a provision for an option of a fine and a prison term not exceeding two years[82]. In most of the

[80] S 14 Tanzanian Public Procurement Act 2004.
[81] S 137 of the Kenyan Public Procurement and Disposal Act 2005.
[82] S 96 of the Ugandan Public Procurement and Disposal of assets Act 2003.

procurement laws in Africa, there are provisions for punitive sanctions and even prison terms. Under the Serbian law sanctions for infraction appear limited to fines only, but such fines can be against the procuring entity as well as against natural or other artificial persons. Also, these laws do provide for debarment of private companies who commit procurement related offences.

Given the international nature of the GPA and EU systems and the direct involvement of sovereign nations, punitive sanctions is not an element of the two frameworks; this is also the case with UNCILTRAL. Nevertheless, the criminal laws in most European countries are well developed and strong enough to provide reasonable deterrence for criminal activity.

5.13 Period allowed for bidders to prepare and submit bids

The WTO/GPA provides that the period of advertisement be fixed by mutual agreement of the procuring entity and selected suppliers, and in the absence of such an agreement, the entity may fix periods which shall be sufficiently long to enable responsive tendering and shall in any case not be less than 10 days. Thus, as against the six weeks minimum period for both ICB and NCB under the Nigerian framework, the WTO minimum number of days is ten days. The EC directive requires publication through the commission and on the buyer information profile of the agency a prior information notice, referred to in Nigeria and under the UNCILTRAL model law as general procurement notice, indicating value and nature of procurement to be carried out in the preceding 12 months. This,

however under the EC regime, is compulsory only for agencies seeking to shorten time limits for receipt of tenders. The EC Directive requires contracting authorities to consider the complexity of the project and time required for preparation of tenders in determining length of notice. The minimum time limit to be given for receipt of tenders is 52 days from the date the contract notice was sent, but this can be shortened for agencies that published prior information notice to 35 days, but not at anytime below 22days[83]. Though the UNCITRAL rules require publication of notices, it does not appear to give guidance on any time limits. The World Bank rules requires that time allowed for preparation of bids be determined with due consideration of the particular circumstances of the project and the magnitude and complexity of the contract, which generally should not be less than six weeks from date of invitation to bids or availability of bidding documents.[84]

5.14 Criteria for Selection.

The GPA lays out the broad principles that tenders must comply with essential requirements of the notices in the tender documentation and be from a supplier who complies with participation requirements[85]. It further requires that unless in the public interest, an entity decides not to issue the contract, the entity shall make the award to the tenderer who has been determined to be fully capable of undertaking the contract and whose tender, whether for domestic products or services, or products or services of other parties, is either the lowest tender or the tender which in terms of the specific evaluation criteria

[83] Articles 35-38 of the EC Directive 2004/18/EC of the European Parliament and of the Council.
[84] Paragraph 2.44 Guidelines for Procurement under IBRD Loans and IDA credits May 2004 revised October 1, 2006 and May 1 2010.
[85] Article X111(4) 9 of the WTO General Procurement Agreement

set forth in the notices or tender documentation is determined to be the most advantageous. In any case, it maintains that awards must be in accordance with the criteria and essential requirements specified in the tender documentation. The World Bank criteria for selection of works also requires that evaluation be in terms of criteria and requirements stated in the invitation to tender in addition to naming additional issues to be considered[86]. In a similar vein, its criteria for evaluation of goods requires that the purchaser take into account, in addition to price quoted in accordance with the invitation to bid one or more of the following factors including; delivery schedule, deviation in payment schedule, cost of replacement components, availability of spare parts in purchaser`s country, operating maintenance cost, performance and productivity of equipment and any other specific criteria to be considered[87].

In providing for award criteria, UNCILTRAL provides that the procuring entity shall not accept a tender if the supplier or contractor that submitted the tender is not qualified or does not accept correction of an arithmetic error or if the tender is not UN responsive i.e. does not substantially answer to the tender requirements. It requires that only tenders accepted are compared, but amongst the accepted tenders UNCILTRAL rules requires award to the tender with lowest price or where the procuring entity has so specified in the tender documents criteria for ascertaining the lowest evaluated tender, then such criteria which must to the extent possible be objective and

[86] World Bank Standard Bidding Documents procurement of works and user guide May 2006 revised April 2007, May 2010 and August 2010.

[87] World Bank Standard Documents for Procurement f Goods May 2004 revised May 2005, September 2006 , May 2007 and May 2010.

quantifiable be given relative weight in evaluation procedure, and may be expressed in monetary terms where practicable. The UNCILTRAL rule also allows that procuring entities consider specific factors in determining lowest evaluated bid, including: tender price subject to margin of preference where applicable; cost of operation and maintenance; time for delivery of goods, completion of works or provision of services; the functional characteristics of the goods or works; terms of payment and guarantees for the goods, works or services; the effect on balance of payments positions of award to a bidder; counter trade arrangements offered; extent of local content, including manufacture, labour and materials in goods and services used or offered, economic development potentials offered including domestic investment, encouragement of employment and reservation of certain production for domestic suppliers, transfer of technology and development of needed skills and National Defense and Security Considerations[88].

Under the EU directives award is to the most economically advantageous bid, in determination of these criteria, procuring entities will have to specify and consider such factors as quality, price, technical quality and merit, aesthetic, functional characteristics, environmental characteristics, running costs, effectiveness of after sales service etc[89].

[88] Article 34 of the UNCITRAL Model Law on Public Procurement
[89] Article 53 of the EU Directive 2004/18/CE.

5.15 Dual role of Procurement Implementation and Dispute Settlement.

Examples exist of other jurisdictions where procuring entities or officers of procuring entities have the dual role of procurement implementation and supervision, as well as dispute settlement. In many of these instances resolution of complaints of bidders is seen as purely administrative, as in the case of the PPA 2007.

As is the case with the Ugandan law[90], the Tanzanian law also empowers the board of the Agency to establish a Complaints Review Committee to handle complaints arising from execution of procurement function by procuring entities[91]. The setting up of a separate committee provides a measure of arms length. By Section 80 of the Law, the Accounting Officer can decide disputes between procuring entity and bidders which cannot be resolved by mutual agreement. The Tanzanian law also has an independent Appeals Tribunal domiciled in the Ministry of Finance, charged with handling appeals by bidders arising from decisions of Tenders boards, Accounting officers, procuring entities or the Authority[92]. However the language of Sections 97-82 encourages mutual resolution of complaints by dialogue. It is not certain how this does happen in practice, and what levels of decisions can be taken by mutual settlement given the often contending

[90] S 15 Ugandan Public Procurement and Disposal of assets Act 2003.
[91] S 19 Tanzanian Public Procurement Act 2004.
[92] S 79 of the Tanzania Public Procurement Act 2004.

interests in issue in a procurement activity. However the Ugandan law in Section 91 makes very similar provisions to Section 54 of the Nigerian PPA, requiring submission of complaints within fifteen working days to the Accounting Officers, and giving him fifteen days to decide the complaint. The Kenyan legislation provides for a Public Procurement Administrative Review Board independent of the Authority and procuring entities and empowers it to hear and determine complaints from bidders, even though the authority shall provide it with administrative services. Its membership shall be determined by regulations[93]. Under Serbian procurement law, the Minister recommends candidates for appointment into the Commission for Protection of Tenderers Rights[94]; the Minister is not a member of the Commission. The Commission is empowered to receive and independently determine requests for protection of tender's rights on appeal from decisions of procuring entities.

In the EU there is a requirement for appointment of a jury of national persons independent of all participants, autonomous in decisions and opinions[95]. The UNCITRAL model law admits of the procuring entity receiving and handling complaints against its actions. It also provides for complaints to be forwarded to supervisory agencies where the supervisory agency is one that approved the action of the procuring entity[96]. It allows for appeals from decisions of the procuring entity to go to an independent administrative

[93] S 25 of the Kenyan Public Procurement and Disposal Act 2005.
[94] S 129 of the Serbian Public Procurement Law.
[95] EC Directive 2004/18/CE Article 73.
[96] UNCITRAL Model Law Article 52-57

tribunal or body, and also provides for judicial review. Indeed, the sequence and hierarchical mode of escalation of complaints in the Nigerian system accords with UNCILTRAL model law requirements. The GPA being an agreement between sovereign nations allows for a more conciliatory dispute resolution mechanism, which includes the WTO agreement on dispute settlement, and involves written representations by aggrieved parties to the party alleged to have infringed the provisions. This is with a view to eliciting sympathetic consideration, but also failing this the dispute settlement board has authority to set up panels, adopt panel and appellate body reports, make ruling and conduct surveillance of implementation of rulings and recommendations.

5.16 Disposal of assets.

The Kenyan legislations provide for the appointment of a Disposal Committee which plans and oversees disposal of store items. It is this committee that recommends methods of disposal to the Accounting Officer[97]. In the Ugandan Act, disposal of assets shall be by method approved by Contract Committee[98]. In none of these two regimes do you have a requirement for prior valuation by an independent valuer as in the Nigerian PPA 2007. Neither the UNCILTRAL nor the EU regulations deal with disposal of assets in the manner we find in the Nigerian, Ugandan or Kenyan laws.

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[97] S 129 Kenyan Public Procurement and Disposal Act 2005.

[98] S 79 of the Ugandan Public Procurement and Disposal of assets Act 2003.

CHAPTER SIX.

CONCLUSIONS AND RECOMMENDED AMENDMENTS ON THE PPA 2007.

6.0 INTRODUCTION

There are good reasons to conclude that though it has some flaws, the PPA 2007 provides a reasonable framework that can, with limited amendments, ensure procurement process clarity, achieve a transparent, fair, competitive, and accountable procurement system.. It would be able to deliver competitiveness, value for money, and improved service delivery in Nigeria. However the amendments proposed by the Executive and Legislative branches, reflect the state of development of governance structures and the continuous contestation for power that is often associated with a system whose institutions are weak and need strengthening. The proposed amendments from both arms of government and the controversies surrounding them betray; a) tensions between the administrative cadre and political leadership on who controls procurement process, b) tensions between the Executive and Legislative branches of government on control of public procurement, and c) the general debate about political interference in the procurement process in Nigeria. The proposals from the executive branch however fail to capture the views of broad range of other stakeholders outside of the executive and legislative branches for amendment of the PPA 2007. Thus both the proposals from the executive and those from the legislative branches appear self serving, and intended to ratify wrongful actions or prevent external

scrutiny of their actions. Given the examples cited and reviewed, it would appear that the issue of who exercises what power and authority, amongst elected officials and civil servants needs to be quickly settled in the minds of political leaders in favour of the structure currently existing in the PPA 2007.This is advocated so that the argument amongst them can change to what principles must continue to apply in exercise of power and authority given, and what levels of improvement are being achieved in terms of transparency, competitiveness, fairness, accountability and value for money, and the minimal amendments required to achieve clarity, effectiveness and progressive implementation of the law, as is currently the case amongst other stakeholders. It does appear however that defining the exact role of political office holders in the procurement process, or removing political interference in contract award decisions in Nigeria, as recommended by the CPAR, will in addition to existing and recommended amendments require strong political will and readiness from the political leaders at the State and Federal levels of government. This is the crux of the challenge that is faced in procurement systems and practices in Nigeria, one which requires strong citizen action and demand to secure compliance to the existing law.

6.1 Disposal of Assets.

The requirement for mandatory valuation of assets prior to disposal of assets as contained in the Nigerian law is well

intended but may lead to waste. Whereas in many instances, minor assets to be sold may have less value than the fees of the valuer, it would appear that what is required is to amend the law to require valuation subject to conditions including thresholds that may be set in the regulations. This will enable appropriate authority (ies) to set more detailed guidelines for when and how valuation should occur, which may include aggregation of small items into lots for valuation, and disposal. Perhaps, the amendments should require the mandatory keeping of assets registers for a period of time extending to a number of years after disposal, with detailed information and periodic update of information. Such information in the assets register would range from all purchase information to information on performance, use, maintenance and disposal of the assets.

6.2 **Dual roles of Procurement Implementation and Complaint settlement by the Bureau and Accounting Officers.**

Granted as already indicated in chapter five above, the duty of the Bureau and Accounting Officer in deciding complaints made by bidders against their own decisions may be considered administrative and not quasi judicial. It may also create difficulty to convince an onlooker of the impartiality of the Accounting Officer or the Bureau in deciding complaints relating to their own actions. It may be even more difficult to

convince the bidder, the result may be that fewer bidders will use the complaint mechanism. A perusal of the list of complaints published in the BPP quarterly procurement journals and on its website will show that most of the complaints are complaints by bidders against actions of the procuring entities directed to the Bureau, only in a few cases do bidders complain to the procuring entity directly, in most instances when they do, they copy the Bureau. Till date not a single procuring entity has published information relating to its handling of complaints. In the same breath, non or very few of these published complaints are against the Bureau. In an environment with less than adequate levels of transparency and accountability, businesses whose profitability may depend on government patronage will exercise restraint complaining against government agencies or personnel, if those who will consider their complaints are also the same people against whom they will be complaining. It has been suggested that the National Council on public procurement could be given power to appoint complaints resolution panels or maintain complaint resolution panels to consider complaints against the Bureau's decisions and actions. This appears to be the case under the Tanzanian law, where the authority has powers to consider complaints, and the board of the ***Authority*** also has power to appoint complaint resolution panels.

In the Nigerian scenario however, the Council sits in Abuja, procuring entities are spread across the 36 States and Federal

Capital Territory, sometimes of about 8-12 hours road journey and one to two hours journey by air from Abuja; complaints against the Bureau are therefore, not likely to be in respect of procurement of small or minor values since period primarily certifies procurement above the prior review threshold. However in case such instances arise, the Council system may need to take account of the big value procurement for which bidders can afford to send complaints to panels sitting in the Nigerian Capital Abuja on the one hand and complaints below certain value thresholds, where there is no value for money in sending complaints to a panel sitting so far away. In the second instance, the Council can set up panels in those areas of the country to handle such complaints. Also whilst it may be necessary for another body or panel or committee to be set up by the Council to handle complaints against the BPP, it is completely appropriate, and indeed necessary that the BPP handle complaints made against procuring entities, over which it already has supervisory powers. This can be directly in respect of procurement below the "No Objection threshold". If this be the case, the BPP need not establish local offices across the country for this purpose. It can appoint local panels to determine such complaints, under its supervision if the need arises, and be made to retain an appellate power on decisions from such panels. It can also handle them directly as is currently the case. Also it is suggested that the fifteen days required for complaints to file their complaint to the Accounting Officer under S 54 of the PPA should be a standstill period, during which no MDA will enter into a valid

contract.

6.3 Award Criteria.

It is recommended that Section 16(17) of the Nigerian Procurement law be amended to either indicate the criteria for selection indicated therein to refer to only goods and works or to add and specify the three criteria for selection of services. In addition, appropriate referencing is required between the provisions of Sections16 (17) and 32(4-5), which requires the bidding documents to set out the factors, in addition to price that will be considered for the purpose of evaluation of bids. It would appear that given the provisions of Section 51 of the PPA 2007, Section 50(1) serves no purpose and may be deleted, this will help resolve the apparent conflict it imposed by introducing the phrase "*"Lowest evaluated price" in place of "Lowest Evaluated Responsive bid" used in Section 16(17).*

6.4 Duration for advertisement and or preparation and submission of bids.

Given the twin problems of late passage of budgets, and late release of funding, as well as the time required for procurement planning within a twelve months budget year, there appears to be a need for flexibility or reduction of the minimum time required for bidders to prepare and submit bids, or period for which bids need to be advertized in Nigeria. This will require an amendment of Section 25 of the PPA 2007, the suggestion is that this section be amended to reduce

the minimum period for national competitive bids to not more than 30 days or 21working days or four weeks, whilst emphasizing in both National and International competitive bids, that the actual decision as to the precise number of days to be given, should take due consideration of the particular circumstances of the project and the magnitude and complexity of the contract, and may be up to the six weeks threshold.

6.5 Offences and Sanctions.

The systems across Africa have an increased emphasis on punitive sanctions, i.e. more of prison terms, than systems from other jurisdictions. It would appear that there is need to have a rethink to this approach. This publication is not about the effectiveness of these systems, but about evaluating proposals for amendment in one jurisdiction-Nigeria. However, there are indications that these statutorily provided sanctions have not in practice provided the much needed deterrence for infractions. It is no use to have punitive sanctions written into the law, if in practice the system is unable to implement and enforce them. Perhaps, a new and additional approach of looking at the challenge from an incentive perspective seeking to address the issue of personal or group benefit or to ensure that those who infringe the law do not keep whatever benefit derived from the infraction, may be worthy of closer examination. This may lead to provisions requiring the courts in each case to fully recover any benefits

resulting from procurement infractions. The provision may include requirements for lighter sentencing if the accused takes early opportunity to surrender or pay back all illicit benefits obtained from the infraction(s) and make full disclosure of facts, including naming and providing evidence of all others who participated in the crime. If this be the case, such an approach may also require deeper examination of criminal justice administration systems beyond the procurement law.

For example, the adoption of a non-conviction based assets forfeiture clause that allows seizure and confiscation of illicit assets or compounding of offences - without prior conviction based on clearly set out rules would be of assistance in this regard. The idea is to make it difficult for individuals to keep and take benefit of ill gotten wealth, and thereby create a disincentive for them to acquire it in the first place. This approach takes account of the fact that some people may be satisfied with prison terms if they are sure that they will retain their loot and live in luxury thereafter. Divesting the offenders of their ill-gotten enrichment would be a more deterrent measure to curb procurement related offences. It may or may not be exclusive of penal sanction, except only as an incentive for accused persons to take an early plea, surrender any ill gotten wealth, make full disclosure of all co-participants in consideration of very light sentencing, or a fine. Also our legal system perhaps needs to consider providing an incentive for people to provide information and evidence of corruption by

percentage incentive payments for persons actively contributing to successful recovery of proceeds of corruption; this is a suggestion for the broader criminal justice system than just for procurement. It will provide an effective counter for ethnic sympathies and the undue solidarity that persons accused of corruption get from their ethnic and religious groups, and provide an incentive for the risks that whistle blowers face.

6.6 Dual Responsibility for Infractions.

As argued in Chapter Five, Strict Liability and Vicarious Liability offences are known exceptions to the general common law rules requiring the existence of *actus reus (i.e the physical act constituting the offence)*, and mens rea, (a guilty intention or knowledge in committing the act or making the omission) for conviction. What, however, is challenging is the application of same sanctions to direct participants in the offence with those to whom the liability inures vicariously. In the case in point which is the Accounting Officer, the mischief sort to be cured may be a justification for vicarious liability for such infractions. But it is doubtful that this justifies equal sanctions for both the delegate and delegator. This is because the Accounting Officer delegating a function may not always fully participate in the infraction or have the guilty knowledge or intent. This is perhaps why ordinarily, strict liability and vicarious criminal liability often applies in minor offences. In this case therefore, it is recommended that sanctions for such

vicarious liability for the Accounting Officers be reduced in severity to a level much lower than that of the person who directly commits the infraction; indeed options of a fine may also apply.

Perhaps also the law may provide for lighter sentencing for the Accounting Officers or complete exoneration, if it is shown that as soon as he became aware or should have become aware of a vicarious infraction, he reported the infraction in writing to the Bureau and relevant criminal investigation authorities or at least takes the earliest opportunity to make full disclosure of facts, documents and identity of all persons involved, including quantum of losses to government resulting from the infraction, and to help government recover all personal gains resulting from the infraction to any party. Also a similar principle could be applied to situations, where a procurement officer has been procured or directed to commit an infraction. In such cases, the person directing the action amounting to an infraction should be held liable for the full sanction and the procurement officer may receive light sentence, an option of a fine or exoneration, provided he takes the earliest opportunity to report the offence, or disclose all information, documents and identity of persons and the quantum of losses incurred by government, and return any personal benefits gained on account of that particular infraction. This principle should also apply to the situation between a contractor and a public officer. These will not only create incentives for those who know, to report infractions, but also reduce strong collusion which will

otherwise make investigation and prosecution difficult, whilst improving recovery of illicit gains, and therefore increasing deterrence.

6.7 Powers of the Bureau to recommend disciplinary action and of the Council to act on it.

The powers granted to the Bureau to recommend disciplinary action in Section 6 of the PPA 2007 is a necessary complement of its power to regulate and supervise the procurement process and the compliance of procuring entities to the provisions of the PPA 2007. The requirement that the recommendation be made to the Council as already argued makes the exercise of no consequence given constitutional provisions for discipline of public officers already referred to in Chapter Five of this work. In that Chapter, we saw good examples of how the Tanzanian and Ugandan laws have dealt with this situation. The recommendation is that this section be amended to require the Bureau to make its recommendations for disciplinary action(s) to the Civil Service Commission and to require this Commission to inform the Bureau in writing, and publish within a given period action taken on such recommendation. In the same breadth, the Bureau's power to recommend to the Council the transfer of procuring functions of a procuring entity as a result of persistent breaches of the PPA 2007 and rules issued therefrom may need to take account of the powers of the President in Section 5 of the Constitution. In doing so, Section 2 of the PPA 2007 must be amended to specifically

give such powers to the Council; this is because, except in such circumstances provided for by law, such a power can only be exercised by the President in accordance with Section 5 of the 1999 Constitution.

6.8 Provisions on advance payment and performance guarantees.

As already indicated in Chapter Three of this work, the provision of Section 35 of the PPA 2007 placing an upper limit of 15% on mobilization fee payable for all projects though well intended, may pose challenges for major none 'off the shelf projects' and supplies involving manufacture and shipments of goods from abroad, standard conditions of which may require irrevocable letters of credit for sums well above 15% of the value of projects. The recommendation is for Section 35 of the PPA 2007 to be amended to provide for an upper limit of mobilization payment of 15% for all procurement except others that may from time to time by regulation be specified by the Bureau. In which case, the Bureau will also have the power to specify limits and conditions applying to payment of such higher advance payment regarding such other groups of procurement. Also the provision requiring performance guarantees in cases where advance payments are made, needs to be amended to require performance guarantees in all cases above a given threshold or in circumstances as may be specified by the Bureau by regulations.

6.9 Subjection of Bureau`s Powers to Council Approval (Independence of the Regulator).

An independent and unfettered regulator is a standard requirement for operation of most regulatory frameworks. The functions of the Bureau are information driven; its efficiency may in many circumstances depend on its ability to partner with other agencies, enter into contracts that support implementation of its functions and above all speedily demand and receive information from the procuring entities. Constraining its powers to undertake such steps reduces its independence and its ability to effectively and efficiently execute its functions. It does not matter that the power to approve such action is given to the Council to which it serves as secretariat. It is recommended that these restrictions to the exercise of the Bureau's powers contained in Section 6 (2) of the PPA 2007 be removed. The examples from Tanzania, Uganda, Kenya, and many other jurisdictions indicate that the Bureau needs to be unfettered in this regard.

6.10 Minister of Finance as Head of Council.

As already argued, whilst it is inappropriate that the Minister as part of the political establishment that determines policy also superintend over procurement implementation, there appears to be no clear justifications to require the Minister not to participate in policy making. Indeed, examples exist in other jurisdictions, where the Minister not only issues procurement regulations, but where the Ministry of Finance also supervises the procurement regulatory body. There are

also examples where non-cabinet members are appointed to chair the procurement policy approval organ or board. It will not appear to matter much what choice is made, provided that the policy approval body does not also have powers to superintend over day-to-day procurement practice and that the procurement supervisory body is independent and sufficiently empowered to carry out its functions. However given the provisions of our public finance laws already referred to, the minister of Finance will be an appropriate officer to chair a body that approves procurement policy.

6.11 Transparency Provisions.

Every public procurement framework requires a regime of detailed documentation of activities, proactive publication of procurement records, open bidding processes (i.e. **open competitive bidding)**, receipt, management and distribution of comprehensive records of all procurement proceedings. Often times, it includes the duty to develop, establish and maintain databases or ICT based systems for collation, storage and distribution of information relating to procurement activities and actors in the procurement process in the subject countries. These however need to be complemented by sufficient access to procurement information and documentation by citizens. The Nigerian PPA 2007 does have access to information provisions that appear more progressive than in the case of other African countries studied such as

Kenya, Tanzania and Uganda. However, it is to be noted that on its own, there is ambiguity in the access to information provisions of the PPA 2007, as could be gleaned from the provisions of Sections 16 (14) and 38 thereof. Though as argued in this research, the provisions of Section 16 (1) of the PPA, and the 1999 Constitution make it imperative that Sections 16 (14) and 38 be progressively interpreted, not to defeat its fundamental objectives and the provisions of the Constitution. The new Freedom of Information Act, 2011 in Nigeria provides a broad access to information framework based on which citizens can, more freely, access public records including procurement information in Nigeria. Perhaps all that may be required will be to bring the provisions of the PPA 2007 to an alignment with the provisions of the Freedom of Information Act 2011.

6.12 Proposals to make the Federal Executive Council Approval Authority for Contracts and or to Constitute Body of Principal Officers of the Legislature or Judiciary as Approval Authority for Contracts above Prior Review Threshold or to approve Thresholds .

It is hard to see any value in Executive Council approval of procurement contracts. There is broad agreement amongst practitioners in Nigeria that this practice is currently not supported by the provisions of the PPA 2007, and this is why the Executive Council introduced an executive bill in the

National legislature to legitimize the practice. There is ample evidence from the practice in other countries that this is not a common practice. Indeed, the author is yet to find another country in the world where such a practice exists.

This is also the case with the proposed amendment to constitute the body of principal officers of the Legislature and the Judiciary Tenders Board into approval authorities for procurement above the prior review threshold for the legislature and the judiciary. These failed proposals for amendment betray the unnecessary contestations for control of the public purse between the executive and the legislature, and the issue of political interference in procurement proceedings identified by the CPAR as one of the major challenges of Nigeria's procurement system prior the reforms. These indicate the need for stronger political will to eliminate political interference in practice from the procurement process in Nigeria. No doubt, any amendments reflecting the above government proposals will completely reverse the gains made in the PPA 2007.

Indeed what is required at the moment is to ensure full implementation of the PPA 2007 in this regard, and to convince the States to reverse the emerging trend of legislative usurpation of procurement functions of administrative officers at the State level.

6.13 Appointment of Director General through a Competitive process.

There are country examples of appointment of the Chief Executive of the regulatory body through a competitive process, as well as directly by the President. In the case of Uganda and Kenya, he is appointed by the board, which will be the Council in the case of Nigeria. However, in Tanzania he is appointed by the president. The minimum standard seems to be that the laws across Africa seem to always indicate the minimum broad qualification of such a person. However, as regards Nigeria, the need for public confidence in the Bureau, and in the process of appointment of its Chief Executive Officer demands that the current provision for competitive nomination of three persons from amongst whom the president will appoint a Chief Executive should be obeyed. The controversy surrounding the failed attempt to amend the current provisions to give the President unfettered discretion to appoint and the failure of government to comply with it, has created low public confidence in the system. Thus, similar proposals for amendment may need to be avoided, not because it is wrong for the President to make such appointment, but because of the risk that citizen's confidence in the procurement system will further reduce in the face of such an amendment.

6.14 **Proposal to replace the word "media" in Section 1(2)(iv) with the Nigerian Union of Journalists, whether or not to remove representative of the Nigerian Society of Engineers and include the representative of the Nigerian Institute of Quantity Surveyors in the Council.**

It would appear reasonable to replace "representatives of the media" in Section 1 (2)(iv) of the Act with the "representative of the Nigerian Union of Journalists". Also the Nigerian Society of Engineers and the Nigerian Institute of Quantity Surveyors and Valuers both need to be represented in the Council. Thus, it is recommended that Section 1(2)(iv) of the PPA 2007 be amended to include a representative of the Nigerian Institute of Quantity Surveyors as an additional member of the Council.

6.15 Major and Minor deviations - Propriety of the providing for this in the Act

It appears that there might not be justification for any provision on minor and major deviations in the law, other than to give the necessary powers for such items to be prescribed by implementing regulations to be issued from time to time pursuant to the law. In other words S 31 the law should be amended removing the current provisions for minor and

major deviations and replacing it with a single provision authorizing the Bureau by regulation to define and list major and minor deviations and provide rules for their application. This is the recommended approach.

6.16 Proposals to Reserve Certain Construction Contracts for Indigenous Companies.

The issue of protection of local industries is a challenging one. On the face of it, such provisions in a law might appear discriminatory, yet as we have found out, the concept of value for money and fitness for purpose, does encompass the attainment of government economic and social objectives. Indeed social justice and equity is a legitimate and common objective of government. Nevertheless the greater challenge appears to be with attempting to legislate these objectives into being through a procurement law. Their nature is such that related issues of social justice, and equity e.g. protection of minority interests or interests of the disadvantaged in society or incentives to local industries may not always be amenable to generalization in a law. It would appear that all the law needs to do is to provide the power or avenue for appropriate criteria to be set to accomplish such goals, if and when they become necessary. The proposal to statutorily calve out construction contracts within a given threshold for local companies does not seem appropriate. This is indicated by the

presentation of stakeholders in the report of the public hearing on the failed bill[99]. Also it is to be taken into account that Section 32 (4) of the PPA 2007 requires that all relevant factors, in addition to price, that will be considered for the purpose of bid evaluation and the manner in which such factors will be applied shall be stipulated in the solicitation documents. Section 32 (5) (a) & (b) requires that such factors include the factors listed therein. It appears to me that since the language of the Act is that, the factors will "include" a number of listed factors, it necessarily means that they shall not be limited to the factors therein listed. Thus, the implementing regulations may list other factors including incentives to local industries, technology and skill transfer, local employment creation, protection of interest of disadvantaged groups etc. An alternative will be for Section 32 to be amended to list out these factors in respect of works and goods as is the case with services in Section 49 of the PPA 2007.

Perhaps also, some administrative strategies including requirements in the standard bidding documents or specific bidding documents for bidders in specific sectors requiring improvements in local capacity, to show or indicate technology and skill transfer proposals, and local partnerships, protection of interest of disadvantaged groups, protection of the environment or how their proposals will generate local jobs etc. The use of this as a mark earning benchmark for bid evaluation may produce far more rapid and

[99] Report of the House Committee on Public Procurement on the Bill for An Act to make it Compulsory for Government of Nigeria and its Agencies to award construction contracts up to 5 Billion Naira to Nigerian Indigenous construction companies and other Connected purposes 2009 (HB.163 2009).

enduring results than legislating quota in the way proposed by the failed proposal for amendment. Without doubt, the construction industry in Nigeria requires this later kind of strategy which is more likely to have equitable and enduring results.

6.17 Conclusion

In conclusion this publication has examined substantive proposals for amendment, featuring stakeholder inputs and subject matter of formal proposals for amendment initiated by the executive or the legislature. It does not claim to have considered all needed amendments or all existing proposals for amendments to the PPA 2007. This is five years after commencement of the implementation of the PPA 2007. Obviously, the time has come for an objective assessment of the need for amendment of the PPA to be undertaken. The nature of the debates over proposed amendment incidentally has been politically charged in the past, and dominated by an apparent contest for control. It is hoped that this publication contributes to a dispassionate look at the need for amendment and indeed the existing proposals for amendment of the PPA 2007, and more importantly helps to reshape the debate from control to issues of public interest.

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