



**X-RAY OF THE PUBLIC PROCUREMENT ACT
(PPA 2007), ITS DEFICIENCIES AND SOLUTIONS**

**A PRESENTATION AT 2-DAY WORKSHOP ON
CONSTRUCTION CONTRACTS BEST PRACTICES**

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1.0 INTRODUCTION

Nigeria Country Procurement Assessment Report of June 30, 2000 anchored by a team of staff from the World Bank and a Government (Federal and State) Task Force, with the assistance of consultants financed by the Bank and the Government of Denmark and the recommendations therein constitute the basis for the enactment of the Public Procurement Act 2007.

The Task Force found inter-alia that;

- There was no specific law or other Act of parliament regarding public expenditure or procurement in Nigeria. The Ministry of Finance, with the authority vested in it by the constitution, issues 'Financial Regulations" (FR) which regulate and delegate the responsibilities of public procurement and financial management at federal level.
- The procurement regulations in the states consist mainly of local Financial Regulations based on the Federal FR, supplemented with circulars and guidelines from within each branch of administration in the state governments.
- The FR is not a law or an act of similar authority, but an administrative document which could be amended by the Minister of Finance without regard to fundamental rights of the suppliers/contractors. Therefore, the rights of suppliers/contractors with regard to the protective measures such as; open advertisement, public award criteria etc. are only protected by the goodwill of the Government in power at any given time.
- The existing regulations on public procurement have no permanent measures for surveillance and control. Instead adhoc investigation groups can be set up within the public body that takes this initiative.
- The existing system relied almost solely on a high degree of self-control within the ministries and other public entities and so could easily be perceived by suppliers/contractors as lacking in transparency.
- There was no permanent body outside the purchasing entities monitoring and controlling the procurement process.
- There was no central policy-making entity in the area of public procurement as this was left to ad-hoc circulars issued by the Ministry of Finance and some cases, the Presidency.
- That neither the FR nor any of the circulars issued under its authority contains any provisions for the filing of complaints concerning public procurement.

- That there was no permanent body independent of the procuring entity where suppliers/contractors can file complaints regarding the procurement process. A supplier/contractor being maltreated by purchasing public entity only has the option of lodging a complaint with the same entity that is accused of wrongdoing. The complaining suppliers/contractors were not guaranteed a formalized treatment containing legal assurances of transparency and equality of their complaints.

Consequently, the Task Force recommended in the short term, the establishment of a public procurement regulatory body, independent of the tenders boards with responsibility for the efficiency and effectiveness of the procurement function across the public sector. It further recommended in the medium term the enactment of a public procurement law based on the United Nations Commission for International Trade Law (UNCITRAL) model, which covered procurement of goods, works and services.

It is safe to assume that these recommendations in time inspired the establishment of the Budget Monitoring and Price Intelligence Unit (BMPIU) within the presidency and subsequently the enactment of Public Procurement Act, 2007.

2.0 ARCHITECTURE

2.1 Legislative Framework (Part I & II)

The Public Procurement Act 2007 (The Act) created the **National Council on Public Procurement** (SS1-2) and the **Bureau of Public Procurement** (SS3-14) as the entities regulating Public Procurement activities in Nigeria.

The council, which is headed by the minister of finance supervises the BPP to ensure adequate implementation of the procedures contained in the Act and regulations/policies made thereunder. The council's functions include approving the following:

- Monetary and prior review Thresholds
- Appointment of Directors of the BPP
- Policies on Public Procurement
- Audited accounts of the BPP
- Changes in procurement process.

The BPP is vested with the responsibility of directly enforcing the provisions of the Act, formulating general policies and guidelines relating to public sector procurement and supervising the implementation of established procurement policies.

Pursuant to the foregoing, the BPP has formulated regulations for the procurement of goods, works and services in Nigeria. These regulations jointly referred to as Public Procurement Regulations include:

- Public Procurement (Goods and Works) Regulations 2007, which regulate the procurement of goods and works by procuring entities.
- Public Procurement (Consultant Services) Regulations 2007, which regulate the procurement of consulting services by procuring entities.

Collateral to these are also a suite of procedures and guidelines which include;

- Procedures and Documentation Pre-requisite for the Issuance of A Certificate of “No objection” to MDAs.
- Approved policy for procurement of Health and Medical Equipment/List of Manufacturers and Equipment for Tertiary Hospitals.
- Complaints procedure under the Public Procurement Act.
- Code of conduct for Public officers involved with procurement.
- Approved Revised Thresholds for service-wide Application and Special Thresholds for procurement in oil sector.
- Budget Implementation Handbook (By order of Federal Executive Council).

Besides the Act and the Public Procurement Regulations and policies, other regulations applicable to Public Procurement include Infrastructure Concession Regulatory Commission (Establishment, etc.) Act 2005 and the Federal Government of Nigeria Financial Regulations 2000. These are however sub-ordinate to the Act in matters of Public Procurement. The Bureau is headed by a Director-General who holds office in the first instance for 4 years, renewable for another 4 years.

2.2 Applicability of Procurement Law (Part III)

The scope of the application of the Act covers procurement of goods, works and services carried out by:

- The Federal Government of Nigeria and procurement entities; and all entities outside the foregoing description which derive at least 35% of the fund appropriated or proposed to be appropriated for any type of procurement in the Act from the Federation share of consolidated Revenue Fund.

Procurement of special goods, works and services involving national defense or national security is specifically excluded unless the President’s express approval had been first sought and obtained.

Thus procuring entities within its remit would include;

- The Federal Government
- Federal Ministries
- Parastatals
- Autonomous/Semi-autonomous Public firms like NNPC, NPA, PHCN, INEC etc.

Given that the under the Act, the Council and the BPP are charged with the responsibility of setting prior review thresholds for the conduct of public procurement, the BPP recently published revised approval thresholds for the award of contract as follows:

Approving Authority/ No objection to award	Goods	Works	Non-Consultant Services	Consultant Services
BPP issues No objection to award/FEC approves	₦100m and above	₦500m and above	₦100m and above	₦100m and above
Ministerial Tenders Board	₦5m and above but less than ₦100m	₦10m and above but less than ₦1.0Billion	₦5m and above but less than ₦100m	₦5m and above but less than ₦100m
Parastatal's Tenders Board	₦2.50m and above but less than ₦50m	₦5.0m and above but less than ₦250m	₦2.50m and above but less than ₦50m	₦2.50m and above but less than ₦50m
Accounting Officer: Permanent Secretary	Less than ₦5m	Less than ₦10m	Less than ₦5m	Less than ₦5m
Accounting Officer: Director-Gen/CEO	Less than ₦2.50m	Less than ₦5m	Less than ₦2.50m	Less than ₦2.50m

With respect to procurements for special works by the Nigerian National Petroleum Corporation (NNPC), Special Financial Limits and thresholds are applicable as follows:

- ₦2.7billion and above are to be approved by FEC backed by BPP’s certificate of “No objection” to award;
- ₦1.4billion and above but less than ₦2.7billion are to be approved by the NNPC Tenders Board;
- ₦540million and above but less than ₦1.4billion are to be approved by the Group Headquarters or NNPC Tenders Board;
- ₦270million and above but less than ₦540million are to be approved by the Parastatal Tenders Board (Refinery & Petrochemicals or Exploration & Production or Corporate Supply Chain Tenders Board);
- ₦70million and above but less than ₦270million are to be approved by the Parastatal Tenders Board (Minor Refinery & Petrochemicals or Exploration & Production or Corporate Supply Chain Tenders Board);
- ₦13.50million and above but less than ₦70million are to be approved by the Parastatal Tenders Board (Business Unit Refinery & Petrochemicals Tenders Board or Exploration & Production or Corporate Supply Chain Tenders Board);
- Less than ₦40million are to be approved by an accounting officer: Permanent Secretary;
- Less than ₦13.50million are to be approved by an accounting officer: Director-General/CEO;

2.3 The Procurement Procedures

2.3.1 Fundamental Principles for Procurement (Part IV)

The fundamental principles for procurement as provided in the Act include;

- Procurement planning supported by prior budgetary appropriations.
- Open competitive bidding in a manner that ensures transparency, equity, accountability and compliance with the Act and relevant regulations.
- Value for money and fitness for purpose
- Promotion of competition, economy and efficiency.

Fund release from the Treasury of Federation Account or any bank account of any procuring entity shall be subject to the production of a certificate of “No objection”

issued by BPP and contracts awarded in default of the said certificate are null and void.

A supplier, contractor or service provider may be a **natural person**, a legal person or a combination of the two. Suppliers, contractors or service providers when acting jointly, shall be jointly and severally responsible for acts of performance or non-performance under the Act. Furthermore, all bidders in addition to the requirements specified in the solicitation documents must inter-alia also evidence the following:

- Requisite professional and technical qualifications
- Financial capability
- Equipment and other relevant infrastructure
- Adequacy of personnel
- Legal capacity
- Noninvolvement in receivership, insolvency or bankruptcy proceedings.
- Taxes, pension, charges, etc. compliance

Potential bidder disqualifiers include; corrupting tendencies; non-performance or careless performance; involvement in insolvency/bankruptcy proceedings; criminal sentence; taxes, rates or other charges violations.

A contract shall be awarded to the lowest evaluated responsive bid subject to the Bureau's right to refuse issuance of "No objection" certificate for price excessiveness. Furthermore, all procurement contracts shall make disputes referable to arbitration whilst the accounting officers and delegates remain primarily responsible for compliance with the Act. Value for money provisions such as warranties, indemnities etc. shall be enshrined in every procurement contract.

Given the revised prior review thresholds, greater procurement responsibilities have been placed on Ministries, Departments and Agencies whilst the BPP focuses mainly on its statutory post-procurement reviews via the "No objection" certification mechanism. For the guidance of the MDAs, the following documents constitute a pre-requisite for the issuance of a "No objection" certificate;

- (i) Letter of request/transmission of documents signed by the Honourable Minister or Permanent Secretary (The Accounting Officer).
- (ii) Evidence of Advertisement/Invitation for Prequalification/Approval for exemption/BPP "No objection" to adopt Restricted Tender or Direct Procurement.
- (iii) Prequalification Documents Submitted by Contractors
- (iv) Pre-qualification Evaluation Report

- (v) Letters of Invitation to Bid (Contractors acknowledged copy)
- (vi) Project Designs & Drawings/Full Specifications for goods
- (vii) Bills of Quantities/Bill of Engineering Measurement and Evaluation.
- (viii) Financial Bids of Pre-qualified Contractors showing evidence of counter-signing of Bills by competing firms.**
- (ix) Bid Return Sheet (duly signed by all Pre-qualified bidders in attendance & Representatives of the MDA/Observers/Professional Organization/NGO.
- (x) Copies of protest letters by bidders and responses/action taken, if any.
- (xi) Progress Reports for on-going Projects requiring argumentation/Latest Interim Statement/Comparative Bill of original Revised works.
- (xii) Bid Evaluation Report: Hard/Soft copy
- (xiii) Consultant's or In-House Project Estimate: Hard/Soft copy
- (xiv) Appropriation/Source of fund (copy of highlighted Budget page).

2.3.2 Organisation of Procurements (Part V)

Subject to the relevant monetary prior review thresholds, the approving authority for the conduct of Public Procurement are;

- (a) **Parastatals Tenders Board** for a government agency, parastatal or corporation and;
- (b) **Ministerial Tenders Board** for a ministry or extra-ministerial entity.

The Tenders Boards are composed as follows:

- | | | | | |
|------------|-------------|-----------|---|----------------------|
| (A) | Ministry: | Chairman | – | Permanent Secretary |
| | | Members | – | Heads of Departments |
| | | Secretary | - | Head of Procurement |
| (B) | Parastatal: | Chairman | – | Director-General |
| | | Members | – | Heads of Departments |
| | | Secretary | - | Head of Procurement |

Organisation of Procurement typically begins with procurement planning anchored by the procurement planning committee, which carries out the basic needs assessment and evaluation and all the other necessary pre-budget activities that drive procurement. Procurement implementation follows on with advertisement and solicitation for bids from contractors/suppliers that had earlier been prequalified.

Received bids are then processed in strict compliance with the provisions of the Act especially in respect of transparency and accountability matters and culminates in the award of contract subject to the approval of the approving authority, obtaining a “certificate of ‘No objection’ to contract award” from the BPP, execution of Contract Agreement and publication of the award.

In all matters of procurement, the Accounting Officer remains responsible for compliance with the Act and is indeed the prime mover and overseer of the activities of the Procurement Planning Committee and The Tenders Board. The Tenders Board is responsible for the award of procurement contracts and its decision shall be communicated to the minister for implementation.

2.3.3 Procurement Methods (Part VI)

Except as provided by the Act, procurement is primarily conducted by the open competitive bidding. This implies, subject to previously defined criteria, offering every interested bidder, equal simultaneous information and opportunity to offer the goods, works or services needed. The winning bid is defined as “that which is the lowest evaluated responsive bid which has been responsive to the bid with regards to work specification and standard”.

Invitations to bid are either by way of **National Competitive Bidding (NCB)** or **International Competitive Bidding (ICB)**, subject to the power of BPP to stipulate the monetary thresholds that qualifies application of either method. The monetary thresholds set by the BPP for the time being are as follows:

Procurement selection method and prequalification	Goods	Works(₦)	Non-Consultant Services (₦)	Consultant Services (₦)
International/National Competitive Bidding	₦100m and above	₦1Billion and above	₦100m and above	Not Applicable
National Competitive Bidding	₦2.5million and above but less than ₦100m	₦2.5million and above but less than ₦1billion	₦2.5million and above but less than ₦100m	Not Applicable
Shopping (Market Survey)	Less than ₦2.5m	Less than ₦2.5m	Less than ₦2.5m	Not Applicable
Single Source/Direct Contracting (Minor Value Procurement)	Less ₦0.25m	Less ₦0.25m	Less ₦0.25m	Less ₦0.25m

Prequalification	₦100m and above	₦300 and above	₦100 and above	Not Applicable
Quality and Cost-Based	Not Applicable	Not Applicable	Not Applicable	₦25m and above
Consultant Qualifications	Not Applicable	Not Applicable	Not Applicable	Less than ₦25m
Least Cost	Not Applicable	Not Applicable	Not Applicable	Less than ₦25m

Invitations under International Competitive Bidding shall be advertised in at least two national newspapers and one relevant internationally recognized publication, any official websites of the procuring entity and the BPP as well as the Procurement Journal, not less than 45 days before the deadline for submission of the bids for the goods and works.

For National Competitive Bidding, advertisement shall be on the Notice Board of the procuring entity, its official websites, at least two national newspapers, and in the Procurement Journal not less than 30 days before the deadline for submission of the bids.

The Act makes extensive provisions for Bid Security, Bid Submission, Bid rejection, Validity period of Bids, modification and withdrawal of bids, Bid opening, examination and evaluation. The core objective of evaluation shall be to determine and select the lowest evaluated responsive bid from the responding bidders.

Bids can be rejected due to major deviations such as:

- Unacceptable Sub-contracting
- Unacceptable time schedule if time is of essence
- Unacceptable alternative design
- Unacceptable price adjustment
- Ineligibility of bidder due to non-invitation and non-prequalification.
- Unsigned bid
- Late submission of bid; and
- Wrong location of submission.

Major deviations warrant suspension of further action on the Bid and return to the Bidder. Every rejection shall be accompanied by a letter stipulating the reasons for the rejection.

Minor deviations (Non- Fatal) include:

- Use of codes
- Difference in standards
- Difference in material
- Alternative design
- Alternative workmanship
- Modified liquidated damages
- Omission in minor items
- Discovery of arithmetical errors
- Unclear and questionable sub-contracting
- Different methods of construction
- Difference in final delivery date
- Difference in delivery schedule
- Non-compliance with some technical local regulation
- Completion period where these are not of essence
- Payment terms
- Any other condition that has little impact on the bid.

Impacts are generally classified as major or minor depending on the gravity of cost implication. Where impacts are minor remedial measures are adopted and if accepted by the supplier or contractor, preserves the responsiveness of the bid.

Margin of preference, subject to the provisions of the Act is permissible and discretionary. Secured mobilization fee of not more than 15% and performance guarantee of not less than 10% of the contract value are applicable. Invoices due for more than 60 days are classified as delayed and shall attract interest charges at the rate specified in the contract document. All contracts shall include terms specifying the interest for late payment of more than sixty days.

Finally, recorded procurement proceedings shall be preserved and subject to other provisions of the Act, be made available for inspection by the BPP and Auditor-General upon request, and where donor-funding is involved, be accessible to donor officials for the purpose of audit and review.

2.3.4 Special and Restricted Procurement Method (Part VII)

(a) Two Stage Tendering Process

When absolutely necessary, procurement entities may engage in two stage tendering procedure. These circumstances include; where formulation of detailed specifications is not feasible; where the procuring entity seeks to enter into a contract for research, experiments, study or development; where

procurement is in respect of national security matters or where an open competitive bidding had failed.

In all relevant situations, the principles of open competitive bidding remains applicable to the two stages. The first stage involves harvesting of proposals without a tender price. Successful bidders in the first stage are then invited to submit final tenders with prices, which are subsequently evaluated using the same protocols of an open competitive bid.

(b) Restricted Tendering

Restricted Tendering may be allowed in situations where; the goods, works or services are only available from a limited number of suppliers, and the time and cost required to examine and evaluate a large number of tenders is disproportionate to the value. In all such cases, the procuring entity shall publish the Notice of selected tendering proceedings in the Procurement Journal.

(c) Request for Quotation

For goods or works of very small value as defined in BPP regulations, Request for quotations may be obtained from at least 3 unrelated suppliers/contractors to ensure competitiveness, whilst the lowest priced responsive quotation receives the award.

(d) Direct Procurement

This method is allowed where; the goods works or services are only available from a particular supplier or contractor or in cases where exclusivity of rights operate; there is urgent need for the goods, works or services thus rendering tender proceedings impractical; owing to catastrophic event an urgent need is created for the goods, works or services thus making tendering procedure impractical. Direct Procurement may also be used where the country is either seriously threatened by or actually confronted with a disaster, catastrophe, war insurrection or Act of God etc.

2.3.5 Procurement of Consultant (Services) Part VIII

The principles outlined in open competitive bidding for goods and works largely apply to procurement of consultancy services. There is usually an invitation to Express Interest or Pre-qualifications. Shortlisted bidders are thereafter requested to submit both technical and financial proposals, which are thereafter evaluated using the criteria outlined in the bid solicitation documents. The consultant with the winning proposal is then invited for negotiations.

2.3.6 Disposal of Public Property (Part X)

For the purposes of this Act, disposal of public property shall operate under the same principles as procuring of public asset, but subject to the provisions of the Public Enterprises (Privatisation and Commercialisation) Act 1999.

Before slating any public property for disposal an Independent Evaluator or such professional with appropriate competence, shall be appointed by the accounting officer in charge, to prepare a Valuation Report.

2.3.7 Code of Conduct (Part XI)

To address issues of conflict of interest and ensure adherence to principles of honesty, accountability, transparency, fairness and equity, the Act authorizes the BPP, with the approval of the Council to stipulate a code of conduct for all public officers, suppliers, contractors and service providers with regards to their standards of conduct acceptable in matters involving the procurement and disposal of public assets.

Consequently, BPP has issued the applicable “Code of conduct for public officers involved with procurement” The code deals basically with transparency and governance issues, undergirded by a corresponding oath of allegiance.

2.4 Administrative Review and Judicial Proceedings (Part IX, XII)

2.4.1 The Bureau is empowered to review and recommend for investigation by any relevant authority any matter related to the conduct of procurement proceedings by a procuring entity or the conclusion or operation of a procurement contract if it considers that a criminal investigation is necessary or desirable to prevent or detect a contravention of the Act.

Furthermore, a bidder may seek administrative review for any omission or breach by a procuring or disposing entity under the provisions of the Act or regulations or guidelines made thereunder. The Bureau has consequently issued a Nine (9)-step complaints procedure as follows:

Where any **Contractor/Consultant/MDA** is not pleased with the outcome of any procurement proceedings either because of a **perceived breach or omission** of the provisions of the Public Procurement Act 2007, he shall:

Step 1: Make a formal and written complaint to the Accounting Officer of the procuring/disposing entity **within fifteen (15) working days from when he became aware of the breach or omission.**

Step 2: The Accounting Officer shall review the complaint and communicate his decision on the matter to the complainant **within fifteen (15) workings days. He shall give reasons for his decision and the corrective measures to be taken where necessary.**

- Step 3:** If the Accounting Officer **fails** to make a decision within the given period or the complainant is not satisfied with his decision, the Act **allows the complainant to forward his complaint to the Bureau within ten (10) working days from the date that decision was communicated to him.**
- Step 4:** Upon receiving the complaint, the **Bureau** shall:
- (a) Notify** the procuring entity of the complaint.
 - (b) Suspend** any further action by the procuring or disposing entity until the matter is settled.
- Step 5:** Unless the Bureau dismisses the complaint, it shall further:
- (a) Prohibit** the procuring/disposing entity from taking further action.
 - (b) Nullify** part or all of the unlawful act or decision of the procuring or disposing entity.
 - (c) Declare** or make known the rules and principles governing the subject matter of the complaint.
 - (d) Reverse** any improper decision by the procuring or disposing entity or substitute its own decision for the improper one.
- Step 6:** The Bureau shall **notify all interested bidders** of the complaint before taking any decision on the matter and may consider representations from the bidders and the respective procuring or disposing entity.
- Step 7:** The Bureau shall make its own decision **within twenty-one (21) working days after receiving the complaint** and shall give the reasons for its decision and the remedies granted if any.
- Step 8:** If the Bureau fails to make its decision within the given time or if the complainant is not satisfied with the Bureau's decision, **the complainant may appeal to the Federal High Court within 30 days** after receipt of Bureau's decision or the expiration of the time specified for the Bureau to make a decision.
- Step 9:** The **decision of the Federal High Court shall be final** on the matter and no further appeals shall lie.

All Contractors/Consultants/MDAs are advised to strictly follow the above steps in seeking redress in any procurement process!!!

2.4.2 The Act furthermore created offences related to public procurement which includes:

- Entering or attempting to enter into a collusive agreement, whether enforceable or not, with a supplier, contractor or consultant, where the prices quoted in their respective tenders, proposals or quotations are or would be higher than would have been the case had there not been collusion between the persons concerned;
- Conducting or attempting to conduct procurement fraud by means of fraudulent and corrupt acts, unlawful influence, undue interest, favour, agreement, bribery or corruption;
- Directly or indirectly attempting to influence in any manner the procurement process to obtain an unfair advantage in the award of a procurement contract;
- Splitting of tenders to enable the evasion of monetary thresholds set;
- Bid-rigging
- Altering any procurement document with the intent to influence the outcome of a tender proceeding;
- Altering or using fake document or encouraging their use; and
- Willful refusal to allow the Bureau or its officers to have access to any procurement records.

Any breach of these provisions by an officer of the Bureau or any procuring entity is punishable on conviction by a term of imprisonment of not less than five years without an option of time and a summary dismissal from government services.

Any legal person so convicted shall be debarred from all public procurements for a period of not less than 5 calendar years and a fine equivalent to 25% of the value of the procurement in issue.

Where a legal person stands convicted, every director of the company as listed in its records at the Corporate Affairs Commission shall be guilty of an offence and liable on conviction, to a term of imprisonment of not less than 3 years but not more than 5 years without an option of time.

All cases are triable at the Federal High Court at the instance of the Attorney-General of the Federation or his appointee.

2.5 MISCELLANEOUS (PART XIII)

This provision largely consists of corporate governance issues and interpretations.

3.0 OVERVIEW OF GENERAL CONDITIONS OF CONTRACT

The GCC is a Standard Form of Contract Produced by the Bureau of Public Procurement (BPP) consequent upon the World Bank- mediated Procurement Reform Programme, for procurement of Works, Goods and Services when such are financed by the National Budget. The GCC Form is contained in a booklet titled “Standard Bidding Document for the Procurement of Works”.

It should be noted that the Special Conditions of Contract (SCC) which is project-specific, dovetails into the GCC and alongside with “Public Procurement Regulations for Goods and Works” constitute the operational documents for procurement of construction works under the Public Procurement Act (no. 14) of 2007.

The GCC is made up of eighty-two (82) clauses and divided into six sections (A-F):

Section A, which is titled “**General**” contains forty-one (41) clauses covering definition, Contract Documents; Corrupt, Fraudulent and Obstructive Practices; Interpretation; Documents Forming the Contract and Priority of Documents; Eligibility; Governing Language and Governing Law; Gratuities/Agency fees and Joint Venture; Confidential Information; Communications and Notices; Copyright; Assignment, Subcontracting and Other Contractors; Contractor’s Responsibilities, Employer’s Responsibilities and Scope of Works; Contract Price, Engineer’s Decisions; Queries about the Contract Conditions, Delegation, Contractor’s Personnel; Approval of the Contractor’s Temporary Works; Instructions, Site Investigation Reports and Possession of the Site; Access to the Site; Safety, Security and Protection of the Environment; Welfare of Labour, Minimum wage and Holidays; Employer’s and Contractor’s risks; Insurance; Taxes and Duties, Limitation of Liability; Force Majeure etc.

Section B, titled “**Time Control**” contains eight (8) clauses (clause 42 – clause 49), covering Time for Completion of the Works; Programme of Works; Early Warning; Extension of Time, Acceleration and Delays ordered by the Engineer, and Management Meetings.

Section C, titled “**Quality Control**” contains seven (7) clauses (clause 50 – clause 56), covering Contractor’s Obligation to Construct the Works;

Inspection of Works and Identifying Defects; Tests, Examination of Works before Covering up; Correction of Defects and uncorrected Defects.

Section D, titled “**Cost Control**” contains seventeen (17) clauses (clause 57 – clause 73), covering Bill of Quantities; Changes in Quantities; Variations; Payment for Variation; Cash flow Forecasts; Payment Certificates; Payments; Compensation Events; Change in Laws and Regulations; Price Adjustment; Retention; Liquidated Damages; Bonus; Advance Payment; Performance Security; Day works and Cost of Repairs.

Section E, titled “**Completion of the Contract**” contains four (4) clauses (clause 74 – clause 77), covering Completion; Taking Over; Final Account; As-Built Drawings and Manuals.

Section F, titled “**Termination and Settlement of Disputes**” contains five (5) clauses (clause 78 – clause 82), covering Termination; Payment upon Termination; Property; Frustration of Contract and Settlement of Disputes.

It should be noted that GCC makes no provision for a “**Nominated Sub-contractor**” as all the sub-contractors are domestic to the main contractor. This is in general compliance with the provisions of Section 16 sub-section 25 of the Public Procurement Act of 2007. The Dispute resolution Mechanisms enshrined therein are: Amicable Settlement (82.1); Adjudication (82.2) and Arbitration (82.4).

4.0 MATTERS ARISING

4.1 Public Procurement Act 2007

4.2 General Matters

The Act remains a comprehensive piece of legislation that accords with best practices anywhere in the world. Nigeria had in many instances adapted and demonstrated world-class legislation in tackling several governance issues but had always failed at the altar of implementation PPA is not an exception.

Over the last five years of its implementation, the results have been mixed. On the one hand are the activist and messianic regulators at the BPP and on the other hand are many MDAs that constitute a Reform Resistance Army (RRA) and do not appear quite enthusiastic about the procurement reform programme.

Information in the public domain has consistently indicated that over the years since the Act came into force, capital budget implementation had on the average, achieved

less than 45% of the deliverables thus inspiring massive return of unspent capital vote to the treasury, leaving our social and engineering infrastructure as decrepit as ever.

MDAs initially blamed the poor capital budget performance on the alleged bottle necks created by the PPA-inspired documentation procedure and the abysmally low level of skills resident in the procurement cadre within the MDAs. This blame appears misplaced because the reality on the ground is that the BPP had embarked on massive sensitization and training programmes aimed at wiping out this skills deficit. In fact, our investigations in some strategic and sensitive ministries, and interactions with very senior procurement personnel in those ministries confirmed that BPP has been most persistent and insistent in implementing the provisions of the Act. The blame must lie elsewhere.

The delay by many MDAs in placing bid solicitation adverts as statutorily required long after the budget has been released, and the rush to solicit for bids towards the end of the budget year greatly, inspires suspicion and betrays a hidden agenda, of perhaps avoiding genuine competitive bidding and resorting to the special and restricted methods in the Act, if the capital budget must be implemented. In some instances, the Accounting Officers allegedly sabotage the entire process by insisting that favoured nominees must win the contract or nothing.

Determined to reverse this trend and scale up budget implementation, the federal executive council issued a budget implementation handbook in October 2008 with very strict timelines and remediating actions against highlighted bottlenecks as follows:

a) Lack of Familiarity and Understanding of Extant Laws Regulations and Guidelines on Procurement.

Expected Actions:

- Accounting Officers are to ensure that all officers involved in the Procurement process have copies of the Public Procurement Act, 2007, relevant circulars and relevant BPP Handbooks.
- Accounting Officers are to ensure that all Officers involved in the procurement process undergo an in-house training on the process before the end of February 2009.
- Accounting Officers are to ensure that all officers involved in the procurement process undergo regular training to update their knowledge and understanding of the process.

- Procurement officers should avail themselves of the use of the BPP Website (**www.bpp.gov.ng**) for information (particularly on prices of goods and services)

b) Delays in Obtaining Approval of Ministers and Permanent Secretaries for Various Stages of the Procurement Process.

Expected Actions:

- Accounting Officers are to treat all matters relating to budget implementation expeditiously.
- Accounting Officers are to take note of the time lines stated in paragraph 7 below in respect of the various stages of the budget implementation process.
- Relevant Officers in the Procurement process are to draw the attention of the Minister/Permanent Secretary to Procurement matters that need their urgent attention.

c) Delaying Processing Payments

Expected Actions

- Authorisation for payment should be given by the Honourable Minister, (for Ministries) or, in his or her absence, the Accounting Officers and by the Accounting Officer (for Parastatals) once he/she is satisfied that all requirements for payment, including Certificate of Valuation or Job Completion, Store Receipt Voucher (SRV), audit clarifications (where necessary), availability of funds, etc. have been met.
- However, Accounting Officers will duly inform the Ministers or Council/Boards, thereafter.
- Contractors should be paid **within 2 weeks** from the time approval of payment is granted by the Accounting Officers. **All payments should be by electronic transfer.**

d) Challenges in Document

Exchanged Actions:

- Once the budget is released, the Procurement Department/Unit shall submit to the **Procurement Planning Committee (PPC)**, a comprehensive proposal on all projects in the budget, detailing the

necessary steps and time lines for the procurement of goods, works and services required by the MDA.

- Pre-qualification of Contractors and Tendering can be done at the same time so as to shorten the process, i.e. **Both Technical and Financial Bids can be received together**, after advertising the contract in both the Federal Tender Journal and at least 2 National Dailies, as provided by the extant laws. **However, only the financial bids of pre-qualified contractors will be opened.**
- All planning process should be finalized **within 2 months after the release of the Budget**, and thereafter the actual award of contracts should be made not later **than 3 months after**.
- All requests for clarifications to MDAs, by the BPP shall be responded to within 2 weeks.

e) Delays in Processing Memos to Council

Expected Actions:

- Memos should go to the Council Secretariat not **later than 2 weeks from the time the BPP issues the certificate of “No Objection”**.

f) Responsibility of Accounting Officers

- Accounting Officers shall be held responsible for unnecessary delays in drawing down funds in pursuance of the implementation of the Budgets of their MDAs.

Summary of New Time-Lines in The Budget Implementation Process

S/N	Action	Time-Line	Beginning of Time-Line
i.	Procurement Planning	2 months	From the date of release of Budget
ii.	Response to BPP requests for clarifications	2 weeks	From the date or request
iii.	Submission of Memos to Council	2 weeks	From the date of issuance of “No Objection” Certificate by the BPP.
iv	Award of contracts	5 months	From the date of release of Budget.
v	Payment of contracts	2 weeks	From the date of approval of payment by the Hon. Minister or, in his or her absence, the accounting officer.

4.3 Specific Matters

4.3.1 Public Procurement Act, 2007 (2007 Act No 14) is described as “AN ACT TO ESTABLISH THE NATIONAL COUNCIL ON PUBLIC PROCUREMENT AND THE BUREAU OF PUBLIC PROCUREMENT AS THE REGULATORY AUTHORITIES RESPONSIBLE FOR THE MONITORING AND OVERSIGHT OF PUBLIC PROCUREMENT, HARMONIZING THE EXISTING GOVERNMENT POLICIES AND PRACTICES BY REGULATING, SETTING STANDARDS AND DEVELOPING THE LEGAL FRAMEWORK AND PROFESSIONAL CAPACITY FOR PUBLIC PROCUREMENT IN NIGERIA AND FOR RELATED MATTERS”

Therefore, it is a document created by Law (An ACT of the National Assembly) to govern the administration of Public Procurement of goods, works and services carried out by the Federal Government of Nigeria and all procurement entities inclusive of entities which derive at least 35% of funds appropriated or proposed to be appropriated for any type of procurement described in the Act from the “Federation share of consolidated Revenue Fund”.

It is now trite Law as ably established by the Supreme Court in the case of **The Military Governor of Lagos State & Ors V. Ojukwu & Anor. (1986) LPELR – 3186 (SC)** That “The Nigerian Constitution is founded on the rule of Law, the primary meaning of which is that **everything must be done according to law. It means that government should be conducted within the frame-work of recognized rules and principles which restrict discretionary power....**” (per OBASEKI, J.S.C @ pp 21-22, pares. C-A) (underlining mine).

The implication within the context of this discourse is that the Act should be administered in consonance with its provisions. **Section 1(1)** states clearly “**There is established the National Council on Public Procurement in this Act referred to as ‘The Council’.**”

Section 2 provides further that the council shall;

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

- 4.3.2** It is instructive that to date, 11 years post enactment and operation of the Act, these functions have been carried out without a functional council in place. No ensuing administration has been able to constitute the council and the Bureau of Public Procurement has run without the oversight of the council. It has been suggested that the functions of the Council is marginal and its absence hardly impedes the operations of the core intendment of the Act. It is further suggested that the council if constituted, may take away “the power of the award of contract from the principal owners of government to vest it in non-principals”. It is submitted with due respects, that the functions of the council as outlined in the Act is not suggestive, in any manner, of the power to award contracts. This issue may in time constitute a fertile ground for some parties to challenge the erstwhile actions of the Bureau of Public Procurement.
- 4.3.3** The Act envisages or assumes the presence of well informed and articulate professionals within the Procurement Department of each Ministry. In other words, the Procurement Department is expected to have the capacity to transform ministerial policies into achievable concepts and well-developed Terms of References for the procurement of service providers. Unfortunately, this assumption in reality is unsupported. Experience has shown that most Procurement Departments cannot articulate project concepts or briefs to clearly define what needs to be done. Many Procurement Departments do not have technically qualified or knowledgeable personnel to develop good Terms of Reference and Procurement Plans. (S.18) Therefore, the capacity to prepare projects for procurement is lacking and this oftentimes, leads to delays in procurement and sometimes frustrated procurement. Our recent experience showed a Director of Procurement who could neither interpret a project Final Account/Final Certificate and did not have personnel with expertise so to do. Therefore, he was incapable of responding to a routine query on project expenditure from the Auditor-General’s office. Part of the responsibilities of the Accounting officer (Permanent Secretary in the Ministry and Director-General/ CEO in the Parastatals), is to constitute the membership of the Procurement Planning Committee [S.21(2)(a) and 21(2)(b)(i)-(vi)] and also ensure that the Department is adequately staffed with people with technical and procurement expertise in relation to the mandate of the Ministry. Routine experience indicates that this is hardly the case.
- 4.3.4** The PPA mandates the BPP to issue Procurement Guidelines and Regulations. [S.6(1)(c)] However, most of the Procurement Guidelines issued by the BPP are not adhered to by the Ministries. Of particular interest is the refusal of most Legal Units of MDAs to use the Conditions of Contract in the Standard Bidding Documents as Contract Conditions for Project Agreements that contain provisions inconsistent with

the General/Special Conditions of Contract issued by the BPP. Sometimes they would provide incorporating clauses such as:

“Professional Standard- The Contract shall be carried out in accordance with the highest professional standard and competence comparable with international standards and **its administration would be regulated by subsisting Federal Government Standard Conditions of Construction Contracts”** (emphasis mine).

Our recent practice experience involves a road project in excess of ₦18 Billion as contract value, that was let based on the Federal Ministry of Works Standard Conditions of Contract Vol.1 1999 Edition and not the GCC of the BPP, and yet obtained a “certificate of No Objection” from the BPP. This is notwithstanding the fact that Public Procurement (Goods and Works) Regulations 2007 issued by the BPP, provides clearly as follows:

Standard Bidding Documents

118: Procuring Entities **shall** use the appropriate Standard Bidding Documents issued by the BPP. Any changes to address project specific issues shall be introduced **only** through the specific conditions of contract, but not by introducing changes in the Standard Instruction to Bidders or the General Conditions of Contract of the Standard Bidding Documents (SBD). (emphasis mine)

Contents of the Bid Documents

119: The Bid Documents shall furnish all the Information necessary for a Bidder to prepare a bid for the goods, works and related services to be supplied.

120: All bid documents **shall** include as a minimum-

- a) The invitation to bid;
- b) Instruction to Bidders (ITB);
- c) Specific Instruction to Bidders;/Form of Bid
- d) Form of Contract
- e) **Conditions of Contract, both General and Special;**
- f) Technical Specifications;
- g) Bill of Engineering Measurement and Evaluation
- h) Bills of Quantities and Drawings;
- i) Schedule of Prices;
- j) Delivery time or Schedule of Completion; and
- k) Necessary appendices, including forms for Proforma Bid bonds, Performance Guarantee and Advance Payment Guarantee.

A recent experience involving an on-going mega dollar denominated project had the Legal Adviser to the procuring entity insisting that the Conditions of Contract should not be part of the bidding documents. She simply could not understand the effect of the Standard Conditions of Contract on the pricing of the contract. Finally, most of the lawyers deployed to the Legal Units of MDAs lack the knowledge of Construction Contract Laws and do not understand how a construction contract runs. They also hardly understand the differences between the Bidding Documents for Consultants and that for the Contractors, often confusing issues of Performance Bond with Professional Indemnity. Such huge technical/legal illiteracy portends grave danger to the integrity and cost efficiency of public procurement activities, since a slight mis-interpretation of the law could have grave financial consequences and open up the Procuring Entity to claims for damages.

- 4.3.5** The PPA is based on the assumption that the Procuring Entity is desirous of a Transparent and Competitive Procurement. However, this is not the case. Most Procurement Entities in Nigeria, at best do what could best be described as guided procurement. Our own experience in the recent past is that most Tender advertisements are mere facades to mask contracts already pre-let and so most attendant activities are merely “working form answer to question” and thus “fulfill all righteousness”.
- 4.3.6** Finally, PPA 2007, is in dire need of editorial cleanup to inter-alia rectify erroneous cross-referencing, inconsistent use of terms and typographical errors. For example, the terms ‘**Bid**’ and ‘**Tender**’ were used in S29(1) and (5), ‘**Consultant**’ and ‘**Service Provider**’ in S23(10), and S6(1)(a)-(b) in Section 16(1)(a) was mis-referenced as S7(1)(a)-(b).

4.4 General Conditions of Contract/Special Conditions of Contract (GCC/SCC)

4.2.1 Definitions

Some items under the “Definitions” clause require review to avoid inconsistencies and ambiguities.

- a) Clause 1.1(b) clearly provides for “**Bill of Quantities**” as “**the priced and completed Bill of Quantities forming part of the Tender**”. This is consistent with international best practices in jurisdictions where contracts are let based on Quantities. However, paragraph 120(g) of the Public Procurement (Goods and Works) Regulations 2007 includes “**Bill of Engineering Measurement and Evaluation**” as part of the Bidding Documents. It should be clearly stated that BEME is a peculiarly Nigerian contraption and is a document unknown in any other jurisdiction. Since BEME is not defined, its use could be awkward and may engender legal issues.

- b) Clause 1.1(r) defined the “**Engineer**” as the person named in the SCC (or any other competent person appointed by the Employer and notified to the contractor) who is responsible for supervising the execution and completion of the works and administering the contract. In cognate jurisdictions, the word “Engineer” when used in some contract forms is an administrative term descriptive of the person responsible for supervision and administration of the contract. Thus, it admits of other professionals other than the person technically referred to as an “Engineer” by virtue of registration with the Council for the Regulation of Engineering in Nigeria (COREN). This is the proper intent and purport of the definition, otherwise application of the GCC in contracts where the Engineer is not the prime consultant may amount to “passing off” and usurping of function and roles thus creating an oxymoron.
- c) Clause 1.1(u) defines Government as “**the Government of the People’s Republic of Nigeria**”. This designation is unknown to all legal Governmental instruments in Nigeria. The proper designation is “the Federal Government of Nigeria” as contained in the interpretation paragraph of Procurement Regulation 2007 at page 589.

4.2.2 Clause 3.5 contains the word “Client” which can create confusion since it wasn’t defined anywhere in the document and so its precise meaning is unclear.

4.2.3 Clause 58.1 provides that if the final quantity of the works done differs from the quantity in the Bill of Quantities for the particular item by more than 25%, provided the change exceeds 1% of the initial Contract Price, the Engineer shall adjust the rate to allow for the change. In a recent practice in an erosion control project financed by the World Bank, the application of this provision became contentious. Due to faulty designs, the quantity of lateritic material required to fill a gully was measured as 25,000m³ as against the 5,800m³ contained in the contract Bills of Quantities. The financial implication was way beyond the provision for contingencies. Given that the contractor is contractually entitled to rate adjustment in accordance with the strict application of the word “shall” in the clause, the contractor nevertheless accepted a lower negotiated figure as a manifestation of goodwill.

4.2.4 Clause 63.1 on payments provides that any certified payment made after twenty-eight (28) days of certification shall attract interest for late payment calculated on the basis of the prevailing rate of interest for commercial borrowing established in Nigeria. A core issue for contention remains a situation where the Special Contract Conditions clearly excluded provision for interest payment by simple insertion of “Not Applicable” (N/A). It has always been our professional contention that S37(3)-

(4) is a mandatory and overriding provision compelling interest payment for any delay in payment for certificates.

4.2.5 Clause 64.1 lists the relevant Compensation Events. Of recent practice experience was in respect of a contract awarded in **April 2011**, but owing to delays in planning approvals, the site was eventually handed over in **July 2014** but was eventually possessed in December 2014. The Contractor requested for review in the rates given that inflation indices had escalated across board. The Consultants in opposing the application of Clause 64.1 came up with a disingenuous argument that the interest accruing from the advance payment which according to them “ought to have been” invested should be applied to the price differential. We countered with clause 70 (Advance Payment) which specifically stated “**...Interest will not be charged on the advance payment**”

4.2.6 Clause 67.2 (Retention) states that:

“On completion of the whole of the works, half of the total amount retained shall be repaid to the contractor, the remaining half shall be repaid when the Defects Liability Period has passed, and the Engineer has certified that all Defects notified by the Engineer to the Contractor before the end of this period have been corrected”.

By this clear stipulation there is a provision for the repayment of 2.5% (one moiety) of retention upon practical completion of the whole work and the balance payable at the end of Defects Liability Period. However, a bespoke Agreement that incorporated GCC as the Standard Conditions of Contract nevertheless provides as follows:

“The Commission shall be entitled to retain 5% (five percent) of the contract price at the completion of the construction work for 6 (six) months as security against latent defects in the construction work occasioned by bad workmanship or negligence on the part of the Contractor”

The Employer’s payment software platform was configured to recognize payment of retention only 6 months after the practical completion of the whole works. This greatly impaired the Contractor’s cashflow and created conflict between it and its Bankers.

5.0 POTENTIAL SOLUTIONS

5.1 There is an urgent need to amend the PPA 2007 to reflect the current realities and clearly vest the power to award contracts with certain threshold bands, in the Federal Executive Council.

- 5.2 The National Council on Public Procurement, with a clear and unambiguous mandate, should be constituted.
- 5.3 Stiffer sanctions should be provided for noncompliance with the provisions of the Act and Procurement regulations.
- 5.4 Capacity building efforts should be significantly escalated to create a crop of competent personnel able to plan and implement procurement in accordance with the true purport of the Act.
- 5.5 The Legal Units of MDAs should be staffed by Lawyers with subject matter competence in procurement, especially in construction contract matters.
- 5.6 Accounting Officers of MDAs should ensure strict compliance with project procurement timelines in the Procurement Regulations.
- 5.7 Both the PPA and GCC should be purged of all errors of inconsistent terms, imprecise definitions, typographical errors and sub-references.

6.0 CONCLUSION

The Public Procurement Act (PPA) could well constitute a vehicle for Public Accountability and value-for-money in construction and building, if its provisions are comprehensively implemented both in spirit and in letter. To achieve its potentials requires the fullest buy-in at the highest level of executive power. The BPP must continue its current insistence that business is longer as usual. It must invoke the full sanctions of the law as provided in the Act upon deviant behavior. Ministers who inexcusably under perform on their capital votes should be sanctioned. In fact, delivering on a capital budget should constitute a barometer for assessing the performance of ministers.

Interaction with some MDAs procurement personnel convinced the writer that most of them have imbibed the transparency ethos of the Act and its driver, the BPP. However, civil service protocols especially in respect of loyalty to superiors, (even when those superiors dance to other tunes) is a great disincentive. Few of the Procurement staff would boldly confront their accounting officers over procurement improprieties.

A way must be found to encourage “whistle blowing” without outright resort to “witch hunting”. Every strata of society must be involved, and every level of Government

should be recruited into the troupe. The new administration has a diamond opportunity to engineer Nigeria in a new direction and ensure that every naira spent by MDAs is accountable. We should stop purchasing ants at the price of elephants. It calls for men of honour and high integrity to drive the process. Those men must stay the course no matter the opposition.

Federal Government only administers a portion of the national projects. State and local governments should be encouraged to adapt PPA to suit their local realities. The collective impact could be synergic if all hands are on deck.

BPP is about to execute a procurement audit programme in line with its mandate. This will augur well for the entire process. **Prudency Audits** and **Pre-award Contract Audits** by MDAs should also be encouraged especially for major contracts.

The dance is on. But it must be danced like “Okpanga”- a dance native to Adazi people of Anaocha LGA in Anambra State. It is said that only mad people dance it right. We must therefore dance “like mad”, for our posterity. Make no mistake about it, change does not come easy and so the foot soldiers should not be discouraged. President John Kennedy once said, and I paraphrase: “The change we envisage may not happen in the 1st 100 days, or 1000 days or indeed in the entire life of this administration. But by all means, let us begin.”

That call to begin remains timeless. We have already begun. But we need to advance and the time to advance is NOW.

God bless.

Ifeanyi Tim. Anago

REFERENCES

1. Nigeria Country Procurement Assessment Report (CPAR), Vol. 1 June 30, 2000 by Worldbank.
2. Aluko & Oyebode: Nigeria; Getting the Deal through – Public Procurement 2010 @www.gettingthedealthrough.com pg 185-191
3. Public Procurement Act, 2007
4. BPP – Complaints Procurement under the Public Procurement Act.
5. BPP –Code of Conduct for Public Officers involved with Procurement.
6. BPP – Approved Revised Thresholds for Service-wide Application and Special Thresholds for Procurement in oil sector.
7. BPP – Procedures and Documentation Pre-requisite for the Issuance of A certificate of “No objection” to MDAs.
8. BPP etc – Approved Policy for Procurement of Health and Medical Equipment/List of Manufactures and Equipment for Tertiary Hospitals
9. BPP – Public Procurement Journal February/March 2009
10. FEC – Budget implementation Handbook.
11. Ewunwuni N. Onnoghien: Construction Law in Nigeria, 2016 Pg. 109